

Mangels v Salvadoreno

2007 NY Slip Op 33809(U)

November 2, 2007

Supreme Court, Nassau County

Docket Number: 3154-06/

Judge: F. Dana Winslow

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 9

KEITH MANGELS

NASSAU COUNTY

Plaintiff,

MOTION DATE: 8/27/07

-against-

MOTION SEQ. NO: 002

RINCONSITO SALVADORENO, ELEFThERIOS
LINDIAKOS, DEBRA LINDIAKOS, ELMER
CRUS-GUDIEN and JOHN DOE

INDEX NO.: 003154/06

Defendants.

The following papers read on this motion (numbered 1-4):

- Notice of Motion.....1
- Notice of Cross Motion.....2
- Affirmation in Opposition.....3
- Reply Affirmation.....4

This motion by defendants Eleftherios and Debra Lindiakos for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and any and all cross-claims against them is **granted**.

This cross-motion by defendant Riconsito Salvatoreno for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint against him is **denied**.

In this action, the plaintiff Suffolk County Police Officer Keith Mangels seeks to recover for injuries suffered on the job. He alleges that he was assaulted by defendant Elmer Crus-Gudien while he was attempting to arrest him. Plaintiff seeks to recover of the defendant Riconsito Salvatoreno ("the Deli") on the

grounds that it allegedly served or sold Crus-Gudien and/or John Doe alcohol when they were intoxicated. Plaintiff also seeks to recover of the individual Lindiakos defendants on the ground that they allegedly operated, managed and supervised the deli. The Lindiakos in fact owned the building as well as the Thrifty Beverage store adjacent to the deli. Although plaintiff has not pled it, the Lindiakos were the Deli's landlords as well as its beer supplier.

In his complaint, the plaintiff Police Officer alleges that he was on duty on July 2, 2005, and that when he responded to an incident report on Route 110 in Huntington, in his attempt to restrain and arrest defendant Crus-Gudien and/or John Doe, he was injured in a struggle. He alleges that the Lindiakos defendants and/or the deli were negligent and violated General Obligations Law § 11-101 *et seq.*, Alcohol Beverage Control Law § 65, as well as General Municipal Law § 205-e, by selling defendants Crus-Gudien and/or John Doe alcoholic beverages and that that sale resulted in his injuries.

At his deposition, the plaintiff Police Officer testified that at about 3:15 AM, he was parked outside the deli for 15 to 20 minutes observing suspicious behavior that he thought might be a drug deal. He then observed defendants Cruz-Gudien and Doe exit the deli carrying open containers of beer. Plaintiff testified that he observed both men stumbling around and that they appeared intoxicated. He testified that after he saw the men begin to urinate in the street, he approached them and observed that they were unsteady on their feet, slurring their speech and appeared visibly intoxicated. In the course of attempting to restrain and arrest Cruz-Gudien, a struggle between them developed and plaintiff fractured a bone in his hand. More specifically, plaintiff testified at his examination-before-trial that defendant Crus-Gudien became irate when he was writing him out a ticket and that

when he told Crus-Gudien that he was going to arrest him, Crus-Gudien attempted to run away. Plaintiff testified that he then grabbed him and they fell to the ground with Crus-Gudien punching plaintiff. Plaintiff testified that he then hit Crus-Gudien in the head and hurt his hand.

The Lindiakos defendants and the deli seek summary judgment dismissing the complaint against them.

“On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff’d. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant’s burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

“General Obligations Law § 11-106 . . . largely abolishes the firefighter’s rule by giving firefighters and police officers a cause of action in negligence for injuries suffered while in the line of duty. . . .” Giuffrida v Citibank Corp., 100 NY2d 72, 78 (2003). “Under the common law, the owner or possessor of property

has the general duty to take reasonable measures to maintain his or her property in a reasonably safe condition.” Novikova v Greenbriar Owners Corp., 258 AD2d 149 (2nd Dept. 1999), citing Nallan v Helmsley-Spear, Inc., 50 NY2d 507 (1980); Basso v Miller, 40 NY2d 233 (1976). “In Nallan v Helmsley-Spear, Inc., the Court of Appeals . . . held that a ‘natural corollary’ of the above-stated general common-law duty to maintain property in a reasonably safe condition was the ‘obligation to take reasonable precautionary measures to minimize the risk [of criminal acts] and make the premises safe for the visiting public.’ ” Novikova v Greenbriar Owners Corp., *supra*, citing Nallan v Helmsley-Spear, Inc., *supra*, at 519-520; *see also*, Jenkins v Ehmer, 272 AD2d 976 (4th Dept. 2000) citing Burgos v Aqueduct Realty Corp., 97 NY2d 544, 548 (1998). “While landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property, an owner’s duty to control the conduct of persons on its premises arises only when it has the opportunity to control such persons and is reasonably aware of the need for such control.” Millan v AMF Bowling Centers, Inc., 38 AD3d 860, 860-861 (2nd Dept. 2007) citing D’Amico v Christie, 71 NY2d 76, 85 (1987); Petras v Saci, Inc., 18 AD3d 848 (2nd Dept. 2005); Cutrone v Monarch Holding Corp., 299 AD2d 388, 389 (2nd Dept. 2002). Thus, “[t]o recover from an owner of real property for injuries caused by the acts of criminals on the premises, a plaintiff must produce evidence indicating that the owner knew or should have known of the probability of conduct on the part of third persons which was likely to endanger the safety of those lawfully on the premises.” Farrell v Vega, 303 AD2d 716, 716-717 (2nd Dept. 2003); *see also*, Rodriguez v 1705 & 1715 Caton Associates, 39 AD3d 617 (2nd Dept. 2007).

The Lindiakos defendants attempt to evade liability on the ground that they

were out-of-possession landlords fails. The Lindiakos operated the adjoining Thrifty Beverage store. Nevertheless, the Lindiakos defendants have established that Thrifty Beverage was a carry-out business; that no beer was consumed in the store; and that it closed by 9 PM. The incident in question occurred at approximately 3:15 AM. There is absolutely no evidence that the Lindiakos defendants played any role in or had any knowledge of the circumstances which gave rise to the plaintiff's injuries. Nor is there any evidence that there was ambient crime which infiltrated the premises or that the Lindiakos defendants had notice of a serious risk of infiltration so as to give rise to a general duty to protect people on the property against criminal conduct. Evans v 141 Condominium Corp., 258 AD2d 293 (1st Dept. 1999), citing Todorovich v Columbia Univ., 245 AD2d 45, 46 (1st Dept. 1997), lv den. 92 NY2d 805 (1998). For the same reasons, plaintiff's attempt to impose liability on the Lindiakos defendants based on their sale of beer to the deli fails, too.

As for the deli's application, factual issues exist on plaintiff's negligence claim against the deli. The plaintiff officer's observation of the individual defendants exiting the deli with beer and behaving in an inebriated fashion after watching the deli for 20 minutes provides sufficient circumstantial evidence to raise an issue of fact as to whether the defendant deli served or sold them beer. See, S&R Lake Lounge, Inc. v New York State Liquor Authority, 87 NY2d 206 (1995). And, the plaintiff Police Officer's observations of the individual defendants' drunken behavior which preceded the altercation provides sufficient circumstantial evidence of causation to raise an issue of fact, as well. McGilveary v Baren, 4 AD3d 844 (4th Dept. 2004); see also, Adams v Ziriakus, supra, at p. 401, citing Romano v Stanley, supra, at p. 450.

“ ‘A police officer seeking to recover under General Municipal Law § 205-e must identify a statute or ordinance with which the defendant failed to comply and must, in addition, set forth facts from which it may be inferred that the defendant’s negligence directly or indirectly caused harm to him or her.’ ” Link v City of New York, 34 AD3d 757 (2nd Dept. 2006), quoting Quinto v New York City Tr. Auth., 7 AD3d 689 (2nd Dept. 2004); see also, Giuffrida v Citibank Corp., supra, at p. 81; Zanghi v Niagara Frontier Transp. Com’n., 85 NY2d 423, 441 (1995). The statute affords a police officer a right of action against any person whose negligent failure to comply with the statute or ordinance either “*directly or indirectly*” results in injury or death. See, Giuffrida v Citibank Corp., supra, at p. 80. “[T]he substantial case law that has developed on this subject holds that a plaintiff need only establish a ‘practical or reasonable connection’ between the statutory or regulatory violation and the claimed injury.” Giuffrida v Citibank Corp., supra, at p. 81, citing Mullen v Zoebe, Inc., 86 NY2d 135, 140 (1995); Zanghi v Niagara Frontier Transp. Com’n., supra, at p. 441.

In advancing his claim pursuant to General Municipal Law § 205-e, plaintiff relies on General Obligations Law § 11-101 (the “Dram Shop Act”) and Alcohol Beverage Control Law § 65 and 106(3). Alcohol Beverage Control Law § 65 is a regulatory provision that, standing alone, does not create a private right of action. Sherman by Sherman v Robinson by Robinson, 80 NY2d 483 (1992). “That right is found and circumscribed in General Obligations Law § 11-100, 11-101.” Sherman by Sherman v Robinson by Robinson, supra, at p. 487. The “elements of a claim under General Obligations Law § 11-101 are (1) an injury caused by an intoxicated person, (2) a knowingly unlawful sale of alcohol by the defendant to the intoxicated person; and (3) that the alcohol sold by the defendant caused or

contributed to the person's intoxication at the time the injury occurred." Johnson ex rel. Fredo v Verona Oil, Inc., 36 AD3d 991, 993 (3d Dept. 2007), citing Sherman by Sherman v Robinson by Robinson, *supra*, at p. 486-488; Cole v O'Tooles of Utica, 222 AD2d 88, 91 (4th Dept. 1996). "Under Alcoholic Beverage Control Law § 65(2), it is unlawful to furnish an alcoholic beverage to any 'visibly intoxicated person.'" Adamy v Ziriakus, 92 NY2d 396, 400 (1998).

"[V]isible intoxication may be established by circumstantial evidence, including . . . eyewitness testimony." Kish v Farley, 24 AD3d 1198, 1200 (4th Dept. 2005), citing Adams v Ziriakus, *supra*, at p. 401-403. "Indeed, the Legislature's use of the term 'visible' in Alcoholic Beverage Control Law § 65(2) does not require that visible intoxication 'be established by direct proof in the form of testimonial evidence from someone who actually observed the allegedly intoxicated person's demeanor at the time and place that the alcohol was served.'" Kish v Farley, *supra* at p. 1200, quoting Romano v Stanley, 90 NY2d 444, 450 (1997).

The plaintiff has failed to identify any statute or ordinance with which the Lindiakos defendants allegedly failed to comply which gave rise to his injuries.

However, there are factual issues with regard to the plaintiff's General Municipal Law § 205-e claim against the deli. While the claim that the deli violated New York Alcoholic Beverage Control Law § 64-d by operating a cabaret without a license fails for both want of proof as well as a lack of any evidence of a causal connection, there is a factual issue as to whether the deli violated General Obligations Law § 11-101, as well as Alcoholic Beverage Law § 106(3) which prohibits the sale of liquor for off-premises consumption when only a retail license for on-premises consumption is held.

The Lindiakos defendants' motion is **granted** and any and all cross-claims against them are **dismissed**.

The defendant deli's motion is **denied**.

Dated:

November 2, 2007 ENTER:

[Handwritten signature]
J.S.C. **ENTERED**

NOV 26 2007
NASSAU COUNTY
COUNTY CLERKS OFFICE