Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D16083
X/cb

_____AD3d_____ Argued - June 14, 2007

A. GAIL PRUDENTI, P.J.
WILLIAM F. MASTRO
DANIEL D. ANGIOLILLO
THOMAS A. DICKERSON, JJ.

2006-08668 DECISION & ORDER

Thomas H. Baker III, respondent, v John Harvards Brew House, LLC, et al., defendants, Patricia Ann Cottage Pub, Inc., appellant.

(Index No. 026240/01)

Congdon, Flaherty, O'Callaghan, Reid, Donlon, Travis & Fishlinger (Max W. Gershweir, New York, N.Y. [Jennifer B. Ettenger] of counsel), for appellant.

Silverberg & Goodman, LLP, Garden City, N.Y. (Peter J. Goodman of counsel), for respondent.

In an action to recover damages for personal injuries pursuant to General Obligations Law § 11-101, the defendant Patricia Ann Cottage Pub, Inc., appeals from an order of the Supreme Court, Suffolk County (Burke, J.), dated August 9, 2006, which denied its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

ORDERED that the order is affirmed, with costs.

The Supreme Court correctly determined that triable issues of fact exist as to whether the plaintiff caused or procured the intoxication of the driver of the vehicle involved in the accident which resulted in his alleged injuries (*see Mitchell v The Shoals, Inc*., 19 NY2d 338, 341), and was thereby precluded from recovering damages under the Dram Shop Act (*see* General Obligations Law § 11-101). Accordingly, the court properly denied the appellant's motion for summary judgment

dismissing the complaint and all cross claims insofar as asserted against it (*see Baker v D.J. Stapleton, Inc.*, _____AD3d_____ [decided herewith]).

PRUDENTI, P.J., MASTRO, ANGIOLILLO and DICKERSON, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court