SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY J.S.C. **PART** 19
Justice

Index Number : 155902/2012
ROWE, ERIC
vs
AEG LIVE LLC
Sequence Number : 013
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____
Answering Affidavits — Exhibits _____ **No(s).** _____
Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

Decided in accordance with the accompanying memorandum decision/order

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

Dated: 5/31/18

Kelly O'Neill Levy J.S.C.
HON. KELLY O'NEILL LEVY
J.S.C.

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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ERIC ROWE,

Plaintiff,

-against-

AEG LIVE, LLC, AEG LIVE PRODUCTIONS, LLC, AEG LIVE NY, LLC and STRIKE FORCE OF NEW JERSEY, INC., MARIEL'S TOURS, LLC, MARIEL'S TOURS, INC, and ARMANDO PEREZ a/k/a PITBULL,

Defendants.

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Index No.: 155902/2012

DECISION AND ORDER

Mot. Seq. 012, 013, 014, 015

KELLY O'NEILL LEVY, J.:

These motions are consolidated for disposition herein. In this action seeking damages for personal injuries, defendant Strike Force of New Jersey (Strike Force) moves, pursuant to CPLR 3212, for summary judgment, dismissing plaintiff's claims, and all cross-claims for contractual indemnity against Strike Force (motion sequence 012). Defendants AEG Live, LLC, AEG Live Productions, LLC and AEG Live NY, LLC (collectively, AEG defendants) also move, pursuant to CPLR 3212, for summary judgment, dismissing the complaint and all cross-claims against them, as well as on its cross-claims against Strike Force and defendants Mariel's Tours, LLC, Mariel's Tours, Inc., and Armando Perez a/k/a Pitbull (Perez) (collectively, the Mariel defendants) (motion sequence 013). The Mariel defendants move, pursuant to CPLR 3212, for summary judgment dismissing the fourth cause of action for negligence, and against the AEG defendants on all of their cross-claims against the Mariel defendants (motion sequence 014). The Mariel defendants also move to amend their answer to the second amended complaint to add an affirmative defense based upon the statute of limitations, and move to dismiss the complaint

for expiration of that statute of limitations (motion sequence 015). The court denies motion sequence number 012 and 014, and grants motion sequence numbers 013 and 015.

Plaintiff Eric Rowe (Rowe) alleges that on June 24, 2010, at approximately 11:00 p.m., he was injured when working as a bodyguard for Mr. Perez during a concert at the Nokia Theater located at 1515 Broadway in Manhattan (Theater). Mr. Rowe alleges that he was present on the right side of the stage, for the protection of Mr. Perez, when Perez stopped the music. At that point, he observed "a fight" going on in the crowd near the stage (Pumariega affirmation, exhibit E, at 135). Specifically, he observed a man punching a woman. Soon after this observation, Perez directed Rowe and one other of his bodyguards to "get them out of the club" (*id.* at 145). Rowe then descended from the stage to enter the crowd to remove the man, who was in the altercation near the stage. After Rowe descended the stage into the crowd, he spoke briefly to the man and took his arm to escort him off the floor of the club (*id.* at 151, 153). While ascending a set of stairs, the man unexpectedly "begins to resist" (*id.* at 165). The man "pushes back . . . and then goes forward," causing Rowe to fall on the stairs (*id.*) and sustain injuries to his knee and shoulder. At this point, the Strike Force security guards appeared and escorted the man out.

The AEG defendants are the owner and operator of the subject theater. AEG controls and manages the venue, which contains a stage area, a floor area for the crowd to stand near the stage, and a seating area. James Minella currently serves as General Manager of the Theater but was not employed by AEG at the time of the subject incident. Strike Force was the security company retained by AEG to provide security at the Nokia Theater. Rick Rispoli is an event manager for Strike Force.

In a general admission show, full capacity at the Theater is approximately 2,150 people, and the floor can fit about 800-900 of those people (McBrearty affirmation, exhibit J, at 23). The stage is approximately 40 feet in length and four to four and one-half feet high (*id.* at 25-26). The stage has a removable barricade. Whether the barricade is removed for a concert is a decision made by either AEG or the artist performing. Strike Force is not involved in the placement or removal of the barricades. There was no barricade at Perez's show on June 24, 2010.

Minella testified that AEG and Strike Force will determine the number of security staff needed for an event:

> "Q: Do you discuss with Strike Force where Strike Force security guards will be assigned in the venue prior to particular shows.
> A: Our operations manager will discuss with the Strike Force supervisors any additional areas we feel may need additional staff an [sic] or bulked up that nighted [sic] for the typerover [sic] show or audience we hae [sic]"

(Pumariega affirmation, exhibit C, at 28).

Under a "Tour Agreement" between AEG Live LLC and Mariel's Tours, LLC dated May 25, 2010, the parties agreed that AEG was responsible for procuring security (Pumariega affirmation, exhibit A, ¶ 6 (f) (iv) (A). On January 1, 2009, AEG Live NY, LLC entered into a "Security Service Agreement" with Strike Force, requiring Strike Force to "provide and deploy security personnel for Events at the [Venue] as requested from time to time by [AEG's] designee" and to "provide reasonably safe and adequate security for the [Venue] as well as for the employees, workers, guests and patrons thereof" (Pumariega affirmation, exhibit B, Security Service Agreement, § 1).

The Security Service Agreement required AEG and Strike Force to formulate a security plan in advance of concerts whereby AEG had to provide at least the following information to Strike Force: "(1) expected attendance information with a description of the expected crowd activities; (2) Operator personnel authorized to communicate with Contractor . . . (4) map of the service area, with [Strike Force] post locations identified" (*id.*, § 4 [D]). Rick Rispoli, who was deposed on behalf of Strike Force, testified that he did not "receive any maps in anticipation of the June 24, 2010 concert" (Raia affirmation, exhibit Q, at 134).

Additionally, in the Security Service Agreement, Strike Force agreed to indemnify, defend and hold harmless AEG Live NY, LLC, and its

> "officers, directors, parents, affiliates, subsidiaries, agents, employees and servants from any and all claims, losses (including reasonable attorneys' fees and all court costs), damages, expenses and liability (including statutory liability) arising out of or relating to the negligence (by act or omission) or willful misconduct of [Strike Force] or any of its employees or retained persons"

(Raia affirmation, exhibit U, ¶ 8 (B)).

Likewise, in the event of negligence on the part of AEG Live NY, LLC, AEG Live NY LLC agreed to indemnify Strike Force.

As described above, on June 24, 2010, Rowe was providing personal protection for Perez during the performance. Prior to the concert, Rowe met with the security manager employed by Strike Force and the Theatre Manager for the AEG defendants to review the security arrangements provided for in the agreement between the Theatre and Perez. Of the assignment of security responsibilities, Rowe alleges in his amended complaint: "[t]he AEG defendants entered into a written agreement with Pitbull, which stated that the venue would provide all necessary security for the floor and crowd, and Rowe and his security team would guard the performers" (Raia affirmation, exhibit I, ¶ 11). During the meeting, Rowe was "assured by the

venue manager . . . that the Theater would provide the necessary security throughout the venue, including the areas where concert goers could access the staging area" (*id.*, ¶ 9).

Rowe alleges that the failure of the venue to provide proper security led to his injuries:

> "Towards the end of the performance Pitbull stopped performing and called for Rowe over the microphone to come to the stage due to a security risk in the crowd. Once on stage, Rowe spotted a visibly intoxicated male in front of the stage engaged in a fight with a female. Further, Rowe observed that there were no Theater security personnel in the vicinity, forcing him to abandon his position on stage and descend into the mosh pit to diffuse the fight. Because of the Defendants' failure to properly secure the venue during the Concert, Rowe was forced to place himself at risk and perform the duties the Defendants were responsible for executing"

(*id.*, ¶ 12).

In his amended complaint, Rowe describes the circumstances that led to his injuries as follows:

> "Once in the crowd, Rowe was violently assaulted by a member of the individual's entourage while escorting the individual into the stairwell leading outside of the venue. While going down the stairs, Rowe began to struggle with individual [sic] causing him to fall on his side and suffer serious injury. It was only at this point that security personnel from the venue appeared and assisted Rowe in removing the individual from the premises"

(*id.*, ¶ 13).

In the second amended complaint, Rowe alleges four causes of action: (1) premises liability as against the AEG defendants, (2) negligence as against Strike Force, (3) breach of contract – third party beneficiary, as against the AEG defendants; and (4) negligence against Perez and the Mariel defendants.

In their answer to the second amended complaint, the AEG defendants asserted cross-claims against Strike Force for contribution and/or indemnification. Additionally, in their answer, AEG asserted cross-claims against the Mariel defendants, asserting that pursuant to an

inducement letter dated June 8, 2010, the Mariel defendants will be responsible for any judgment obtained against the AEG defendants. Likewise, in its answer to the second amended complaint, Strike Force asserted cross-claims against the AEG defendants and the Mariel defendants for common law and contractual indemnity. In their answer to the third-party complaint, the Mariel defendants also seek common law and contractual indemnification and contribution as against AEG and common law indemnification and contribution against Strike Force.

The AEG defendants move for summary judgment dismissing the complaint, on the grounds that: (1) the alleged incident was unforeseeable and unexpected and therefore AEG did not owe, or breach, any duty to Rowe; (2) Rowe assumed the risk of injury, and on its cross claims against Strike Force on the grounds that (a) AEG is entitled to summary judgment as to its claims for contractual indemnity against Strike Force; as well as (b) its claim for breach of contract to procure insurance as against Strike Force. The AEG defendants also move on their cross claims against Strike Force and the Mariel defendants.

Strike Force likewise moves for summary judgment on the grounds that it had no duty to Rowe that was breached, and that Rowe's actions in intervening in the crowd disturbance were unforeseeable. Finally, the Mariel defendants move to amend their answer to add the statute of limitations bar as an affirmative defense, and then move on that ground to dismiss the second amended complaint. The Mariel defendants also move for summary judgment dismissing the complaint.

Discussion

I. The Summary Judgment Motion of the AEG Defendants

The AEG defendants move to dismiss the two claims asserted against them by Rowe, sounding in negligence and in breach of contract under the theory that Rowe was a third-party beneficiary to AEG's contract with Strike Force. With respect to the negligence claim, the AEG defendants argue that Rowe's injuries were caused by two unforeseeable events, undermining any liability for AEG, the premises' operator. First, Perez ordered Rowe to enter the crowd to remove the male patron from the venue. According to the AEG defendants, this directive was outside the scope of plaintiff's employment duties, and was therefore unforeseeable. Second, Rowe claims he fell as he tried to remove the non-cooperative male patron from the concert. Because Rowe was injured as a result of these two unforeseeable acts, the AEG defendants cannot be held liable as a matter of law. Further, defendants argue that Rowe, through his work as a bodyguard, assumed the risk of physical injury associated with entering the crowd and removing the unruly patron. With respect to the breach of contract claim, AEG defendants argue that pursuant to the language of the Security Service Agreement, Rowe, in his role as Perez's bodyguard, was not a beneficiary of any rights under the contract, nor are there any allegations of misfeasance against the AEG defendants to satisfy this claim.

Finally, the AEG defendants argue that if this Court does not dismiss Rowe's complaint, they are entitled to contractual indemnification from Strike Force and the Mariel defendants.

On a motion for summary judgment, the initial burden is on the defendant to establish in evidentiary form the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]. Once the defendant has made this prima facie showing, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact, "but only as to the elements on which the defendant met the prima facie burden" (*Reilly v Cohen*, 121 AD3d 961, 962 [2d Dept 2014]).

With respect to the negligence claim, "a property owner must act in a reasonable manner to prevent harm to those on its premises, 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" (*Giambruno v Crazy Donkey Bar & Grill*, 65 AD3d 1190, 1192 [2d Dept 2009]). "Issues of negligence, foreseeability and proximate cause involve the kinds of judgmental variables which have traditionally, and soundly, been left to the finder of fact to resolve even where the facts are essentially undisputed" (*Rotz v City of New York*, 143 AD2d 301, 304 [1st Dept 1988]). An owner of the premises owes a "duty to those, such as plaintiff, who had been invited to enter the [premises]. Its duty in that regard includes the obligation to provide an adequate degree of general supervision of the crowd invited by exercising reasonable care against foreseeable dangers under circumstances prevailing" (*id.*). Any consideration of premises liability must ask the question of whether "defendants knew or should have known of a likelihood that third persons might endanger the safety of those lawfully on the premises, and whether defendants satisfied the duty, if any, to offer protection against such criminal activity on the premises. Foreseeability is thus an important element of liability in these circumstances" *Lee v Chelsea Piers,* 11 AD3d 257, 257 [1st Dept 2004][internal citation omitted]).

"With the exception of a specific violation of the Dram Shop Acts, the standard of care for a nightclub operator is no different from the standard of care for any premises operator" (*Zamore v Bar None Holding Co., LLC*, 73 AD3d 601, 601 [1st Dept 2010]). "Inasmuch as the incident was attributable to the sudden, unexpected and unforeseeable act of plaintiff's assailant, its prevention was beyond any duty defendant may have had as a landowner to its patrons" (*id.*, [internal quotation marks at citation omitted]). Likewise, in *Lebron v Loco Noche, LLC*, (82 AD3d 669 [1st Dept 2011], the First Department dismissed this personal injury action against the

owner of the premises, Noche, which contracted with MZE to provide security, "because plaintiff failed to raise a triable issue of fact as to whether the assault was foreseeable" (*id.* at 670). In *Lebron*, the plaintiff was injured while observing a fight when "an unknown assailant unexpectedly struck him with a bottle" (*id.*).

In *Djurkovic v Three Goodfellows*, 1 AD3d 210 (1st Dept 2003), the First Department likewise dismissed plaintiff's personal injury claims against a nightclub owner in the absence of evidence of "any prior criminal activity at its club" (*id.*). The appellate court affirmed the lower court's granting of the defendant's motion to set aside the verdict and direct judgment for defendant as a matter of law. The Court considered the defendant owner's responsibility to plaintiff in the event of a criminal attack in its night club:

> "even if the anticipated presence of large crowds of young people consuming alcohol at a 'hip-hop' club in the early morning hours made this type of targeted criminal attack foreseeable, thus imposing a duty on defendant [owner] to take reasonable security measures to minimize the danger, there is no evidence from which the jury could have inferred that defendant breached that duty. Defendant, in fact, took security measures against criminal attacks involving weapons, including the hiring of state-licensed security guards who were present throughout the club in significant numbers, and who conducted patdowns and operated metal detectors at the entrance. . . . But because plaintiff offered no expert testimony in the field of security, the jury could only speculate as to any deficiencies in the security provided by defendant, and what additional safety measures, if any, could reasonably have been taken to prevent this type of crime"

(*id.* at 210 – 211[internal citations omitted).

Furthermore, a defendant is not held to anticipate the exact circumstances that arise: "That defendant could not anticipate the precise manner of the accident or the exact extent of injuries, however, does not preclude liability as a matter of law *where the general risk* and character of injuries are foreseeable" (*Rotz*, 143 AD2d at 305-306 [internal quotation marks and citation omitted]).

Here, the AEG defendants argue that due to the unforeseeable and unexpected nature of the circumstances leading to Rowe's injury, Rowe cannot establish a basis for liability against the AEG defendants. Specifically, the AEG defendants state that Perez observed the assault erupt suddenly. Perez testified that he noticed a patron start to get "a little too rowdy" and then he observed the man remove his shirt (Pumariega affirmation, exhibit G, at 36). He testified: "All of a sudden, I saw him start to hit this girl" (*id.*). The AEG defendants argue that Perez's subsequent actions in sending Rowe off the stage and into the crowd was an equally unforeseeable act because it was outside the scope of Rowe's employment duties, and, additionally, because Strike Force was responsible for responding to crowd disputes. According to Rick Rispoli's testimony, there were 25 Strike Force security guards at the theatre that night (Raia affirmation, exhibit Q, at 28-29). Further, the AEG defendants argue that the circumstances causing Rowe's injury were unforeseeable for the additional reason that Rowe was injured when the patron whom he was escorting out suddenly turned around and pushed him. In fact, AEG defendants argue that, during his deposition, Rowe testified that he was not responsible for entering the floor area and ejecting an unruly patron, and that he only took that action because Perez directed him to:

> "Q: Do you think as you sit here today that you could have stayed on stage and waited for the security guards to come over from Strike Force?
> A: No.
> Q: Why not?
> A: Because my boss told me to do something and I saw that the lady was in trouble, the young lady was in trouble.
> Q: If Pitbull didn't tell you to do anything, what would you have done?
> A: Nothing.
> Q: You would have stayed on stage?
> A: Yes, I would have"

(Raia affirmation, exhibit P, at 29).

Likewise, another one of Perez's employees testified during his deposition that Perez's staff deals only with him:

> "Q: What was your understanding of what the security, the personal security for Pitbull was supposed to handle at the concert versus the security at the venue?
>
> A: The personal security for Mr. Perez is to deal with him and his persons period. Like that's it. Venue security deals with crowds, doors, security, everything from the venue and the show"

(Raia affirmation, exhibit S (Barry London deposition), at 18).

The court finds, based upon the deposition testimony of Rowe, Rispoli and Perez, as well as the Security Service Agreement, that the AEG defendants have satisfied the prima facie showing required to warrant judgment as a matter of law. Through this evidence, these defendants, as the owners of the premises, have established that the incident causing Rowe's injuries was unforeseeable, and that they provided adequate security at the theatre, and therefore, Rowe is unable to establish that the AEG defendants breached any duty owed to him. As the AEG defendants have made their prima facie showing on this motion, the burden shifts to Rowe to establish that a question of fact exists.

In opposition, Rowe argues that the AEG defendants are liable for his injuries in that the defendants' failure to properly secure the theater during Perez's performance forced Rowe to perform duties outside of his required responsibilities.

Rowe testified during his deposition that during the walk through with AEG and Strike Force personnel prior to the show, he was told that security guards would be placed up front, by the stage:

"Q: With regard to the stage area, did they state how many security personnel they were planning on placing in front of the stage between the stage and the crowd?
A: Yes.

Q: How many did they say?
A: He said between six and eight.
Q: Now, was there any buffer at all, I mean, even a foot between the stage and the crowd for this particular event?
A: No, not that I recall, no.
Q: Who told you they were going to placing security officers up front? Was it the venue, the security company or both?
A: Both of them"

(*id.*, exhibit O, at 100-101).

Based upon the parties' submissions, the court finds that Rowe is unable to establish a question of fact on his negligence claim with respect to the liability of the AEG defendants. The court finds as a matter of law that the assault by one patron upon another, not unlike the assaults in *Zamore, Lebron*, and *Djurkovic,* was an unforeseeable incident that cannot establish a basis for liability against the premises owner. As in *Lebron* and *Djurkovic*, the venue owner here, the AEG defendants, satisfied its duty to take reasonable security measures to prevent harm to those on its premises by contracting with Strike Force to provide security.

There is no evidence before the court that there were previous criminal incidents at the Nokia Theatre that would have put the AEG defendants on notice that this type of incident would occur at the June concert, or that its security measures were not adequate on that night. Rowe has not established that there is any evidence necessitating more security than the AEG defendants had in place. Further, there are no facts reflecting an out of control crowd or failure by the owners or organizers to provide adequate crowd control or security (*see Ram Krishna Maheshwari v City of New York*, 307 AD2d 797, 798 [1st Dept 2003] affd 2 NY3d 288 [2004]; *Rotz*, 143 AD2d at 305 [the Court found that a jury could reasonably find that the risk of riot could have been averted by "adequate crowd-control measure which would have inhibited or prevented the eruption of precipitating incidents"]). In his affidavit in support of Strike Force's

motion, Rispoli states: "[p]rior to Pitbull stopping his concert, the crowd was well behaved and I don't recall that there were any issues" (Pumariega affirmation, exhibit J, ¶ 31).

Rowe testified that prior to the concert, the AEG defendants and Strike Force agreed to place six to eight security personnel by the stage, however, Rowe additionally testified that from the time he stepped off the stage to the time he got to the stairs, while escorting the disruptive audience member out, he saw no security guards:

> "Q: And from the time that you get off the stage up until the point you actually get to these stairs, do you ever see any security guards from the venue or from Strike Force?
>
> A: No"

(Pumariega affirmation, exhibit E, at 159-160).

Furthermore, according to Rispoli, once the concert begins decisions regarding fights and incidents are handled by Strike Force, and not AEG:

> "Q: Once a fight occurs or an incident occurred, a fight needs to be broken up, does Strike Force consult with AEG, or the venue, or anybody else in determining what needs to be done, or does Strike Force just make the determination?
>
> A: We make the determination, then we bring it – at the end of the night, I talk to AEG about how many ejections and how many problems we had that night"
>
> Q: Do you know whether AEG or anybody from the venue participated in any way in terms of breaking up the fight or escorting the trouble maker out of the venue?
>
> A: They did not"

(Raia affirmation, exhibit Q, at 93-94).

The court finds that the unforeseeability of the incident coupled with the AEG defendants' reasonable measures in hiring trained security guards to patrol the theatre, including, prior to the concert, directing the placement of six to eight security guards near the stage, relieves

the AEG defendants of liability in this case. According to all submissions, once the concert began, Strike Force was solely responsible to execute those security measures. The court notes that Rispoli testified that AEG determined the number of security guards for any given night (*id.*, ¶ 18). Yet, there is no evidence establishing that the number of security guards had any causal effect on the incident or on Rowe's injuries. There is no proof here that the AEG defendants did not, as a matter of law, take reasonable security measures based upon what was known prior to, and after, the concert. Likewise, the fact that Rispoli testified that the AEG defendants did not provide Strike Force with a map prior to the concert does not create liability for AEG where there is no proof that this contributed in any way to the incident or to Rowe's injuries.

The AEG defendants additionally move to dismiss Rowe's breach of contract claim against them. Rowe alleges that as a third-party beneficiary to the contract between the AEG defendants and Strike Force, he was owed a duty by AEG. According to Rowe, the language in the contract that requires Strike Force, in agreement with AEG, to "provide reasonably safe and adequate security for the Facility as well as for the employees, workers, guests and patrons thereof," which includes "crowd control . . . contractor's employees shall direct and control the audience, deter any crowd disturbances and fights and/or other violent actions by attendees of the Events" (Pumariega affirmation, exhibit B, at 1).

The language therein does not disqualify Rowe from being conferred a direct benefit under the Security Agreement. Under the contract, Strike Force is required to provide security services for the "Facility," the Nokia Theatre, and additionally for the employees, workers, guests, and patrons thereof. According to Rowe, the contract covers him as a patron or guest. Nowhere are these terms defined in the agreement to exclude him.

There are New York cases that identify "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). In *Moch, Eaves Brooks, Palka* and *Espinal*, the Court of Appeals examined claims of alleged third-party beneficiaries and set forth parameters for finding liability therefor (*see Espinal,* 98 NY2d 136; *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579 [1994]; *Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220 [1990]; *Moch Co. v Rensselaer Water Co.*, 247 NY 160 [1928]). A "contractual obligation, standing alone, will impose a duty only in favor of the promisee and intended third-party beneficiaries" (*Eaves*, 98 NY2d at 226). However, in those cases the Courts were determining liability for the service providers and not the premises owners. The premises owner, contract or no contract, is charged with a duty to act in a reasonable manner to prevent harm.

As set forth above, even if this court were to find that Rowe was an intended third-party beneficiary, there is no proof to support a finding that the AEG defendants breached any duty it might have had to Rowe that night. In *Espinal*, the Court made a finding that the landowner retained at all times its duty to inspect and safely maintain the premises. Specifically, the owner in *Espinal* was charged with a duty to decide whether to direct its contractor to salt-sand the property, and then to inspect the property within 12 hours of the work (*id.* at 141). Here, the AEG defendants hired Strike Force to secure the premises. Even though the AEG defendants made decisions concerning number and placement of security guards, once the concert began, AEG was no longer involved in that decision making. The court finds, based upon the above analysis that the AEG defendants did not breach a duty to Rowe, and, therefore, dismisses this claim.

On a final note concerning the liability of the AEG defendants, the court addresses an argument set forth in the Mariel defendants' opposition papers. They argue, in opposition to the AEG defendants' motion, that "AEG's own corporate representative testified that there should have been additional security" (Pumariega affirmation in opposition to AEG defendant's motion for summary judgment, ¶ 2). In support of this argument, the Mariel defendants cite Minella's deposition testimony. Minella, who was not employed by AEG at the time of the concert in June of 2010, answered hypothetical questions about security at the theatre. He was asked:

> "Q: How many security guards in your experience do you believe would be appropriate for HIP [sic] hop concert with no barricades?
> A: Having never done a hip hop show withouted [sic] a barricade I couldn't answer that question.
> Q: More than 24?
> A: I would probably increase the normal number, yes"

(Pumariega affirmation, exhibit C, at 31).

The court does not find this testimony probative of the issue of the AEG defendants' liability in that it is speculation in response to a hypothetical question. Furthermore, there is no testimony that the number of security guards was a factor in causing Rowe's injuries that night. There is no testimony that the guards present in the theatre were attending to other events, or that there were not enough guards to address the subject incident. As a result, the court does not find merit in this argument. Further, the court need not consider the AEG defendants' arguments concerning its claims for contractual indemnity against Strike Force, or its cross-claims for contractual indemnity against Mariel's Tours and Perez.

II. Strike Force's Motion for Summary Judgment

Rowe alleges a single claim of negligence as against Strike Force. Strike Force argues that it owed no duty to Rowe, and, therefore, could not have breached any duty to him.

In determining liability for negligence, "the proper inquiry is simply whether the defendant has assumed a duty to exercise reasonable care to prevent foreseeable harm to the plaintiff" (*Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d at 226). Additionally, under certain circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract. In New York, "one who assumes a contractual obligation to maintain a safe condition may be answerable in damages for liability resulting from injuries sustained by a third party because of the obligor's breach" (*Saint Patrick's Home for Aged & Infirm v Laticrete Intl.*, 267 AD2d 166, 167 [1st Dept 1999]).

There are, however, only "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care – and thus be responsible in tort– to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties launches an 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 had entirely displaced the other party's duty to maintain the premises safely" (*Espinal* at 140).

Strike Force argues that pursuant to its agreement with AEG to provide security services, Strike Force did not assume any of the duties as set forth in *Espinal*. Strike Force argues that it did not have exclusive control over the security of the venue. Additionally, Strike Force argues that it did not "launch an instrument of harm" in the performance of its duties that caused plaintiff's alleged accident, nor did Rowe detrimentally rely on Strike Force's continued performance of its duties. Strike Force attaches to its motion the affidavit of Donald J. Decker CPP, a police practices and procedures expert. Decker opines that the actions of the AEG defendants and of Strike Force were reasonable, they complied with the standard of care for

concert venue security, and they were not causes of the incident that led to Rowe's injuries. Decker additionally states that these defendants had no reason to foresee that Rowe would intercede in the crowd disturbance that evening.

Strike Force also relies on the deposition testimony of Perez and Rowe to establish that Perez's actions in directing Rowe to leave the stage and address the unruly audience member interfered with, and undermined, any duties set forth under the agreement between the AEG defendants and Strike Force. In fact, Perez admitted that he never called for Strike Force to handle the situation as he didn't "hire the venue security" (Pumariega affirmation, exhibit G, at 39). Ultimately, it is Strike Force's position that Rowe should not have gone into the crowd, and would not have, had Perez not instructed him to. On this point, Strike Force argues that Rowe's act of stepping off the stage was an unforeseeable incident, severing any causal connection between Strike Force's actions and Rowe's injury.

Strike Force likewise relies upon the testimony of Rispoli, who stated that he would not have placed security guards up against the stage where there is no buffer. According to Rispoli, "Pitbull's bodyguard should not have jumped down into the crowd, but should have waited for Strike Force security guards to deal with the situation" (Pumariega affirmation, exhibit J, ¶ 35). He avers that Strike Force security guards were available to escort the male out of the venue" (*id.*, ¶ 30). Rispoli states that he heard of the incident at a time when he was in the hallway on stage left, and the music was not playing. He ran to address the incident and found Perez's bodyguards escorting the "male" up a staircase out of the theatre (*id.*, ¶ 29).

The court agrees that Strike Force did not launch an instrument of harm and that Rowe did not detrimentally rely on Strike Force for the continued performance of its duties. However, the court finds that, pursuant to the Security Service Agreement, once the concert began, Strike

Force entirely displaced AEG to provide "reasonably safe and adequate security for the Facility as well as for employees, workers, guests and patrons thereof" (exhibit B at 3). Additionally, during the concert, Strike Force was solely responsible for providing "crowd control," and for providing services to "direct and control the audience, deter any crowd disturbances and fights and/or other violent actions by attendees of the Events" (*id.*). Strike Force was in the best position to prevent hazards or injuries from arising during the concert. The contract does not contain any language excluding Rowe, as a person present in the Nokia Theatre during the concert, or as Perez's employee, or as an independent contractor, from its protections.

The court finds, based upon the deposition testimony of Rowe, Rispoli, and Perez, as well as upon Rispoli's and Decker's affidavits, that Strike Force has satisfied the prima facie showing required to warrant judgment as a matter of law. Through this evidence, Strike Force has established that the incident causing Rowe's injuries was unforeseeable, and that it provided adequate security at the theatre. As Strike Force has made its prima facie showing on this motion, the burden shifts to Rowe to raise a question of fact.

Rowe argues that there exist questions of fact concerning whether the Strike Force security guards, who were hired for the benefit of anyone in the theatre in the event of a "crowd disturbance," failed to position any guards close to the stage, or anywhere close to the incident, failing to protect Rowe, and thereby necessitating Rowe's actions in connection with the crowd disturbance.

During his deposition, Perez testified that he did not see any security at the time of the incident:

> "Q: Between the time that the incidents began and when Eric and the other two men got there, did you ever see any of the venue security approaching?

A: To my knowledge, no. I didn't see."

(Pumariega affirmation, exhibit G, at 40).

Rowe testified that prior to the concert, he met with Strike Force personnel and, as a result, understood that the six to eight security guards would be placed up front. According to Rowe, as the concert began, Rowe observed the six security guards at the front of the stage:

"Q: Once the show begins, at the very start of the show, those security guards are in place; is that correct?
A: At the very start –
Q: The very start of Mr. Perez's show, are those six security guards basically in place?
A: When he comes out on stage, yes.
Q: Is there still a security guard by stage left and stage right?
A: Yes"

(Pumariega affirmation, exhibit E, at 132).

Rowe further testified that from the time he left the stage to the time he was injured on the stairs, he did not see any Strike Force personnel. He testified that after the incident, at the end of the concert, he asked "where were you guys?" and he was told "we were off doing something else" (exhibit E at 182).

The court finds that although Strike Force met its prima facie burden of establishing summary judgment, Rowe's opposition creates questions of fact necessitating a trial on the questions of Strike Force's liability. The proof offered on this motion establishes that under *Espinal,* at the time of Rowe's injury, Strike Force had exclusive control over the security of the venue once the concert began. Through its Security Service Agreement with AEG Live NY LLC, Strike Force exclusively owed a duty to Rowe to provide security at the concert, which included deterring "crowd disturbances and fights." It was Rowe's testimony that Strike Force agreed to place six to eight security guards at the stage. According to the submissions, there was

no other security in the theatre at that time. Rispoli testified that once a fight needs to be broken up, Strike Force alone makes the determination. Perez testified that he did not see venue security approaching the incident. Rowe additionally testified that he did not see any security guards from the time he left the stage to the time he was injured that night. These facts raise questions as to the occurrence of the crowd disturbance and the need for Rowe to leave the stage to address it and Strike Force's liability for Rowe's injuries.

Although Strike Force argues that the AEG defendants were responsible for the number of guards in the theatre, there is no testimony whatsoever that it was the number of guards that led to Rowe's injury that night. There is no testimony that the guards were dealing with other disturbances in the theatre, or that the subject incident required a larger number of guards to quell than were available in the theatre at the time.

Further, the court finds that any questions concerning Rowe's reason for leaving the stage and his expectations for his own safety as a bodyguard are all questions of fact more appropriately resolved by a trier of fact. Consequently, the court denies Strike Force's motion for summary judgment.

The court need not address Strike Force's motion to dismiss the cross-claims of the AEG defendants.

III. The two motions of Armando Perez and the Mariel defendants

A. Motion to Amend the Answer and Affirmative Defenses to Dismiss Rowe's Claims as against them

The Mariel defendants move to amend their answer and affirmative defenses to plaintiff's second amended complaint, and to dismiss the fourth cause of action based upon expiration of the statute of limitations.

Procedural History

Plaintiff Rowe filed his original complaint on September 29, 2012, naming the AEG defendants. He did not bring the action against Perez or a Pitbull-related entity. Rowe amended his complaint on March 20, 2013 to add Strike Force, but again did not name Perez. On October 16, 2013, AEG impleaded the Mariel defendants, asserting claims for indemnification and contribution. The Mariel defendants answered the third-party complaint and asserted various counterclaims and crossclaims against AEG and Strike Force. In March 2015, Rowe moved to amend his complaint a second time. The second amended complaint includes a claim against Perez.

The Mariel defendants move, pursuant to CPLR 3025 (b), to amend their answer stating that "through an inadvertent omission, the(ir) answer did not include a statute of limitations defense" (Mariel defendants' mem of law for leave to amend answer at 3).

"[I]t is well-established that leave to amend pleadings to add the statute of limitations defense should be freely allowed, except where the proposed defense clearly lacks merit or there is prejudice or surprise resulting directly from the delay" (*New York Cent. Ins. Co. v Berdar Equities, Co.*, 33 Misc3d 1214 (A) [Supreme Court, New York County 2011] citing *Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166, 170 [1989]). "This favorable treatment applies even if the amendment substantially alters the theory of recovery" (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014][internal quotation marks and citations omitted]). Prejudice is described by the Court of Appeals as "more than 'the mere exposure of the [party] to greater liability . . . there must be some indication that the [party] has been hindered in the preparation of

[the party's] case or has been prevented from taking some measure in support of [its] position" (*id.*). "The kind of prejudice required to defeat an amendment . . . must . . . be a showing of prejudice traceable not simply to the new matter sought to be added, but also to the fact that it is only now being added. There must be some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add" (*Jacobson v* Croman, 107 AD3d 644, 645 [1st Dept 2013][internal quotation marks and citation omitted]). The burden of establishing prejudice is on the party opposing the amendment (*id.*).

The First Department has ruled "where the amendment is sought after a long delay, and a statement of readiness has been filed, judicial discretion in allowing the amendment should be discreet, circumspect, prudent and cautious" (*Jacobson v Croman*, 107 AD3d at 645 [internal quotation marks and citation omitted]). However, lateness standing alone is not considered a bar to an amendment. "'It must be lateness coupled with significant prejudice to the other side . . .'" (*id.*[internal quotation marks and citation omitted]). In *Barbour v Hospital for Special Surgery* (169 AD2d 385 [1st Dept 1991]), the defendant moved to amend the answer to add the defense of the statute of limitations seven years after the commencement of the lawsuit. The Court held that the defendant was entitled to amend his answer, despite this delay, because the defense had merit and the plaintiff was unable to establish prejudice or surprise (*id.*). in *Seda v New York City Hous. Auth.* (181 AD2d 469, 470 [1st Dept 1992]), where the defendant moved for leave to amend its answer to assert a statute of limitations defense, the Court held: "Three years is an inordinate amount of time in which to amend an answer. However, mere lateness by NYCHA is not a barrier to amendment. Lateness must be coupled with significant prejudice to plaintiff."

The Mariel defendants' proposed defense that the claim is barred by the statute of limitations, is meritorious. The statute of limitations for personal injury claims is three years (CPLR 214), and it accrues on the date the tortious act took place (*Bassile v Covenant House*, 191 AD2d 188, 188 (1st Dept 1993]). Here the alleged tort took place on June 24, 2010. Rowe did not bring a claim against the Mariel defendants until March 30, 2015, almost five years after the incident, and after the expiration of the statute of limitations.

The Mariel defendants could have raised this defense much earlier in the litigation, at the time they filed their original answer, on May 14, 2015 or in the course of discovery, but did not. However, since Rowe brought the claim against the Mariel defendants after the expiration of the statute of limitations, Rowe cannot reasonably claim to have been prejudiced or surprised by the Mariel defendants' request to amend their answer (*see Lettieri v Allen*, 59 AD3d 202, 202 [1st Dept 2009]).

Rowe and AEG oppose this motion to amend on essentially the same grounds. They argue that the parties, including the Mariel defendants, have been engaged in active and costly litigation for years, during which time the Mariel defendants interposed an answer; the parties conducted discovery, including multiple depositions; engaged in significant motion practice; and the note of issue was filed nearly one year prior to the motion to amend. The opposing parties further argue that the Mariel defendants do not offer any excuse for their delay in raising this defense, despite their knowledge of the date of the alleged incident. Rowe further argues that the Mariel defendants did not oppose Rowe's initial motion, in March of 2015, to add them as direct defendants, and did not raise this issue in their summary judgment motion. The opposing parties argue, therefore, that they are prejudiced by this amendment as they spent significant time and money litigating this case. Specifically, Rowe adds, the expense of deposing Perez as a party.

Rowe has established lateness here, since the answer filed by the Mariel defendants in May of 2015, did not contain the statute of limitations defense. However, the court finds that there is neither prejudice nor surprise that would bar the Mariel defendants from amending their answer to assert this affirmative defense. It was not the addition of the Mariel defendants that necessitated the time and money litigating this matter. Rowe's initial claims against the AEG defendants and then the addition of Strike Force into the action, required the parties to depose not only their own representatives, but to take the deposition of Perez as well, as a first-hand witness to the incident who directed Mr. Rowe to intervene. The court, therefore, permits the Mariel Defendants to amend their answer to the second amended complaint, to include the statute of limitations defense. As a result, the court grants the Mariel defendants' motion to dismiss the second amended complaint against them, as those claims are barred by the applicable statute of limitations.

The court need not address the Mariel defendants motion for summary judgment on their crossclaims against Strike Force.

In accordance with the foregoing, it is

ORDERED that the motion by defendant Strike Force of New Jersey, Inc. for summary judgment (motion sequence 012) is denied; and it is further

ORDERED that the motion by defendants AEG Live LLC, AEG Live Productions, LLC and AEG Live NY, LLC for summary judgment (motion sequence 013) is granted, and the complaint is dismissed in its entirety against these defendants and the Clerk is directed to enter judgment accordingly in favor of these defendants; and it is further

ORDERED that the motion by Mariel Tours, LLC, Mariel's Tours, Inc. and Armando Perez (a/k/a Pitbull) to amend the answer and dismiss the second amended complaint (motion sequence 015) is granted, and the complaint is dismissed in its entirety against these defendants and the Clerk is directed to enter judgment accordingly in favor of these defendants; and it is further

ORDERED that the motion by Mariel Tours, LLC, Mariel Tours, Inc. and Armando Perez (a/k/a Pitbull) for summary judgment (motion sequence 014) is denied as moot; and it is further

ORDERED that the action is severed and continued against the remaining defendants.

This constitutes the decision and order of the court.

Dated: May 31, 2018

Kelly O'Neill Levy

KELLY O'NEILL LEVY, J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.