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Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

Present: Hon. JOHN A. MILANO, PART IAS 3  
Justice

-----x Index # 5350/99

MICHAEL MICHAEL,

Motion date: 9/25/01

Plaintiff,

-against-

Cal. # 22

KELLY’S INN and FRANK PAGANO,  
Defendants.

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The following papers numbered 1 to 9 read on this motion by co-defendant Kelly’s Inn for summary judgment of dismissal.

N/M, AFF., EXHIBITS A-F AND SERVICE .....	1-4
AFF. IN OPP., EXHIBIT A AND SERVICE .....	5-7
REPLY AND SERVICE .....	8-9

Upon the foregoing papers it is ordered that this motion is decided as follows:

This is an action by plaintiff to recover for personal injuries sustained by plaintiff when he was attacked by defendant Frank Pagano on the premises of defendant Kelly’s Inn. Plaintiff contends that shortly after arriving at Kelly’s Inn he was “sucker punched” by Pagano.

Kelly’s Inn moves for summary judgment of dismissal of all claims against it claiming no liability under any theory of law, either the Dram Shop Act or Common Law Negligence.-

For liability to lie under the Dram Shop Act, GOL § 11-101, the claimant must establish, that the Dram Shop furnished an alcoholic beverage to a “visibly intoxicated person”.

Movant’s counsel has summarized for this court, the pleadings and discovery material addressed to date and makes a demonstration that there is no credible evidence of Dram Shop liability against Kelly’s Inn.

The deposition testimony of plaintiff himself does not indicate any credible evidence that defendant Pagano was “visibly intoxicated” when he attacked plaintiff.

The sole evidence presented by plaintiff in opposition to this motion is the deposition testimony of Theresa Palladino, a witness at the time of the attack and apparently a former girlfriend of the plaintiff. First, Palladino testified that she saw defendant Pagano before the

incident. Palladino arrived at Kelly's Inn five minutes before the incident and saw defendant Pagano "with a beer". Palladino then testified that in her opinion Pagano was intoxicated and the basis of her opinion was that "he was rowdy and he was like very violent". Pagano explained that her use of the term "rowdy", meant that Pagano was "Like trying to start a fight." " When we got there he was like that". In response to plaintiff's counsel's question "How was he trying to start a fight when you got there?", Palladino replied, "He was rambling on about Michael (the plaintiff)." Palladino further testified she never spoke to defendant Pagano.

This court believes the case of Romano v. Stanley, 90 NY2d 444, 661 NYS2d 589 (1997) is relevant to the action sub judice. In Romano, the court addressed the requirement of a showing that liquor was served to a "visibly intoxicated person" before Dram Shop liability will attach.

In Romano the issue concerned the sufficiency of circumstantial forensic evidence concerning the drinker's blood and urine alcohol levels. The forensic expert claimed that based upon these levels, to a reasonable degree of medical certainty, the drinker would likely have exhibited visible signs of intoxication to a bartender. There was also evidence of what and how much the drinker had consumed at each of the bars sued under the Dram Shop Act.

The Court of Appeals held at page 451 that "an expert's affidavit proffered as the sole evidence to defeat summary judgment motion must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor".

The Court of Appeals ruled that the summary judgment motions brought by the bars should have been granted, dismissing claims against them as there was insufficient evidence that the drinker was "visibly intoxicated".

In the case before this court there is no expert testimony, no evidence of any blood or urine alcohol level and no evidence of what or how much defendant Pagano had been drinking, other than Palladino's observation he was drinking beer. Palladino specifically denied knowledge of how many drinks were served to Pagano.

The sole evidence presented by plaintiff to establish that the Kelly's Inn's bartender should have known Pagano was "visibly intoxicated" is Palladino's testimony. Her testimony consisted solely of her conclusion Pagano was intoxicated because he was "rowdy and violent"

and “trying to start a fight” because “he was rambling on about Micheal [plaintiff] ”.

No other evidence was presented of defendant Pagano’s alleged intoxication and no evidence was presented to establish that Kelly’s Inn had notice of such intoxication or if intoxicated, whether such intoxication was “visible”.

The Court of Appeals in Romano found the testimony of the expert was “mere speculation” and insufficient to defeat the summary judgment motions of the establishment that served alcohol. In the action, sub judice, the evidence presented by plaintiff is far less compelling. By no fair interpretation of the evidence could a jury conclude that Palladino’s testimony was anything more than mere speculation and as such would be insufficient to support a verdict in the proponents favor.

No credible evidence has been presented to establish any Common Law Negligence liability against movant.

Accordingly, summary judgment is granted and all claims are dismissed as against defendant, Kelly’s Inn.

Upon the filing of a Note of Issue, plaintiff is granted leave to contact this Court to schedule an inquest upon notice, against defaulting defendant Frank Pagano.

Dated \_\_\_\_\_

\_\_\_\_\_  
John A. Milano J.S.C.