[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C. PART 10

Index Number : 122958/2002

SANCHEZ, RADAMES

VS.

IGUANA NEW YORK, LTD

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAR 17 2010
COUNTY CLERK'S OFFICE
NEW YORK

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: MAR 12 2010

HON. JUDITH J. GISCHE J.S.C.

J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

Radames Sanchez,

Plaintiff,

-against-

Iguana New York, LTD and Minerva 54 Realty Co., L.L.C.,

Defendants.

----------x

DECISION/ ORDER
Index No.: 122958/02
Seq. No.: 004

PRESENT:
Hon. Judith J. Gische
J.S.C.

----------x

Iguana New York, LTD and Minerva 54 Realty Co., L.L.C.,

Third-Party Plaintiffs,

-against-

S&C Security a/k/a All Season Protection and Abraham Martinez,

Third-Party Defendants.

----------x

3rd Party Action
Index No.: 590291/08

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Def Iguana and Minerva's n/m (3212) w/ JCA affirm, exhs	1
All Season's cross-motion (3212) w/ RDP affirm, exhs	2
Pltf opp w/ DS affirm, exhs	3
Def cross-motion in partial opp w/ JCA affirm	4
Def reply w/ JCA affirm	5

Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action by Radames Sanchez ("Sanchez"), arising from

an alleged assault at the Iguana Grill, an establishment owned by defendant/third-party plaintiff, Iguana New York, LTD ("Iguana"). The "Iguana Grill" is located at 240 West 54th Street, New York, NY (the "Premises") and defendant/third-party plaintiff, Minerva 54 Realty Co., L.L.C. ("Minerva"), is the owner of the Premises. Iguana and Minerva have initiated a third-party action against S&C Security a/k/a All Season Protection ("All Season") and Abraham Martinez ("Martinez") for indemnification.

The court has before it Iguana and Minerva's motion for summary judgment dismissing Sanchez's complaint. All Season has cross-moved for summary judgment against Iguana and Minerva. Sanchez opposes defendants' motion for summary judgment. Iguana and Minerva submit a partial opposition to All Season's cross-motion for summary judgment. Martinez has not appeared in this action.

Since issue has been joined and the note of issue was filed by Sanchez on June 15, 2009, defendants' motion for summary judgment is timely, and will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

The court's decision and order is as follows:

Arguments

Sanchez contends that he was physically assaulted by Martinez and other unidentified parties on Saturday, June 2, 2001 at approximately 1:15 a.m., while at the Iguana Grill.

Sanchez has withdrawn three of the six causes of action asserted in his complaint, but is proceeding on his three remaining claims based upon defendants' alleged failure to provide adequate security.

Discovery has been completed in this case and Sanchez was deposed at an

examination before trial ("EBT"). During Sanchez's EBT, he testified that there were at least two or three security personnel on the main floor and three to four additional security personnel downstairs, all dressed in black attire. Sanchez testified that while downstairs, he walked along the dance floor and passed a female whom he recognized, at which point he tapped her on the shoulder so that he could say good-bye and pass through towards the exit. Sanchez states that within seconds after this exchange, Martinez, came out of nowhere, grabbed and pushed Sanchez, and stated "don't touch her, that is my girlfriend," and Sanchez replied "I can't fight with you, I am here with clients. I don't want to fight." Sanchez and Martinez then reportedly exchanged words and grabbed each other. Then, within "at least a minute, minute and a half, a couple of minutes," Sanchez and Martinez started to wrestle and Sanchez was hit with something sharp, such as a bottle, and fell to the floor.

Sanchez testified at his EBT that after he was struck, other unidentified individuals came over and started beating him as well. According to Sanchez, the glass bottle shattered, he sustained lacerations on his head, was bleeding profusely, and could not see out of his eye. Sanchez contends that although there was security at the premises, security did not come over at any point to break up the fight or to help him, but that a bouncer approached Sanchez to escort him off of the Premises after the fight ended.

Rahim Johnson ("Johnson"), Sanchez's roommate and a non-party eye-witness to the incident, was deposed. Johnson testified at his EBT that he too recalled approximately three men walking around inside the Iguana wearing black attire. Johnson stated that shortly after leaving the bathroom, he observed an altercation at the other end of the dance floor, and noticed that his friend, Sanchez, involved.

According to Johnson, at least five guys were engaged in the altercation. Johnson tried to pull the aggressors off of Sanchez. Johnson states that at approximately the same time that he tried to help Sanchez, security came over and began breaking up the fight by pulling people back. Johnson did not observe anyone strike Sanchez with a bottle, but did see him bleeding from his head.

Nino Brusco ("Brusco"), Iguana's general manager since August of 2003, was also deposed. Brusco stated in his EBT that he currently has seven security personnel working at Iguana on Friday and Saturday nights. Five of these people are located downstairs. He also testified that he had fewer security persons prior to 2003 because there were fewer patrons.

Iguana and Minerva deny they were negligent. They argue that this was an unexpected altercation and the defendants could not have reasonably anticipated or prevented a spontaneous assault by one patron against another. Iguana and Minerva argue that Sanchez cannot prove his claims at trial because there is no evidence of defendants' negligence.

All Season cross moves for summary judgment against Iguana and Minerva on two grounds. First, All Season contends that it was not in existence at the time of Sanchez's alleged assault and thus did not provide security services to Iguana Grill on the night in question. All Season contends that at the time of the incident, S&C Security was providing security services to the Iguana Grill, and that All Season is no longer an active business. All Season states that it began providing security services to the Iguana beginning in 2003 or 2004. However, Iguana and Minerva argue, and it is not disputed, that All Season is merely a continuation of S&C Security, with all of the same employees (Carlos Stio, as principal, and Sal Tommasino, his partner), and that there

was no interruption of the security services provided to the Iguana, and that the same services previously provided are currently provided, simply under a different business name.

Alternatively, All Season contends that it did not owe a duty of care to Sanchez and, therefore, is not liable for his injuries for the same reasons set forth in Iguana and Minerva's motion for summary judgment against Sanchez.

Applicable Law

"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 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, *supra* at 563-64.

Discussion

An owner or possessor of land has a common-law duty to maintain the public areas of the property in a reasonably safe condition for those who use it. Nallan v. Helmsley-Spear, Inc., 50 NY2d 507, 519 (1998); Basso v. Miller, 40 NY2d 233, 241 (1976). This duty includes the obligation to maintain minimal security precautions to protect users of the premises against injury caused by the reasonably foreseeable criminal acts of third persons. Nallan v. Helmsley-Spear, Inc., 50 NY2d at 519.

Although a jury determines whether and to what extent a particular duty was breached, it is for the court first to determine whether any duty exists. Maheshwari v. City of New York, 2 NY3d 288 (2004); Tagle v. Jakob, 97 N.Y.2d 165, 168 (2001). The scope of the possessor's duty is defined by past experience and the "likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor." Maheshwari v. City of New York, 2 NY3d at 294 (internal citations omitted). The possessor of land has no duty to protect persons against unforeseeable and unexpected assaults, unless there was a foreseeable risk of harm from criminal activities of third persons on the premises. Camacho v. Edelman, 176 A.D.2d 453, 454 (1st Dept 1991). Furthermore, the mere fact that an accident occurs does not mean that a defendant is liable; the plaintiff needs to show how the defendant's breach of some duty caused or contributed to the plaintiff's mishap. Braithwaite v. Equitable Life Assur. Soc. of U.S., 232 A.D.2d 352 (2nd Dept 1996).

As owners of the bar/nightclub, Iguana and Minerva had a duty to undertake reasonable security measures to protect people entering their Premises. Maheshwari v. City of New York, *supra*.; Nallan v. Helmsley-Spear, Inc., *supra*. Defendants are not, however, the insurer of plaintiff's safety. The possessor of land does not have to provide the optimal or most advanced security system available to fulfill that obligation. Florman v. City of New York, 293 A.D.2d 120 (1st Dept 2002).

Iguana and Minerva have proven, through the testimony of Johnson and Sanchez himself, that on June 2, 2001, the Iguana had bouncers and other security personnel in identifiable black attire. Sanchez testified at his deposition that there were at least two or three security personnel on the main floor and three to four additional security personnel downstairs. Sanchez's claim that there are issues of fact over

defendants' negligence in providing security must fail.

Even assuming Sanchez can prove at trial that Iguana and Minerva were negligent, his injuries (lacerations, etc.) were due to the independent, intervening criminal acts of Martinez and other unidentified persons. Maheshwari v. City of New York, 2 N.Y.3d 288 (2004). Neither Iguana nor Minerva were insurers of Sanchez's safety. Sanchez fails to raise issues of fact about whether defendants failed to take reasonable security measures. Defendants have established that they not only provided security, but have presented a *prima facie* case that it was more than just minimal security.

Although a landowner must use reasonable care to protect persons at their premises from injury arising from reasonably anticipated causes, there is no duty to protect against an occurrence that is extraordinary in nature and the landowner could not have reasonably anticipated. D'Amico v. Christie, 71 NY2d at 85;Custen v. Salty Dog, Inc., 170 A.D.2d 572 (2nd Dept 1991). To withstand summary judgment, plaintiff must raise an issue of fact that the attack on plaintiff was foreseeable. McKinnon v. Bell Security, 268 AD2d 230 (1st Dept 2000) (*citing* Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 316 [1980]). "Foreseeability" does not determine whether there is a duty, but the scope of the duty, once the duty is established. Maheshwari v. City of New York, *supra*.

Here, defendants have established that the attack on Sanchez was unexpected and spontaneous. It was, therefore, extraordinary in nature and not something that Iguana and Minerva could have reasonably anticipated. There is no testimony or claim by Sanchez of any prior contact between himself and Martinez. Johnson's testimony states that the altercation happened within seconds. This incident occurred on an

ordinary Friday night/Saturday morning, and there is no testimony that the Iguana was hosting a concert or special event requiring heightened security. Also, there has been no testimony or claim by Sanchez that either himself or Johnson felt unsafe, complained to security, or that Johnson looked for or called upon security when he noticed the altercation near the dance floor. Rather, Johnson, in an effort to help, made a "beeline in that direction" to pull the unidentified men off of his friend. Sanchez has not raised triable issues of fact that the attack was a normal or foreseeable consequence of a situation the defendants created. Maheshwari v. City of New York, *supra*. Therefore, Iguana and Minerva did not owe a duty to Sanchez, and neither of these defendants were negligent.

Conclusion

Defendants have proved they are entitled to summary judgment dismissing Sanchez's complaint by establishing that their security arrangements were reasonable and that the criminal act of Sanchez's assailants was an extraordinary act. In opposition, Sanchez has failed to raise triable issues of fact that defendants' security arrangements were unreasonable and/or that the actions of his assailants were foreseeable.

Defendants' are entitled to summary judgment dismissing the complaint and their motion for such relief is granted. The clerk shall enter judgment in favor of defendants, dismissing the complaint against them. Since the third-party action is contingent on the claims of Sanchez being established, the third-party action is hereby dismissed as well.

IT IS HEREBY

ORDERED that the Clerk shall enter judgment in favor of defendants, Iguana New York, LTD and Minerva 54 Realty Co., L.L.C., against plaintiff, Radames Sanchez, dismissing the complaint; and it is further

ORDERED that the third-party action is also dismissed as moot; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, York
March 12, 2010

So Ordered:

Hon. Judith J. Gische, J.S.C.