

Fama v 155 Second Ave. Rest., Inc.

2007 NY Slip Op 32394(U)

July 30, 2007

Supreme Court, New York County

Docket Number: 0104551/2003

Judge: Walter Tolub

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

PRESENT: _____ PART _____

Index Number : 104551/2003

FAMA, PATRICK

EX NO. _____

vs

TION DATE _____

155 SECOND AVENUE RESTAURANT

TION SEQ. NO. _____

Sequence Number : 001

TION CAL. NO. _____

SUMMARY JUDGMENT

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

Cross-Motion: Yes No

AUG 03 2007

Upon the foregoing papers, it is ordered that this motion

NEW YORK COUNTY CLERK'S OFFICE

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 7/30/07

J.S.C.

WALTER B. TOLUB

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 15

-----x
PATRICK FAMA,

Plaintiff,

Index No.104551/03
Mtn Seq.001

-against-

155 SECOND AVENUE RESTAURANT, INC.
D/B/A THE THIRSTY SCHOLAR

Defendant.
-----x

FILED
AUG 03 2007
NEW YORK
COUNTY CLERK'S OFFICE

WALTER B. TOLUB, J.:

By this motion, defendant seeks summary judgment pursuant to CPLR §3212. Defendant's motion is denied in its entirety.

Background

Defendant 155 Second Ave. Restaurant, Inc. d/b/a The Thirsty Scholar ("defendant") is a bar located on Second Avenue in Manhattan. Patrick Fama ("plaintiff") was a patron in defendant's bar on March 17, 2000- St. Patrick's Day. Plaintiff claims that he initially entered defendant's bar at 4pm, but left, only to return around midnight on March 18, 2000. Plaintiff claims that when he returned to defendant's bar, he was punched in the face by an unknown assailant. Plaintiff and defendant concede that a fight ensued in the bar. Plaintiff claims that during the fight, he and the assailant were separated by defendant's employees. According to plaintiff, one of defendant's bartenders escorted plaintiff outside of the bar onto

* 3]

Second Avenue where plaintiff's assailant and several other people were already standing. Plaintiff claims that, upon seeing the unknown assailant in front of defendant's bar, the unknown assailant resumed the fight on the sidewalk of Second Avenue. Subsequently, plaintiff claims that a second unknown assailant standing outside of defendant's establishment on Second Avenue, who he neither recalls seeing inside the bar, nor with the first assailant, struck him above the left eye with an empty beer bottle. The fight resulted in plaintiff sustaining a fractured nasal bone and lacerations to the face.

Plaintiff commenced this action on March 10, 2003 claiming that defendant acted negligently by ejecting plaintiff from inside the bar onto the sidewalk where his first assailant and several other individuals were already standing.

Discussion

As with any motion for summary judgment, success is wholly dependent on whether the proponent of either of the respective motions has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotes omitted]). "A party is entitled to summary judgment if the

sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law" (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:80). "This means that none of the material elements of the claim or defense are in dispute" (Id.).

On defendant's motion for summary judgment, defendant may demonstrate the lack of several prima facie elements of plaintiff's case (Id. at §37:182). However, to prevail, defendant only needs to demonstrate the absence of a single element (Id.). Once defendant presents evidence showing the absence of facts necessary to establish a prima facie case, the burden shifts to the plaintiff (Id. at §37:190). If the plaintiff is unable to produce sufficient evidentiary proof establishing the existence of material facts requiring trial, (Zuckerman v City of New York, 49 NY2d 557 [1980]; Pemberton v. New York City Tr. Auth., 304 AD2d 340 [1st Dept 2003]), summary judgment will be granted.

Defendant argues that plaintiff has not made a prima facie case of negligence against them, specifically, that defendant was negligent in failing to prevent injury to plaintiff in a situation that could have reasonably been anticipated or prevented. To prove a prima facie case of negligence, "a plaintiff must establish the existence of a duty on the part of

the defendant, a breach of that duty, and that the breach of said duty was a proximate cause of his or her injuries" (Lodico v City of New York, 2007 WL 1463302, 2007 NY Slip Op- 51017 (u), 15 Misc. 3d 1137(A) [Sup Ct., Richmond Co. 2007]). See Del Bourgo v Sidelines Corp., 208 A.D. 2d 795, 796 [2d Dept 1994]; Bernstein v Starrett City, Inc., 303 A.D. 2d 658, 659 [2d Dept 2003]. The degree of care reasonably necessary against foreseeable dangers depends upon the attendant circumstances (Rotz v The City of N.Y., 143 A.D. 2d 301, 304 [1st Dept 1988]). Without a duty of care, there can be no breach and therefore, no liability (Bernstein, 303 A.D. 2d 658, 659).

Generally in negligence suits, the issue is whether the defendant or the plaintiff acted reasonably under the circumstances (Andre v Pomeroy, 35 N.Y. 2d 361, 364 [1974]). Foreseeability usually poses questions for the trier of fact and is rarely decided as a matter of law (Silver v Sheraton-Smithtown Inn 121 A.D. 2d 711, 712 [2d Dept 1986]).

A public establishment has a duty to act in a reasonable manner to prevent harm to those on their property. (Banayan v F.W. Woolworth Co., 211 A.D. 2d 591, 592 [1st Dept 1995]). See also Millan v AMF Bowling Centers, 38 A.D. 3d 860, 860-61 [2d Dept. 2007]). The duty of a public establishment to protect its patrons from a foreseeable risk of harm only arises when the

establishment has the opportunity to control its patrons, and the establishment is reasonably aware of the need for control (Banayan, 211 A.D. 591, 592; Millan, 38 A.D. 3d 860,860-61). Therefore, a public establishment can only be negligent when the event giving rise to the injury was foreseeable, and the event could have been prevented with the exercise of appropriate care (Pinero v Rite Aid of N.Y., 294 A.D. 2d 251, 252 [1st Dept 2002]) as there is no duty to protect patrons from unforeseeable and unexpected assaults on its premises unless a foreseeable risk of harm from third persons on its premises exists (Rivera v. 21st Century Restaurant, Inc., 199 A.D. 2d 14, 15 [1st Dept 1993]).

In this case, plaintiff's deposition raises a question of fact as to whether the attack causing plaintiff injuries was reasonably foreseeable by defendant's employees. That issue of fact is a triable question for the jury. As such, summary judgment is denied.

Accordingly, it is


ORDERED that defendant's motion for summary judgment is denied.

Counsel for the parties are directed to appear for the mediation scheduled for September 10, 2007. If the mediation does not resolve this action, counsel shall appear for a Pretrial

Conference in 1A Part 15, Room 335, 60 Centre Street, New York,
New York at 11:00am on October 12, 2007.

This memorandum opinion constitutes the decision and order
of the Court.

Dated: 7/30/07



HON. WALTER B. TOLUB, J.S.C.

FILED

AUG 03 2007

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