

Doherty v Fisher

2008 NY Slip Op 30577(U)

February 19, 2008

Supreme Court, Nassau County

Docket Number: 6307-05/

Judge: Edward W. McCarty

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. EDWARD W. MC CARTY, III
Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

BRIAN DOHERTY,

Plaintiff(s)

INDEX No.6307/05

-against-

MATTHEW FISHER, MICHAEL DOLAN,
THOMAS P. DOLAN and KAREN E. DOLAN,

MOTION DATE:11/30/07
MOTION SEQ.#003-004

Defendant(s)

The following papers read on this motion:

Notice of Motion/Order to Show Cause	XX
Cross-Motion	
Answering Affidavit	XXX
Replying Affidavits	X

Motion (#003) by defendants Michael, Thomas and Karen Dolan for an order pursuant to CPLR 3212 granting summary judgment in favor of the Dolan defendants, and/or an order pursuant to CPLR 3211(a)(7) dismissing the complaint and any and all cross claims against the Dolan defendants, and motion (#004) by order to show cause by defendant Fisher for an order pursuant to CPLR 602(a) consolidating *Doherty v Fisher, et al.*, Supreme Court, Nassau County, Index No. 6307/05 (hereinafter, "Action No. 1") with *Doherty v Larson*, Supreme Court, Nassau County, Index No. 7057/07 (hereinafter, "Action No. 2"), are decided as set forth herein.

Action No. 1 is a personal injury action arising out of an altercation which allegedly took place on April 25, 2004 between plaintiff and defendant Fisher, while they were at a gathering at the Dolan defendants' home, where alcoholic beverages were available to underage guests. Action No. 2 is a personal injury action arising out of the same altercation which also allegedly involved an assault upon plaintiff by defendant Larson.

Plaintiff's complaint in Action No.1 alleges causes of action against the Dolan defendants for violation of GOL 11-100 and negligence.

General Obligations Law 11-100(1) provides, in relevant part, that: "[a]ny person who shall be injured in person... by reason of the intoxication or impairment of ability of any person under the age of twenty-one years,.... shall have a right of action to recover actual damages against any person who knowingly causes such intoxication or impairment of ability by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of twenty-one years."

While the complaint makes no reference to violations of GOL 11-101, plaintiff's response to the Dolan defendants' demand for a verified bill of particulars alleges that the Dolan defendants acted in violation of both GOL 11-100 and 11-101. General Obligations Law 11-101 provides for compensation for injury caused by the illegal sale of intoxicating liquor. Any claims plaintiff may allege against the Dolan defendants for violation of GOL 11-101 must be dismissed because liability under GOL 11-101 requires commercial sale of alcohol (see, *Place v Cooper*, 35 AD3d 1260) and the facts herein are undisputed that the guests at the Dolan defendants' home on April 25, 2004 were not charged by the Dolans for any of the alcohol which they may have consumed (see, *McGlynn v St. Andrew the Apostle Church*, 304 AD2d 372.).

With respect to plaintiff's claims against the Dolan defendants for violation of GOL 11-100, the facts are undisputed that defendants Thomas and Karen Dolan were away for the weekend at their vacation home in Pennsylvania when the subject incident occurred. It is also undisputed that they repeatedly instructed their son, defendant Michael Dolan, not to have people over and not to drink when they were away, and they never had any reason to suspect that these instructions were not followed prior to the incident on April 25, 2004. The Dolan defendants have established that Thomas and Karen Dolan did not know that alcohol was being served to underage individuals in their home and thus they are entitled to summary judgment dismissing the GOL 11-100 cause of action against defendants Thomas and Karen Dolan. (See, *Lombart v Chambery*, 19 AD3d 1110.)

However, with regard to defendant Michael Dolan, the deposition testimony of the parties raises issues of fact as to whether he served alcohol at his home on the night of the subject incident, and whether defendant Fisher became intoxicated as a result thereof. While defendant Michael Dolan testified at his deposition that he did not really recall any alcohol being in the house on the night of the incident, both plaintiff and defendant Fisher

testified at their depositions as to the presence of alcohol in the home that evening. Plaintiff further testified at his deposition that defendant Michael Dolan offered a few beers to everyone. (Doherty EBT, p. 58, lines 8-9.) Defendant Fisher testified at his deposition that he brought his own beer to the Dolan's home, but he also drank some tequila which was at the house when he arrived. (Fisher EBT, p. 32, lines 13-19; p. 37, lines 14-15.) The disputed facts indicate that defendant Michael Dolan may have been more than "an unknowing bystander or an innocent dupe whose premises were used by other minors seeking to drink". (See, *Rust v Reyer*, 91 NY2d 355, 361.) Given the disputed account of the facts provided by the various depositions, summary judgment in favor of defendant Michael Dolan on the cause of action for violation of GOL 11-100 is denied.

Turning next to plaintiff's common law negligence claim against the Dolan defendants, such cause of action must be dismissed as against defendants Thomas and Karen Dolan as it is undisputed they were not at home on the evening the incident occurred and had no reason to believe alcohol was being served in their home. With no opportunity to control the conduct of the guests in their home that evening and no reason for them to have foreseen the activities which took place that night, the defendant parents may not be held liable herein. (See, *Nelson v Neng*, 297 AD2d 313.)

Insofar as defendant Michael Dolan is concerned, it is unclear whether plaintiff has asserted a common law negligence claim against him, but in any event, Michael Dolan's deposition testimony indicates that he asked everyone to leave and then he went up to bed, and was not aware of any altercation taking place on the stoop outside his home. Plaintiff testified that he did not see Michael Dolan during the altercation (Doherty EBT, pp. 104-105, lines 25, 1-8.) Defendant Fisher did not testify that Michael Dolan was present during the altercation. There is no evidence that plaintiff and defendant Fisher had expressed any animosity or aggression toward each other during the course of the evening in the Dolan home. There is no testimony that would indicate that the altercation between plaintiff and defendant Fisher was foreseeable. Plaintiff fails to raise an issue of fact in this regard. The Dolan defendants had no duty to control defendant Fisher's behavior if they were unaware of the need to control him and had no opportunity to control him. Without the requisite awareness, there is no duty and in the absence of duty, there can be no negligence. (See, *Crowningshield v Proctor*, 31 AD3d 1001.) Therefore, the Dolan defendants are granted summary judgment dismissing the negligence claim against them.

Defendant Dolans' motion (#003) for summary judgment dismissing the complaint is granted, to the extent that all claims against defendants Thomas and Karen Dolan are dismissed and any claim for common law negligence against defendant Michael Dolan is

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also dismissed. The cause of action for violation of GOL 11-100 by defendant Michael Dolan remains.

Defendant Fisher's motion (#004) by order to show cause to consolidate Action No. 1 with Action No. 2 is denied. While both actions arise from the same incident, Action No. 1 is ready to be tried and scheduled to appear on the Central Jury calendar on March 4, 2008, Action No. 2 is in its infancy and should not hold up Action No. 1 from proceeding to trial as scheduled.

Date 2-19-08

EDWARD W. McCARTY II

J.S.C.

ENTERED

FEB 26 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE