

**Stanton Surf Club LLC v  
Allstar Sec. & Consulting, Inc.**

2023 NY Slip Op 30813(U)

March 14, 2023

Supreme Court, New York County

Docket Number: Index No. 651638/2021

Judge: Lucy Billings

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 41

-----x  
STANTON SURF CLUB LLC d/b/a THE STANTON, Index No. 651638/2021

Plaintiff

- against -

DECISION AND ORDER

ALLSTAR SECURITY & CONSULTING, INC.,

Defendant  
-----x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Defendant entered a written agreement, dated March 1, 2015, to provide security services and personnel to plaintiff's venue. On May 5, 2016, defendant's employee, nonparty Kevin Slack, sustained personal injuries from a physical altercation with nonparty Benjamin Kraiem, an allegedly intoxicated patron of plaintiff's venue. Slack commenced a personal injury action, Slack v. Stanton Surf Club LLC, 506235/2017 (Sup. Ct. Kings Co.), in which Slack claims battery against Kraiem, claims negligent hiring and retention and a violation of New York General Obligations Law §§ 11-100 and 11-101 (Dram Shop Act) against plaintiff, and does not claim against defendant, his employer. Plaintiff subsequently commenced this action for defendant's breach of the contract in failing to provide indemnification and procure insurance covering plaintiff. It now moves for summary judgment on liability for breach of the contract, which the

parties stipulate is authenticated and admissible for purposes of the motion. C.P.L.R. § 3212(b). The court denies plaintiff's motion as follows.

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

"A contract should be read 'as a harmonious and integrated whole' so as to 'give effect to its purpose and intent,' and 'must be construed in a manner which gives effect to each and every part, so as not to render any provision meaningless or without force or effect.'" HTRF Ventures, LLC v. Permasteelisa N. Am. Corp., 190 A.D.3d 603, 603 (1st Dep't 2021) (quoting Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc., 30 N.Y.3d 572, 581 (2017)). Plaintiff seeks to enforce the contract's indemnification provision:

5. INDEMNIFICATION: Guard Services agrees to defend, indemnify, and save the Venue and the Venue's landlord, and their respective officers, directors, employees, and representatives, harmless (a) from and against any and all claims, actions, damages, liability, and expense, including reasonable attorney's fees, in connection with loss of life, personal injury and/or damage to property arising from or out of the provision of security services under this Agreement by Guard Service or its personnel [at the] Venue, (b) from any and all claims of sole contribution or intentional acts or omissions of its Guard Service personnel at the Venue, and (c) any breach by Guard Service of any of the terms, conditions, warranties, representations or covenants of this agreement. Guard Service shall not be obligated to the Venue under this indemnity to the extent that any claim is made solely as a result of the sole negligent acts or omissions of the Venue or its officers or employees without any claimed acts, omissions or negligence on the part of Guard Service for which Venue shall indemnify and hold, Guard Service, its officers, directors and employees harmless therefrom. The indemnification obligations of Venue stated herein shall extend to Venue's

warranties, representations or covenants contained in this Agreement. This indemnification shall survive the expiration or termination of this Agreement.

Aff. of Jonathan J. Pincus Ex. A ¶ 5 (emphasis added). Plaintiff (the "Venue") insists that defendant (the "Guard Service") must provide indemnification because Slack's complaint does not allege a claim solely for plaintiff's negligence. Defendant maintains that both the negligent hiring and retention claim and the Dram Shop Act claim inherently require a determination of plaintiff's negligence and, if those determination are adverse to plaintiff, defendant will not be obligated to provide indemnification.

The above provision relieves defendant from providing indemnification "to the extent that any claim is made solely as a result of the sole negligent acts" of plaintiff. Id. Although plaintiff emphasizes the first half of the sentence, that "any claim is made solely," to insist that only an explicit claim for negligence triggers the exception, the second half adds "as a result of the sole negligent acts," which contemplates any claim that may be reduced to negligence or requires an apportionment of liability based on negligence.

Slack's Dram Shop Act claim requires a showing that plaintiff, a defendant in Slack's action, negligently continued to furnish alcohol to Kraiem after he was already visibly intoxicated. Adamy v. Ziriakus, 92 N.Y.2d 396, 400 (1998); Lorenzo v. Great Performances/Artists as Waitresses, Inc., 211

A.D.3d 640, 640 (1st Dep't 2022); Denenberg v. 268 W. 47th Rest., Inc., 211 A.D.3d 404, 404 (1st Dep't 2022). A violation of the Dram Shop Act constitutes negligence per se, Davis v. Turner, 132 A.D.3d 603, 603 (1st Dep't 2015); Tzic v. Kasampas, 93 A.D.3d 438, 439 (1st Dep't 2012). Thus, if the trier of fact apportions faults entirely to plaintiff based on its violation of the Dram Shop Act, Adamy v. Ziriakus, 92 N.Y.2d at 400, plaintiff will be precluded from indemnification.

Even if Slack does not prevail on his Dram Shop Act claim, or a Dram Shop Act violation is not negligence per se, plaintiff may be liable solely based on Slack's negligent hiring and retention claim. Plaintiff does not dispute that negligence is an integral element of that claim. Waterbury v. New York City Ballet, Inc., 205 A.D.3d 154, 162 (1st Dep't 2022).

Consequently, plaintiff's entitlement to indemnification rests on plaintiff's nonliability for Slack's Dram Shop Act claim and his negligent hiring and retention claim. Defendant need not indemnify plaintiff in the underlying action if plaintiff is found liable for either of these claims. Because defendant's liability to plaintiff rests on plaintiff's nonliability to Slack, summary judgment on plaintiff's indemnification claim is premature at this juncture.

Plaintiff also claims defendant breached the contract by failing to procure insurance in the underlying action. Since

defendant's insurer is providing a defense to plaintiff, however, plaintiff's remedy lies in its declaratory judgment action against defendant's insurer, Stanton Surf Club LLC v. Lexington Insurance Company, Index No. 650180/2022 (Sup. Ct. N.Y. Co.), where plaintiff claims, inconsistently with its claim here, that the insurance defendant procured covers plaintiff. Even more fundamentally, plaintiff fails to present defendant's insurance policy to support this motion, without which plaintiff fails to demonstrate its prima facie claim. Kamara v. 323 PAS Owner LLC, 210 A.D.3d 501, 502 (1st Dep't 2022).

IV. CONCLUSION

For the foregoing reasons, the court denies plaintiff's motion for summary judgment on defendant's liability for breach of the parties' contract by failing to provide indemnification and procure insurance. C.P.L.R. § 3212(b).

DATED: March 14, 2023

*Lucy Billings*

\_\_\_\_\_  
LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C.