At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2nd day of March, 2023.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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EDOSHEDA BROWN, Index No. 501367/2019

Plaintiff,

- against - DECISION AND ORDER

MAS SECURITY ASSOCIATES, INC., PLACE TO BEACH, CAI FOODS LLC, "JOHN DOE", and PROFESSIONAL CORPORATE SECURITY SERVICES, Motion Sequence #8

Defendants,

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

Papers Numbered (NYSCEF)	
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	22-34, 39, 40,
Opposing Affidavits (Affirmations)	44-45,
Reply Affidavits (Affirmations)	47-53

After a review of the papers and oral argument the Court finds as follows:

The Plaintiff, Edosheda Brown (hereinafter the "Plaintiff") commenced this action alleging injuries caused by an unsafe and dangerous premises located at 1301 Boardwalk West, Brooklyn, New York (the "Premises") on August 26, 2018. The Plaintiff contends that violent altercations at the Premises were "commonplace." Defendants Cai Foods Inc. ("Cai") and Place to Beach ("Beach") (collectively the "Moving Defendants") move pursuant to CPLR 3212 for summary judgment dismissing the action and all cross-claims against them. The Moving Defendants contend that Defendant MAS Security Associates ("MAS") and Defendant Professional Corporate Security Services ("Professional") (collectively the "Security Defendants") are responsible for the subject

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occurrence, assumed and breached a duty to maintain a safe premises, and created an instrument of harm that caused the Plaintiff's injuries. The Moving Defendants argue that the subject incident related to a "sudden and unexpected altercation between the Plaintiff and one of the security guards, as the Plaintiff was being escorted from the Premises." The Moving Defendants also state that this incident was unforeseeable in that there was "no recorded history of prior incidents or patron complaints of harm or assault occurring as a result of conduct of the establishment's security."

Both the Plaintiff and the Security Defendants oppose the motion. The Security Defendants contend that this case does not relate to a matter where the assailant is unknown. They contend that the allegation is that Defendant Professional's employee, acting as a security guard, was the alleged assailant and Defendant Beach "had the ability to interview and vet the security company as well as the officers." Moreover, Defendant Professional further contends that, in any event, it provided adequate security and training, and Beach had a level of oversight. Professional also argues that their expert supports the position that the conduct was reasonable in light of the circumstances. Plaintiff argues that Defendant Beach's presence and their actual notice of "violent and aggressive behavior displayed on at least five prior occasions," prohibits dismissal of the claims, and serves to defeat the motion.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341, 320 N.E.2d 853[1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. See

Sheppard-Mobley v. King, 10 AD3d 70, 74 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N..E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 A.D.3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

Defendant Movants proffer the deposition testimony of the Plaintiff, non-party witness Shaneya Means, non-party Giacomo Silvestris (Beach General Manager), and non-party Max Francois (for Defendant Professional). The Plaintiff stated that she arrived at the Premises on the "25 of August 2018." (See Moving Defendants' Motion, Exhibit E, Page 29). Plaintiff stated that she "went with [her] cousin and a mutual friend of ours." (Page 31). When asked what time she arrived, the Plaintiff stated, "[i]t was probably, like, around 10:00 when I got there." (See Moving Defendants' Motion, Exhibit E, Page 33). When asked to describe the person that pushed her, the Plaintiff stated, "[h]e was short. He had a hat on. He had a black shirt. I can't remember. And he

had a black hat on. His hat was backwards on his head, and that's all I remember – remembered." (See Moving Defendants' Motion, Exhibit E, Page 43). When asked how long she was at the Premises before the incident occurred, the Plaintiff stated, "[p]robably, um, like, an hour -- hour-and-a-half maybe." (See Moving Defendants' Motion, Exhibit E, Page 48) When asked how many security guards there were in the lounge area, the Plaintiff stated, "[o]n the top of my head, I remember four." (See Moving Defendants' Motion, Exhibit E, Page 49). When asked how the incident occurred, the Plaintiff stated, "I was trying to enter into the bathroom but it was a random lady that was, you know, intoxicated and she was real rude and she started yelling, 'You're not skipping the line.'" (See Moving Defendants' Motion, Exhibit E, Page 51). The Plaintiff continued with, "[s]o when my cousin comes over there and she's talking to the lady, the lady is still yelling and cursing." (See Moving Defendants' Motion, Exhibit E, Page 52). When asked whether she and the members of her party were escorted out of the Premises by means of the rear exit, the Plaintiff stated, "[y]es." When asked what happened next, the Plaintiff stated, "the Caucasian guy pushed through the other security guards as I'm walking out -- as they escorting us out to the back door, he push through the other agency and he started pushing me like a mother would push they child when they upset with them." (See Moving Defendants' Motion, Exhibit E, Page 65). The Plaintiff then stated that she told the security guard not to "put [his] hands on me. I'm walking out." (See Moving Defendants' Motion, Exhibit E, Page 66). When asked what occurred when she was pushed again, the Plaintiff stated, "I flew out the door and then to the ground, yes." (See Moving Defendants' Motion, Exhibit E, Page 68).

When asked what his position was at Place to Beach at the time of the alleged incident, Giacomo Silvestris stated, "I was t[*1] of Place to Beach." (See Moving Defendants' Motion, Exhibit G, Page 1 long he had been the General Manager,

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Mr. Silvestris stated, "[f]rom the beginning actually when we opened, so around 8 years." (See Moving Defendants' Motion, Exhibit G, Page 10). When asked if he was at Place to Beach on August 26, 2018, Mr. Silvestris stated, "I think probably I was there, but I don't remember exactly." (See Moving Defendants' Motion, Exhibit G, Page 12). When asked how many people were working that day, Mr. Silvestris stated, "I can't tell you exactly the number, but there were around 20 -- 30 people." (See Moving Defendants' Motion, Exhibit G, Page 13). When asked if this number included security guards, Mr. Silvestris stated, "[n]o." (See Moving Defendants' Motion, Exhibit G, Page 14). When asked if the security guards were from an outside company, Mr. Silvestris stated, "[y]es, correct." Mr. Silvestris stated, "MAS Security, at the time." (See Moving Defendants' Motion, Exhibit G, Page 14). When asked how the number of security guards needed was established, Mr. Silvestris stated, "[y]es, usually, I would send the schedule, I say any, for example, 8 guys on Thursday, 10 guys on Saturday, 12 guys, on Sunday, and they will send me the guys; I never talk directly with them." (See Moving Defendants' Motion, Exhibit G, Page 15) When asked if he would communicate by email with MAS Security, Mr. Silvestris stated, "[y]es, usually I would send an e-mail or a text message." (See Moving Defendants' Motion, Exhibit G, Page 16). When asked if one of the security guards supervised the others, Mr. Silvestris stated, "[y]es, usually they were a couple of guys that were more often present; it wasn't really one supervisor; it was the supervisor, but he wasn't always there, so I was talking directly with the owner of the company, one of the partners of the company." (See Moving Defendants' Motion, Exhibit G, Page 18). When asked whether one of the security guards directed the placement of the guards, or management provided for placement, Mr. Silvestri stated, "Max, he was most of the time there; he was also running around on Coney Island, but he was physically there every time, so Maxi [sic] was also the person that was sent in their schedule" "...he was kind of like

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supervision of the company." (See Moving Defendants' Motion, Exhibit G, Page 20). When asked whether he or anyone else on Beach's behalf had ever requested that any specific security guard not be sent to Place to Beach, Mr. Silvestris stated, "[n]ot that I recall." (See Moving Defendants' Motion, Exhibit G, Page 25). When asked how he had become aware of the alleged incident, Mr. Silvestris stated, "[i]f I remember, because they told me that there was a complaint about it, and they requested the video; the first time that I heard about it is when I saw the video." (See Moving Defendants' Motion, Exhibit G, Page 29). When asked whether, prior to the incident, he had seen the security guards dragging or pushing female customers, Mr. Silvestris stated "[y]es." As to the frequency, thereof, he stated, "I don't remember; it happened probably sometime, but it was pretty rare." (See Moving Defendants' Motion, Exhibit G, Page 30). After stating that he was aware that the conduct had occurred, he stated that such conduct occurred "more than five times" during the one year period from when he started as a general manager to the date of the incident. (See Moving Defendants' Motion, Exhibit G, Page 31).

During his deposition, Max Francois stated that he worked for "PCS Professional Corporate Security." When asked how long he had worked for PCS, Mr. Francois stated, "[a]bout three years now." (See Moving Defendants' Motion, Exhibit H, Page 8). When asked what his position was with PCS, Mr. Francois stated, "[s]ecurity director." (See Moving Defendants' Motion, Exhibit H, Page 8). When asked when he had stopped working for MAS Security, Mr. Francois stated "[c]ould be '15, '16." When asked if PCS handled the security for Place to Beach in 2018, Mr. Francois stated, "[y]es." (See Moving Defendants' Motion, Exhibit H, Page 11). When asked whether he worked at Place to Beach for MAS Security, Mr. Francois stated, "[n]ot at that time, no." (See Moving Defendants' Motion, Exhibit H, Page 12). When asked if he was informed of the alleged incident involving the Plaintiff, Mr. Francois stated "[n]o." (See Moving

Defendants' Motion, Exhibit H, Page 13). When asked who was working at Place to Beach on the night of the incident, Mr. Francois stated, "[c]ouple different guys, when -- Derek, Donald, Blacks, I don't remember offhand but pretty much -- I don't know who else was working that night." (See Moving Defendants' Motion, Exhibit H, Page 14) When asked what type of training security guards receive, Mr. Francois stated, "[e]verybody goes into where you got to actually come in and watch somebody else work and learn how to do it, and we do a class, and show videos of past stuff that happened that we try to avoid." (See Moving Defendants' Motion, Exhibit H, Page 15). As to the procedure for removing an unruly patron, Mr. Francois stated, "[t]here would always be two guards walking them out. If it gets a little bit too crazy, a little bit out of hand, we would call a police officer who is always on the boardwalk and they would come down and help us out." (See Moving Defendants' Motion, Exhibit H, Page 16-17).

"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." *Ali v. Miller's Ale House, Inc.,* 189 AD3d 966, 967, 133 N.Y.S.3d 909 [2d Dept 2020]; *see also Forgione v. Quiet Man Pub, Ltd.,* 206 AD3d 624, 625, 167 N.Y.S.3d 404, 405 [2d Dept 2022]. "However, an owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such conduct, and is reasonably aware of the need for such control." *Oblatore v. 67 W. Main St., LLC*, 169 AD3d 705, 706, 91 N.Y.S.3d 714, 715 [2d Dept 2019], quoting *Kranenberg v. TKRS Pub, Inc.,* 99 AD3d 767, 768, 952 N.Y.S.2d 215, 217 [2d Dept 2012]. To establish a cause of action based on negligent hiring and supervision, it must be shown that "the employer knew or should have known of the employee's propensity for the conduct which caused the injury." *Jackson v. New York Univ. Downtown Hosp.,* 69 A.D.3d 801, 801, 893 N.Y.S.2d 235, 236 [2d Dept 2010], *quoting Kenneth R. v. Roman Cath. Diocese of Brooklyn*, 229

AD2d 159, 161, 654 N.Y.S.2d 791, 793 [2d Dept 1997]; *Lindskog v. Southland Rest., Inc.*, 160 AD2d 842, 843, 554 N.Y.S.2d 276 [2d Dept 1990] [similar incident by unidentified assailant within the last year not sufficient to establish foreseeability].

The Plaintiff argues that there is an issue of fact as to whether the Moving Defendants had actual or constructive notice regarding the foreseeability of the physical altercation involving the Plaintiff. Mr. Silvestris acknowledged that incidents of dragging and pushing had occurred between security guards and customers prior to the subject incident, "[p]robably more than five times" during the one year period he was general manager (See Moving Defendants' Motion, Exhibit G, Page 31).

Additionally, the Plaintiff relies on the report of Joseph Pollini concerning the foreseeability of the conduct that occurred in relation to the Plaintiff.[1] Mr. Pollini is a retired member of the New York Police Department ("NYPD") who apparently retired as a Lieutenant Squad Commander. Mr. Pollini states that he had reviewed the depositions of the parties, and the pleadings, and that his opinion is based upon his own experience and literature such as the "Best Practices for Nightlife Establishments", published by the NYPD. Based upon a review of these documents, and in light of the prior physical incidents acknowledged by Mr. Silvestris, Mr. Pollini stated that "[o]nce these issues occurred, Place to Beach management should have taken immediate steps to prevent this conduct from happening again." Mr. Pollini also stated that, "[t]hey should have identified the specific guards that were involved in the violations and had them ban [sic] from the club." Mr. Pollini stated that after taking these steps, Place to Beach "should have insisted that all security personnel be instructed and retrained in the proper way to interact with patrons of their club." Mr. Pollini concluded that "Defendants Place to Beach had prior experiences with security

[1] Although not sworn, there is no objection to the admissibility of this report. In fact, the Moving Defendants, in reply, refer to the report in further support of their motion.

personnel utilizing unnecessary force and this occurrence was foreseeable and expected based on the prior history of violations committed by security personnel." (See Plaintiff's Affirmation in Opposition, Exhibit 2, Report of Joseph Pollini).

The Court finds that there are issues of fact in relation to the Moving Defendants' motion. The Moving Defendants seek summary judgment in relation to their cross-claims against the security defendants, in as much as they claim that the Security Defendants are responsible for the subject incident. However, as stated above, there is an issue of fact regarding whether the Moving Defendants were negligent because the physical altercation involving the Plaintiff, and her resulting alleged injuries, were foreseeable. There is a further outstanding issue as to whether the conduct was excessive, based upon the Plaintiff's own testimony.

The Security Defendants rely on the report of Walter P. Signorelli, Esq. He states in his report that he is a retired member of the New York Police Department ("NYPD"). He retired as an Inspector and served as a Commanding Officer in various precincts throughout New York City. Mr. Signorelli states that he reviewed the depositions of the parties and the pleadings. His opinion is based upon his own experience. Mr. Signorelli concludes that, "Defendant Professional Corporate Security Services conduct comported with the accepted and standard practices for providing security within a public restaurant, and the conduct of their security guards was in accordance with the standards of proper police/security guard procedures for removing disruptive patrons." (See the Security Defendants' Affirmation in Opposition, Exhibit A, Report of Walter P. Signorelli, Esq.). However, the Report does not specifically address the allegations made by the Plaintiff. Mr. Signorelli does not reference the alleged statements made by the Security Defendants' staff regarding Plaintiff's race and gender. It was alleged that a security guard, during the altercation stated, "I want these bl..k b…hes out." (See Moving Defendants' Motion, Exhibit

E, Page 62). This clearly raises issues of lack of professional conduct, anger, and other aggravating factors in support of the allegations of excessive force. Additionally, Mr. Signorelli does not address the testimony by Mr. Silvestris that during the year prior to the incident, "[d]uring the whole year when I was general manager?" similar incidents occurred "[p]robably more than five times." (See Moving Defendants' Motion, Exhibit G, Page 31). In light of the lack of a more detailed, fact focused analysis Mr. Signorelli's report is speculative. There are issues of fact regarding the propriety of such conduct of the Security Defendants' employees, and the foreseeability of such conduct. In fact, there is no mention of the names of any of the participating guards, and whether they were engaged in any of the prior incidents acknowledged by Mr. Silvestris. The Moving Defendants also seek summary judgment on their cross-claim for common law indemnification against the Security Defendants. However, an issue of fact exists as to whether Plaintiff's injuries resulted from negligence on the part of the Moving Defendants. This serves to bar their claim for common law indemnity at this time. See *Konsky v. Escada Hair Salon, Inc.*, 113 AD3d 656, 657, 978 N.Y.S.2d 342 [2d Dept 2014]; *Morris v. Home Depot USA*, 152 A.D.3d 669, 670, 59 N.Y.S.3d 92 [2d Dept 2017].

Based on the foregoing, it is hereby ORDERED as follows:

The motion by Defendants Cai Foods Inc. and Place to Beach (motion sequence #8) is denied.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

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