

Martirano v Marriott Intl., Inc.
2025 NY Slip Op 35584(U)
March 7, 2025
Supreme Court, Dutchess County
Docket Number: Index No. 2022-53663
Judge: Thomas R. Davis
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SUPREME COURT- STATE OF NEW YORK
DUTCHESS COUNTY

Present: Hon. THOMAS R. DAVIS, J.S.C.

SUPREME COURT: DUTCHESS COUNTY

-----X
TINA MARTIRANO,

Plaintiff(s),

-against-

MARRIOTT INTERNATIONAL, INC., COURTYARD
MANAGEMENT CORPORATION, CBM TWO
HOTELS, LP, ROY JOHNSON and
DEVIN TAYLOR,Defendant(s).
-----X**DECISION AND ORDER
ON THREE MOTIONS**

(Motion Seq. Nos. 6, 7 & 8)

Index No.: 2022-53663

The following papers were read and considered on Defendant Marriott International, Inc.'s motion (NYSCEF Motion Seq. 6), Defendant CBM Two Hotels LP's motion (NYSCEF Motion Seq. 7), and Defendant Courtyard Management Corporation's motion (NYSCEF Motion Seq. 8) seeking summary judgment and dismissing the Complaint and each and every cause of action therein.

Motion Seq. 6: NYSCEF Document Nos. 102- 119, 158-178 including electronic recordings of Plaintiff's police interview and various video of the hotel and surroundings.

Motion Seq. 7: NYSCEF Document Nos. 120-136, 163-183 including electronic recordings of Plaintiff's police interview and various video of the hotel and surroundings.

Motion Seq. 8: NYSCEF Document Nos. 137-151, 168-188 including electronic recordings of Plaintiff's police interview and various video of the hotel and surroundings.

In this action arising from a shooting at a Poughkeepsie hotel, Defendants move for summary judgment. Specifically:

Marriott International, Inc. ("Marriott") (Motion sequence # 6), CBM Two Hotels, LP ("CBM") (Motion sequence # 7) and Courtyard Management Corporation ("CMC") (Motion sequence # 8).

The motions argue, initially, that two of the three moving defendants do not have any duty to the Plaintiff as CBM Hotels was an “out-of-possession” landlord and Marriott International “did not manage, control, or operate the Hotel.”

All three defendants argue as well that they were not negligent.

The background of the matter can be found in a decision and order on a CPLR § 3211 motion previously entered by the Court. *Martirano v Marriott Intl., Inc.*, 80 Misc 3d 609 [Sup Ct 2023].

The standard for summary judgment.

It should be noted initially that the Defendants’ moving papers incorrectly set forth the standard for summary judgment. In both the standard recited by the Defendants and the arguments made, it repeatedly is argued that the Plaintiff’s proof is lacking. However, on a motion for summary judgment – unlike trial – the burdens here are initially on the Defendants.

"[It is] a fundamental aspect of a motion for summary judgment [that] the movant MVAIC must first come forward with admissible evidence demonstrating, prima facie, the absence of material issues of fact and that, on those facts, it is or would be entitled to judgment as a matter of law. MVAIC's burden on a motion for summary judgment cannot be satisfied merely by pointing out gaps in the plaintiff's case (*see e.g. Shafi v. Motta*, 73 A.D.3d 729, 730, 900 N.Y.S.2d 410; *Gamer v. Ross*, 49 A.D.3d 598, 600, 854 N.Y.S.2d 160; *Totten v. Cumberland Farms, Inc.*, 57 A.D.3d 653, 654, 871 N.Y.S.2d 179; *DeFalco v. BJ's Wholesale Club, Inc.*, 38 A.D.3d 824, 825, 832 N.Y.S.2d 632)." *Englington Med., P.C. v Motor Veh. Acc. Indem. Corp.*, 81 AD3d 223, 230 [2d Dept 2011].

See also,

"Defendants merely point to gaps in plaintiffs’ evidence, and thus fail to meet their burden as the movant (*see e.g. Ferraro v. McGovern*, 193 A.D.3d 571, 572, 142 N.Y.S.3d 801 [1st Dept. 2021])." *RCSUS Inc. v SGM Socher, Inc.*, 214 AD3d 488 [1st Dept 2023].

Of course, the initial analysis by the Court is to examine the moving parties’ papers and determine whether they have established a *prima facie* case that there are no questions of fact to be determined by a jury. It is not if and until the moving parties establish such that there is any burden on the non-moving party, here the Plaintiff, to establish a *prima facie* case. ““The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *see McHale v. Sweet*, 217 A.D.3d 666, 667, 190 N.Y.S.3d 438). “Failure to make

such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572).” *Lee v S. Nassau Communities Hosp.*, 231 AD3d 807, 808-09 [2d Dept 2024].

Thus, the first question is what allegations have to be disproven by the moving party. Generally, that requires an analysis, in a personal injury case, of the Bill of Particulars and Complaint. No Bill of Particulars has been submitted to the Court in the initial moving papers. A Bill of Particulars was supplied in the moving parties’ replies, but it is not a proper one and does allege facts in support of the claims.¹ Thus, in order to be successful on a motion for summary judgment, the moving parties must set out a *prima facie* case by admissible evidence that the claims made in the complaint are lacking in one or more elements necessary to establish a cause of action.

The Defendants

The original complaint in this action named the following defendants: “MARRIOTT INTERNATIONAL, INC., COURTYARD MANAGEMENT CORPORATION, PIZZAGALLI PROPERTIES, LLC, CLARION PARTNERS LLC, ROY JOHNSON and DEVIN TAYLOR.”

Pursuant to a stipulation entered by the parties on January 27, 2023, (NYSCEF 2022-53663) CBM Two Hotels, LP (“CBM”) was substituted for and replaced Clarion Partners, LLC and identified as the owner of the hotel. Pizzagalli Properties, LLC was dropped from the action.

CBM as an “out-of-possession landlord.”

Defendant CBM Two Hotels, LP attaches an affidavit from Charles Lathem, president of CBM Hotels LP authenticating an Amended and Restated Management Agreement between CBM and Courtyard Management Corporation (“CMC”), which is submitted as well. Lathem’s affidavit, in summary, identifies CMC as the solely responsible party for the operation of the hotel, including the responsibility for day-to-day operations, hiring and firing personnel, repairs and maintenance of the hotel and the policies and procedures of the hotel.

“An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct” (*Casson v. McConnell*, 148 A.D.3d 863, 864, 49 N.Y.S.3d 711 [internal quotation marks omitted]; see *Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 N.Y.2d 559, 566, 516 N.Y.S.2d 451, 509 N.E.2d 51; *Byrd v. Brooklyn 46 Realty, LLC*, 129 A.D.3d 882, 883, 10 N.Y.S.3d 642; *Alnashmi v. Certified Analytical Group, Inc.*, 89 A.D.3d 10, 18, 929 N.Y.S.2d 620).” *Robbins v 237 Ave. X, LLC*, 177 AD3d 799, 800 [2d Dept 2019].

Initially, Plaintiff argues that because the Management Agreement proffered by the Defendants is not a lease, the issue is resolved. However, the citation to *Lamb v. BOC Group, Inc.* 199 AD3d 909 [2nd Dept. 2021] concerned an agreement analyzed by the Appellate Division that

¹ Objections to the adequacy of the Bill of Particulars were never raised before the Court.

was not a lease. The Second Department did not rule that in order to escape liability only a lease would suffice, but analyzed the agreement and found that the particular contract in that case allowed the owner certain privileges and controls such that it could not be said that control was relinquished to the extent that no liability could be found – specifically, that the owner had the right to use the premises, enter the premises and inspect the premises.

The management agreement here, as Plaintiff points out, also includes a variety of obligations the owner imposes on CMC such that it cannot be found to have relinquished control sufficiently to the point where liability could not be found as detailed below. Specifically, the management agreement, by requiring certain guidelines for the operation of the hotel promulgated by the owner, does not establish a total lack of control by the owner. Thus, the owner has failed to meet their *prima facie* burden on this issue.

Marriott International, Inc.

Similarly, Marriott International argues that it owes no duty to the Plaintiff as it has no control over the owner or operator of the hotel. Again, the moving party's obligation is to eliminate questions of fact as to the allegations contained in a complaint or bill of particulars.

As to Marriott International, the allegations in the complaint include:

“8. Upon information and belief, defendant Marriott International exercises full control and authority over the ownership, management and operation of the Hotel by defendants, COURTYARD MANAGEMENT CORPORATION, PIZZAGALLI PROPERTIES, LLC, and/or CLARION PARTNERS LLC.

[...]

53. The Corporate Defendants afforded the Individual Defendants extra leeway and privileges, bypassed industry-standard operating procedures, and either relaxed or failed to enforce Marriott's inadequate security policies and procedures that were in place for the safety of their guests.”

While the management agreement referenced by the Defendant Marriott International does indicate that the hotel “shall be under the exclusive supervision and control of manager” it also says that the manager (CBM) is subject to “System Standards.” Specifically, the agreement provides:

“In fulfilling its obligations under this Agreement, Manager shall act as a reasonable and prudent operator of the Hotels, having regard for the status of the Hotels and maintaining the System Standards. Manager shall operate the Hotels with the goal of achieving long-term profitability, subject to the requirement that the Hotels be managed, operated and maintained as part of the System and in accordance with System Standards.”

System and system standards are defined in the agreement as:

“‘System’ shall mean all hotels which are operated under the ‘Courtyard,’ ‘Courtyard by Marriott’ or ‘Marriott Courtyard’ Trade Names or any successor Trade Names.

‘System Standards’ shall mean any one or more (as the context requires) of the following three (3) categories of standards: (i) operational standards (for example, services offered to guests, quality of food and beverages, cleanliness, staffing, frequent traveler programs such as the Marriott Rewards Program and other similar programs, etc.) as prescribed in the Manual; (ii) physical standards (for example, quality of the hotel, FF&E, and Fixed Asset Supplies, frequency of FF&E replacements, etc.); and (iii) technology standards (for example, those relating to software, hardware, telecommunications, systems security and information technology); each of such standards shall be the standard which is generally prevailing or in the process of being implemented at other hotels in the System, including all services and facilities in connection therewith that are customary and usual at comparable hotels in the System.”

Further, the agreement provides:

“Subject to Owner fulfilling its obligations under this Agreement to fund the cost of Capital Expenditures, and any shortfalls in the FF&E Reserve and all other material obligations of Owner under this Agreement, Manager shall manage the Hotels in conformity with the System Standards and under standards comparable to those prevailing in other hotels in the System, including all activities in connection therewith which are customary and usual to such an operation. “

The moving papers do not eliminate any question of fact as to the relationship between Marriott International and CMC, as the respective allegations in the complaint make reference to each corporate defendant’s “employees, affiliates and/or representatives.”

In fact, as Marriott International is not mentioned by name in either the affidavit of Charles R. Lathem or Loretta Traboldt submitted by the Marriott International, it cannot be said that the moving papers eliminate all questions of fact regarding its control of the management of the hotel or the promulgation of standards that are applicable to the hotel’s operation.

NEGLIGENCE:

The complaint contains numerous allegations upon which the claims of negligence are based. Among them are the following (The term "individual defendants" refers to Johnson and Taylor):

48. "...the Individual Defendants [Johnson and Taylor] with one other unidentified third party, entered the Marriott, approached the front desk, and sought to check in to their room..."

50. "...the Corporate Defendants, through their employees, affiliates, and/or other representatives, bypassed industry-standard operating procedure and security protocols by ignoring the Individual Defendants, and acted as though the unidentified third party was the *only* guest of the Hotel."

51. "...the Corporate Defendants did not seek, nor require the Individual Defendants to present a form of identification or provide any other customary check-in information. Instead, the Corporate Defendants only requested said information from the unidentified third party."

52. "Upon information and belief, unlike the Individual Defendants, whom both possessed luggage, the unidentified third party was empty handed."

53. "The Corporate Defendants afforded the Individual Defendants extra leeway and privileges, bypassed industry-standard operating procedures, and either relaxed or failed to enforce Marriott's inadequate security policies and procedures that were in place for the safety of their guests."

54. "Upon information and belief, despite the unidentified third-party's involvement during the check-in, and the Corporate Defendants' understanding that the Individual Defendants were the only guests staying at the Hotel, Marriott personnel arranged for only the Individual Defendants to be escorted to their first-floor room."

55. "Upon information and belief, before the Individual Defendants were escorted to their room, the unidentified third party left the lobby, exiting the Hotel and never to be seen again."

56. "Upon information and belief, over the next couple of hours and throughout the weekend, the Individual Defendants exited and re-entered the Hotel multiple times, transporting to their first-floor room, an arsenal of illegally modified firearms, bomb-making supplies and materials, ammunition, and other suspicious-looking bags, each time passing the front desk, and other Marriott personnel."

57. "Upon information and belief, Marriott has a strict no weapons and firearms policy. Consequently, the Corporate Defendants, through their employees, affiliates, and/or other representatives, voluntarily assumed, and continued to assume, at all times relevant hereto, a duty to protect their guests by prohibiting firearms at the Hotel, recognizing such prohibition as being necessary for the safety of their guests."

58. "The Corporate Defendants failed to enforce this policy against the Individual Defendants, which resulted in Plaintiff's injuries."

59. "Upon information and belief, not only were the Corporate Defendants negligent in preventing the Individual Defendants' from transporting firearms, bomb-making supplies and materials, and ammunition into the Hotel, but the Corporate Defendants, through their employees, affiliates, and/or other representatives, negligently escorted, delivered, carried and/or helped the Individual Defendants transport the prohibited weapons and other dangerous items to their room."

62. "Upon information and belief, the Individual Defendants both displayed signs of drug use and acted erratically when exiting and re-entering the Hotel in the presence of Marriott personnel."

63. "Upon information and belief, Defendant Johnson was seen roaming about the Hotel in the presence of Marriott personnel, wearing nothing but underwear, a trench coat, and a ski mask."

64. "Upon information and belief, the Corporate Defendants, through their employees, affiliates, and/or other representatives, were aware of the individual Defendants' suspicious activities and unlawful conduct, yet despite having notice, they not only failed to enforce their inadequate security policies, but also neglected to alert security, or contact law enforcement."

65. "The Corporate Defendants were on notice that their negligent conduct, and failure to exercise due care for the safety of their guests, including their failure to enforce their inadequate security policies, and Marriott's *strict* no weapons and firearms policy, would result in, and/or enable, conduct similar to that of the Individual Defendants', thereby leaving their guests defenseless to harm."

66. "... and Marriott's *strict* no weapons and firearms policy, all in place for the safety of their guests, the Individual Defendants were able to exit and re-enter the Hotel at all hours of the night, each time gaining access to the lobby, and other entryways without having to provide any form of identification or utilize a keycard, and transport an arsenal of illegally modified firearms, bomb-making supplies and materials, and ammunition, into their first-floor room."

68. "The series of events that led to the murder of Paul Kutz and the Individual Defendants' conspiracy to blow up the Hotel and/or staging a mass shooting would have been fully prevented if not for the negligence of the Corporate Defendants."

Thus, in order for the Defendants to establish a *prima facie* case entitling them to summary judgment dismissing the complaint, they must eliminate any question of fact as to the various allegations that constitute negligence in the complaint or that there was a lack of causation.

First, however, it must be noted that Plaintiff has objected to the inclusion of "conspicuously truncated" exhibits put forth by Defendants in their moving papers. All of the deposition testimony submitted by the Defendants (EBTs of Loretta Traboldt, Olga Hostyea, Nadra Thomas, Tina Martirano and Taylor Robinson), contain only a few select pages of the deposition, are not sworn to, nor have a stenographer's authentication. Thus, they are not

admissible. *See Pavane v Marte*, 109 AD3d 970 [2d Dept 2013]. "The deposition transcripts of two nonparty witnesses, submitted by the defendant without an explanation as to why they were unsigned and unsworn, were not in admissible form and should not have been considered by the court (*see* CPLR 3116; *Santos v. Intown Assoc.*, 17 A.D.3d 564, 793 N.Y.S.2d 477; *Lalli v. Abe*, 234 A.D.2d 346, 650 N.Y.S.2d 313)." *McDonald v Mauss*, 38 AD3d 727, 728 [2d Dept 2007]

Particularly with a non-party witness, the moving party needs to establish the witness was given an opportunity to review the transcript in accordance with CPLR § 3116. "The defendants failed to show that the unsigned deposition transcripts of various witnesses submitted in support of their motion were previously forwarded to the relevant witnesses for their review pursuant to CPLR 3116(a)." *Santos v Intown Assoc.*, 17 AD3d 564, 565 [2d Dept 2005] "The defendants failed to show that the unsigned deposition transcripts of various witnesses submitted in support of their motion were previously forwarded to the relevant witnesses for their review pursuant to CPLR 3116(a). Hence, contrary to the defendants' contention, the transcripts were not admissible (*see Lalli v. Abe*, 234 A.D.2d 346, 347, 650 N.Y.S.2d 313; *Palumbo v. Innovative Communications Concepts, Inc.*, 175 Misc.2d 156, 157–158, 668 N.Y.S.2d 433; Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C3116:1)." *Santos v Intown Assoc.*, 17 AD3d 564, 565 [2d Dept 2005].

Much of the narrative put forth by the Defendants in their moving papers as to the events the day before the shooting and whether Johnson had spent the night at the hotel previously is dependent on the deposition of non-party witness Nadra Thomas. To the extent that Ms. Thomas' testimony would, if the Court could consider same, negate the allegations in the complaint, it does not without a proper foundation for its admissibility under CPLR § 3116.

An examination of the individual arguments made by counsel for the Defendants follows:

Defendant Johnson's actions were not foreseeable.

While Defendants maintain that Johnson's actions on the morning of the shooting were not foreseeable and the hotel's staff was not negligent, that is based almost exclusively on the argument put forward that, despite the allegations in the complaint, Johnson was not at the hotel the night before and that he walked into the hotel for the first time on the morning of the shooting, giving the staff only 2 ½ minutes to react.

For that proposition, Defendants rely in part on Ms. Thomas' alleged EBT testimony. Ms. Thomas was allegedly the one who rented the room where Taylor stayed at the subject hotel. The allegation in the complaint is that Johnson was there with him.

Defendants also put forward a video recording to support this argument.

First, as to the video, Defendants attempt to authentic the video (which is a "multiplex" video showing four different camera angles) by including a portion of the transcript from the criminal trial against Johnson and Taylor where the District Attorney and Mr. Gulino stipulated to the following (according to the transcript from the trial);

ASSISTANT DISTRICT ATTORNEY WHELAN: "Court Exhibit L reads as follows: It is hereby stipulated by and between the People of the State of New York and the defendant, through his attorney, that if called as a witness, Matthew Card will testify to the following: He is employed as an investigator with the New York State Police assigned to the computer crimes unit for Troop K in Poughkeepsie, New York. In that capacity, he downloaded surveillance video recordings taken from security cameras inside the business of the Courtyard by Marriott Hotel located at 2641 Route 9, Poughkeepsie, New York. These recordings contain video footage recorded at that Courtyard by Marriott Hotel between October 1, 2022 at approximately 2:42 p.m. and October 2, 2022 at approximately 8:00 a.m. The video surveillance recordings are contained on People's Exhibits 1, 2 and 3. The original times reflected on all of the recordings are six minutes and 19 seconds behind real time. It is signed by myself from the district attorney's office, Mr. Gulino² and the defendant."

No stipulation or authentication of the images is presented in this case. Thus, the video fails to be available to support the necessary *prima facie* showing necessary by Defendants.

If the Court were to consider the video, Defendants argue that it shows Johnson entering the hotel on the morning of the shooting, and not as the Plaintiff has alleged, coming from a room where he spent the night. The fourth image on the "multiplex" video is not from the Marriott Hotel, but from a gasoline station across the highway³. The image is not sufficiently clear and is not taken from a distance close enough as to demonstrate that Johnson is actually the person depicted. No affidavits or deposition testimony is offered in the moving papers to identify Johnson in the video⁴. Thus, as far as eliminating any factual issue, the video does not serve to do so. Further, even if Johnson were the one depicted in the video outside the hotel, such does not refute an allegation that he was staying there the night before, particular since it appears he is wearing nothing but underwear and a coat in the lobby images.

Ms. Thomas is alleged to have rented rooms for Johnson and Taylor at various hotels in the Poughkeepsie area in the days leading up to the shooting. According to her, on the day before the shooting, she travelled to pick up Johnson and Taylor from a different local hotel to move them to another location. She testified that she argued with Johnson that morning and did not take him to the Marriott and told Taylor, who she did transport to the Marriott, not to allow Johnson to stay there. Further, the fact that Ms. Thomas may have indicated at a deposition that she did not bring

² Attorney Gulino represented Johnson in the criminal case and has appeared on his behalf in this civil matter.

³ The fourth image is later replaced by a video that appears to be from the front desk clerk's cellphone.

⁴ Evidence offered in reply cannot be used to establish the Defendant's burden. "[A] party cannot sustain its *prima facie* burden by relying on evidence submitted for the first time in its reply papers." *Matthews v Bright Star Messenger Ctr., LLC*, 173 AD3d 732, 734 [2d Dept 2019]

Johnson to the hotel or that she instructed Taylor not to allow him to stay there, does not establish that he wasn't there.

Notably, Defendants also submit an expert affidavit from Donald J. Decker in support of their motion. Defendants' own expert cites testimony from the criminal trial from a George Scivolette. According to Decker's report, Mr. Scivolette testified that Johnson took his car the day before the shooting in order to drive to the Marriott hotel. Thus, the Defendants' own moving papers provide contradictory versions of the events, particularly as to when Johnson first arrived at the hotel and whether he spent the night before the shooting there.

Thus, not only is there insufficient proof put forward that Johnson did not spend the night before the shooting at the Marriott, but at least some indications that he did. Thus, a question of fact remains as to whether Johnson was at the hotel prior to the incident and thus, was present and engaged in erratic behavior and the like for a sufficient time period for the staff to be alerted to his violent behavior or was allowed, with a variety of weapons, to occupy the hotel.

Defendants also attempt to refute the allegation in the complaint that the outer doors of the hotel were locked and those locks were not operational at the time of the shooting. Again, Defendants cite video purportedly from body cams worn by police officers at the scene (which are not authenticated) which purport to show officers unable to enter the hotel moments after the shooting because the locks were in working order and they did not have key cards. However, the officers only tried three of the four doors. Thus, even if it were considered by the Court, the video does not eliminate any question of fact as to whether all the exterior door locking mechanisms were properly working.

Finally, many of the claims put forward regarding Johnson's activities as well as Taylor's, including whether they were present for the check-in process, whether they were assisted in bringing guns to the hotel room in their luggage by hotel personnel and the like are dependent not on statements from the hotel staff, but completely put forward by excerpts from a purported deposition of Ms. Thomas, which, again, in the form presented, cannot serve to eliminate any questions of fact.

The hotel's security measures were adequate.

Mr. Decker's opinions regarding the adequacy of the security at the hotel are not based upon other record evidence. (See *Cameron v Palmeri*, 230 AD3d 1100, 1102 [2d Dept 2024]). Specifically, Decker's opinions are based upon a variety of items examined by him, according to his affidavit. The following items, listed as a basis for his opinion, however, are not part of the record:

- Compliance Report for Discovery Package;
- Crime Scene Photographs, Bates-stamped DCDA00046-DCDA01427;
- 911 Audio Call by Tina Martirano;
- 911 Audio Call by Romaine Banton;
- 911 Audio Communications;
- [Criminal] Jury Trial Exhibit 1, Bates-stamped HD00005 and HD00026- HD00027;

- Examination Before Trial Transcripts of Olga Hostyeva, Tina Martirano, Taylor Robertson, Nadra Thomas, Loretta Traboldt, and Exhibits (supplied to the Court were excerpted pages without exhibits, oath or, in the case of Nadra Thomas, proof of compliance with CPLR § 3116);
- [Criminal] Jury Trial Transcripts of Romaine Banton, Olga Hostyeva, Roman Hostyeva, Jennifer Krinsky, Tina Martirano, Taylor Robertson, George Scivolette, Timothy Smith⁵, and Nadra Thomas Testimony;
- Supporting Depositions of Roman Hostyeva, Olga Hostyeva, and Taylor Robertson;
- Redacted Supporting Depositions, Bates-stamped DCDA00032-DCDA00036 and DCDA00043-DCDA00044
- Google Earth satellite images.

Thus, to the extent Mr. Decker's affidavit is submitted in support of defendant's motion, it does not serve to support a *prima facie* case.⁶ Were the Court to consider same on the issue of the adequacy of the hotel's security measures, the Plaintiff has put forth their own security expert's affidavit which serves to create an issue of fact regarding the adequacy of the hotel's security measures and the employees' responses to Johnson's behavior.

As to the issues regarding gross negligence, negligent hiring and retention and negligent infliction of emotional distress, again the Defendants argue that the burden is on the Plaintiff. Given the analysis above regarding the proper burden and the Defendants' failure to meet that burden, the arguments here are also without merit.

For the foregoing reasons, therefore, it is hereby,

ORDERED, that the motions by the Defendants Marriott International, Inc., Courtyard Management Corporation and CBM Two Hotels, LP ("CBM") for summary judgment are DENIED.

Dated: March 7, 2025
Poughkeepsie, NY

ENTER:


Hon. Thomas R. Davis, J.S.C.

⁶ The criminal trial transcript of Timothy J. Smith is submitted in Defendant's reply papers, and thus cannot be considered. "The [moving party] could not rely in support of their motion on evidence submitted for the first time in their reply papers (*see Adler v. Suffolk County Water Auth.*, 306 A.D.2d 229, 760 N.Y.S.2d 523; *Constantine v. Premier Cab Corp.*, 295 A.D.2d 303, 743 N.Y.S.2d 516; *Voytek Technology v. Rapid Access Consulting*, 279 A.D.2d 470, 719 N.Y.S.2d 112)." *GJF Const. Corp. v. Cosmopolitan Decorating Co., Inc.*, 35 AD3d 535, 535 [2d Dept 2006].

To: All Parties via NYSCEF

Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.