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

PRESENT: CAROL EDMEAD J.S.C. PART 35

Justice

Index Number : 109993/2004
LUCAS, SANTIAGO VEGA
VS
NEW CHEN CHEN CORP
Sequence Number : 007
SUMMARY JUDGMENT

INDEX NO. 109993/04
MOTION DATE 4/26/07
MOTION SEQ. NO. 007
MOTION CAL. NO.

this motion to/for

PAPERS NUMBERED

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 19 2007
COUNTY CLERK'S OFFICE
NEW YORK

This motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the portion of the cross motion which seeks to strike defendants' answer is denied; it is further

ORDERED that the portion of the defendants' motion which seeks summary judgment dismissing the complaint as against them in its entirety as unsubstantiated as a matter of law is granted and the complaint is hereby dismissed as against them; and it is further

ORDERED that any and all other relief sought by the parties is denied. It is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

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

Dated: 7/12/07

CAROL EDMEAD J.S.C.
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 35

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SANTIAGO VEGA LUCAS, as administrator of the Estate of LEONIDES MILAN,

Plaintiff,

Index No. 109993/04

-against-

NEW CHEN CORP., doing business as "IMPERIAL GARDEN", and John Doe, Proprietor, SHAN HAN CORP. and BAO DONG CHEN, Individually and as a Principal of Shan Han Corp.,

Defendants.

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CAROL ROBINSON EDMEAD, J.:

MEMORANDUM DECISION

This is a wrongful death action alleging that decedent employee became excessively intoxicated at his employer's after- hours company party, causing his death. The complaint alleges causes of action under the Dram Shop Act, section 65 of the Alcoholic Beverage Control Law and common-law negligence. Defendants, owners of Imperial Garden restaurant (the Restaurant), move, pursuant to CPLR 3212, to dismiss the complaint, and all cross claims as against them. Defendants alternatively seek an order of preclusion pursuant to CPLR 3126.

Plaintiff, the administrator of the estate of Leonides Milan, former employee of defendants (decedent), moves pursuant to CPLR 3126 for an order precluding defendant Bao Dong Chen (Chen) from testifying, due to his asserted intentional disregard of discovery obligations.

On the evening of January 30, 2003, Leonides Milan (decedent) attended a Chinese New Year Party held after hours at Imperial Garden, the Chinese restaurant of his employer, Chen,

located at 536 Third Avene in New York City. Decedent worked as a dishwasher/cook at Imperial Garden. That evening, after the Restaurant closed for business, Chen encouraged Milan and approximately 15 other individuals present, including employees and friends, to eat whatever food and drink they wished to consume. The parties agree that no employees were charged for the alcohol or food. According to the allegations in the complaint, decedent and another employee, Ernesto Rosette, were offered large cups of an unidentifiable alcoholic drink. They initially refused the offer of drink but upon Chen's insistence, they both drank the drink that their employer poured for them (First Amended Verified Complaint, annexed to Defendants' Motion for Summary Judgment as Ex. C). According to an affidavit submitted by Rosette, who is also decedent's cousin, Milan and Rosette felt socially pressured to drink the alcohol offered to them by Chen, so as not to insult their employer (Affidavit of Ernesto Rosette dated June 30, 2004, annexed to the Plaintiff's Affidavit in Opposition to the Motion for Summary Judgment). Rosette did not see anyone else offered the drink (*id.*). While Rosette stopped after drinking two cups because he felt himself becoming intoxicated, Milan did not stop until he had approximately eight cups (*id*). Later that evening decedent became ill, fell to the floor, was taken away from the Restaurant by ambulance and died the next day at 4:30 a.m.

Milan's administrator commenced the present action against *inter alia*, Shan Han Corp., the corporation that owns Imperial Gardens, and Chen, the owner of Shan Han Corp. and manager of Imperial Garden, claiming that Chen's conduct in serving decedent alcoholic beverages in violation of law was the proximate cause of his death. Chen and Shan Han Corp. deny the factual allegations in Milan's complaint, maintaining instead that at no time did he force, intimidate or even encourage any of the attendees of the party to consume alcohol (*see*

Affidavit of Bao Dong Chen, dated June 21, 2005, annexed to Defendants' Motion for Summary Judgment as Ex S). In fact, Chen maintains that when he observed Milan consume several cups of the whiskey he had provided for guests, Chen avers that he asked Milan to stop, reminding him that he had to work the next day (*id.*).

Plaintiff's cross motion to strike defendants' answer and/or preclude Chen from testifying, based upon defendant Chen's asserted bad faith in failing to comply with certain discovery requests is denied as without merit. When a plaintiff files a Note of Issue with a Certificate of Readiness asserting that all discovery is complete, as plaintiff has done in this matter, the plaintiff waives the right to conduct further discovery (*Abbott v Memorial Sloan Kettering Cancer Center*, 295 AD2d 136 [1st Dept 2002]). In addition, in order to strike a defendant's answer there must be a "clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith [quotation marks and citation omitted]" (*Byrne v City of New York*, 301 AD2d 489 [2nd Dept 2003]). A review of the numerous discovery requests and responses that have filled the record over the years reveals that any alleged faulty record keeping on behalf of Chen regarding the full names and addresses of his employees over the years was clearly not done in a willful or contumacious manner warranting a striking of defendants' answer, especially in light of the fact that plaintiff was given the identity of the Restaurant's accountant who possibly could have provided plaintiff with such names (Affidavit of Bao Dong Chen, annexed to the Defendants' Opposition to Cross Motion, Ex N).

With regard to defendants' motion for summary judgment, neither the statutory claims nor the common-law claims asserted can be supported on the facts as alleged by plaintiff. In order to meet their burden, defendants must come forward with admissible evidence reciting

material facts and showing that the plaintiff's causes of action have no merit (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). To defeat the defendants' motion requires a demonstration of facts sufficient to require a trial or an acceptable excuse why plaintiff did not have access to those facts (*Conigliaro v Franco*, 122 AD2d 15 [2nd Dept 1986]).

Viewing the complaint's allegations and all of the evidence and affidavits in the light most favorable to plaintiff non-movant, noting that summary judgment is a drastic remedy (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]), the court finds that there are no genuine triable issues of fact (*Zuckerman v City of New York*, 49 NY 2d 557, *supra*), and this court finds that neither the statutory claims nor common-law claims are legally maintainable.

The court first considers plaintiff's claim against Chen and the Restaurant under the Dram Shop Act (General Obligations Law § 11-101, or the Statute). "[H]istorically it was the drinking of alcohol, not the furnishing of it, that was regarded as the proximate cause of alcohol-induced injury. There was therefore no basis for imposing liability on persons who merely furnished alcohol, for injuries caused by an intoxicated person" (*D'Amico v Christie*, 71 NY2d 76, 84-85 [1987]). New York courts have continued to consistently refuse to recognize a common-law cause of action against providers of alcoholic beverages in favor of persons injured as a result of their inebriation (*Sheehy v Big Flats Community Day*, 73 NY2d 629, 636 [1989]; *Butler v New York City Transit Authority*, 3 AD3d 301 [1st Dept 2004]). The Dram Shop Act is a vehicle created by the Legislature for affording civil damages to a third party injured or killed by an intoxicated person against a commercial provider of alcoholic beverages (*D'Amico*, 71 NY2d at 83). Specifically, the Statute provides a right of action by "[a]ny person injured in person, property, means of support, or otherwise by any intoxicated person" against the person who

unlawfully sold or assisted in the procuring of the intoxicated person's alcohol" (id). Clearly, the plain wording of the Dram Shop Act does not provide for recovery by decedent who undeniably did not purchase his drinks but instead had consumed them at a party *(Conigliaro v Franco*, 122 AD2d supra at 16). Importantly, nor can he seek damages under the Statute because they stem from injuries resulting from his own intoxication (*Sheehy v Big Flats Community Day*, 73 NY2d at 636); *Mitchell v The Shoals, Inc.*, 19 NY2d 338, 340-341 [1967]; *Butler v New York City Transit Authority*, 3 AD3d at 302); *Livelli v Teakettle Steak House*, 212 AD2d 513 [2d Dept 1995]) nor should the court try to read the words broadly as the Statute is an exception to the common law, and as such it must be construed narrowly (*D' Amico,* 71 NY2d at 83*)*.

Nor is there a cause of action under section 65 of the Alcoholic Beverage Control Law since it has long been established that this statute does not create an independent statutory cause of action *(Butler v New York City Transit Authority*, 3 AD3d at 302; *Moyer v Lo Jim Café*, 19 AD2d 523 [1st Dept 1963], *affd* 14 NY2d 792 [1964]).

With regard to plaintiff's purported common-law claims, this court concludes that they are fatally flawed as well. As noted above, New York courts have consistently refused to impose a "common-law duty to protect a person whose injuries are the results of his or her own voluntary intoxication, and have refused to recognize a common-law cause of action against providers of alcoholic beverages for injuries to such persons" (*Butler v New York City Transit Authority*, 3 AD3d at 301-302; *Sheehy v Big Flats Community Day*, 73 NY2d at 636). This is because at common law, "[e]xcessive alcohol consumption was deemed to be the proximate cause of injuries produced by the inebriate; selling or furnishing alcohol to an adult who elected to become intoxicated was not viewed as the root of the resulting harm" (*D'Amico v Christie*, 71

NY2d at 83).

As noted by plaintiff, landowners in general do have a duty to act in a reasonable manner to prevent harm to those on their property (*Basso v Miller*, 40 NY2d 233, 241 [1976]). Specifically, a property owner has a duty to protect third persons on their premises, or in other areas within the property owner's control, from a known danger (*De Ryss v New York Cent. R.R. Co.*, 275 NY 85 [1937]). Applying this reasoning, a limited exception to the general common-law rule has been recognized in cases where injuries to a third person were caused by an intoxicated guest, at least when a reasonable opportunity to supervise was present *(Joly v Northway Motor Car Corp.*, 132 AD2d 790 [3d Dept 1987]). Importantly, with respect to the derivative claims of support, the duty cited applicable to third persons extends only to those persons who are physically present on the defendant's property, and is thus inapplicable to the members of decedent's family who were undisputedly not present during the incident at issue (*D'Amico v Christie*, 71 NY2d at 85; *Paul v Hogan*, 56 AD2d 723 [4th Dept 1977]*; Dollar v O'Hearn,* 248 AD2d 886 [3rd Dept 1998]). Significantly, the limited duty runs to third parties to protect them against the potential danger, i.e., the intoxicated person on their premises, and has no application in a case such as this, which involves an attempt to recover by the person who voluntarily became intoxicated.

Moreover, plaintiff's assertion that there is a triable issue of fact as to whether defendants violated their duty to provide decedent with a safe work environment, is in complete contradiction of the undisputed facts that the party occurred after work hours (*see* Chen Affidavit, Ex O to Defendants' Notice of Motion). As the decedent was not in the course of his employment or performing any work, Labor Law § 200 is not applicable (*Artiga v Century*

Management Co., 303 AD2d 280 [1st Dept 2003]). Moreover, even if the incident occurred during working hours, plaintiff has failed to demonstrate any potential liability for an unsafe work site due to the consumption of alcoholic beverages since there has been no showing of a violation of defendant's own internal rules or any violation of Labor Law § 200 to support their assertions (*Horan v Cold Spring Construction Company*, 109 Misc 2d 1034 [Sup Ct, Steuben County 1981]).

Finally, plaintiff relies upon the public policy behind the hazing case of *Oja v Grand Chapter of Theta Chi Fraternity Inc.* (257 AD2d 924 [3d Dept 1999]) to support his assertion that decedent's employer's conduct in serving him drinks was the proximate cause of decedent's injuries. According to plaintiff, this court should find, as the court did in *Oja*, that there is a triable issue of fact as to whether the decedent's intoxication was completely voluntary, warranting denial of the motion.

In *Oja,* the plaintiff alleged a private right of action against fraternity members based upon violations of the New York State anti-hazing statute, Penal Law § 120.16, for having recklessly caused the decedent minor, who was pledging their fraternity, to consume voluminous amounts of alcohol during a hazing ritual. In support of plaintiff's negligence claim, it was alleged that the decedent became intoxicated, that defendants recklessly left the decedent unsupervised, knowing that his life was in danger by reason of intoxication, and after numerous regurgitations induced by the drinking, the decedent died and was left unattended in that condition. The court in *Oja* found a possible issue of fact as to whether the public policy of protecting impressionable college youths from being bullied and humiliated under the anti-hazing statute can be extended to permit a civil damages claim based upon the possibility of a finding by

a jury that an adolescent pledge's endurance of pain and discomfort in order to join a fraternity is not entirely voluntary. Thus, the opinion in *Oja* is an attempt to provide a civil remedy for a criminal violation that protects minors from hazing traditions that the Legislature has determined needed reform. In support of their request for damages, plaintiff, importantly, has cited no penal statute or public policy protecting decedent, an adult, from the effects of being offered a drink at a company party. Nor has the court found any on point. Moreover, the alleged facts in this matter are vastly different from those alleged in *Oja* in that decedent is not a vulnerable minor who was bullied and coerced into a state of intoxication and then recklessly left unattended alone to die, but rather, at best, an adult who was merely furnished drinks by his employer at a company party.

Thus, based upon the foregoing, defendants' motion for summary judgment is granted and the complaint is dismissed in its entirety, as plaintiff has no remedy on these facts.

Accordingly, it is

ORDERED that the portion of the cross motion which seeks to strike defendants' answer is denied; it is further

ORDERED that the portion of the defendants' motion which seeks summary judgment dismissing the complaint as against them in its entirety as unsubstantiated as a matter of law is granted and the complaint is hereby dismissed as against them; and it is further

ORDERED that any and all other relief sought by the parties is denied. It is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

Dated: July 12, 2007

Hon. Carol Robinson Edmead, J.S.C.