Sun v Vinyl Entertainment Inc.
2022 NY Slip Op 30065(U)
January 6, 2022
Supreme Court, Kings County
Docket Number: 519116/2019
Judge: Larry D. Martin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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JACK SUN,

Plaintiff,

v.

VINYL ENTERTAINMENT INC., d/b/a the VNYL, SECURITY SERVICES, INC., JOHN ROESCH, and JOHN DOE,

Defendants.

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Index No. 519116/2019

DECISION & ORDER
Hon. Larry D. Martin

Following consecutive violent altercations in a Manhattan nightclub, plaintiff Jack Sun brought this action against co-defendants Vinyl Entertainment Inc., d/b/a the "VNYL," Security Services, Inc. ("Security"), and alleged assailants John Doe and John Roesch seeking damages for VNYL's and Security's negligence and for assault and battery as against Doe and Roesch (*see* Compl., NYSCEF 69). In answering, Security and VNYL jointly cross-moved for indemnification from Roesch (*see* Answer, NYSCEF 70).

Following discovery, VNYL and Security moves for summary judgment pursuant to CPLR § 3212 dismissing Sun's complaint in its entirety as well as any potential cross claims by Roesch (Seq. No. 2., NYSCEF 78) and Sun moves for summary judgment (i) against Roesch as to Sun's second, third, fourth, and fifth claims; (ii) against VNYL and Security as to their first, second, and third affirmative defenses; and (iii) against Roesch as to his first, second, third, and seventh affirmative defenses (Seq. No. 3, NYSCEF 90).

BACKGROUND

On January 05, 2019, VYNL contracted with Security to provide three security guards ("Contract"). That night, Sun and his friends were seated at a table on VNYL's third floor but

spent most of the night on its mezzanine level. At some point that night, a fight broke out between Sun's and Roesch's groups, culminating in Roesch punching Sun in the face and one of Roesch's friends tackling Sun, resulting in Sun suffering a neck laceration ("Incident 1"). Security broke up the fight and escorted Sun to the ground level, however, at Sun's request, one of Security's guards escorted Sun back to the third floor to retrieve his jacket, where an unidentified patron ("John Doe") broke a glass bottle on Sun's face severely injuring him ("Incident 2").

Roesch was arrested some months later pursuant to a "wanted" poster, and charged with harassment, aggravated harassment, and misdemeanor assault. Those charges were dismissed with prejudice on or about December 02, 2020 and the records were sealed on or about June 02, 2021 pursuant to an adjournment contemplating dismissal ("ACD") disposition.

DISCUSSION

A. Summary Judgment Standard

Summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party (CPLR § 3212 [b]). To succeed, the movant must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Summary judgment is usually inappropriate in negligence cases since whether a party acted reasonably under the circumstances can rarely be resolved as a matter of law (*see Charles v Garber*, 195 AD2d 585, 600 NYS2d 739 [2d Dept 1993]). At bottom, for summary judgment to lie, there must be no material, triable issues of fact and the Court's role is merely "issue finding," not "issue determination" (*Paulin v Needham*, 28 AD3d 531, 531, 812 NYS2d 658, 658 [2d Dept 2006]).

A. VNYL's and Security's summary judgment motion

VNYL and Security moved for summary judgment (Seq. No. 2) dismissing all claims against them on the grounds that (1) neither owed Plaintiff a duty of care, (2) the incident was caused by a third party's unforeseeable attack, (3) neither acted unreasonably under the circumstances, and (4) VNYL's patrons, including Sun, were not third-party beneficiaries of the Contract.

While property owners have a duty to act in a reasonable manner to prevent harm to visitors and must take minimal precautions to protect visitors from foreseeable harm including a third party's criminal conduct, such duty arises only when a property owner has the opportunity to control the third-party and is reasonably aware of the need for such control (*see, e.g., D'Amico v Christie*, 71 NY2d 76, 85, 524 NYS2d 1, 5 [1987]; *Lindskog v Southland Rest., Inc.*, 160 AD2d 842, 843, 554 NYS2d 276, 277 [2d Dept 1990]); *Durham v Beaufort*, 300 AD2d 435, 436, 752 NYS2d 88, 90 [2d Dept 2002].

Here, Security's owner opined that there should be one guard for every 50 patrons and the New York Police Department (NYPD) suggests the ratio should be roughly one to 75 but confers discretion to management. Either way, for purposes of the motion, VNYL and/or Security exceeded that ratio on the night of the incidents. Moreover, VNYL normally hired four guards per night but, on the night of the incident, being budgetarily constrained, it only employed three guards. Accordingly, whoever was responsible for controlling capacity at least fell short of the NYPD's and Security's best practices.[1]

Thus, for example, in *Roberts v Nostrand Hillel Food, Inc.*, 90 AD3d 1011, 1011, 935 NYS2d 635, 636 (2d Dept 2011), wherein a defendant restaurant employee tried to break up a

1 According to Sun, he alone was removed after Incident 1, however, that fact has not been shown to be material or relevant.

dispute between plaintiff and another patron and the plaintiff was struck and rendered unconscious, the Second Department ruled that defendants established their prima facie entitlement to summary judgment by demonstrating that the patron's acts were unforeseeable and that defendants had no knowledge or information about that customer that would have put them on notice of his propensity to assault the plaintiff.

Here, whether VNYL and/or Security ultimately prevail in establishing that the acts committed by VNYL's patrons were unforeseeable and that defendants lacked knowledge or information that would have put them on notice of a propensity to assault Sun, they have not done so here. Moreover, given the different standards of proof between criminal and civil actions, dismissal of Roesch's criminal charges is not dispositive in this civil action in which a lower burden of proof may apply. Simply put, there are material, triable issues of fact surrounding the incidents.

B. Summary judgment against Roesch as to Sun's second through fifth claims

Plaintiff Sun moved for summary judgment (Seq. No. 3) against Roesch as to his second through fifth claims but testified that, while he believes it was Roesch who struck him. He only saw his attacker out of the corner of his eye and it "was difficult to get a complete recognition" of who struck him. Sun alleges that he went to retrieve his jacket from a pile of coats by *his* table when Roesch and his friends approached him. Roesch disputes this account and produced a screenshot reservation suggesting that the table at issue had been assigned to his group rather than Sun's. Roesch further refutes that Sun "was merely attempting to retrieve his jacket," charging that Sun sought to continue the altercation.

C. Dismissal of VNYL's, Security's, and Roesch's affirmative defenses.

Likewise, Sun's motion (Seq. No. 3) seeking dismissal of VNYL's and Security's first, second, third affirmative defenses and Roesch's first, second, third, and seventh affirmative defenses, suffers from the same fatal ill as set forth above – *i.e.*, a failure to proffer sufficient evidence to demonstrate the absence of any material, triable issues of fact (*see Winegrad*, *supra*).

Accordingly, it is hereby

ORDERED, both motions (Seq. Nos. 2, 3) are **denied**.

Dated: January 06, 2022

Hon. Larry D. Martin, J.S.C.

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT