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

PRESENT: HON. DORIS LING-COHAN PART 36

Justice

Holicyn

INDEX NO. 102234/06

MOTION DATE

- v -

MOTION SEQ. NO. 001

MOTION CAL. NO.

Populace, Inc. d/b/a Camaradas El Barrio Bar & Restaurant,

The following papers, numbered 1 to 4 were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	3
Replying Affidavits	

FILED

JAN 28 2008

COUNTY CLERK'S OFFICE NEW YORK

Cross-Motion: ☑ Yes ☐ No (by plaintiff's)

Upon the foregoing papers, it is ordered that this Cross motion for Summary Judgment is

denied in accordance with the attached memorandum decision. The Court noted that the motion was resolved by order of this Court dated August 23, 2007.

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

Dated: 1/22/08

HON. DORIS LING-COHAN 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 36

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ONEIDA HOLICYN and ALEXANDER HOLICYN,

Plaintiffs,

-against- Index No. 102234/06

POPULACE, INC. d/b/a CAMARADAS EL BARRIO BAR AND RESTAURANT, Motion Seq. No.: 001

Defendant.

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DORIS LING-COHAN, J.:

Defendant Populace, Inc. d/b/a Camaradas El Barrio Bar and Restaurant originally moved for an order, among other things, compelling plaintiff to appear for a supplemental deposition and physical examination. That motion was resolved pursuant to an order dated August 23, 2007. Plaintiffs Oneida Holicyn and Alexander Holicyn cross-moved for summary judgment on liability. Plaintiffs' cross motion is the subject of this decision.

Plaintiff Oneida Holicyn alleges that on or about January 1, 2006, while at the Camaradas El Barrio Restaurant and Bar (Camaradas), which was operated by defendant, she fell through an open unprotected trap door, falling down the stairs into the cellar, and seriously injuring herself. According to plaintiff she arrived at the restaurant at approximately 11:50 p.m., on New Year's Eve, after having eaten dinner at another restaurant half a block away. Plaintiff testified that just before she fell, she had gone to get her jacket from a hook. Plaintiff stated that she never saw the trap door when she hung her coat up or when she retrieved it. She was putting the jacket on when she turned to

go outside to get some fresh air, because the restaurant was very hot, when she fell through the trap door.

In support of her cross motion, plaintiff relies on the deposition of Raul Rivera, one of the owners of defendant Populace, Inc., which operates Camaradas. Rivera states that when Camaradas moved into the premises to operate its restaurant and bar, it made the trap door substantially larger in order to utilize the basement for storage. According to Rivera, the trap door is in an employees-only area beyond the bar near the kitchen. Rivera states that on the night of plaintiff's accident, there was dim lighting near the trap door, there were no warning signs or ropes blocking the area to the trap door, and there was a mobile coat rack along the wall past the bar. Since the occurrence of the accident, a fence with a "Danger, Do Not Enter" sign has been installed near the trap door.

Plaintiff also relies on the deposition of John C. Chen, the architect who drew up the plans to design the space occupied by Camaradas. According to Chen, because of safety considerations, his designs did not provide for a trap door in an area open to the public. Chen further states that his plans for Camaradas provided for access to the basement through an exterior hatch door. That aspect of Chen's plans was apparently not adopted.

Plaintiff contends that as the owner and operator of a restaurant and bar serving the public, defendant had a duty to maintain the premises reasonably safely. Plaintiff further

contends that the dim lighting, failure to post warning signs and failure to rope off the area near the trap door, coupled with the fact that defendant increased the size of the trap door, rather than eliminating it, as provided in Chen's design, constitute prima facie evidence of negligence.

Defendant argues that evidence in the record raising questions regarding possible contributory negligence by plaintiff precludes summary judgment. Defendant relies on plaintiff Oneida Holicyn's own deposition testimony in which she admits to consuming alcohol prior to the subject accident and the hospital records prepared immediately following the accident which indicate that she had four beers and sangria prior to the accident. Defendant also relies on Rivera's deposition testimony in which he states that he was at the door acting as a "gatekeeper" during the evening of the accident, and that although he had not previously met plaintiff, he noticed her when she came into the restaurant with her son, who was a regular customer. Rivera further stated that he noticed that plaintiff was inebriated when she entered the restaurant and would have asked her not to come in, because she was inebriated, had she not been with her son.

Plaintiff argues in response that defendant has failed to offer competent evidence of her alleged intoxication since no blood alcohol tests were administered when she was admitted to the hospital, and that the testimony concerning plaintiff's state

of inebriation is insufficient because it was from defendant's employee, who is an interested witness.

In arguing that defendant provided insufficient evidence to establish her alleged inebriation, plaintiff relies on a series of cases that relate to whether the evidence of contributory negligence was sufficient to submit to the jury (*see e.g. Rountree v Manhattan and Bronx Surface Transit Operating Authority*, 261 AD2d 324 [1st Dept 1999], lv denied 94 NY2d 754 [1999]); *Sanchez v Manhattan and Bronx Surface Transit Operating Authority*, 203 AD2d 128 [1st Dept 1994]), rather than on cases regarding the standard for summary judgment. The law is clear, however, that because summary judgment is a drastic remedy, it should not be granted when there is any doubt as to the existence of material and triable issues of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). Furthermore, the proof of the party opposing the motion for summary judgment must be given inferences most favorable to it. *Henderson v City of New York*, 178 AD2d 129, 130 (1st Dept 1991), citing *Strychalski v Mekus*, 54 AD2d 1068 (4th Dept 1976).

Plaintiff also argues that under New York law, one who takes charge of a person in a position in peril is liable to that person for bodily harm caused by a failure to exercise reasonable care to assure the safety of that person. However, none of the cases cited by plaintiff suggest that merely permitting a member

of the public to enter a bar or restaurant constitutes taking charge of that person. Thus, the cases cited by plaintiff are inapposite.

Although it is not clear whether, at trial, defendant will be able to establish that plaintiff was contributorily negligent, at this stage of the proceeding the burden is on plaintiff to clearly show that no material and triable issue of fact exists (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d at 404). Where, as here, plaintiff fails to establish, as a matter law, her freedom from comparative negligence, summary judgment on the issue of liability is properly denied. *See Sammis v. Nassau/Suffolk Football League, 95 NY2d 809 (2000); Scibelli v Hopchick*, 27 AD3d 720 (2d Dept 2006). Accordingly, it is

ORDERED that plaintiff's cross motion is denied; it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy upon plaintiffs with notice of entry.

Dated: January 22, 2008

Hon. Doris Ling-Cohan, J.S.C.

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