

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

751

CA 24-00980

PRESENT: BANNISTER, J.P., MONTOUR, NOWAK, DELCONTE, AND KEANE, JJ.

DIAMOND GONZALEZ, PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF BUFFALO, ET AL., DEFENDANTS,
AND POIZE, INC., DEFENDANT-RESPONDENT.

PENBERTHY LAW GROUP LLP, BUFFALO (BRITTANYLEE PENBERTHY OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

TIVERON LAW, PLLC, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered June 5, 2024, in a personal injury action. The order and judgment granted the motion of defendant Poize, Inc., for summary judgment and dismissed the complaint against said defendant.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the motion is denied in part and the first cause of action is reinstated against defendant Poize, Inc.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly suffered when she was struck by a vehicle operated by an intoxicated driver. Plaintiff's first two causes of action were asserted against Poize, Inc. (defendant), among others. Defendant moved for summary judgment dismissing the complaint against it, and Supreme Court granted the motion. Plaintiff now appeals, as limited by her brief, from the resulting order and judgment insofar as it granted that part of defendant's motion with respect to the first cause of action, which asserted that defendant was responsible for her injuries inasmuch as it sold or provided alcohol to the driver at a time when she was visibly intoxicated, in violation of General Obligations Law § 11-101 and Alcoholic Beverage Control Law § 65 (2). We reverse the order and judgment insofar as appealed from.

We agree with plaintiff that defendant failed to meet its initial burden on that part of the motion with respect to the first cause of action. Under the General Obligations Law, anyone "who shall, by unlawful selling to or unlawfully assisting in procuring liquor for [an] intoxicated person, have caused or contributed to such intoxication" is liable for injuries caused to third parties by reason

of the intoxicated person's intoxication (§ 11-101 [1]), including injuries resulting from intentional torts (see *Sahr v Schmidli*, 236 AD2d 785, 785 [4th Dept 1997]). Here, plaintiff alleges that defendant's provision of alcohol to the driver was unlawful under Alcoholic Beverage Control Law § 65 (2), which provides that "[n]o person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away, any alcoholic beverages to . . . [a]ny visibly intoxicated person."

We conclude that defendant failed to meet its initial burden of establishing that the driver was not visibly intoxicated at the time she was served in defendant's bar (see *Calagiovanni v Carello*, 177 AD3d 1286, 1286 [4th Dept 2019]). In support of the motion, defendant submitted evidence that, throughout the evening preceding the accident, plaintiff and a group of others—including the driver—were out celebrating and consumed alcohol. Just before they went to defendant's bar, the entire group had been denied entry into another establishment because some members of the group were visibly intoxicated. At defendant's bar, the group was served and consumed more alcohol. Although defendant's owner and employees testified that defendant's employees as a general practice do not allow visibly intoxicated persons to drink alcohol and that the employees were trained to recognize visibly intoxicated people, no one could specifically recall seeing the driver, nor could they describe the driver's level of intoxication on the night at issue (see *Bauseman v Pamdh Enters., Inc.*, 220 AD3d 561, 561 [1st Dept 2023]; *Calagiovanni*, 177 AD3d at 1286). In fact, none of the deposition testimony submitted by defendant was from an individual physically present inside the bar at the time the driver was allegedly served. Because defendant's submissions were insufficient to demonstrate entitlement to judgment as a matter of law that the driver was not visibly intoxicated at the time she was served, the burden never shifted to plaintiff to demonstrate the existence of material issues of fact that require a trial of the action (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

All concur except DELCONTE and KEANE, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent inasmuch as we disagree with the majority's conclusion that defendant failed to meet its initial burden with respect to that part of its motion seeking summary judgment dismissing plaintiff's statutory cause of action against it.

"The visibly intoxicated standard [under Alcoholic Beverage Control Law § 65 (2)] was specifically crafted to limit the tavern keeper's exposure and to preclude the imposition of a regulatory or monetary penalty when he or she had no reasonable basis for knowing that the consumer was intoxicated" (*Romano v Stanley*, 90 NY2d 444, 449 [1997] [internal quotation marks omitted]). As the proponent of the motion, it was incumbent upon defendant to establish, *prima facie*, that it "did not procure or sell alcohol to [the driver], . . . that [the driver] was not visibly intoxicated when she was furnished alcohol" (*Abate v Black Wolf*, 219 AD3d 1118, 1119 [4th Dept 2023]), or that its sale of alcohol to the driver had no reasonable or practical

connection to plaintiff's alleged injuries (see *Oursler v Brennan*, 67 AD3d 36, 43 [4th Dept 2009]; see also *Sherwood v Otto Jazz, Inc.*, 142 AD3d 1160, 1160 [2d Dept 2016]).

Contrary to the majority, we conclude that defendant met its initial burden on the motion by submitting uncontradicted deposition testimony "in which its employees averred that they had no recollection that [the driver] was visibly intoxicated while she was . . . at [defendant]'s establishment" (*Kish v Farley*, 24 AD3d 1198, 1199 [4th Dept 2005]; see *Giordano v Zepp*, 163 AD3d 781, 782 [2d Dept 2018]). Specifically, defendant's employees testified that staff are trained to recognize visibly intoxicated persons; that bartenders do not allow visibly intoxicated persons to drink alcohol; and that bouncers do not allow visibly intoxicated persons to enter the bar, that they make rounds inside the establishment in order to observe the patrons and determine if anyone is visibly intoxicated, and that they signal the bartenders to stop serving alcohol to patrons who are visibly intoxicated. Additionally, a bouncer testified that he recalled conducting "rounds inside the establishment" on the night of the incident and that he observed the patrons, as was his routine, but did not "signal[] to the bartenders that anyone was intoxicated."

We further conclude that, in opposition, plaintiff failed to raise a triable issue of fact whether the driver had been served alcohol by defendant when she was visibly intoxicated inasmuch as she failed to present any evidence that the driver "exhibited signs of intoxication at the time she was served in [defendant's] establishment[]" (*Romano*, 90 NY2d at 450; cf. *Calagiovanni v Carello*, 177 AD3d 1286, 1286-1287 [4th Dept 2019]). We would, therefore, affirm.