

<b>Mitchell v Bowlmor Lanes LLC</b>
2022 NY Slip Op 30885(U)
March 14, 2022
Supreme Court, New York County
Docket Number: Index No. 152011/2017
Judge: Francis A. Kahn III
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. FRANCIS KAHN, III** PART **32**

*Acting Justice*

INDEX NO. 152011/2017

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 009, 010, 011

NY'ANNE MITCHELL,

Plaintiff,

- v -

BOWLMOR LANES LLC, JOHN DOE, NESCTC SECURITY AGENCY, LLC, and SJ SOLUTIONS SECURITY & PROTECTION SERVICES INC.,

Defendants.

**DECISION + ORDER ON MOTION**

BOWLMOR LANES LLC

Third-Party Plaintiff,

Third-Party  
Index No. 595850/2017

-v-

NESCTC SECURITY AGENCY, LLC

Third-Party Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 210-240, 247, 248, 250, 254, 256, 265, 270, 272-281, 298, 299, 302, 303, 306, 308, 310-312, 319-341, 357-371, 398-400; (Motion 010) 241-246, 249, 253, 255, 257, 266, 282-291, 296, 297, 307, 309, 313-315, 372-397; (Motion 011) 292-294, 300, 301, 304, 316-318, 342-356

were read on these motions/cross-motions for SUMMARY JUDGMENT

Upon the foregoing documents, the motions and cross-motions are decided as follows:

This action arises out of an incident that occurred early in the morning of July 16, 2016 at Bowlmor Lanes at Chelsea Piers, located at Pier 60, on the west side of Manhattan. At the time, the establishment was owned and operated by Bowlmor Lanes LLC ("Bowlmor"). Plaintiff claims that while at this location with members of her family, two fights broke out at closing time during which Plaintiff was hit in the head by an unknown attacker identified as "John Doe." As a result, New York City Police were called to quell the brawl. Bowlmor previously contracted with Defendant NESCTC Security Agency, LLC ("NESCTC") to provide security at the bowling alley. NESCTC engaged Defendant SJ Solutions Security & Protection Services Inc. ("SJ"), via a subcontract, to provide the actual security and personnel at the premises.

Plaintiff initially commencing this action against only Bowlmor and John Doe. Bowlmor commenced a third-party action against NESCTC for common-law contribution and indemnification, contractual indemnification, and breach of contract for failure to procure insurance. NESCTC answered the third-party complaint. Thereafter, Plaintiff amended her complaint to include NESCTC as a direct Defendant. Plaintiff again amended her complaint to add SJ as a Defendant.

In her second amended complaint, Plaintiff pleads Defendants owned, operated, managed, maintained and controlled the subject premises and were negligent in failing to keep the premises in a reasonably safe condition. Plaintiff also claims that Defendants negligently failed to provide proper security on the premises and negligently employed, trained, supervised their employees. Defendants Bowlmor, SJ and NESCTC answered the amended complaint and asserted crossclaims against each other for contribution, common-law indemnification and contractual indemnification.

Early in this action, Plaintiff's counsel requested Bowlmor preserve any surveillance footage of the subject incident. During discovery, it was revealed that Bowlmor's security system recorded the subject incident. Despite Plaintiff's request, and with knowledge from the date of the incident of Plaintiff's alleged injury and the NYPD response, Bowlmor failed to preserve its surveillance footage. Plaintiff and SJ moved pursuant to CPLR §3126 for spoliation sanctions against Bowlmor for the loss of the surveillance footage. This Court granted the motions to the extent of ordering that an adverse inference charge be given against Bowlmor at the time of trial.

Now, Defendant Bowlmor (Motion Seq No 9) moves for summary judgment dismissing Plaintiff's complaint and all crossclaims. Defendants SJ and NESCTC cross-move for summary judgment dismissing Plaintiff's complaint and all crossclaims. Defendant NESCTC moves separately (Motion Seq No 10) for summary judgment on its crossclaim against SJ for contractual indemnification and its duty to defend NESCTC as well as to dismiss Bowlmor's crossclaim for contractual indemnification. Defendant SJ also moves separately (Motion Seq No 11) for summary judgment dismissing Plaintiff's complaint and all crossclaims.

#### Plaintiff's Deposition Testimony

Plaintiff testified at her deposition that upon arriving at the bowling alley she and the other members of her group encountered a man in a black polo shirt that she presumed was a Bowlmor employee who she learned later was a security guard. Plaintiff testified her cousin Madway Greer, Jr. ("Madway") paid a cashier at Bowlmor for three games of bowling for the group on his credit card. Between thirty-minutes and one-hour after arriving at the bowling alley, the group was in the fourth frame of its first game when a security guard informed the group Bowlmor was closing. Plaintiff averred that as Madway was attempting to get money back from the cashier, a security guard in a black polo shirt told Plaintiff and her family in an aggressive manner and with profanity, that Bowlmor was closing. Plaintiff testified that when Madway confronted the security guard and told him not to speak to his family in that manner, the security guard struck Madway in the face whereupon the two engaged in a brawl. Soon thereafter, approximately five Bowlmor employees entered the area, all wearing red shirts, not including those that remained behind the counter. Plaintiff testified that a second security guard attempted to exclude the other patrons from the fight. Plaintiff's cousins Sheunita Greer ("Sheunita") and Kevin Cleveland, Jr. ("Kevin") attempted aid Madway by striking the security guard he was fighting. The second security guard then engaged Kevin and they struck one another. At least one other patron joined that fight. When all of the patrons started to run out, Plaintiff was struck on the right cheek and knocked out by a still unknown assailant.

#### Alejandro Lopez's Deposition (Bowlmor)

Alejandro Lopez ("Lopez"), a current Bowlmor employee, testified that he worked as a front desk attendant for Bowlmor on the night of the incident. He averred that when Plaintiff and her family arrived, eight persons in total, he was at the front desk with another Bowlmor employee, Jose Hernandez-Lujan ("Hernandez-Lujan"). According to Lopez, Hernandez-Lujan advised Plaintiff's group to order only a single game because of the late hour, but that they insisted on two games. He advised Plaintiff's group that Bowlmor had a no-

refund policy for pre-paid games. The group became “a little upset” and Lopez claims Plaintiff stated he was being homophobic because she was a lesbian. Lopez sold the party the two games and placed them on two lanes, rather than the usual one, to speed the play. At some point after, screens located on each lane scrolled a message to all patrons notifying them that they had ten minutes or five minutes left before closing. Lopez believed that the group had completed one game before the lanes were shut off. Lopez stated that a tall, well-built man with Plaintiff’s group went to the front desk after the scrolling message appeared and told Hernandez-Lujan, “[y]ou are going to not turn off these lanes when it is time. I am going to finish out my game.” Lopez indicated that Hernandez-Lujan was apologetic but stated the lanes had to be shutdown. Hernandez-Lujan offered the patron an arcade card or bowling coupons to compensate for the lost game, but he refused the offer. Lopez claimed that Plaintiff’s entire group became “a little more rowdy” as a result. Lopez then went and stood next to Hernandez-Lujan and called Operation Manager Shonee Strother (“Strother”) via “walkie”, but there was no response. Lopez testified there were four security guards on duty that evening. However, at the time of this incident, only one security guard remained.

Lopez recounted that as the tall, well-built man from Plaintiff’s group became more agitated, the security guard approached the counter. Then, according to Lopez, the group began heckling Lopez and Hernandez-Lujan using homophobic slurs. Then the tall, well-built man walked behind the counter towards Lopez and Hernandez-Lujan. As a result, Lopez screamed into the “walkie” that he needed a manager. The security guard then jumped in front of the patron separating him from Lopez and Hernandez-Lujan. Lopez testified that the tall, well-built man punched the security guard and the rest of Plaintiff’s group started throwing drinks over the counter. When Strother came to the front, two people from Plaintiff’s group pushed him and held him back from the brawl behind the counter. Lopez, Hernandez-Lujan and a female server in the area all retreated to the general manager’s office and locked themselves in. Lopez could not recall if Strother became physically involved in the brawl. Lopez testified that on the night of the incident, front desk workers, including himself and Hernandez-Lujan, were wearing white shirts, that Bowlmor bartenders, porters, laser tag attendants and waitresses all wore black. When asked about Bowlmor’s Operating Standards, Rule 13 that required the security guard to leave with the last Bowlmor employee on premises, Lopez noted there was no security on site when he and the other employees emerged from the manager’s office.

#### Jose Hernandez-Lujan’s Deposition Testimony (Non-Party)

Hernandez-Lujan, presently employed by Bowlero Corp., the parent company of Bowlmor, testified that on the night in question he worked as a front desk associate at Bowlmor Chelsea Piers and his shift was from Friday at 5:00 p.m. to 3:00 a.m. on Saturday. He worked the front counter with Lopez and stated that Strother was his direct supervisor that evening. Hernandez-Lujan indicated that three security guards, all dressed in black, were on duty that evening. Hernandez-Lujan stated that Bowlmor’s general manager was responsible for security at the premises. He also testified that although the general manager would tell NESCTC or SJ how many security personnel were necessary on a given day, the number that showed up was the security companies’ decision.

Hernandez-Lujan testified that Plaintiff arrived at approximately 2:00 am, an hour before closing, with five other individuals. Hernandez-Lujan said he informed the group that they probably only had time for one game, but the group insisted on pre-paying for two games. Hernandez-Lujan testified he advised the man that unfinished games were non-refundable, and he assented to the limitation. Hernandez-Lujan recounted that some fifteen-minutes before Bowlmor closed at 3:00am, a message flashed across the screen at the lanes informing the patrons of same. Hernandez-Lujan averred that at 3:00am he turned off the lanes where Plaintiff’s group was bowling. Plaintiff’s entire group then went to the front counter and demanded a refund. Hernandez-Lujan stated that the group were angry and intoxicated. When a security guard approached the

counter where Hernandez-Lujan was stationed, he radioed for Strother to come to the counter. Hernandez-Lujan stated he attempted assuage the group by offering them Bowlmor coupons, but they were not placated. Hernandez-Lujan testified that a man with the group walked behind the counter and approached him. Hernandez-Lujan stated that when the security guard who approached earlier jumped over the front counter to intercept him, the man then punched the security guard. Hernandez-Lujan saw Plaintiff throw a glass which shattered against a wall and heard her yell a homophobic slur at himself and Lopez. Hernandez-Lujan, Lopez and a waitress then retreated to the general manager's office and called the police. Hernandez-Lujan returned to the front counter when the police arrived. He observed the premises was in disarray and Plaintiff was seated on a chair with her head in her hands. He also saw Plaintiff attended to by EMS and removed from the premises on a stretcher. He did not see any security guards and no guest incident report was completed after this event. Hernandez-Lujan testified that prior to this incident, between January 1, 2016 and July 15, 2016, five other fights and/or altercations between patrons occurred at Bowlmor, although he was only present for two of them.

#### Shonee Strother's Deposition Testimony (Non-Party)

Strother, a former Bowlmor Operations Manager, testified he was the only operations manager on duty on the date of incident. Strother opined that given his responsibilities and the size of the venue, a lone manager was insufficient. On the night in question while Strother was in the cash room, he heard lots of screaming and shouting. When he emerged from the cash room to investigate, he saw a huge fight consisting of approximately twenty people. In addition to the incident with the large group outside of the cashier counter, he claimed there was a second incident between a Bowlmor employee named Jose and a security guard behind the counter. He stated Plaintiff was behind the counter, screaming and yelling, trying to get past security. Strother also described that Plaintiff appeared drunk, was acting in a loud and aggressive manner and saw her throwing objects. Strother also claimed that Plaintiff joined in the melee and threw punches at other patrons. He stated he did not see any Bowlmor employees strike Plaintiff, but that it was possible another customer did. Bowlmor bartenders, food servers and janitors were also present but only the janitors attempted to break up the scrum. Strother indicated he was struck a couple of times by guests as he attempted to quell the violence. He claimed that more than a few, but less than ten fights had occurred at the Bowlmor Lanes prior to the subject incident. None he saw, however, were as bad as the one at issue. Strother testified that prior to the incident he complained to management about inadequate security at the premises. Following this incident, Strother sent a text to the general manager indicating that given the late hour, having one security guard and one manager on the floor was, in his opinion, a threat to his safety. Strother indicated that Jose had a reputation for being rude to customers. Strother opined that it was against policy to "shut down" customers' games, particularly without informing the guest first, as occurred here.

#### Haykeem Mayfield's Deposition Testimony (Non-Party)

Hyakeem Mayfield ("Mayfield"), a former security officer for SJ, testified he worked as a security officer at Bowlmor at Chelsea Piers on the night in question. He averred that at approximately 2:30 a.m., a group of some eight to twelve individuals were standing in front of the counter complaining about their bowling games being cut off early. One member of the group was a tall man who smelled of alcohol. Mayfield stated the tall man walked behind the counter and attempted to approach a Bowlmor manager, who was with two other Bowlmor employees. As Mayfield believed the Bowlmor manager was in imminent danger, he jumped over the counter to intercept the tall male. Mayfield testified that the tall male either pushed or grabbed him as a result. Subsequently, he observed that objects were thrown over the counter and "chairs started flying." Mayfield stated that once he engaged the tall male, he had no recollection of what occurred in the customer area. Mayfield testified that another security guard was present when the fight started, but he did not know where he was during the melee. After, he observed a woman was sitting on the floor that he had not seen before. When

the police arrived, Mayfield and the other people, including the other security officer, ran out of the building. Mayfield opined that three additional security guards should have been present at Bowlmor on the night of the incident.

#### Theodore Cooks Deposition Testimony (NESCTC)

Theodore Cooks ("Cooks"), the VP of Operations for NESCTC, testified that he has been employed by this party since 2015. He averred that NESCTC entered in a contract to provide security management services at all Bowlmor locations, including Chelsea Piers, and that the agreement was in effect on the day of the incident. Cooks stated that Bowlmor would notify NESCTC on regular intervals of its needs for security personnel in the coming weeks and that NESCTC would issue a purchase order. Pursuant to the contract, with Bowlmor's consent, NESCTC provided personnel through third-party vendors it retained. Cooks acknowledged that NESCTC never advised Bowlmor whether its security personnel requests were adequate and no NESCTC employee ever visited Chelsea Piers before the incident. After reviewing records shown to him at the deposition, Cooks testified that Bowlmor requested six guards, but later changed his answer to three. According to the records, guards would begin departing at one-hour intervals between 1:00 am and 3:00 am. For the incident date, the purchase order for Bowlmor only requested one guard be present at 3:00 am. His review of SJ's timesheets at the deposition revealed one security guard claimed to be at the site at the time of the incident. Cooke described the uniform for security personnel at Bowlmor as a black polo-type shirt and black pants.

Cooks testified that SJ personnel were required to create reports that documented incidents they witnessed at the premises. He admitted awareness of prior incidents at Chelsea Piers, which he described as "altercations mostly". Cooks testified that he searched but found no incident report from SJ regarding the incident. He stated that no report existed because Omowale St. Juste, the President of SJ, informed him that no security guard was present when the incident occurred. Cooks claimed that he found no evidence through investigation that any SJ guard struck Plaintiff or her family. He also claimed that SJ personnel at Chelsea Piers were under the direction and control of Bowlmor managers.

#### Omowale St. Juste's Deposition Testimony (SJ)

Omowale St. Juste ("St. Juste") testified that he is the President and founder of SJ. He acknowledged SJ contracted with NESCTC to provides security services for Bowlmor locations, including Cheasea Piers. He averred that SJ would receive purchase orders from NESCTC for the particular client's security needs for a given day and time. He stated the purchase orders included the time, date, location, number of guards, and the post orders. St. Juste stated NESCTC would generate an attendance sheet that SJ personnel would complete on the sight which contained arrival and departure times for the guards on duty. The attendance sheets would be submitted to NESCTC for billing. St. Juste testified that three SJ guards were scheduled to work at Chelsea Piers on the incident date, Mayfield, Rashid Bilal ("Bilal") and James Woods ("Woods"). He admitted awareness of previous incidents at Chelsea Piers and discussing with NESCTC prior to the incident the potential need for a fourth security guard and longer personnel hours at the premises.

St. Juste testified that he first learned of the incident when he received a letter notifying SJ of pending litigation but did not recall when he received same. He claims that after receiving the correspondence he spoke to Woods and Bilal who denied witnessing any incident when they were at Bowlmor on the date in question. He stated that the lack of an incident report generated by SJ personnel corroborates that his employees had departed before the incident occurred. He reiterated that "[n]obody knows anything about the incident as far as my employees are concerned." St. Juste was presented the attendance sheet for the incident date and stated it

showed the following shifts: Bilal - 8pm to 1am, Mayfield – 9pm to 2am, and Woods 10:30pm to 2am. St. Juste stated it was possible the figure written for Woods' departure time was 3, but he viewed it as a 2. St. Juste testified SJ personnel would ordinarily remain at Chelsea Piers until all customers departed, but, on occasion, Bowlmor's manager on duty would discharge SJ guards while patrons were still on site.

St. Juste testified that Chelsea Piers was about the size of ½ a football field and contained five rooms. Guard assignments would typically be one or two guards checking ID's at the door and a single guard patrolling the rest of the premises. He stated that at one time SJ personnel at Chelsea Piers wore all black, including a blazer, but at present, the guards wear black polo-type shirts and pants. He confirmed the post orders for SJ personnel at Chelsea Piers included a uniform of blazer, slacks and badge. St. Juste confirmed Bowlmor's on-site supervisory control for SJ security personnel at Chelsea Piers. He averred that Bowlmor would sometimes provide additional in-house guards for a special event.

#### James Woods' Deposition Testimony (Non-Party)

James Woods ("Woods"), an employee of SJ, testified he was employed by SJ as a security guard in July of 2016. He stated he left SJ's employ thereafter and returned some 60 days before his deposition. Woods had virtually no recollection of any particulars regarding the day of the incident. Besides saying it was possible he was assigned to work at Bowlmor on the day of the incident, he could not remember whether he worked there in 2016, who his co-employees were and did not recall an incident involving patrons in July of 2016. He also denied knowing Balil or Mayfield. Woods recalled with certainty that he never stayed past 2:00 am, that he never witnessed a fight or serious incident on July 16, 2016, or any other date. When shown the attendance sheet for the incident date, Woods stated he signed out at 2:00 am and that it was standard practice for a Bowlmor manager to sign the sheet whenever a guard departed. He further averred that he was never asked to stay past 2:00 am. He stated the uniform for SJ personnel at Bowlmor was suits with an SJ button. Woods denied that personnel ever wore polo-type shirts.

#### Analysis

While it is ultimately the Plaintiff's burden at trial to establish a *prima facie* case of negligence against the Defendants, on a motion for summary judgment it is incumbent upon the moving party to present evidence in admissible form showing their entitlement to judgment in its favor as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557). In support of their motions, Defendants were required to demonstrate *prima facie*, that one or more of the essential elements of Plaintiff's negligence claim are negated as a matter of law (*see eg Poon v Nisanov*, 162 AD3d 804 [2d Dept 2018]; *Nunez v Chase Manhattan Bank*, 155 AD3d 641 [2d Dept 2017]). Failure to make such a showing requires denial of the motions regardless of the sufficiency of the opposition papers (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see also Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce proof, in admissible form, which establish the existence of material issues of fact (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

As to the branch of Bowlmor's motion for summary judgment dismissing Plaintiff's complaint, it argues that none of its employees were involved in the altercations, that SJ's security guards were not Bowlmor special employees and that it cannot be liable because the incident was a sudden, unforeseeable event that could not have been reasonably anticipated.

Generally, special employment does not exist unless there is a “clear demonstration of surrender of control by the general employer and assumption of control by the special employer” (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]). Also, the special employee is required to be “aware [of] and consented to the alleged change in his employment status” (*id.*). Here, there is no proof SJ surrendered control of its personnel or that SJ’s employees consented to same. Moreover, the deposition testimony, contracts and other documentation reveals little more than Bowlmor’s exercise of general supervisory control over the SJ guards (*see McLaughlan v BR Guest, Inc.*, 149 AD3d 519 [1st Dept 2017]).

Bowlmor’s assertion that the proffered evidence demonstrates that no Bowlmor employee was involved in the incident which Plaintiff claims was a cause of her injury is generous speculation at best. Unsurprisingly, the chaotic nature of this event resulted in extremely divergent recounts of the brawl which certainly does not adequately account for the actions of *all* Bowlmor employees during these two fights and remove all issues of fact as to their actions. For example, Strother’s testimony that he and the Bowlmor janitors were involved in breaking up the two fights that occurred is entirely contradictory to this claim. Moreover, the missing surveillance footage, for which Bowlmor has incurred a spoliation sanction, renders the outcome of this issue solely one of witness credibility which is not an issue for summary judgment (*see Comando v C.P. Yang Corp.*, Misc3d\_\_\_\_, 2019 Slip Op 33188[U] [Sup Ct NY Cty, 2019]).

On the issue of liability based upon landowner status, Bowlmor was “under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk” (*see eg Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept 2008] *citing Basso v Miller*, 40 NY2d 233, 241 [1976]). “Although landlords and permittees have a common-law duty to minimize foreseeable dangers on their property, including the criminal acts of third parties, they are not the insurers of a visitor's safety” (*Maheshwari v City of New York*, 2 NY3d 288, 294 [2004]) and a landlord’s duty to control the conduct of third parties on its premises only arises when it has “the opportunity to control such persons and is reasonably aware of the need for such control” (*D’Amico v Christie*, 71 NY2d 76, 85 [1987]; *see also Aupperlee v Restaurant Depot, LLC.*, 177 AD3d 940, 941 [2d Dept 2019]).

Whether the complained of conduct was foreseeable is based upon past experience and the “likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor” (*Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519, *quoting* Restatement [Second] of Torts § 344, Comment f; *see also Doe v Turnmill*, 193 AD3d 618 [1st Dept 2021]). “To establish that criminal acts were foreseeable, the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location” (*Markov v Grecian Gardens Co.*, 188 AD3d 1032, 1033 [2d Dept 2020] *quoting Karim v 89th Jamaica Realty Co., L.P.*, 127 AD3d 1030 [2d Dept 2015] *citing Tambriz v P.G.K. Luncheonette, Inc.*, 124 AD3d 626, 628 [2d Dept 2015]; *Beato v Cosmopolitan Assoc., LLC*, 69 AD3d 774, 776 [2d Dept 2010]; *Novikova v Greenbriar Owners Corp.*, 258 AD2d 149, 153 [2d Dept 1999]). “Thus, the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults” (*Bisignano v Raabe*, 128 AD3d 751, 752 [2d Dept 2015]; *see also Millan v AMF Bowling Ctrs., Inc.*, 38 AD3d 860 [2d Dept 2007]).

As such, to establish *prima facie* entitlement to dismissal of Plaintiff’s negligence claim, Bowlmor was required to demonstrate it provided adequate security measures (*see Marrero v City of New York*, 102 AD3d 409 [1<sup>st</sup> Dept 2013]; *Villa v Paradise Theater Prods., Inc.*, 85 AD3d 402 [1<sup>st</sup> Dept 2011]) and/or the incident at issue was, as a matter of law, unforeseeable and unexpected (*see eg Faughey v New 56-79 IG Assoc., L.P.*, 149 AD3d 418 [1<sup>st</sup> Dept 2017]).

As to Bowlmor's opportunity to control the situation, allowing Plaintiff's group to pre-pay for multiple games (whether two or three) given the late hour of their arrival seemingly served as a flashpoint for the events that followed. Both Lopez and Hernandez-Lujan testified that the tall well-built man from Plaintiff's group who pre-paid the games was aggressive, intoxicated and insisted on buying multiple games. Permitting him to pay for non-refundable games that were unlikely to be completed is evidence that he might become disgruntled when the lanes were abruptly shut off and would in turn lead to a confrontation with staff. Indeed, Strother opined that shutting down the games of Plaintiff's group was against policy and rude. After the lanes were shut off, and as the tall man and rest of Plaintiff's group were arguing with Hernandez-Lujan and getting "more rowdy," Hernandez-Lujan observed that the situation was becoming volatile and frantically attempted to raise the operations manager on the radio to have him come to the front counter to intercede. This evidences an evolving, rather than spontaneous, encounter with the male patron which ultimately escalated to a physical altercation and sparked a second separate fight. As such, there are a triable issues of fact as to whether Bowlmor had the opportunity to control the conduct of these patrons and whether it was reasonably aware of the need for such control (*see Cole v JW's Pub*, 133 AD3d 815, 816 [2d Dept 2015]; *Panzer v Johnny's II*, 253 AD2d 864 [2d Dept 1998]; *Cittadino v DeGironimo*, 198 AD2d 801, 802 [4th Dept 1993]; *cf. Martinez v National Amusements, Inc.*, 50 AD3d 302 [1st Dept 2008]). Moreover, the deliberate acts taken by Bowlmor employees during the initial transaction with Plaintiff's group precludes granting summary judgment to Bowlmor (*see Sachar v Columbia Pictures Indus.*, 129 AD3d 420 [1st Dept 2015]).

Concerning the adequacy of security at the premises and the foreseeability of the incident, there are also questions of fact. Lopez testified that Bowlmor's general manager requisitioned the amount of security guards needed on a given night. Multiple witnesses, including Strother, Hernandez-Lujan and Mayfield, testified that numerous physical altercations had occurred at the premises previously. Also, both Strother and Mayfield testified there was an insufficient number of security personnel present on the night in question and Strother added that he complained to management about inadequate security at Bowlmor prior to the incident. That the incident was greater in scope than Strother had seen before does not make it unforeseeable as a matter of law. It is established that an episode of criminal conduct "is within the class of foreseeable hazards that [a] duty exists to prevent, the [landlord] may be held liable, even though the harm may have been brought about in an unexpected way." (*Di Ponzio v Riordan*, 89 NY2d 578, 584 [1997]). Consequently, Bowlmor failed to establish the adequacy of security at the premises and whether the incident was foreseeable (*see Bryan v Crobar*, 65 AD3d 997 [2d Dept 2009]; *see also Whittingham v McDonald's Corp.*, 174 AD3d 672, 673 [2d Dept 2019]; *Solomon v National Amusements, Inc.*, 128 AD3d 947, 948 [2d Dept 2015]; *Hedges v East River Plaza, LLC*, 58 Misc3d 1211, \*9 [Sup Ct. NY Cty, 2018]).

Therefore, the branch of Bowlmor's motion for summary judgment dismissing Plaintiff's complaint is denied.

The branch of Bowlmor's motion for summary judgment dismissing the crossclaims by SJ and NESCTC for common-law indemnification and contribution is denied as, based on the finding supra, Bowlmor failed to establish it was not negligent (*see Digirolomo v 160 Madison Ave LLC*, 194 AD3d 640, 641 [1st Dept 2021]; *ing Wong Realty Corp. v Flintlock Constr. Services, LLC*, 95 AD3d 709 [1st Dept 2012]; *Hussain v Try 3 Bldg. Services, Inc.*, 308 AD2d 371, 372 [1st Dept 2003]).

The branch of the motion for dismissal of the crossclaim for contractual indemnification against Bowlmor is granted without opposition as it is unchallenged that Bowlmor did not contractually agree to indemnify either NESCTC or SJ (*see generally Lombardo v Tag Court Square, LLC*, 126 AD3d 949, 951 [2d Dept 2015]).

Bowlmor also seeks summary judgment on its claims for contractual indemnification against NESCTC and SJ. “[T]he right of a party to recover indemnification on the basis of a contractual provision depends on the intent of the parties and the manner in which that intent is expressed in the contract” (see *Suazo v Maple Ridge Associates, LLC*, 85 AD3d 459, 460 [1st Dept 2011] citing *Kurek v Port Chester Hous. Auth.*, 18 NY2d 450 [1966]). “The promise [to indemnify] should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances” (*Hooper Assoc., Ltd. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; see also *In re Part 60 RMBS Put-Back Litigation*, 195 AD3d 40, 56 [1st Dept 2021]).

Bowlmor’s contract with NESCTC provides, in pertinent part, as follows:

[NESCTC] agrees to indemnify, defend and hold harmless Client... and their respective officers, directors, employees, agents, and/or representatives... from and against any and all claims, actions, liabilities, losses, costs and expenses, including without limitation reasonable attorney’s fees, incurred by any such Client Entities... to the extent any of these result from or are caused by any of the following: (i) the gross negligence or willful misconduct of Contractor, its officers, directors, employees and agents;... (iii) injury to any person(s) caused by Contractor, or its subcontracted vendors... or (v) damage to any property, caused by Client, its personnel or invitees, by Contractor or its vendors

Here, Bowlmor has not demonstrated that NESCTC was either grossly negligent or committed “willful misconduct” so to trigger the indemnification clause. Likewise, as discussed above, the conflicting deposition testimony does not support Bowlmor’s claim that Plaintiff’s injury was caused solely by the acts or omissions of NESCTC or by its subcontractor SJ. Therefore, the branch of Bowlmor’s motion for summary judgment on its contractual indemnification claim is denied.

As against SJ, there is no contract between it and Bowlmor. To the extent Bowlmor claims it may be covered under the subcontract between SJ and NESCTC, that agreement, at paragraph ten, provides for possible indemnification of Bowlmor by SJ, but it is limited to instances where the claims “result from or are caused by the alleged or actual negligence or willful misconduct of [SJ], its officers, directors, employees, agents and/or representatives”. Since Bowlmor has failed to establish, as a matter of law, that SJ was negligent or committed willful misconduct this branch of Bowlmor’s motion is also denied. Moreover, to the extent Bowlmor may be seeking indemnification for its own negligence, no such provision is unequivocally expressed in either agreement (see *eg Sovereign Bank v Biagioni*, 115 AD3d 847, 848 [2d Dept 2014]).

SJ, relying on *Espinal v Melville Snow Contractors, Inc.*, (98 NY2d 136 [2002]), cross-moved to dismiss Plaintiff’s complaint arguing, in part, that it did not owe a duty of care to Plaintiff who was a non-contracting third party. NESCTC parrots the arguments made by SJ in support of the branch of its cross-motion<sup>1</sup> to dismiss Plaintiff’s complaint.

The general rule is that “a contractual obligation standing alone will generally not give rise to tort liability in favor of a third party” (*id.* at 138). However, this rule is subject to three exceptions:

<sup>1</sup> While NESCTC’s cross-motion is untimely, the Court may consider its merits since the issues raised mirror those in SJ’s timely cross-motion (see CPLR §§2214[b], 3212 [a]; *Baez v 1749 Grand Concourse LLC*, 178 AD3d 520 [1st Dept 2019]; *Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp.*, 161 AD3d 691, 692 [1st Dept 2018]).

(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] 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

(*Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [2007]).

SJ established, *prima facie*, that as a subcontractor to NESCTC it owed no duty of care to Plaintiff notwithstanding its contractual obligation to provide security at Bowlmor's premises (*see generally Murphy v Goldman Sachs Group, Inc.*, 198 AD3d 511 [1<sup>st</sup> Dept 2021]). Similarly, NESCTC demonstrated *prima facie* that no duty of care to Plaintiff arose out of its contract with Bowlmor.

In opposition, Plaintiff failed to raise an issue of fact on the second or third *Espinal* exceptions as to either SJ or NESCTC. The relevant deposition testimony and contracts demonstrate neither SJ nor NESCTC comprehensively displaced Bowlmor's obligation to maintain safety at the premises (*see Rahim v Sottile Sec. Co.*, 32 AD3d 77 [1<sup>st</sup> Dept 2007]). Further, the same evidence fails to demonstrate how these parties' security services lulled Plaintiff into a "false sense of security" and, resultantly, she neglected to take precautions she would have taken if SJ were not present (*id.*, citing *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 522 [1980]).

Plaintiff's reliance on the Court of Appeals case *Palka v Servicemaster Mgt.*, (83 NY2d 579 [1994]) is misplaced. In *Palka*, the Defendant was contracted to provide maintenance services for a hospital where the plaintiff therein was injured when a wall-mounted fan fell on her. There, the Court concluded the defendant entirely displaced the in-house maintenance of the hospital and the contract made the defendant exclusively responsible to train personnel to make all repairs. In this case, neither SJ nor NESCTC contracted to provide such an all-encompassing security presence. The testimony of Bowlmor employees established it maintained a general supervisory role over the guards with respect to their posting and monitored the guard's interaction with patrons. As to NESCTC, it had no employees on the premises when the incident occurred.

Unlike the agreements here, the contractual obligations in *Palka*, "plainly affected the safety of all users of the premises who [were] entitled to rely on the nonnegligent maintenance services and repair responsibilities imposed by the contract" (*see Palka*, supra at 586). By contrast, the language in the contracts here reveal security personnel were to maintain minimum contact with patrons and to not act unilaterally upon any perceived wrongdoing but simply to "observe and report." (*see Dabbs v Aron Security, Inc.*, 12 AD3d 396, 398 [2d Dept 2004]; *Buckley v I.B.I. Sec. Service, Inc.*, 157 AD2d 645 [2d Dept 1990]). Notably, under the NESCTC/Bowlmor contract, security guards were to refrain from becoming involved in any "refund or exchange issues", a central issue in this case. These differences also distinguish *Flynn v Niagara Univ.*, (198 AD2d 262 [2d Dept 1993]) and *Kuti v Sera Sec. Servs.*, (182 AD3d 401 [2d Dept 2020]), the other cases relied upon by Plaintiff.

The launching of an instrument of harm exception considers affirmative steps that either decrease safety or create or exacerbate an already existing dangerous condition (*see Genen v Metro-North Commuter R.R.*, 261 AD2d 211, 214 [1st Dept 1999]; *see also Medinas v MILT Holdings LLC*, 131 AD3d 121 [1st Dept 2015]). In other words, "tort liability for breach of contract will not be imposed merely because there is some safety-related aspect to the unfulfilled contractual obligation. If liability invariably follows nonperformance of some safety-related aspect of a contract, the exception would swallow up the general rule against recovery in tort based merely upon the failure to act as promised" (*Church v Callanan Indus.*, 99 NY2d 104, 112 [2002]).

As to NESCTC, Plaintiff failed to establish any basis for application of the first *Espinal* exception since it is uncontradicted that NESCTC employees were not present at the time of this occurrence. There is no proof NESCTC launched a force or instrument of harm and any inaction on its part was simply a non-actionable refusal to become an instrument for good. On the other hand, the proffered evidence demonstrates an issue of fact exists based upon intervention by SJ personnel into the refund dispute between the male member of Plaintiff's group and Bowlmor employees (*see Lee v Piers*, 11 AD3d 257 [1st Dept 2004]). Plaintiff testified that while Madway sought a refund, a security guard approached her family in an aggressive manner and ultimately struck Madway when he objected to his conduct and demeanor. There is no proof that any other security personnel other than those provided by SJ were present. Moreover, Mayfield admitted he engaged in a physical confrontation with a male customer. That Mayfield claims he was struck first only raises a credibility issue and does not alter the testimony supporting that the actions of a security guard affected, and perhaps escalated, a volatile situation which ended in Plaintiff's injury.

Accordingly, the branch of SJ's cross-motion to dismiss Plaintiff's complaint is denied. The branch of SJ's cross-motion to dismiss NESCTC's crossclaims for common-law and contractual indemnification is denied based upon the principles cited *supra*.

In opposition, Plaintiff and Bowlmor initially argue that NESCTC cross-motion (Mot Seq No 9) is untimely and that its separate summary judgment motion (Mot Seq No 10) is improperly successive. NESCTC's cross-motion is untimely, but, as noted *supra* in footnote 1, since it raises the same issues as SJ's timely cross-motion, it may be considered by the Court (*see Baez v 1749 Grand Concourse LLC, supra; Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp., supra*). NESCTC's second motion for accelerated judgment seeks summary judgment on its claim for contractual indemnification against SJ as well as dismissal of Bowlmor's claim for contractual indemnification. Typically, successive motions for summary judgment are barred, but this rule is not absolute. "A subsequent summary judgment motion may be properly entertained when it is substantively valid and when granting of the motion will further the ends of justice while eliminating an unnecessary burden on the resources of the courts" (*Cioffi v S.M. Foods, Inc.*, 178 AD3d 1006, 1012 [2d Dept 2019] *quoting Kolel Damsek Eliezer, Inc. v Schlesinger*, 139 AD3d 810, 811 [2d Dept 2016]). Here, the Court finds addressing the issues in Motion Sequence Number 10 satisfy these ends.

As to the merits of the opposition, Plaintiff fails to raise a triable issue of fact as to NESCTC's negligence. Without specifying any provision in the contract, Plaintiff casts NESCTC's contract as "extremely vague" arguing that it fails to show that a duty was not owed to the patrons. A cursory examination the sample purchase order attached to the contract shows this is not the case. That attachment reveals that: "Security Officers are on site only to deter potential loss, not to detain, apprehend, question, accuse, follow or pursue anyone. Security Officers are instructed to observe and report only." Additionally, per the contract, security officers were prohibited from, *inter alia*, detaining or apprehending any customer, questioning or accusing any customer of wrongdoing, asking any customer to leave the site or engaging in any confrontation.

Finally, Plaintiff wrongly argues that "all negligent acts done by SJ Solutions relate back to NESCTC." NESCTC subcontracted the security work in this case to independent contractor SJ. "As a general rule, one who hires an independent contractor may not be held liable for the independent contractor's negligent acts" (*Braun v Star Community Pub. Group, LLC*, 125 AD3d 913 [2d Dept 2015] *quoting Campbell v HEI Hospitality, LLC*, 72 AD3d 860, 861 [2d Dept 2010]). In her opposition, Plaintiff does not invoke any exception to this rule (*see generally Rosenberg v Equitable Life Assur. Soc. of U.S.*, 79 NY2d 663, 668 [1992]; *Backiel v Citibank, N.A.*, 299 AD2d 504, 505-507 [2d Dept 2002]). Therefore, any potential negligent act by SJ is not attributable to NESCTC.

To the extent Bowlmor argues that NESCTC is not entitled to dismissal of its crossclaims for common law contribution and indemnification, NESCTC has established that it was not negligent (*see CONRAIL v Hunts Point Terminal Produce Coop. Ass'n, supra; Higgins v TST 375 Hudson, L.L.C., supra; Ramirez v Almah, LLC*, 169 AD3d 508, 509-510 [1st Dept 2019]). Bowlmor's argument that its liability would entirely vicarious is inapposite since SJ's security guards were not special employees and Bowlmor's liability to Plaintiff would be based upon its own negligence in failing to maintain a safe premises (*see Edge Management Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006]). Likewise, as discussed above, NESCTC did not completely displace Bowlmor's obligation "to maintain the premises in a reasonably safe condition" (*see Cacciuottolo v Brown Harris Stevens Management*, 197 AD3d 551 [2d Dept 2021]). As such, Bowlmor fails to raise an issue of fact.

Lastly, based on the principles cited supra, SJ's crossclaims for common-law contribution and indemnification against NESCTC fail and are dismissed.

NESCTC's motion (Mot Seq No 10) also seeks summary judgment on its crossclaim against SJ for contractual indemnification, for a defense in this action as well as dismissal of Bowlmor's crossclaim for contractual indemnification. Here, NESCTC demonstrated the indemnification clause in its contract with SJ would be triggered should SJ be determined to be negligent and by its express terms to indemnify, defend and hold NESCTC harmless (*see Tolpa v One Astoria Square, LLC*, 125 AD3d 755, 756 [2d Dept 2015]; *cf. Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 995-996 [2d Dept 2009]). Accordingly, NESCTC is entitled to conditional summary judgment on this claim. SJ's argument that the indemnification provision violates General Obligations Law §5-322.1 is without merit as that statute is inapplicable here. That section only applies where contract is for the "construction, alteration, repair, or maintenance of a building, structure, appurtenances and appliances" (General Obligations Law §5-322.1).

Regarding the branch of NESCTC's motion to dismiss Bowlmor's crossclaim for contractual indemnification, NESCTC is obligated to indemnify Bowlmor for not only for NESCTC's negligent actions, but "upon injury to any person(s) caused by Contractor, or its subcontracted vendors". Since SJ's negligence is still an open issue, NESCTC has not demonstrated, *prima facie*, its entitlement to summary judgment dismissing this crossclaim (*see George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]; *see generally Anderson v United Parcel Service, Inc.*, 194 AD3d 675, 678-679 [2d Dept 2021]). However, this provision cannot be interpreted to find NESCTC agreed to indemnify Bowlmor for its own negligence (*see generally Margolin v New York Life Ins. Co.*, 32 NY2d 149 [1973]).

SJ's second motion for summary judgment (Mot Seq No 11) seeks dismissal of Plaintiff's claims as well as the crossclaims of Bowlmor and NESCTC based the Court's imposition of a spoliation sanction against Bowlmor at the time of trial. As the Court found that Bowlmor's conduct was not intentional and did not justify striking its pleading or awarding Plaintiff summary judgment, that decision alone does not warrant summary judgment be granted to SJ (*see generally May v American Multi-Cinema, Inc.*, 191 AD3d 657 [2d Dept 2021]). As to Plaintiff, penalizing her for the actions of Bowlmor would be nonsensical.

Accordingly, it is

ORDERED that the motion (Mot Seq No 9) for summary judgment by Bowlmor Lanes, LLC is denied, and it is

ORDERED that the cross-motion (Mot Seq No 9) for summary judgment by SJ Solutions Security and Protection Services, Inc is denied, and it is

ORDERED that the cross-motion (Mot Seq No 9) for summary judgment by NESCTC Security Agency, LLC is granted to the extent that Plaintiff's complaint against it, the crossclaims and third-party claims by Bowlmor Lanes LLC for common-law contribution and indemnification and all the crossclaims by SJ Solutions Security & Protection Services Inc. are dismissed, but the branch of the motion to dismiss Bowlmor's crossclaim for contractual indemnification is denied, and it is

ORDERED that the motion (Motion Seq No 10) for summary judgment by NESCTC Security Agency, LLC is granted to the extent that conditional summary judgment is granted against SJ Solutions Security & Protection Services Inc. on the claims for contractual indemnification and defense, but the branch of the motion to dismiss Bowlmor's crossclaim for contractual indemnification is denied, and it is

ORDERED that the motion (Motion Seq No 11) for summary judgment by SJ Solutions Security & Protection Services Inc. is denied in its entirety.

3/14/2022

DATE

*Francis A. Kahn III*

FRANCIS KAHN, III, A.J.S.C.

**HON. FRANCIS A. KAHN III**

NON-FINAL DISPOSITION

**J.S.C.**

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE