

Ingber v DA Shark Inc.
2012 NY Slip Op 31625(U)
June 13, 2012
Supreme Court, New York County
Docket Number: 108448/2009
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
J.S.C. Justice

PART 19

Index Number : 108448/2009
INGBER, JOSH
vs.
DA SHARK
SEQUENCE NUMBER : 002
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

*and motion 3
are*

~~motion and cross-motion~~ are decided in accordance with accompanying memorandum decision.

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

FILED FILED
JUN 19 2012

NEW YORK
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Dated: 6/13/12

Saliann Scarpulla
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: CIVIL TERM: PART 19

----- X
JOSH INGBER, MATTHEW WALDMAN, and JIMMY
ESCOBAR,

Plaintiffs,

- against-

Index No.: 108448/2009
Submission Date: 03/21/2012

DA SHARK INC. and LESTON SIMPSON,

Defendants.

----- X
DA SHARK INC.

Third-Party Plaintiff,

- against-

VINO BAR AND RESTAURANT and
JBSR ENTERPRISES t/a VINO,

Third-Party Defendant.

----- X

For Plaintiffs:
The Jacob D. Fuchsberg Law Firm
500 Fifth Ave.
New York, NY 10110

For Defendant/Third Party Plaintiff Da Shark Inc.:
Melito & Adolfsen P.C.
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New York, NY 10279-0118

For Third-Party Defendants:
Lewis Brisbois Bisgaard & Smith LLP
77 Water Street, Suite 2100
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Papers considered in review of this motion for summary judgment:

- Notice of Summary Judgment
- Motion1
- Aff in Opposition2
- Reply Aff3
- Notice of Motion for Leave
to Amend4
- Aff in Opposition5
- Reply Aff6

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HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, third-party defendant Vino Bar and Restaurant and JBSR Enterprises t/a Vino (collectively "Vino") moves for summary judgment dismissing the third-party complaint against it (motion sequence no. 2). Plaintiffs Josh Ingber ("Ingber"), Matthew Waldman ("Waldman") and Jimmy Escobar ("Escobar") (collectively "plaintiffs") move separately to amend the complaint to add Vino as a first-party defendant (motion sequence no. 3). Motion sequence nos. 2 and 3 are consolidated for disposition.

This action arises from personal injuries plaintiffs sustained on the premises of defendant/third-party plaintiff Da Shark Inc. ("Da Shark"), a bar in Monticello, New York. Plaintiffs allege that in the early morning hours of December 13, 2008, defendant Leston Simpson ("Simpson") stabbed plaintiffs during an altercation at Da Shark.

At his deposition, Escobar testified that a group of men engaged in a physical altercation with Escobar's cousin while they were at Vino, another Monticello bar, earlier that evening. Escobar stated that he did not remember if any punches were thrown, but did say there was pushing. Though Simpson testified at his deposition that he was not at Vino that night, Escobar testified that he saw Simpson with the group involved in the altercation. According to Escobar, he did not remember Simpson's group doing anything at Vino, besides being "very loud," to suggest that they were intoxicated.

After the altercation, Vino's owner, Keith Rieber, called the police and closed the bar for the night. Thereafter, plaintiffs arrived at Da Shark, where they saw the same group that had argued with Escobar's cousin at Vino. According to Escobar, the group appeared intoxicated at Da Shark. Approximately an hour after plaintiffs arrived there, the fighting resumed and plaintiffs were stabbed.

Plaintiffs commenced this action in June, 2009, asserting causes of action against Da Shark for common law negligence and Dram Shop Act violations. Plaintiffs allege that Da Shark served Simpson alcohol while he was visibly intoxicated, and failed to adequately secure its premises to avoid the stabbing. In December, 2010, Da Shark asserted a third-party action for contribution against Vino on both the negligence and Dram Shop Act claims. Da Shark alleges that Vino contributed to plaintiffs' injuries by failing to provide adequate security, and by serving Simpson alcohol while he was visibly intoxicated.

Vino now moves for summary judgment, arguing that it is not liable under the Dram Shop Act because Simpson was not at Vino on the night of the incident. Vino further argues that it is entitled to dismissal of the common law negligence claim because it had no duty to protect plaintiffs after they left Vino.

In opposition, Da Shark and plaintiffs argue that Escobar's testimony creates a triable issue of fact as to whether Simpson was at Vino. On the common law negligence

claim, Da Shark argues that a jury should decide whether Vino acted unreasonably by failing to alert other bar owners about the altercation at Vino.

Plaintiffs also move for leave to amend the complaint to add Vino as a defendant in their first-party action. Plaintiffs argue that the amendment will not prejudice Vino, and that denying leave to amend would be an inefficient use of the Court's resources as it would force plaintiffs to file a separate action against Vino.

In opposition to plaintiffs' motion, Vino argues that the proposed claims are without merit, and that the amendment would prejudice Vino because it would not have an opportunity to conduct discovery as a direct defendant.¹

Discussion

Summary Judgment Motion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party, who

¹Vino also argues that the proposed amendment is untimely because the Preliminary Conference Order in the first-party action set a September 22, 2010 deadline for impleading new parties, and plaintiffs did not move for leave to amend until November 2011. However, the Court finds that Vino waived any alleged untimeliness by failing to raise it when Da Shark impleaded Vino as a third-party defendant on December 8, 2010.

must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, triable issues of fact preclude summary judgment on the Dram Shop Act cause of action. Under the Dram Shop Act, a bar owner is liable for serving alcohol to a visibly intoxicated patron where that sale “bore some reasonable or practical connection to the resulting damages.” *Dugan v. Olson*, 74 A.D.3d 1131, 1132 (2d Dept. 2010).

Vino argues that it is entitled to summary judgment because Simpson, the person who plaintiffs allege stabbed them, testified that he was not at Vino on the night of the stabbing. However, Escobar testified that Simpson was part of the group that argued with his cousin at Vino. Vino does not dispute that Escobar’s testimony conflicts with Simpson’s testimony. Escobar’s testimony creates an issue of fact as to whether Simpson was at Vino that night.

In its reply, Vino argues for the first time that there is insufficient evidence to establish that Simpson was intoxicated at Vino. As Vino did not make this argument in its moving papers, the Court may not consider the argument in determining these motions. *See Dannasch v. Bifulco*, 184 A.D.2d 415, 416-17 (1st Dept 1992).

In any event, Vino has not made an adequate showing to support dismissal based on Simpson’s alleged lack of intoxication while at Vino. It is Vino’s burden, in the first instance, to make a *prima facie* showing that Simpson was not intoxicated while at Vino. Vino has failed to present an affidavit or testimony of anyone with personal knowledge

attesting that Simpson was not intoxicated at Vino, or that Vino did not serve him alcohol while he was intoxicated. *See Dugan v. Olson*, 74 A.D.3d 1131, 1133 (2d Dept. 2010). Accordingly, the Court denies that part of Vino's motion in which it seeks dismissal of the Da Shark's Dram Shop Act cause of action.

However, Vino is entitled to summary judgment dismissing Da Shark's common law negligence cause of action. A defendant landowner's duty to protect patrons from the actions of other intoxicated patrons does not extend beyond property owned or controlled by the defendant. *See D'Amico v. Christie*, 71 N.Y.2d 76, 85 (1987). Here, it is undisputed that plaintiffs' injury did not occur on Vino's property, or on property under Vino's control. Further, it was not Vino's duty to alert other bar owners about the altercation on its property. *See Marianne OO v. C & M Tavern, Inc.*, 180 A.D.2d 998, 999-1000 (3d Dept. 1992). Accordingly, the Court dismisses Da Shark's common law negligence claim as to Vino.

Motion to Amend Complaint

In the absence of prejudice to the opposing party, "motions for leave to amend should be freely granted." *Lucido v. Mancuso*, 49 A.D.3d 220, 226-27 (2d Dept. 2008). A plaintiff seeking to amend the complaint must "simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 500 (1st Dept. 2010).

Here, the proposed amendment will not prejudice Vino. The defense Vino asserts in opposition to plaintiffs' proposed Dram Shop claim is identical to the defense Vino asserts against Da Shark, namely, that Vino did not serve Simpson while he was intoxicated. Vino argues that it will be denied the opportunity to conduct first-party discovery against plaintiffs if the Court grants leave to amend. However, Vino fails to articulate what information it could obtain from plaintiffs as first-party defendants that it did not already have an opportunity or interest in obtaining as third-party defendants.

Further, because there is an issue of fact as to whether Simpson was at Vino on the night of the stabbing, plaintiffs' proposed Dram Shop cause of action against Vino is not "palpably insufficient." *See MBIA Ins. Corp.*, 74 A.D.3d at 500.

However, plaintiffs' proposed first-party common law negligence cause of action against Vino is devoid of merit. As stated above, Vino did not have a duty to protect plaintiffs after they left Vino, thus plaintiffs may not assert a common law negligence cause of action against Vino based upon the injuries they sustained while at Da Shark. *See Smith-Hoy v. AMC Prop. Evaluations, Inc.*, 52 A.D.3d 809, 811 (2d Dept. 2008); *Bishop v. Maurer*, 83 A.D.3d 483, 485 (1st Dept. 2011).

In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment dismissing the third-party complaint made by third-party defendants Vino Bar and Restaurant and JBSR Enterprises t/a Vino is granted insofar as the common law negligence cause of action against Vino

Bar and Restaurant and JBSR Enterprises t/a Vino in the third-party complaint is dismissed, and the motion is otherwise denied; and it further

ORDERED that the motion by plaintiffs Josh Ingber, Matthew Waldman and Jimmy Escobar for leave to amend the complaint is granted insofar as plaintiffs may assert a direct cause of action for violation of the Dram Shop Act against third-party defendants Vino Bar and Restaurant and JBSR Enterprises t/a Vino, and the motion is otherwise denied. Plaintiffs are directed to serve and file an amended complaint against defendants and the proposed additional defendant within thirty days of the date of this decision.

This constitutes the decision and order of the Court.

Dated: New York, New York
June 13, 2012

FILED

JUN 19 2012

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Saliann Scarpulla
Saliann Scarpulla, J.S.C.