

<b>Morris v Third Ave. Rest., Inc.</b>
2007 NY Slip Op 34146(U)
December 17, 2007
Supreme Court, New York County
Docket Number: 0113700/2005
Judge: Rolando T. Acosta
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. ROLANDO T. ACOSTA

PART 61

Index Number : 113700/2005

MORRIS, CONSTANTINE

vs

MIRABI

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

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 (A-K)

3

4-5 (A-C)

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

**FILED**

DEC 26 2007

NEW YORK COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION**

SO ORDERED

Dated: 12/17/07

[Signature]  
ROLANDO T. ACOSTA J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION J.S.C.

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

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Constantine Morris,

Plaintiff,

– against –

Third Ave. Rest., Inc., d/b/a Jake's Dilemma,

Defendant.

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**DECISION/ORDER**

Index No. 113700/05

Seq. No. 1

Present:

**Rolando T. Acosta**  
Supreme Court Justice

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The following documents were considered in reviewing defendant's motion for an order pursuant to CPLR 3212 dismissing the complaint:

**Papers**

**Numbered**

Notice of Motion, Affirmation, Affidavits &  
Memorandum of Law

1-2 (Exhibits A-K)

Affirmation in Opposition

3 (Exhibits A-B)

Reply Affirmation & Memorandum of Law

4-5 (Exhibits A-C)

Plaintiff, a patron at a bar known as Jake's Dilemma, was injured when Laura Bang, another patron hit him in the eye with a highball glass. Prior to the injury, plaintiff was in the bar with two friends, Hughes and Rob Rhodes; there was a total of about ten patrons in the bar. Plaintiff had consumed approximately six scotch and sodas when Bang entered the bar and sat in an empty bar stool between plaintiff and Rob and began talking and cursing. Plaintiff told Bang that she could not sit there because the seat was reserved for a friend. Bang was undeterred and sat on the stool anyway. Approximately five minutes later, plaintiff punched her in the chest and jaw and Bang fell to the floor. According to plaintiff, Bang got up and ordered a drink.

According to Karen Granelli, the bar tender and only employee present at the time, she heard Bang arguing with plaintiff about her desire to sit in the empty stool. Granelli told them to be quiet and then took Bang's order for a beer with a highball glass on the side, which according to Granelli, Bang never consumed. Minutes after serving Bang her beer, Granelli saw plaintiff shove Bang to the floor. According to plaintiff, he punch her in the chest and jaw again. Bang and plaintiff were eventually separated from their shoving match

[\* 3 ]

by one of plaintiff's friends. Plaintiff walked across the room a few feet and Bang threw a glass at him. Granelli simply heard the crash of the breaking glass. Approximately five seconds later, according to Granelli, Bang threw a second glass that struck plaintiff in the eye. The whole incident occurred within a span of between two and five minutes. Bang eventually pled guilty to assault in the second degree for the incident.

Plaintiff commenced the instant action on September 29, 2005, where it asserted negligence claims against Jake's Dilemma. Specifically, plaintiff alleged in his Bill of Particulars that defendant was negligent for, *inter alia*, permitting "assaultive and belligerent" patrons to remain on the premises, in permitting the patron to assault the plaintiff, failing to have proper security, in serving drinks to Bang and thereby providing her "with a weapon to assault plaintiff, in failing to remove Bang from the bar upon learning of his/her intoxicated state and for permitting Bang on the premises when her "belligerent physical aggressive propensities were well known to the defendant." See Defendant's Exhibit C.

Plaintiff commenced a separate action against Bang on August 10, 2006, under Index No. 111189/06 claiming that he was harassed and assaulted by Bang which resulted in severe and permanent injuries to his left eye. By order dated March 19, 2007, this Court denied plaintiff's motion for an order consolidating both actions.<sup>1</sup>

Defendant now moves for summary judgment for an order dismissing the complaint on the basis that defendant was not obligated to protect plaintiff from a sudden and

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1. After plaintiff commenced its action against Bang, Bang was criminally prosecuted for assault against plaintiff for the incident and pleaded guilty to assault in the second degree PL § 120.05(02). Bang subsequently brought a third-party action against Jake's Dilemma for injuries she claims she suffered from public humiliation. According to Bang, Jake's Dilemma negligently failed to prevent the altercation between herself and plaintiff, and negligently served plaintiff alcohol in violation of General Obligations Law § 11-101. Jake's Dilemma in turn moved pursuant to C.P.L.R. § 3211(a)(7) to dismiss the third-party complaint, which this Court granted on September 19, 2007 (See Decision and Order dated Sept. 19, 2007, Motion Seq. 2, Index No. 111189/06).

In dismissing Bang's third-party complaint against Jake's Dilemma, this Court noted that Bang had already pleaded guilty to assaulting plaintiff. Indeed, in her third-party complaint, Bang actually incorporates plaintiff's complaint against her and "begs leave" of the Court to refer to the facts in plaintiff's complaint against her which state, *inter alia*, that plaintiff was assaulted by Bang. Under New York law, "a claimant whose injuries are the direct result of [her] commission of what is judged to be serious criminal or illegal conduct is not entitled to recover." Barker v. Kallash, 63 N.Y.2d 19 (1984).

[\* 4 ]  
unforeseeable assault, that its general duty to prevent the risk of foreseeable injuries was not breached under the circumstances at bar, that Bang was the sole proximate cause of plaintiff's injuries, and that there is no viable claim under the New York Dram Shop Act. Defendant's motion is granted solely to the extent of dismissing that portion of the complaint which alleges a claim under the New York State Dram Shop Act.

A tavern owner is not held to a duty to take protective measures unless there is a foreseeable risk of harm resulting from criminal activities of third persons on the premises. Rivera v. 21<sup>st</sup> Century Restaurant, 199 A.D.2d 14 (1<sup>st</sup> Dept. 1999); Camacho v Edelman, 176 A.D.2d 453, 454 (1<sup>st</sup> Dept. 1991). "[A] landowner nevertheless has the duty to control the conduct of persons present on its premises when it has the opportunity to control or is reasonably aware of the necessity for such control." Rivera v. 21<sup>st</sup> Century Restaurant, *supra*, 199 A.D.2d at 15 (citing Lindskog v. Southland Rest., 160 A.D.2d 842, 843 (2<sup>nd</sup> Dept. 1990)). Given the facts of this case, it cannot be said that there was no foreseeable risk of harm. Specifically, the record shows that Bang was cursing and attempting to insert herself between plaintiff (who had already consumed six scotch and sodas) and his friend immediately upon entering the bar, had been punched in the chest and jaw even before she was served a beer, and was punched or shoved a second time after she was served her beer. At the very least, there are triable issues of fact as to whether there was sufficient time for Granelli to intervene and have either plaintiff or Bang removed from the bar inasmuch as the whole incident occurred within a span of between two and five minutes. Indeed, Granelli knew that something was brewing, but her only course of action was to tell plaintiff and Bang to shut up. Whether five minutes (as plaintiff claims) or two minutes (as his friends claim) was sufficient time for Granelli to act is for the jury to decide. There are also issues of fact as to whether Granelli failed to control Bang when she had the opportunity to do so. Accordingly, that portion of the motion which seeks to dismiss plaintiff's claims sounding in negligence is denied

There is no indication in the record, however, that defendant violated the Dram Shop Act. New York General Obligations Law §11-101 (known as the Dram Shop Act), sets forth the statutory provision for the unlawful sale of alcohol:

1. Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.

For plaintiff to prevail against defendant under the Dram Shop Act, he must prove that defendant sold an alcoholic beverage to Bang at a time when Bang was visibly intoxicated, that the unlawful sale of alcohol to Bang caused or contributed to Bang's intoxication in any

\* 5 ]  
appreciable way, and that there is some reasonable connection between Bang's intoxication and plaintiff's injury. NYPJI 2:28. Furthermore, under the Alcohol beverage Control Law § 65(2), it is unlawful to furnish an alcoholic beverage to any "visibly intoxicated person." If a person is not "visibly intoxicated" when served an alcoholic beverage, an "unlawful sale" under section 11-101 of the general Obligations law is not established, and a defense to plaintiff's Dram Shop action is thus proven. Campbell v. Step/Lind Restaurant Corp., 143 A.D.2d 111 (2<sup>nd</sup> Dept. 1988).

Here, defendant has established its prima facie entitlement to summary judgment dismissing the Dram Shop action inasmuch as there is no indication that plaintiff was "visibly intoxicated" when she was served a beer. Rather, the evidence merely indicates that she was cursing and perhaps belligerent. Nor is there any indication in the record that she drank her beer, thus the sale of beer could not have contributed to her intoxicated state. Defendant having established its prima facie entitlement to summary judgment on this claim, the burden shifted to plaintiff to raise triable issues of fact, which he has failed to do. Accordingly, this portion of the motion is granted. Thus, based on the foregoing it is

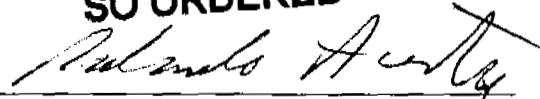
ORDERED that defendant's motion for an order granting summary judgment dismissing the complaint is granted solely to the extent dismissing plaintiff's Dram Shop cause of action; and it is further

ORDERED that the action proceed to trial on the causes of action sounding in negligence.

This constitutes the Decision and Order of the Court.

Dated: December 17, 2007

SO ORDERED



Rolando T. Acosta, J.C.  
**ROLANDO T. ACOSTA**  
J.S.C.

**FILED**

DEC 26 2007

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