Supreme Court of the State of New York
County of Kings

Part 91

ANTHONY MONTALBANO,

Plaintiff,

against

RAKIM MAYERS A/K/A/ A$AP ROCKY, MARKESE ROLLE A/K/A/ SPACEGHOST PURP, DAROLD BROWN A/K/A/ DAROLD FERGUSON A/K/A A$AP FERG, TAIRIQ DEVEGA A/K/A A$AP NAST, JABARI SHELTON A/K/A/ A$AP BARI, FADER MEDIA NETWORK A/K/A/ THE FADER, INC., ROOT DRIVE IN STUDIOS, DRIVE IN 24 LLC, KAGE KONSULTING LLC AND ALL SEASON PROTECTION OF NY LLC,

Defendants.

Index Number 13982/2012
Seq. 010–16

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1–7
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	8–22
Replying Affidavits	23–34
Exhibits	
Other	

Upon the foregoing papers, the motions for summary judgment filed by defendant Kage Konsulting LLC (Mot.Seq.010), by defendant All Season Protection of NY LLC ("AllSeason") (Mot. Seq. 011), by defendant Rakim Mayers[1] (Mot. Seq. 012), by defendant Jabari Shelton (Mot. Seq. 013), by defendant Darold Brown (Mot. Seq. 014), by defendant Tairiq Devega (Mot. Seq. 015), by defendants The Fader, Inc. a/k/a Fader Media Network s/h/a Fader Media Network a/k/a the Fader, Inc. (Collectively, "Fader") and Root Capture, Inc. s/h/a Root Drive In Studios

[1] Defendants Mayers, Brown, Devega, and Shelton are collectively referred to as the *A$AP Defendants*

and Drive In 24 LLC (collectively, "Root Drive-In")[2] (Mot. Seq. 016) are decided as follows:

Factual Background

Plaintiff commenced this action against defendants for injuries he claims to have suffered as a result of an assault on October 21, 2011, at Root Drive-In Studios, 443 W 18th St, New York, New York, during a music event. Plaintiff testified at his deposition that, on the day of the incident, he was employed as an audio engineer by Best Instrument Rental Service and was working in that capacity at Root Drive-In Studios for an event called the Fader Fort by Fiat music festival (plaintiff EBT at 57-58). Plaintiff testified that, at the time the A$AP Defendants were performing at the event, plaintiff went on stage with the stage manager, Robyn Baskin, to attend to guitar amplifiers that had been kicked from the stage (*id.* at 226-28). When he was about to walk back across the stage, he was hit in the back of the head and knocked unconscious (*id.* at 233, 255).

Robyn Baskin of Fader testified at her deposition that she was Fader's marketing and events manager responsible for overseeing sponsor programs (Baskin EBT at 11-12). She testified that Kage Konsulting was the agent for the venue, Root Drive-In (*id.* at 179-80). Fader collected the names of invitees from sponsors, staff, and others, and sent the invitations (*id.* at 22 and 37-41). Security for the show was provided by "[t]he venue, who was represented by Kage Konsulting" (*id.* at 35). Baskin testified that she requested two additional guards on October 21, 2011, over and above the six that she originally requested (*id.* at 53-54). In making the determination to use a ratio of one guard to 75 people Baskin considered "the recommendation of

[2] Although not included in the caption of this action Root Drive-In uses a hyphen between Drive and In.

the venue, and [her] experience in producing similar kinds of events for The Fader" (*id.* at 81). In deciding where to place the guards, Ms. Baskin testified that she "worked with the venue to determine where the security guards should go, based on the layout of [the] event" (*id.* at 195-96). The guards worked for a company called All Season Protection (*id.* at 60). It was Ms. Baskin's decision that "[i]n order to accommodate for [sic] all of the bands upstairs and make sure that we have some wiggle room to get VIPs in and cover staff, [they were] going to cap the downstairs general admission to 350" (*id.* at 72-73). She spoke to the guards over the course of the night, but they had their own supervisor, also an All Season employee (*id.* at 186-87). She noted that there was at least one security guard who was actually on the stage during the incident (*id.* at 122). Baskin denied knowledge of why plaintiff accompanied her on stage or that she requested his assistance (*id.* at 123). Baskin saw the general commotion on stage related to plaintiff's incident, but did not see plaintiff actually get hit (*id.* at 124-26).

Jennifer Keller, a vice president with Kage Konsulting, testified at her deposition that Kage Konsulting is a booking agent (Keller EBT at 8-9). As the booking agent, Kage Konsulting negotiates price and shows the venue to customers, and also hires security when the event is booked (*id.* at 16-17). Kage used a company called All Season Protection when booking security for events at Root Drive-In (*id.* at 37). Keller herself assumed the role of an "operations manager", which she described as "a general support and management oversight position", liaising between the venue and staff, including security (*id.* at 59-60). However, Kage Konsulting did not direct security about how to staff and control the front door (*id.* at 63-64). Security controlled the front door and kept track of the number of people going in and out of the venue (*id.* at 64). Ms. Keller testified that she did not know why eight security guards had been

requested or where the guards were posted (*id.* at 104 and 118). She testified that the security captain, and not Kage Konsulting, was responsible for positioning the guards (*id.* at 81).

Amanda Craft testified at her deposition that she was hired by Kage Konsulting as "on-site operations manager", for events for Root Drive-In (Craft EBT at 16-17). In general, her duties included briefing security on the event and "either position[ing] them [herself] or position[ing] them along *with the input of a producer or someone who was in charge of putting* that event together" (*id.* at 21-22). For this event, she was not a part of the decision about the number of security guards, but she did make sure that the guards were properly "dispersed" (*id.* at 27, 30, 39). She testified that she saw the altercation as a crowd formed in front of the stage, and that it ended quickly (*id.* at 41-42).

Ms. Keller testified that she was not present at the altercation but typed an incident report based on Ms. Craft's notes and sent it to Craft to review and "fill in any blanks" (Keller EBT at 87). The incident report was then signed by Craft as Event Operations Manager on Root Drive-In's letterhead. Craft testified that this signed report reflects only the input of her and Keller (Craft EBT at 79-86). The report states:

> On Friday, October 21, 2011, at the close of The Fader Fort by Fiat Event at 8:59 pm, the lead singer of the last band "ASAP Rocky" became belligerent on stage and tried to kick over the drum kit. The sound tech, Tony, got on stage to stop damage to the equipment and was struck in the head by the lead singer. I was the on-site operations manager and called for an ambulance because Tony was bleeding from the head. Both police and ambulance responded, and arrived after order was restored by the in-house security team All Season Protection. No official report was made.
>
> Tony refused the ambulance ride to the hospital and but did speak with police at the scene. Later, it was confirmed by Robyn Baskin from The Fader magazine that Tony went to the hospital on his own and was met by The Fader publisher, Anthony Holland.

Notwithstanding the clear text of the incident report, Ms. Keller claimed to "know" that Craft did not have "a sight line to the stage" (*id.* at 90). Keller contends that Ms. Baskin later requested that specific changes be made to the wording of the report, but Keller did not recall why Baskin wanted the changes (*id.*). Furthermore, the record does not include any copy of the alleged later, modified report. Ms. Keller claimed that, in drafting this report, she wanted to "get a general sense of what happened" rather than making sure the person reporting saw the incident "with [their] own eye[s]", in part because she believed they would rely on the recording from the video cameras (*id.* at 90-91).[3]

Sal Tommasino, a principal of All Season Protection, testified at his deposition that he hires his guards, all of whom are licensed as security personnel by the State of New York (Tommasino EBT at 16-17). When providing security guards for an event involving a musical performance, the standard ratio of guards-to-guests would be one guard for every fifty to seventy-five guests, though that number could change depending on the layout of the venue (*id.* at 31, 55, 119-20). The venue made the decision on the number of guards (*id.* at 31, 120). The only information that he requested or expected was the date of the event and the number of guards the client wanted (*id.* at 41). Tommasino described the duties of All Season's guards as "keep stairways clear, check for illegal narcotics, underage drinking, keep the sidewalk clears [sic] and just overall security" as well as keeping patrons safe "[t]o the best of their ability" (*id.* at 59-60). The guards were also responsible for letting people into and out of the event (*id.* at 60). All Season's guards would not necessarily keep the crowd off of the stage at a performance

[3] The parties attempt to submit a video recording of the incident, but the court is unable to view the video. However, the parties also submit color images that were authenticated at the depositions of certain parties.

unless they were specifically requested to do so, because "some stage managers want a party atmosphere, they don't care who approaches the stage" and that "in a lot of cases it's encouraged" (*id.* at 129-30).

Tacuma Braithwaite, one of the guards the night of the altercation, testified at his deposition that his supervisor told him what his station for the event was (*Braithwaite EBT at* 35-36). Brathwaite was stationed on the stage (*id.* at 36). Nobody except his direct supervisor ever told him where he should go or how he should do his job (*id.* at 143). He stated that his duty as the guard by the stage was to keep people off the stage and from disrupting the performance (*id.* at 36-37). On one prior occasion at the same venue, Braithwaite saw breaking up fights as one of his security duties (*id.* at 38-39). When a number of spectators came up *onto* the stage during A$AP Rocky's performance, Braithwaite called for back-up (*id.* at 56-57). Mr. Braithwaite "tried to control the situation" but could not, though he continued to usher people off stage and tell others that they could not come up (*id.* at 69). A total of about 15 to 20 people spectators came on stage (*id.* at 71-72). Mr. Braithwaite did not actually see the fight break out, but he did see that "somebody that was on the stage jumped down into the crowd and started getting physical" (*id.* at 60). When Mr. Braithwaite first called for back-up, no one immediately responded, his supervisor eventually responded but did so "kind of late" (*id.* at 57). When the number of people on stage became too much for him to handle alone, Braithwaite left the stage and went backstage to keep from getting hurt himself, and returned after a minute to two (*id.* at 101-03).

Defendant Rakim Mayers ("A$AP Rocky") testified at his deposition that he is affiliated with a "collective of musical artists" known as "A$AP Worldwide", of which Mayers is the CEO

(Mayers EBT at 6-8). Mayers testified that, at the time of the incident "some people just bum-rushed the stage" (*id.* at 27). Mayers testified that he did not remember kicking over a drum kit but said it would not be "far fetched" (*id.* at 30). Mayers testified that he could recall "looking over and seeing SpaceGhost [defendant Rolle] and [plaintiff] looking like they were scuffling. But [he could not] specify what happened because [he] was busy performing. And as soon as [he] could, [he] got out of there, off the stage" (*id.* at 33). He did not recall seeing anyone besides Rolle striking the plaintiff (*id.*). He testified that he considered Rolle to be a "liability" for, among other things, the subject incident (*id.* at 17-18, 72). He claimed that Rolle was never employed by Mayers or by A$AP Worldwide (*id.* at 18).

Defendant Darold Brown (a/k/a "A$AP Ferg") testified at his deposition that he was on stage during the incident, and that a fight had broken out from "nowhere" (Brown EBT at 40-41, and 50). From a video and photographs, he identified other members of the group on stage that were involved. He testified that one of the photographs depicted Markese Rolle holding the plaintiff down (*id.* at 49) and that Rolle and another person were struggling with each other and "wrestling" on the stage (*id.* at 51-52). He identified defendant Tairiq Devega (a/k/a "A$AP Nast"), who Brown said laid his hands on the plaintiff during the incident (*id.* at 54). Mr. Brown admitted that at least three of the marked photographs show him holding on to the back of plaintiff's shirt, but Brown claims he was trying to pull plaintiff away from Mr. Rolle (*id.* at 74-75, 81-82). Brown also identified Mr. Devega as being shown in at least one photo with Devega's right arm across the plaintiff's back (*id.* at 84-85).

Defendant Tairiq Devega testified at his deposition that he is part of A$AP Worldwide and performed with Mayers, Rolle, Brown and Shelton that night (Devega EBT at 7, 33). He

explained that the stage was small and the cords kept tripping the five of them (*id.* at 33, 39). He admitted that he and Mayers kicked over a drum kit. He testified that plaintiff was pushing them to get to the drum set (*id.* at 39). He recalled seeing the plaintiff and Markese Rolle "pushing or whatever" (*id.* at 43-44). Devega also admitted that a photograph of the incident showed he had his hand on the plaintiff's head (*id.* at 62-63).

Defendant Jabari Shelton ("A$AP Bari") testified at his deposition that he is not a member of the group, but just a friend (Shelton EBT at 9-10). He was not on stage that night but rather was at the venue in the lounge area (*id.* at 19, 21). However, Mr. Devega testified that Shelton was on stage that night (Devega EBT at 3).

Plaintiff submits the affidavit of Russell Kolins, who states that he has more than 40 years of experience in the security and events planning industry. Mr. Kolins opines that defendants did not develop a minimally acceptable security plan for the event, did not keep track of the total number of guests, and did not communicate with each other about the security needs of the event. As a result, Mr. Kolins believes that the number of guests could have exceeded 500, which would violate the claimed standard of having 1 guard for every 75 people. Mr. Kolins contends that this is just a guideline in any event, and not necessarily a sufficient industry standard. Mr. Kolins further opines that All Season did not perform its duty to provide security because, when the fight occurred, there was not sufficient security at the scene and the one guard who was present, Mr. Braithwaite, hid for his own safety.

Analysis

Defendants each move for summary judgment. On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable

issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Kage Konsulting's motion for summary judgment (Mot. Seq. 010)

There is no dispute that Kage Konsulting is the agent of the venue, Root Drive-In Studios. The scope of an agent's authority is either defined in writing, or else the trier of fact must determine it from the circumstances (*Time Warner City Cable v Adelphi Univ.*, 27 AD3d 551, 553 [2d Dept 2006]). The record does not contain any agreement between Root Drive-In Studios and Kage Konsulting. The contract between Fader and Root Drive-In Studios states that Kage Konsulting "has the rights [sic] to represent [Root] Drive In Studios and accept payments and process documents on its behalf" (contract at 4, para. 6). Ms. Keller described Kage Konsulting as a "booking agent" that negotiated price, showed the venue, and hired the security (Keller EBT at 8-9, 6-17). Ms. Keller stated that Kage Konsulting did not direct security about how to staff and control the front door, and she was not involved in choosing the number or placement of guards (*id.* at 63-64, 104 and 108). Ms. Craft stated that she was not a part of the decision about the number of security guards, but she did make sure that the guards were properly "dispersed" (Craft EBT at 27, 30, 39). Likewise, Ms. Baskin testified that she "worked with the venue to determine where the security guards should go, based on the layout of [the] event" (Baskin EBT at 195-96).

Kage Konsulting argues that its only duty to plaintiff, if any, comes from its contractual relationship with the venue, Root Drive-In Studios (*Mendez-Canales v Agnelli Macchine S.R.L.*,

165 AD3d 646, 648 [2d Dept 2018]). This duty of care to plaintiff exists only in three potential circumstances: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Nachamie v County of Nassau*, 147 AD3d 770, 774 [2d Dept 2017], quoting *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

Kage Konsulting argues that none of these circumstances are present here. However, there is evidence that Kage Konsulting's work and responsibilities displaced, in some fashion, the venue's duty to keep the property safe from criminal acts. Ms. Keller testified that Kage Konsulting hired security and that she liaised with security (Keller EBT at 16-17 and 59-60). Ms. Craft testified that she, on behalf of Kage Konsulting, had input in the position of the security guards (Craft EBT at 27, 30, 39). Craft also prepared the report of the incident (*id.* at 79-86). It is not clear whether Kage Konsulting's actions sufficiently displace the responsibility of the property owner to keep the property safe (*Thayer v Community Services for the Mentally Retarded, Inc.*, 184 AD3d 889, 891 [2d Dept 2020]; *Reeves v Welcome Parking Ltd. Liab. Co.*, 175 AD3d 633, 635 [2d Dept 2019]). However, there is sufficient evidence about its actions and responsibilities regarding security to raise triable issues of fact about the extent of its contractual duty to plaintiff.

Plaintiff also argues that Kage Konsulting was an organizer and/or promoter of the event and, as such, owed a duty of care to plaintiff (*see Vetrone v Ha Di Corp.*, 22 AD3d 835, 838 [2d Dept 2005]). However, there is not sufficient evidence of Kage Konsulting's responsibilities to

determine whether it warrants such a title.

Kage Konsulting also argues that the assault was unforeseeable. "A possessor of real property is under a duty to maintain reasonable security measures to protect those lawfully on the premises from reasonably foreseeable criminal acts of third parties" (*Bryan v Crobar*, 65 AD3d 997, 999 [2d Dept 2009]). Criminal assault is foreseeable as a matter of law when there are "prior occurrences of the same or similar criminal activity at a location sufficiently proximate to the subject location" (*id.*). Kage Konsulting contends that the incident was not foreseeable because of how quickly it escalated and was finished, but foreseeability is based on past events, not only the present one.

Kage further seeks dismissal of plaintiff's claim for negligent hiring/supervision. To succeed on a claim for negligent hiring, plaintiff must show that Kage Konsulting knew or should have known of the conduct of All Season's employees, which plaintiff alleges caused the incident (*Kelly G. v Bd. of Educ. of City of Yonkers*, 99 AD3d 756, 757 [2d Dept 2012]). Kage argues that there is no evidence of any prior malfeasance by All Season, and so there is no support for any negligent hiring claim. Plaintiff submits no evidence of any such malfeasance, and so the claim is dismissed.

Finally, the A$AP Defendants oppose Kage Konsulting's motion only to the extent that they request their cross-claims for indemnification not be dismissed. Although Kage Konsulting seeks such relief, it does not make any specific arguments in favor of dismissing any cross-claims against it. Accordingly, no cross-claims against Kage Konsulting are dismissed.

All Season's motion for summary judgment (Mot. Seq. 011)

All Season argues that that it has a duty of care to plaintiff only in accordance with the

three *Espinal* situations: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Nachamie*, 147 AD3d at 774, quoting *Espinal*, *supra*).

All Season argues that no negligence claim lies because none of these circumstances are present. The record does not support a finding that All Season launched an instrument of harm. All Season also contends that plaintiff did not rely on it for performance of any duty in part because plaintiff is not an intended beneficiary of All Season's contract with the venue. However, All Season does not provide a copy of its contract with the venue, and so it is not possible to determine whether plaintiff is a beneficiary.

It is further unclear whether All Season sufficiently displaced the venue's duty to keep the premises safe. On one hand, there is no dispute that All Season was hired to provide security at the event. Sal Tommasino and Tacuma Brathwaite each testified that the duties included keeping the patrons safe and the stage area safe (Tommasino EBT at 59-60; Braithwaite EBT at 36-37). Additionally, Brathwaite testified that he took orders only from his All Season supervisor (Braithwaite EBT at 143; *see also* Keller EBT at 63-64). On the other hand, the venue hired security (Baskin EBT at 35; Keller EBT at 16-17, 37). Fader determined the number of security guards (Baskin EBT at 53-54). Fader, Root Drive-In, and Kage Konsulting, possibly determined the placement of the guards (Baskin EBT at 195-96; Keller EBT at 81; Craft EBT at 27, 30, 39). Thus, there are questions of fact as to whether All Season entirely displaced the venue's duty to keep the event safe.

Assuming All Season had a duty of care, it had a duty to take "reasonable security measures to protect those lawfully on the premises from reasonably foreseeable criminal acts of third parties" (*Bryan*, 65 AD3d at 999). As explained above, foreseeability is dependant on"prior occurrences of the same or similar criminal activity at a location sufficiently proximate to the subject location" (*id.*). Mr. Tommasino testified that fights had not broken out at prior rap concerts for which All Season had provided security (Tommasino EBT at 89). However, this testimony, standing alone, is not sufficient information to determine foreseeability.

Lastly, All Season argues that there is no evidence of any prior malfeasance by its guards, and so there is no support for any negligent hiring and supervision claim (*Kelly G. v Bd. of Educ. of City of Yonkers*, 99 AD3d 756, 757 [2d Dept 2012]). Again, plaintiff offers no such evidence, and so this specific claim against All Season is dismissed.

A$AP Defendants' Summary Judgment Motions (Mot. Seq. 012, 013, 014, and 015)

Each of the A$AP Defendants moves for summary judgment to dismiss the claims against them for negligent hiring/supervision, assault and battery, intentional infliection of emotion distress, and punitive damages. As to the first claim, they contend that none of them were involved in making any security decisions. The evidence shows that security decisions were made by others, and plaintiff does not oppose this portion of defendants' motions. Accordingly, this claim is dismissed against defendants Mayers, Brown, Devega, and Shelton.

Next, the A$AP Defendants seek dismissal of the assault and battery claims against them. A claim for civil assault must show that the defendant's intentional physical conduct placed the plaintiff in imminent apprehension of harmful contact (*Thaw v N. Shore Univ. Hosp.*, 129 AD3d 937, 938 [2d Dept 2015]). Separately, "[t]o recover damages for battery, a plaintiff must prove

that there was bodily contact, that the contact was offensive, i.e., wrongful under all of the circumstances, and {that there was} intent to make the contact without the plaintiff's consent" (*Higgins v Hamilton*, 18 AD3d 436, 436 [2d Dept 2005]).

All four of the A$AP Defendants deny that they intended to harm or made physical contact with him. However, based on the photos of the incident involving plaintiff, both defendants Brown and Devega acknowledged that they made physical contact with plaintiff. Thus, there are questions of fact regarding whether defendants Brown and Devega committed civil assault and/or battery on plaintiff, but there are no questions of fact about whether defendant Shelton committed such offenses. Indeed, plaintiff does not oppose *defendant Shelton's motion for summary judgment.*

There is no testimony or photographic evidence that defendant Mayers assaulted or battered plaintiff. There is, however, an incident report that states plaintiff was "struck in the head by the lead singer", presumably referring to Mayers. Additionally, Craft, who also wrote the report, sent an email to Kage Konsulting and the venue less than an hour after the incident stating "the lead singer of the last band jumped off the stage and punched one of the Fader staff". Although Craft testified at her deposition that she did not see Mayers strike plaintiff (Craft EBT at 62), such testimony conflicts with the email she sent and the incident report she signed. Thus, *there remain triable questions* of fact as to whether Mayers struck plaintiff.

Next, the A$AP Defendants seek dismissal of plaintiff's intentional infliction of emotional distress ("IIED") claim. An IIED claim must establish that defendants committed (1) extreme and outrageous conduct, (2) with intent to cause, or with disregard of a substantial probability of causing, severe emotional distress, that there is (3) a causal connection between the

conduct and injury; and (4) severe emotional distress (*Leff v Our Lady of Mercy Academy*, 150 AD3d 1239, 1241 [2d Dept 2017], citing *Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). Liability under the first prong is found where the conduct at issue is so outrageous and extreme that it falls beyond "all possible bounds of decency, and [is] regarded as . . . utterly intolerable in a civilized community" (*Murphy v American Home Prods Corp.*, 58 NY2d 293, 303 [1983]).

Each of the A$AP Defendants contends that plaintiff's IIED claim against them should be dismissed because plaintiff cannot establish that they committed any "outrageous conduct", as that term is used in the cause of action. To that end, they argue that they were not involved in the altercation with plaintiff. The evidence shows that defendant Shelton was not involved in the confrontation, but that defendants Mayers, Brown, and Devega may have been involved. Consequently, plaintiff's IIED claim is dismissed only against defendant Shelton.

The A$AP Defendants also seek to dismiss plaintiff's claim for punitive damages against them. Punitive damages are awarded in tort actions where there is a showing of "reckless disregard for the rights of others, bordering on intentional wrongdoing" (*Jones v LeFrance Leasing Ltd. Partnership*, 127 AD3d 819, 821-22 [2d Dept 2015]). The evidence does not support a claim for punitive damages against defendant Shelton, but the evidence suggests a claim for punitive damages may lie against defendants Mayers, Brown, and Devega.

Lastly, plaintiff argues that he has a claim against defendant Mayers for aiding and abetting the altercation by getting the band and the guests excited, but plaintiff does not plead such a claim.

Fader and Root Drive-In's summary judgment motion (Mot. Seq. 016)

Fader and Root Drive-In seek dismissal of plaintiff's negligent hiring and supervision and common-law negligence claims against them. As to the negligent hiring and supervision claim, there is no evidence of any prior occurrence of negligence or malfeasance by the personnel of Fader, Root Drive-In or All Season (*Kelly G.*, 99 AD3d at 757). Accordingly, this claim is dismissed against them.

As the owner of the venue, Root Drive-In had a duty to take "reasonable security measures to protect those lawfully on the premises from reasonably foreseeable criminal *acts* of third parties" (*Bryan*, 65 AD3d at 999). As the promoter of the event, Fader also had a duty of care (*Vetrone*, 22 AD3d at 838). Neither Root Drive-In nor Fader establish the absence of "prior occurrences of the same or similar criminal activity at a location sufficiently proximate to the subject location" (*Bryan*, 65 AD3d at 999). Accordingly, they have not made a prima facie case for dismissal on summary judgment.

Conclusion

For the foregoing reasons, the various motions are resolved as follows:

a) Kage Konsulting's motion for summary judgment (Seq 010) is granted to the extent that plaintiff's claim for negligent hiring/supervision is dismissed against it.

b) *All Season's motion for summary judgment (Seq 011) is granted* to the extent that plaintiff's claim for negligent hiring/supervision is dismissed against it.

c) Mr. Mayer's motion for summary judgment (Seq 012) is granted to the extent that plaintiff's claim for negligent hiring/supervision is dismissed against him.

d) Mr. Shelton's motion for summary judgment (Seq 013) is granted and he is

dismissed from this action.

e) Mr. Brown's motion for summary judgment (Seq 014) is granted to the extent that plaintiff's claim for negligent hiring/supervision is dismissed against him.

f) Mr. Devega's motion for summary judgment (Seq 015) is granted to the extent that plaintiff's claim for negligent hiring/supervision is dismissed against him.

g) Fader and Root Hill Drive-In's motion for summary judgment (Seq 016) is granted to the extent that plaintiff's claim for negligent hiring/supervision is dismissed against it.

This constitutes the decision and order of the court.

January 4, 2021
DATE

DEVIN P. COHEN
Justice of the Supreme Court

KINGS COUNTY CLERK
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