

Sucietto v Radio Bar LLC
2007 NY Slip Op 30664(U)
April 4, 2007
Supreme Court, New York County
Docket Number: 0100875/2005
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLOW

PART _____

PRESENT:

Index Number : 100875/2005
SUCIETTO, BRADEN
vs
RADIO BAR LLC
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 11/13/07
MOTION SEQ. NO. _____
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	
1-2	_____
3-4	_____
5-6	_____

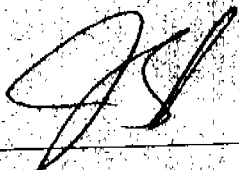
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

N.B. -- pre-trial conference is scheduled for May 7, 2007 at 2 PM

FILED

Dated: 4/4/07


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

[*2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55
-----X

BRADEN SUCIETTO,

Plaintiff,

-against-

RADIO BAR LLC, 119 BAR and "JOHN DOE",

Defendants.
-----X

DECISION AND ORDER

INDEX NO. 100875/05

JANE S. SOLOMON, J.

Defendant Radio Bar LLC moves for summary judgment dismissing the complaint against it, or alternatively, for an order limiting plaintiff's proof at trial. By a separate motion, Radio Bar seeks leave to this action with Sucietto v Minth, index number 108283/05, also pending before me.

As a preliminary matter, the motion for summary judgment is not supported by an affidavit and does not include copies of the complaint or any other pleading (see CPLR 3212[b]), but the court can surmise the lawsuit is one to recover damages for personal injury. The motion to consolidate also lacks copies of pleadings, and notably is not served on anyone other than plaintiff's attorney. It appears from the court's records that the defendant there is in default, and an inquest against him has been held in abeyance pending decision herein. On the motion, however, Plaintiff contends that the actions involve different legal issues.

Plaintiff Braden Suciетto ("Suciетto") alleges that he sustained injuries as the result of being assaulted by two men in a drinking establishment operated by Radio Bar (the "Bar"), located on East 15th Street in Manhattan. Suciетto left the Bar to call for help; outside, he was attacked again after the bartender requested that the assailants also leave the Bar. Suciетto sued Radio Bar under the Dram Shop Law (General Obligations Law § 11-101), alleging that its employee served drinks to the men who struck Suciетto, and that the assailants were visibly intoxicated. As against Minth, his claim is for assault and battery.

In support of his claim that the assailants were visibly intoxicated, Suciетto contends that he observed them and they appeared drunk. He also relies on statement given to plaintiff's investigator by Radio Bar's bartender, Brian Burke. Burke said that he witnessed the assault, that the assailants were drunk and had been drinking for a while, and that Burke had just bought them a round of drinks before the assault. Aff. of Lawrence B. Saftler, Esq., at Exh. 2. At his deposition, Burke testified that he was the only employee in the Bar that night. The Bar had a capacity of approximately eighty patrons, although only twenty were present at the time of the assault. He saw plaintiff being attacked after hearing the yells of other patrons. He had served the assailants at least four rounds of

beer in two hours, and perhaps a shot or two of liquor. He admitted he served them a round on the house soon before the altercation. He denied, however, that they were "visibly drunk".

Sucietto testified at his deposition that he observed his assailants just before the attack. He observed that the principal assailant, described as the "red haired" one, spoke loudly with slurred speech, was leaning over, acting belligerent, and appeared to be "not sober." Sucietto Deposition Transcript, p. 188.

On this record, Bar Radio cannot establish as a matter of law that it is not liable under the Dram Shop Law. A question of fact exists as to whether the "red haired" assailant was visibly intoxicated when Burke served him a drink just before the assault. Burke stated that he served him between four and six drinks in the two hours before the assault. Sucietto observed objective signs of intoxication just before the assault, at approximately the same time as Burke served the final drink. A jury could conclude that the assailant was visibly intoxicated, even if Burke failed to notice it. Bar Radio also has not met its burden to show that Sucietto's negligent supervision claim must be dismissed as a matter of law; the attack began in the Bar and a question of fact exists as to whether it may have been averted if the establishment was properly staffed.

Radio Bar also seeks to preclude neurological evidence

of Sucietto's injury at trial. The memorandum in support of the motion makes reference to a letter report prepared by a treating physician. In a memorandum of law, Bar Radio's counsel questions the correctness of the physician's medical conclusions. Counsel's opinion is not relevant to this issue, and matters regarding the evidence to be presented at trial may be addressed at the pre-trial conference directed below. Accordingly, it hereby is

ORDERED that Bar Radio's motion for summary judgment (motion sequence 03) is denied; and it further is

ORDERED that the motion to consolidate (motion sequence 02) is granted to the extent that the Inquest in Sucietto v Minth, index number 108283/05, shall be held together with the trial in this action so as to conserve judicial resources, and if this action is settled, the Inquest shall proceed forthwith thereafter.

Dated: April 4, 2007

ENTER:



J. S. C.

JUDIE S. SOLOMON