

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

D16087
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_____AD3d_____

Argued - June 14, 2007

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

2006-10882

DECISION & ORDER

Robert Tunison, etc., et al., plaintiffs-respondents, v
Robert Malloy, etc., et al., defendants-respondents,
John Harvards Brew House, LLC, respondent-appellant,
Patricia Ann Cottage Pub, Inc., appellant-respondent.

(Index No. 29960/01)

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

Churbuck, Calabria, Jones & Materazo, P.C., Hicksville, N.Y. (Nicholas P. Calabria and George Jones of counsel), for respondent-appellant.

Tinari, O'Connell, Osborn & Kaufman, LLP, Central Islip, N.Y. (Frank A. Tinari of counsel), for plaintiffs-respondents.

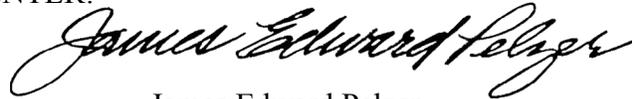
In an action to recover damages for personal injuries pursuant to General Obligations Law § 11-101, the defendant Patricia Ann Cottage Pub, Inc., appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Doyle, J.), entered October 17, 2006, as denied its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, and the defendant John Harvards Brew House, LLC, cross-appeals, as limited by its brief, from so much of the same order as denied its cross motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

ORDERED that the order is affirmed insofar as appealed and cross-appealed from, with one bill of costs.

The Supreme Court correctly determined that, with respect to each plaintiff, triable issues of fact exist as to whether he or she caused or procured the intoxication of the driver of the vehicle involved in the accident which resulted in the plaintiffs' 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 motion of the defendant Patricia Ann Cottage Pub, Inc., and the cross motion of the defendant John Harvards Brew House, LLC, for summary judgment dismissing the complaint and all cross claims insofar as asserted against each of them (*see Tunison v D.J. Stapleton, Inc., d/b/a Napper Tandys*, _____AD3d_____ [decided herewith]).

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

ENTER:



James Edward Pelzer
Clerk of the Court