

**Steinhaus v Duvernoy**

2008 NY Slip Op 30059(U)

January 10, 2008

Supreme Court, Suffolk County

Docket Number: 0008424/2004

Judge: Robert W. Doyle

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At his examination before trial, Travis Steinhaus testified to the effect that he has lived with his mother, plaintiff Karen Steinhaus, in Suffolk County and that he was attending East Northport Middle School in 2003. He visited defendant's home several days after Christmas in 2003. On New Year's Eve of 2003, defendant hosted a party for his adult friends in the dining room on the main floor, while Samantha, then 17 years old, had a party for her teenage friends in the basement. Travis spent his time eating snacks and listening in to the adults on the main floor until approximately 10:30 or 11:00 p.m. when he first went downstairs. Thereafter, he stayed downstairs for the rest of the evening until right after midnight when he left the basement. After he went downstairs, he first observed "pretty much every person" – approximately 50 people – having a beer in their hand. About a half hour later, one of Samantha's friend handed him a can of beer, holding an open beer can in her hand. After he finished drinking the beer in the main storage room in which the party took place, he went into the smaller storage room and talked to Jordan, Samantha's friend. There was a 24 pack of beer right by Jordan, and Travis took a can from the case upon himself and drank half of it. At that time, there were about 15 people in the smaller storage room and five people in the laundry room. At about 11:30 p.m., Adam, Samantha's adult brother, "came downstairs to make sure everything was going okay," stood there for a minute, looked around and went back upstairs. Right after midnight, everybody at the "teenager party," including Travis, went outside through a door which leads outside to the driveway, and he observed that Samantha had argued with a skinny male with blond hair. Samantha was yelling at him to leave, and he did not want to leave. At that time, Travis "walked up to him and put [the right] hand on his shoulder and told him 'you got to leave, the party's getting shut down.'" The male "took one step back and pushed [Travis] to the ground." Immediately after Travis fell on the ground, two males including the skinny male "jump[ed] on top of [him]" and beat him up.

At his deposition, defendant testified that, prior to and on New Year's Eve of 2003, he did not have any discussion with Samantha regarding her party. At probably between 7:30 p.m. and 8:00 p.m. on the day of the accident, he went down to the basement and saw approximately 10 girls sitting around together and waiting for Samantha who was working till 8:30 p.m. Since then, no adult went down to the basement to check Samantha's party except Adam. Defendant served dinner at the adult party and consumed alcoholic beverages with other guests. While people were sitting in the living room in the adult party, Adam went down to the basement at one point to "see how things were going." Two minutes thereafter, Adam returned from the basement and said "everything's cool." Prior to the midnight, defendant did not observe "any of the guests from the downstairs party consuming any alcohol" or "having alcohol in their hands" except one occasion. Defendant testified that, just before midnight, "there was a guy that looked old enough to drink who came up with a bottle of champagne and asked for a corkscrew and I gave it to him." Defendant also testified that Travis went down to the basement with Adam and came up and that defendant gave Travis a can of beer right before midnight. After midnight, defendant went out to guide one of his guest's cars out the driveway and "saw Samantha yelling at a couple of guys that turned out to be the assailants." He came inside. When he heard Nancy's shout, he was going out to see what was going on. At the time, he met Travis at the door, and his face was all swollen, dirty and bloody. The first time that defendant went outside, he observed approximately 40 people outside, who were the guests of Samantha's party, and did not observe anyone holding anything including alcoholic beverages until after midnight.

To sustain a claim under General Obligations Law § 11-100, a plaintiff who has been damaged by reason of the intoxication or impairment of ability of an underage person must demonstrate that the

defendant knowingly furnished or unlawfully assisted the underage person in procuring alcoholic beverages (*see*, General Obligations Law § 11-101; *Sherman by Sherman v Robinson*, 80 NY2d 483, 591 NYS2d 974 [1992]; *Johnson v Verona Oil, Inc.*, 36 AD3d 991, 827 NYS2d 747 [2007]; *Nehme v Joseph*, 160 AD2d 915, 554 NYS2d 642 [1990]). However, a defendant who was nothing more than an unknowing bystander or an innocent dupe whose premises were used by other minors seeking to drink (*see*, *Dodge v Victory Mkts.*, 199 AD2d 917, 606 NYS2d 345 [1993]; *Reickert v Misciagna*, 183 AD2d 151, 590 NYS2d 100 [1992] ), or, defendants who were passive participants that merely knew of the underage drinking and did nothing to encourage it, will not be liable under General Obligations Law § 11-100 (*see*, *Lane v Barker*, 241 AD2d 739, 660 NYS2d 194 [1997] ; *MacGilvray v Denino*, 149 AD2d 571, 540 NYS2d 449 [1989]; *see also Pelinsky v Rockensies*, 209 AD2d 392, 618 NYS2d 103 [1994]). Moreover, General Obligations Law § 11-100 requires a showing that the very minor to whom the intoxicant was sold or furnished became intoxicated and in his or her intoxicated state injured a third party (*see*, *Dodge v Victory Markets Inc.*, 199 AD2d 917, 606 NYS2d 345 [1993]). Nevertheless, the defendant will not avoid liability under the statute where the defendant played an indispensable role in a deliberate scheme to make the alcohol available to the under age party guests (*see*, *Rust v Reyer*, 91 NY2d 355, 670 NYS2d 822 [1998]).

Here, although Travis testified that “pretty much every person” at Samantha’s party had alcohol in his/her possession and consumed alcohol, there is no evidence that defendant was aware of, or had given permission for, the consumption of alcoholic beverages on his premises by underage people. There is also no evidence that defendant furnished or procured alcoholic beverages for any of the people who attended Samantha’s party, except for Travis. The testimony of Travis and defendant demonstrates that the defendant was nothing more than a mere passive participant that, at most, knew of the underage drinking and did nothing to encourage it (*see*, *Guercia v Carter*, 274 AD2d 553, 712 NYS2d 143 [2000]; *Lane v Barker*, *supra*). Moreover, there is no evidence that two male assailants were intoxicated at the time of the alleged assault (*see*, *Guercia v Carter*, *supra*). Under the circumstances, defendant established his prima facie entitlement to summary judgment dismissing the complaint insofar as it was based on General Obligations Law § 11-100. Furthermore, in opposition, plaintiffs did not allege that defendant is liable under General Obligations Law § 11-100. Accordingly, this branch of the motion by defendant for summary judgment dismissing the complaint based upon General Obligations Law § 11-100 is granted.

Defendant also seeks summary judgment in his favor dismissing plaintiffs’ claim for common-law negligence.

It is settled that homeowners have a duty to act in a reasonable manner to prevent harm to those on their property, which includes the duty to control the conduct of third persons on their premises when the homeowners have the opportunity to control such persons and are reasonably aware of the need for such control (*see*, *D’Amico v Christe*, 71 NY2d 76, 524 NYS2d 1 [1987]; *Chalu v Hariraj*, 304 AD2d 515, 758 NYS2d 132 [2003]).

Here, the adduced evidence indicates that defendant was present at his home when the alleged assault took place. There is evidence from which it could be inferred that defendant knew or should have known that most guests at Samantha’s party were minors, many of whom were drinking (*see*, *Lane v Barker*, *supra*). Moreover, defendant testified that he observed “Samantha yelling at a couple of guys

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that turned out to be the assailants" prior to the incident. Nevertheless, defendant just came inside without doing anything. There is a question of fact as to whether defendant acted reasonably in permitting the alleged assailants to remain on his premises under the circumstances (*see, Fantuzzo v Attridge*, 291 AD2d 871, 737 NYS2d 192 [2002]). Thus, defendant has failed to sustain the initial burden of establishing a prima facie entitlement to judgment as a matter of law. Accordingly, this branch of the motion by defendant for summary judgment on the issue of common-law negligence is denied.

Dated: JAN 10 2008

  
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J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION