

Fink v Le Pays Basque, Inc.

2011 NY Slip Op 30708(U)

March 22, 2011

Sup Ct, NY County

Docket Number: 107541/08

Judge: Judith J. Gische

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

DECENT.

PART 10

Index Number : 107541/2008

FINK, ERIKA

vs

LE PAYS BASQUE, INC.

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

FILED

MAR 25 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/22/11

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
Erika Fink, as Executrix of the Estate of Marion
Horn, Deceased,
Plaintiff (s),

DECISION/ ORDER
Index No.: 107541/08
Seq. No.: 002

-against-

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

Le Pays Basque, Inc., La Cote Basque, LTD.
and 60 West 55th Street Corp.

Defendant (s).
-----X

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

Papers	Numbered
Def' n/m (3212) w/ RBW affirm, exhs	1
Pltff's EF opp w/JRV affirm, exhs	2
Defs' reply /wRBW, exhs	3

FILED

MAR 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

GISCHE J.:

This is an action to recover damages for the conscious pain and suffering and wrongful death of Marion Horn ("Ms. Horn"). Plaintiff, Erika Fink ("Fink"), is the executrix of the estate of Ms. Horn. Defendants are the restaurant, La Cote Basque ("LCB"), the owner of the restaurant, Le Pays Basque, Inc. ("LPB"), and the landlord of the building where Ms. Horn was injured, 60 West 55th Street Corp. ("Landlord"). Issue was joined by the moving defendants. The note of issue was filed. The court has before it a timely motion by LCB and LPB (sometimes "LCB/LPB") for summary judgment dismissing plaintiff's complaint. Plaintiff opposes summary judgment on the basis that there exist

material issues of fact requiring trial and that relevant and material evidence has been lost.

The court's decision and order is as follows:

Facts and Arguments Presented

On June 10, 2006, Ms. Horn and her two friends, Robert and Lauren Klieger, went out to dinner at LCB to celebrate the Klieger's wedding anniversary. Over the course of three to four hours, the three patrons enjoyed a full course meal as well as one bottle of champagne and one bottle of wine. At the end of their meal, each of them were offered a complementary flute of champagne, which they each drank. Before leaving LCB, Ms. Horn and Mr. Klieger went to use the bathroom, which was located on a lower level. As Ms. Horn was ascending the staircase leading to the bathrooms, she miss-stepped and fell to the bottom. Ms. Horn struck her head and lost consciousness. Mr. Klieger ran down the stairs to help Ms. Horn, who shortly thereafter was taken to the hospital. The hospital records indicate that Ms. Horn had a blood alcohol concentration of 0.16%. On June 13, 2006, Ms. Horn was pronounced dead, reportedly as a result of the injuries she sustained from the fall.

Plaintiff has asserted three causes of action. Plaintiff's first and second causes of action are that defendants LCB and LPB failed to maintain adequate lighting on the staircase where plaintiff's decedent fell and defendant continued to serve alcohol to plaintiff's decedent even though they should have known doing so posed a danger. Plaintiff's third cause of action is against the landlord of LCB, who has never appeared in this action, and plaintiff's time to take a default against landlord has expired. Therefore, summary judgment is available on only the first two causes of action.

Defendants move for summary judgment claiming that the plaintiff's theory of liability, based on the staircase being inadequately lit, is purely speculative and unsupported by any of the information adduced through discovery. Defendants also claim that they did not have constructive or actual notice that the staircase was poorly lit, because no complaints were made prior to or on the day of the accident. Defendants contend that plaintiff's claim, that Ms. Horn was negligently over served or plied with alcohol, fails to state a cause of action because New York does not recognize a common law private action for voluntary intoxication.

In opposition to summary judgment, plaintiff relies on the Alcoholic Beverage Control Law §65(2) and General Obligation Law §11-101, commonly referred to as the "Dram Shop Act." Plaintiff admits that these two statutes do not create a private cause of action against the purveyor, but should be read expansively so as to impose a duty of care on a host, restaurant, bar etc, with respect to serving alcohol to its patrons. Plaintiff contends that the defendants affirmatively created the dangerous condition by providing Ms. Horn with alcohol free of charge, when her judgment was already impaired and she did not have had the clear sense to refuse it. Plaintiff claims this determination should be a question of fact for the jury to decide and the reason to deny defendants motion for summary judgment. Plaintiff also points to the "disappearance" of evidence that would have established exactly what the three patrons ordered, while dining at LCB. Plaintiff believes this evidence is material and relevant and the reason to deny defendants motion for summary judgment. Plaintiff does not oppose summary judgment on the inadequate lighting on the staircase.

Discussion

A movant seeking summary judgment in its favor must make a *prima facie* showing of entitlement to judgment as a matter of law, tending 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). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). 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., 49 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Inadequate Lighting on the Staircase

To recover on a theory of negligence in a premises action, plaintiff must demonstrate that the premises owner either created the alleged defective condition or had actual or constructive notice of the defect. Lopez v. Crotona Ave. Associates, LP., 39 A.D.3d 388, 390 (1st Dept. 2007). Defendants' controller and person responsible for customer complaints, Yasmine Gargiulo, testified at her deposition that there were no complaints or previous accidents on the staircase at LCB. Robert Klieger, who was with the Ms. Horn when she fell, testified at deposition that he had no difficulty in running down the stair to help Ms. Horn. Defendants have established that the stairs were adequately lit. Plaintiff has not come forward with any triable issue of fact that the lighting was inadequate. Therefore, the court finds that defendant has proved its defenses, and its entitlement to summary judgment on this issue.

Over-service of Alcohol

In New York, it is well-established law that there is no private common law right of action against a tavern owner for the service of intoxicating beverages to voluntarily intoxicated individuals. Delamater v. Kimmerle, 104 A.D.2d 242 (3rd Dept. 1984); Allen v. County of Westchester, 172 A.D.2d 471 (2nd Dept. 1991); D'Amico v. Christie, 71 N.Y.2d 76 (1987). Plaintiff cites the Alcoholic Beverage Control Law §65(2) and the General Obligation Law §11-101 ("Dram Shop") to show that a standard of care exists between alcohol providers and a visibly intoxicated individual. Plaintiff has not provided to any legal authority supporting this assertion. While the Dram Shop laws create a duty to third parties who are foreseeably injured by persons to whom liquor is served, there are no cases that hold the duty extends to the intoxicated person. Oursler v. Brennan, 67 A.D.3d 36 (4th Dept. 2009). Even were the court persuaded by these arguments, plaintiff has still not raised a triable issue of fact that Ms. Horn was visibly intoxicated. Although Ms. Horn had a blood alcohol concentration of 0.16%, this alone does not establish that she was visibly intoxicated, thereby putting defendant on notice that she should not be served any more alcohol. The visible effects of alcohol vary widely from person to person. Proof of a high blood alcohol count alone generally does not establish the "visible" intoxication that Alcoholic Beverage Control Law § 65(2) requires. Romano v. Stanley, 90 N.Y.2d 444 (1997). Furthermore, Mr. Klieger, her dinner companion, testified that Ms. Horn did not exhibit any signs of being visibly intoxicated at any point during the evening. The fact that Ms. Horn was served a complimentary flute of champagne at the end of her dinner, which she drank, reinforces the principle that she was drinking voluntarily. New York common law has repeatedly held, that a voluntarily

intoxicated individual does not have a private cause of action, nor does his estate should he die, against the purveyor of alcohol. Allen v. County of Westchester, *supra*; D'Amico v. Christie, *supra*. Plaintiff has failed to state a cause of action on which relief can be granted.

Plaintiff claims that evidence "disappeared," and that it would have shown exactly what items Ms. Horn and the Kliegers ordered for dinner at LCB. This appears to suggest that defendants spoliated evidence. Leaving aside the issue of whether evidence was destroyed, this evidence, even if it existed would not be helpful to plaintiff in defeating defendants' motion for summary judgment. It does not refute the fact that Ms. Horn was consuming alcohol of her own free will. In any event, Mr. Klieger's testimony and the hospital records establish the deceased's blood alcohol level. Therefore, defendants have established they are entitled to summary judgment, as a matter of law on the negligent intoxication claim and it is dismissed. Plaintiff has failed to state a valid cause of action and has not demonstrated a triable issue of fact.

Although the landlord has not appeared or otherwise joined in this motion, the reasoning in this decision otherwise precludes any action against the landlord.

Conclusion

In accordance with the foregoing:

It is hereby

ORDERED that defendants' Le Pays Basque, Inc. and La Cote Basque, LTD, motion for summary judgment dismissing the complaint is granted against plaintiff, Erika Fink, as Executrix of the Estate of Marion Horn, deceased; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendants, Le Pays Basque, Inc., La Cote Basque, LTD, and 60 West 55th Street Corp., against plaintiff, Erika Fink, as Executrix of the Estate of Marion Horn, deceased dismissing the complaint; the moving defendants are also entitled to the costs and disbursements of this action; and it is further

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

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

Dated: New York, New York
March 22, 2011

So Ordered:



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

FILED

MAR 25 2011

**NEW YORK
COUNTY CLERK'S OFFICE**