

**Dailey v Esteves**

2008 NY Slip Op 30519(U)

February 7, 2008

Supreme Court, Suffolk County

Docket Number: 0009092/2005

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 10-1-07  
ADJ. DATE 11-19-07  
Mot. Seq. # 002 - MG

-----X  
JARED DAILEY, :  
 :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 LOUIS ESTEVES, MARY ANN ESTEVES, :  
 KRYSTAL TRANZOLA and ALAN ANDREWS, :  
 :  
 Defendants. :  
-----X

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Upon the following papers numbered 1 to 26 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 13 - 17; Replying Affidavits and supporting papers 18 - 26; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by defendants Louis Esteves, Mary Esteves and Krystal Tranzola for summary judgment dismissing plaintiff's complaint is granted

Plaintiff Jared Dailey commenced this action to recover damages for personal injuries he allegedly sustained during an altercation that occurred in the home of defendants Louis Esteves, Mary Esteves and Krystal Tranzola on July 18, 2004. Plaintiff alleges that the defendants are liable for his injuries under General Obligations Law §11-100, because they unlawfully assisted his assailant, defendant Alan Andrews, who was a minor at that time, in procuring alcoholic beverages. In addition to the statutory claim, plaintiff also claims the moving defendants are liable for negligently failing to supervise and control an intoxicated guest on their property. Plaintiff also asserts claims against defendant Andrews for a cause common law negligence and assault.

Defendants Louis Esteves, Mary Esteves and Krystal Tranzola now move for summary judgment dismissing plaintiff's complaint. Specifically, Louis and Mary Esteves argue that summary judgment

should be granted in their favor, because they were neither aware of, nor gave permission for alcoholic beverages to be served on their property. Similarly, Tranzola asserts that while she consumed alcohol that was brought to her home by a friend, she did not provide alcohol for Andrews or any of the other guests at her home on the night of the incident. In support of their motion, defendants submit, inter alia, copies of the pleadings and the transcripts of the parties' deposition testimony.

In opposition, plaintiff argues that the motion should be denied, as there are issues of fact as to whether alcohol was previously served at the Esteves' home during another party held by Tranzola, and whether it could reasonably be inferred that the Esteves had reason to know that another beer party would be hosted at their home. Plaintiff submitted a copy of his own affidavit within his opposition papers.

During her examination before trial, Tranzola testified that she disregarded her parents' instructions and decided to throw a party in their home while they were away on vacation. Tranzola testified that she did not provide alcohol for the party, but shared a twelve-pack of beer that was brought to the party by a friend. Tranzola testified that other guests also brought alcohol to the party. Tranzola testified that the first time she observed plaintiff arguing with Andrews, she heard Andrews screaming that he did not fear the plaintiff and would fight him if he came outside. She testified that a few minutes later plaintiff punched Andrews in the face during an altercation outside the house. Tranzola testified that both men appeared intoxicated, and that she observed Andrews drink several cans of beer that night. She testified that she did not see the second altercation, during which time plaintiff sustained the injuries that are the subject of this action, but observed plaintiff bleeding from his arm and throwing bottles of beer at Andrews as he was exiting through her front door. Tranzola testified that as far as she was aware, the only beer placed in her refrigerator was the beer that she shared with one of her friends. She also testified that the alcohol kept in the house by her parents was not provided to her guests on the night of the incident.

At his examination before trial, defendant Louis Esteves testified that he forbade his daughter from having anyone over and that he first learned of the subject party the morning after the incident occurred. He also testified that he and his wife only drank occasionally, and that there were only two bottles of wine in his home at the time of the incident.

In his affidavit, plaintiff states that defendant Andrews appeared intoxicated on the night of the incident. He states that Andrews' speech was slurred, his eyes were bloodshot and he had been cursing loudly. Plaintiff states that his initial encounter with Andrews involved play wrestling and that he then encountered Andrews for a second time later that night when Andrews challenged him to come on the front lawn and took several swings at him. Plaintiff avers that Andrews was visibly angry and that he punched him in the face in order to defend himself. He also states that ten to fifteen minutes later Andrews attacked him with a broken beer bottle and stabbed him numerous times as he tried to defend himself. Plaintiff states that he observed wine and vodka on the counter of the defendants' kitchen as well as cases of beer in the refrigerator. He also avers that he had been invited to a party hosted by Tranzola earlier that summer, when her parents were away. He states that alcohol was available to all the guests at the earlier party.

In order to obtain summary judgment, the movant must establish his cause of action or defense sufficiently, by tender of evidentiary proof in admissible form, to warrant the court to direct judgment in his

favor as a matter of law. On the other hand, to defeat a summary judgment motion the opposing party must show facts sufficient to require a trial of any issue of fact. Thus, on a motion for summary judgment the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see, Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). Nevertheless, mere conclusions or unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (*Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

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, Sherman by Sherman v Robinson*, 80 NY2d 483, 591 NYS2d 974 [1992]; *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 (*Dodge v Victory Mkts.*, 199 AD2d 917, 606 NYS2d 345 [1993]; *Reickert v Misciagna*, 183 AD2d 151, 590 NYS2d 100 [1992] ), or, who was a passive participant that merely knew of the underage drinking and did nothing to encourage it, will not be liable under General Obligations Law §11-101 (*Lane v Barker*, 241 AD2d 739, 660 NYS2d 194 [1997] ; *MacGilvray v Denino*, 149 AD2d 571, 540 NYS2d 449 [1989]; *Pelinsky v Rockensies*, 209 AD2d 392, 618 NYS2d 103 [1994]). Nevertheless, a defendant will not avoid liability if the defendant played an indispensable role in a deliberate scheme to make the alcohol available to under age party guests (*Rust v Reyer*, 91 NY2d 355, 670 NYS2d 822 [1998]).

Although it is undisputed that Tranzola hosted a party where her guests consumed alcohol, there is no evidence that her parents were either aware of the party or gave permission for the consumption of alcoholic beverages by minors. Thus, Louis and Mary Esteves are entitled to summary judgment dismissing plaintiff's claim against them for violation of General Obligations Law §11-100 (*see, Barry v Gorecki*, 38 AD3d 1213, 833 NYS2d 329 [2007]; *Guercia v Carter*, 274 AD2d 553, 712 NYS2d 143 [2000]). Plaintiff also failed to raise an issue of fact warranting denial of summary judgment in favor of the Esteves. Plaintiff's uncorroborated assertion that the Esteves had prior knowledge of the party and that alcohol would be served to minors appears to be an attempt to raise a feigned issue of fact in order to avoid the consequences of dismissal (*see, Tejada v Jonas*, 17 AD3d 448, 792 NYS2d 605 [2005]; *Novoni v La Parma Corp.*, 278 AD2d 393; 717 NYS2d 379 [2000]; *see also, Zuckerman v New York, supra*). Plaintiff does not dispute the fact that the Esteves forbade their daughter from having anyone over while they were away, and does not offer any evidence corroborating his claim that they knew that a similar party was held in their home earlier that summer. In addition, plaintiff failed to demonstrate a cause of action predicated upon common law negligence against the Esteves. It is undisputed that Louis and Mary Esteves were absent from the home at the time of the incident and, therefore, did not have an opportunity to control the behavior of plaintiff or Andrews (*see, Fantuzzo v Attridge*, 291 AD2d 871, 737 NYS2d 192 [2002]; *Guercia v Carter, supra*).

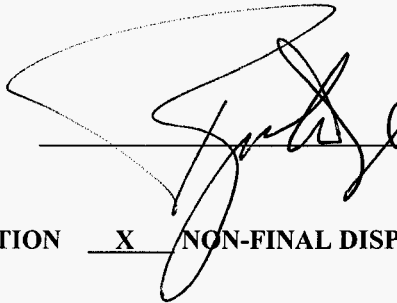
With respect to Tranzola, the evidence demonstrates that she was nothing more than a mere passive participant who knew of the underage drinking at the party but did nothing to encourage it (*Lane v Barker, supra; Reickert v Misciagna*, 183 AD2d 151, 590 NYS2d 100 [1992]). Here, there is no evidence that Tranzola participated in procuring the alcohol consumed by the guests at the party, or

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placed beer and vodka on the kitchen counter for her guests to drink. Thus, plaintiff's statement that he observed alcohol in the kitchen is insufficient to raise an issue of fact as to whether Tranzola played an indispensable role in a deliberate scheme to make the alcohol available to her under age party guests (see, *Lane v Baker, supra*; *Reickert v Misciagna, supra*; see also *Zuckerman v New York, supra*). Indeed, plaintiff testified he and his friends stopped at a gas station and purchased beer for themselves before arriving at Tranzola's party. With regard to plaintiff's common law negligence claim against Tranzola, the evidence indicates that she could not have been reasonably expected to prevent plaintiff's attack which occurred shortly after she observed plaintiff punch Andrews in the nose and re-entered her house in order to get another friend to help bring the party to an end (see generally, *D'Amico v Christie*, 71 NY2d 76, 524 NYS2d 1 [1987]).

Accordingly, defendants Louis Esteves, Mary Esteves and Krystal Tranzola's motion for summary judgment dismissing plaintiff's complaint is granted, and the action is severed and continued as against defendant Alan Andrews.

Dated:           FEB 07 2008          

  
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J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION