Passaro v JEC IL LLC
2009 NY Slip Op 30306(U)
February 9, 2009
Supreme Court, New York County
Docket Number: 104548/06
Judge: Joan A. Madden
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[* 1]

SCANNED ON 2/13/2009

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

PRESENT: Hon John A. Middlemiss PART 11

Index Number : 104548/2006

PASSARO, NICOLE

vs.

JEC II LLC

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 and cross-motion are decided in accordance with the annexed Memorandum Decision + Order.

FILED
FEB 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: February 9, 2009 _____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

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NICOLE PASSARO,

Index No. 104548/06

Plaintiff,

- against -

JEC II LLC, ONE LITTLE WEST 12 CO., d/b/a/ ONE LITTLE WEST 12TH and ALL SEASON PROTECTION SERVICES,

Defendants.

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FILED
FEB 13 2008
COUNTY CLERK
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JOAN A. MADDEN, J.:

In this personal injury action arising out of an assault at a bar, defendant JEC II LLC, One Little West 12 Co., d/b/a One Little West 12th ("JEC") moves, and defendant All Season Protection Services ("All Season") cross moves, for summary judgment dismissing the complaint. Plaintiff opposes the motion and cross motion.

Background

This action arises out of personal injuries sustained by the plaintiff on November 7, 2005, at about 2:30 am, when she was cut on the cheek by another female patron (hereinafter "the assailant")[1] at One Little West 12th ("Little West"), a bar and restaurant owned by JEC. JEC engaged All Season to provide certain security service at Little West, and at the time of the

[1] The record indicates that the assailant was an Asian women between 5"2' and 5"5' in height. Although a photograph was taken of the assailant by a member of All Season's security staff, the assailant was never apprehended or identified by name.

incident, six to eight employees of All Season were working as security guards at Little West. There was no written contract between JEC and All Season.

In this action, plaintiff sues defendants for negligence in connection with the management, operation, control and supervision of Little West and JEC for allegedly serving the assailant alcoholic beverages when she was visibly intoxicated in violation of New York's Dram Shop Act.

On the evening of the incident, plaintiff was at Little West attending a birthday party for a friend which took place in a party room located in downstairs portion of the restaurant. Plaintiff arrived at Little West with her sister, Dana Passaro ("Dana"), between 8:30 and 9:00 pm on Sunday, November 6, 2005. Plaintiff testified that she drank one glass of wine that night. Following the birthday party, at around 12:30 pm, plaintiff and the rest of the people attending the party went to the bar lounge on the main floor of the Little West, where a weekly Sunday night promotional event was being held. According to plaintiff, she went upstairs with Dana and three female friends and talked with them in the bar in the front area of Little West for about an hour.

When the front bar became crowded, plaintiff and Dana went to a back bar known as the Champagne Bar and stayed there until the incident. According to plaintiff, while at the Champagne Bar, she spoke with an individual named Jennifer who was hired by

the bar as a dancer, and who plaintiff knew through a mutual friend. Plaintiff testified that during her conversation with Jennifer she first noticed the assailant, who was "making fun [of]...[and] mimicking the way we were laughing" (Plaintiff's Dep. at 55)about 15 to 20 minutes before the incident. She described the assailant as "mocking and pointing and drunk" (Id. at 54).

According to plaintiff she next noticed assailant about 15 minutes later when she dropped a glass. Plaintiff testified that the assailant "was obviously drunk" and "carrying on and loud" (Id. at 62, 69) and that the assailant and her friends were "shoving each other [and were] falling and sloppy." (Id. at 70). Plaintiff testified that the assailant "dropped a drink, which I thought was meant to fall on me, near me. So I took it as she was drunk and dropped her drink" (Id, at 62). According to plaintiff, she observed the assailant with the drink she was holding and described it as clear liquid, but did not see her served any other drinks.

Plaintiff testified that she was about five feet away from the assailant, and standing about one or two feet from the bar, when the assailant dropped her drink and the glass broke and shattered on the floor. Plaintiff also testified that the drink was not dropped straight out of the assailant's hand but more towards her, and that because of this, she looked down to check if her pants had gotten wet, and that's when she noticed that the

assailant was behind her. According to plaintiff she turned around and said to the assailant "what is the problem, do I know you."(id., at 78). After this, plaintiff saw the assailant's hand coming towards her as if to punch her. While she was not punched, plaintiff testified when she turned around, Dana told her that she was cut and bleeding.

Plaintiff testified that although Dana immediately grabbed the assailant, the manager of Little West appeared and told Dana to mind her own business. Shortly thereafter the assailant was seen leaving the club by taxi.[2] Plaintiff subsequently went to a nearby emergency room, where the wound required numerous stitches.

Charles Walsh ("Walsh"), the evening manager on the night of the incident and a 20% shareholder of JEC, testified he was outside at the front door of Little West at the time of the incident and went inside after he was notified via his walkie-talkie that there was a disturbance at the Champagne Bar. Walsh described the Champagne bar as "a 17 foot bar with a long communal table about five feet away from the bar" (Walsh Dep. at 51). Walsh testified that he arrived at the scene of the

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[2]Plaintiff also testified that a security guard named Mecca told her friend Christie that the assailant was a known trouble maker and that there had been two prior incidents at Little West on two prior Sundays. However, as there is no evidence to support this testimony, which is hearsay, the court will not considered it.

incident within 25 seconds of getting notice of it but by that time the altercation had ended. He testified the plaintiff was bleeding, "screaming and cursing," and that the assailant was "calm" (Id. at 55, 57).

Walsh also testified that he did not recall making any observations regarding the sobriety of the plaintiff or the assailant when he saw them after the altercation, and denied being aware of any broken glass at the Champagne Bar. Walsh further testified that an accident report was prepared regarding the incident, although no such report was found when it was sought by plaintiff during discovery.

Two witnesses testified on behalf of All Season. Donnelly McCants ("McCants"), the Security Manager and Supervisor for All Season, was present on the night of the incident, and described his duties as "staffing the guys at particular posts and controlling the flow at the front door" (McCants Dep. at 6). McCants testified that he was outside the front door when he was alerted "on the radio about a situation my [staff] was converging on." He arrived at the scene about a minute later and was informed that the assailant "bumped [plaintiff] and either cut her with glass or some type of sharp object," and that his guards did a "sweep of the area" found "multiple glass from dropped drinks" but "did not see any green glass in the immediate area," even though he was informed that a Heineken bottle was used to

cut plaintiff (Id at 24, 26).

McCants testified that he observed that assailant after the incident and that "she definitely had alcohol in her. I would not say she was over the top. She knew exactly what she was doing in trying to avoid me after it was established I knew who she was. I can't say she was drunk or anything like that" (Id., at 23). As for the plaintiff's demeanor, McCants testified that she did not seem "overly intoxicated," and that "she was coherent but a little shook up" (Id., at 23).

Bertrand Girigorie ("Girigorie"), a member of the All Season's security staff on duty at Little West on the night of the incident, testified that he did not observe the altercation. According to Girigorie he became aware of a problem when he observed a commotion, people crowding around and looking distressed and he walked twenty feet towards the crowd and then he noticed plaintiff with a gash on the right side of her face. At the point, according to Girigorie, plaintiff had left the area where the altercation occurred. Girigoire responded "yes" when asked if he was confident that no one on the security team or management saw the altercation (Girigorie Dep. at 30).

JEC argues that based on the record summary judgment is warranted in its favor as there is insufficient evidence demonstrating that the assailant was visibly intoxicated for the purposes of the Dram Shop Act. It further argues that the common

law negligence claims are without merit as the altercation was the result of a sudden and unforeseeable act by the assailant.

All Season also seeks summary judgment, asserting that its agreement to provide security service to JEC does not give rise to a duty owed to plaintiff since plaintiff was not a party to the agreement or a third-party beneficiary to such agreement, and that there is no evidence that All Seasons assumed a special duty to plaintiff. Rahim v. Sottile Security Co. LLC, 32 AD3d 77 (1st Dept 2006). Next, All Season argues that even if it owed a duty to plaintiff, it cannot be held liable for any negligence since it did not have notice since the incident was sudden and unexpected.

Plaintiff opposes the motion, arguing that evidence that the assailant was loud and drunk and mocking plaintiff within a few feet of the bar fifteen minutes prior to the incident are sufficient to raise an issue of fact as to whether the assailant was visibly intoxicated when served alcohol, and as to whether the management and security staff knew or should have known that the assailant was a danger to the plaintiff.

Plaintiff also submits the affidavit from sister Dana Passaro, who defendants elected not to depose.[3] According to

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[3]In its reply affirmation, JEC counsel states that it did not depose Dana Passaro "on consideration of her familial relationship to plaintiff ... and the strength of deposition testimony in support of [its] non-liability" Reply Affirmation, at 2-3, n.1.

Dana, the incident occurred in the Champagne Bar, and that she and her sister were seated near the corner portion of the bar in the middle. In her affidavit, Dana states that during the thirty minutes before her sister's injury:

> [the assailant] and her companions consumed at least 4 clear drinks which they were served from one of the female bartenders in attendance at the Champagne Bar. They remained standing at the bar. Their behavior deteriorated. I could see [the assailant] engaged in some kind of physical horse-play with her companions which consisted mostly of rough pushing. I saw [the assailant] on two occasions light cigarettes which she smoked until the female bartender approached her. On the first occasion I saw her stamp out the cigarette, but on the second occasion she continued smoking whereupon the bartender just left her alone. I cannot say that [the assailant] was profane, but I saw her blow smoke right in the bartender's face. No one else approached her.

(Affidavit of Dana Passaro, ¶ 5).

Dana further states that approximately 15 minutes prior to plaintiff's injury, the assailant and her friends repositioned themselves within five feet of the area where she and plaintiff were seated, and that plaintiff was facing her and the assailant and her companions were behind plaintiff. According to Dana, at that time, the assailant began to "physically mimic or imitate" plaintiff who was initially unaware of this, and that the gestures made about her sister were "outlandish [and] overt," and "[the assailant] and her friends "were laughing in a derisive and confrontational manner" (Id., ¶ 7).

Dana states that the assailant continued to make "this crude and provocative" imitation of plaintiff for five minutes and then dropped her shot glass, at which time plaintiff turned around to see if she got liquid on her, and the assailant continued her imitation of plaintiff who saw it for the first time and asked the assailant, "'do you have a problem'" or "'what's your problem.'"

According to Dana, the assailant then made "a vulgar gesture" and continued her physical imitation of plaintiff over the next several minutes and then turned away from the bar and behind plaintiff's shoulder. When plaintiff turned around, the assailant's hand went upward towards plaintiff's face, and when plaintiff turned around, Dana noticed plaintiff was cut.

Dana states that when the assailant tried to leave, she grabbed her and held her for at least two minutes until security or management arrived. During that time, Dana states she was "face to face" with the assailant whose "breath reeked of alcohol," whose eyes "were glazed and unfocused," and who "was snarling at me incoherently, yelling and spitting on me" (Id., ¶11).

Plaintiff also submits the affidavit of Jerry Pascucci, a security expert. Mr. Pascucci states after reviewing the record, it is his opinion that All Season should have been aware that a potentially dangerous situation existed, and that the security

detail on the date of the incident was under-manned and improperly positioned. He also states that the failure to preserve the incident report, to more quickly arrive at the scene of the altercation, and to detain the assailant and prevent her departure were deviations from acceptable security practices.

In reply, JEC argues that Dana's "self-serving" affidavit should not be considered since many of her statements, including where plaintiff was positioned in relation to the assailant and whether the assailant was in plaintiff's line of sight, contradict plaintiff's deposition testimony.

JEC also submits an affidavit from its Beverage Director, John Sherman, who was a bartender on the night of the incident. In his affidavit, Mr. Sherman denies that the Champagne Bar has seating after 11:00 pm, and states that on the night of the incident only male bartenders worked the Champagne Bar and that no female bartender worked at the Champagne Bar until December 2007.

Discussion

On a motion for summary judgment, the proponent "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. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing

the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

General Obligations Law § 11-101, known as the Dram Shop Act, makes a defendant who "unlawfully" sells alcohol to another person liable for injuries resulting from that person's intoxication. Under Alcohol Beverage and Control Act § 65(2), it is unlawful to provide an alcoholic beverage to a person who is visibly intoxicated.

Here, while JEC's representative did not make any observations as to the assailant's sobriety, McCants' testimony that the assailant was not drunk arguably shifts the burden to plaintiff to produce proof sufficient to raise a triable issue of fact. See Conyea v. Folger, 133 AD2d 964, 965 (2d Dept 1987), citing Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

Plaintiff has met this burden based on her deposition testimony that assailant was loud, drunk and obnoxious while in front of the bar, and Dana's statements in her affidavit that she observed assailant being served four drinks, that her breath reeked of alcohol and her eyes were glazed and unfocused. See e.g. McGovern v. 4299 Katonah Inc., 5 AD3d 239 (1st Dept 2004); Heavlin v. Gush, 197 AD2d 773 (3d Dept 1993). Based on this evidence, it cannot be said that the assailant did not act or appear to be intoxicated when she was provided with alcohol at

Little West.

Moreover, contrary to JEC's position, the statements in Dana's affidavit may be considered by the court to the extent that they amplify rather than contradict plaintiff's deposition testimony. See Bosshart v. Pryce, 276 AD2d 314 (1st Dept 2000)(denying summary judgment when allegations by plaintiff in opposition to the motion though more detailed did not contradict her earlier deposition testimony); Lesman v. Weinrib, 221 AD2d 601(2d Dept 1995)(court did not err in considering affidavit which did not contradict plaintiff's deposition testimony); compare Phillips v. Bronx Lebanon Hospital, 268 AD2d 318, 320 (1st Dept 2000).

Here, Dana's statements as to whether the assailant appeared to be intoxicated do not contradict the deposition testimony of plaintiff. Moreover, since the record indicates that Dana grabbed and held the assailant after plaintiff was injured, she was arguably in a better position to assess whether the assailant was intoxicated. Furthermore, insofar as the statements in Mr. Sherman's affidavit call into question the accuracy of Dana's statements and raise issues of credibility, such issues cannot be resolved on a motion for summary judgment. Accordingly, JEC is not entitled to summary judgment on plaintiff's Dram Shop Act claims.

On the other hand, JEC is entitled to summary judgment on

the negligence claims. Although as the owner of a public establishment JEC owes a duty to exercise reasonable care to protect its patrons from injury, it has no duty to "protect patrons against unforeseeable and unexpected assaults." Ash v. Fern, 295 AD2d 869 (3d Dept 2002); see also, Elba v. Billie's 1890 Saloon, Inc., 227 AD2d 438 (2d Dept 1996). In this case, in view of the short time that elapsed between plaintiff's statement to the assailant, which was her first direct interaction with her,[4] and the assailant's attack on plaintiff, JEC could not have reasonably foreseen the assault on plaintiff. Moreover, although the record shows that the assailant was imitating and mocking plaintiff, this type of conduct was insufficient to put JEC on notice, or give it reason to anticipate, that the assailant would attack the plaintiff. See Strafford v. 6 Crannel Street, Inc., 304 AD2d 997 (3d Dept 2003)(holding that evidence of "moshing" at a nightclub was insufficient to sustain negligence cause of action where plaintiff testified that the attack on her by another patron was

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[4]To the extent Dana's statements in her affidavit indicate that the assault occurred minutes after plaintiff's statement to the assailant, instead of immediately afterwards as described in plaintiff's deposition, such distinction is insufficient to raise a factual issue as to JEC's negligence since the interaction between the assailant and plaintiff was not the type that would have put JEC on notice of the danger of a violent confrontation between the two women. In any event, since Dana's statements contradict plaintiff's deposition testimony in this regard, they cannot be considered to defeat JEC's summary judgment motion. Phillips v. Bronx Lebanon Hospital, 268 AD2d at 320.

sudden and unprovoked); Compare Ash v. Fern, 295 AD2d 869 (denying defendant's motion for summary judgment as to common law negligence claim where record showed that the confrontation between two groups of patrons, including yelling, cursing and vulgarities, escalated over a time period of 10 to 15 minutes and several warnings were given by defendant's employees). Under these circumstances, the common law negligence claims against JEC must be dismissed.

As plaintiff's injuries resulted from a sudden and unforeseeable assault, the negligence claims against All Season must also be dismissed.[5] Moreover, the expert opinion relied by plaintiff is insufficient to raise a triable issue of fact in this regard since the record establishes that even in the absence of the alleged deviations from good and accepted security practices, All Season could not have anticipated the sudden attack on the plaintiff. Accordingly, the court need not consider whether the All Season owed any duty to plaintiff.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by defendant JEC II LLC, One Little West 12 Co., d/b/a One Little West 12th

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[5]To the extent the complaint and cross claims could be construed as asserting claims against All Season for violation of the Dram Shop Act, such claims are without merit since there is no evidence that All Season sold or otherwise provided alcohol to the assailant. See General Obligations Law § 11-101(1).

Very Ltd, is granted to the extent of dismissing plaintiff's common law negligence claims and these claims are severed and dismissed; and it is further

ORDERED that the claims against defendant JEC II LLC, One Little West 12 Co., d/b/a One Little West 12th Very Ltd, under the Dram Shop Law shall continue; and it is further

ORDERED that the cross motion by defendant All Season Protection Services for summary judgment dismissing the complaint and all cross against it is granted and the claims and cross claims against defendant All Season Protection Services are severed and dismissed; and it is further

ORDERED that the remaining parties shall appear for a pre-trial conference in Part 11, room 351, on March 12, 2009, at 2:00 pm.

DATED: February 9, 2009

J.S.C.

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