

Zambrano v Babola

2008 NY Slip Op 31578(U)

June 4, 2008

Supreme Court, New York County

Docket Number: 0105536/2006

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Justice

Ilena Zambrano

INDEX NO.

105536/06

MOTION DATE

Melissa Bobola

MOTION SEQ. NO.

02

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

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
JUN 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION:**

Dated: June 4, 2008

[Signature]
HON. JUDITH J. GISCHE S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X

Ileana Zambrano,
Plaintiff,

-against-

Melissa Bobola and
Ten's Cabaret, Inc. d/b/a Rock Candy,

Defendants.

-----X

Melissa Bobola,
3rd Party Plaintiff

-against-

Knight Security,
3rd Party Defendant.

-----X

DECISION/ ORDER
Index No.: 105536/06
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

3rd Party Action
Index No.: 590012/07

FILED

JUN 10 2008

**COUNTY CLERK'S OFFICE
NEW YORK**

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Ten's Cabaret OSC (3212) w/ EDM affirm, exhs	1
IZ's opp w/MJW DN affid, exh	2
MB's opp w/LWK affirm, ET affid, exhs	3
Ten's Cabaret reply w/EDM affirm	4

Upon the foregoing papers, the decision and order of the court is as follows:

This is a an action by plaintiff Ileana Zambrano who contends she was physically assaulted by defendant/ 3rd party plaintiff Melissa Bobola ("Bobola) the morning of June 3, 2005 inside the "Rock Candy," a lounge/ nightclub owned by the corporate defendant, Ten's Cabaret Inc. The court has before it Ten's Cabaret Inc.'s (hereinafter "Rock Candy") motion for summary judgment brought after the filing of the note of issue. Rock Candy seeks the dismissal of plaintiff's complaint and the cross claims against it Bobola.

Plaintiff opposes Rock Candy's motion as does Bobola. Knight Security has defaulted in answering the 3rd party complaint. A prior motion by Bobola for entry of a default judgment was granted only to the extent that the default was noted. Order, Gische J., 10/25/07.

Since issue was joined by the moving defendants and this motion is timely, having been brought within 120 days of the note of issue being filed, the motion will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Arguments presented

Plaintiff contends that she was physically assaulted at Rock Candy by defendant Bobola who was drunk and threw a glass at her. The incident took place inside Rock Candy, a lounge/ nightclub in New York City. Plaintiff claims that Bobola was visibly intoxicated while at the club, but still served alcohol. Therefore, plaintiff has asserted not only common-law negligence claims against the lounge, based upon an alleged failure to provide adequate security, but also claims Rock Candy violated General Obligations Law section 11-101, more informally known as the "dram shop act." The dram shop act allows an injured party to be compensated for injuries caused by the illegal sale of alcohol to any intoxicated person. GOL § 11-101 (1).

Discovery has been completed in this case and plaintiff was deposed by the defendants ("EBT"). At her EBT, plaintiff testified that she and three friends were having drinks at Rock Candy when someone pushed past her. Plaintiff admits she pushed the woman (Bobola) back. Bobola stopped in her tracks, turned around and cursed at plaintiff. Plaintiff admits she threw the contents of her glass at Bobola. According to plaintiff, an unidentified male stepped between herself and Bobola, but Bobola reached around and threw her glass at plaintiff. Also, according to plaintiff, she was hit with such force, the

glass shattered, she sustained lacerations on the side of her head and was bleeding profusely. Plaintiff admits she had consumed one drink at Rock Candy and was in the process of consuming a second drink when the incident took place. She contends, however, that she was not drunk, but Bobola was visibly intoxicated and holding a drink. Plaintiff contends the lounge was crowded and noisy. She did not observe any security personnel, and cannot recall if the man who intervened was a patron or working at the lounge

Dawn Nacional, plaintiff's friend and an eye-witness to the incident, has provided her sworn affidavit in opposition to Rock Candy's motion for summary judgment. Nacional states that Bobola pushed plaintiff first and then plaintiff pushed Bobola back. Bobola became enraged and attacked plaintiff, first grabbing plaintiff by the arm, cursing at her and then threatening to "kill" her. Nacional's states that an unidentified man intervened, but Bobola reached around him and smashed her glass on plaintiff's head. Nacional states she observed the glass shatter and plaintiff started to bleed. Nacional described Bobola as being intoxicated, describing her "speech [as] harsh, loud and totally inappropriate."

Bobola was also deposed ("EBT"). Like plaintiff, Bobola admitted that she had been drinking while at Rock Candy. She had consumed one drink and was in the process of consuming a second drink when the incident occurred. Bobola testified, however, that it was plaintiff who was the provocateur of the incident, and she did nothing wrong except push past her through a crowd. While admitting to throwing her drink at plaintiff, Bobola denies that she ever threw the glass itself, or that it hit plaintiff on the head, or that the glass broke and cut plaintiff.

Rock Candy contends that there is no evidence Bobola was intoxicated when she

ordered either of her drinks and that even assuming Bobola was loud and angry, it is simply plaintiff's and Nacional's opinion that Bobola was drunk. Rock Candy denies any negligence in how the lounge was staffed with security personnel. It offers the deposition testimony of Chris Reda, who was the director of marketing at the time of the alleged assault. Reda testified the security staff immediately escorted both women out of the Rock Candy lounge and took plaintiff's personal information to prepare a report. Reda testified at his EBT that plaintiff was injured and taken to the hospital. He also testified that Rock Candy had a service contract with 3rd party defendant Knight Security who has defaulted in this action. Reda states that there were eight (8) security guards present on duty the night of the incident. They serviced the entire lounge consisting of 8,500 feet.

Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64.

The dram shop act imposes statutory liability on the owner of a bar, etc. to "adequately supervise and control the patrons consuming alcoholic beverages within the area where supervision and control might reasonably be exercised . . ." Lippman v. Hines, 138 A.D.2d 845, 846 (3rd Dept 1988).

Although Rock Candy contends that Bobola was not visibly intoxicated and she only

had two drinks at their establishment, which could not have made her drunk, there is eyewitness testimony and a sworn affidavit, that Bobola exhibited the visual signs often associated with a person being intoxicated (slurring, staggering, etc). Further, Bobola herself admits to throwing the *liquid* in her glass at plaintiff (MB EBT Tr. Page 31 line 17 et seq), but denies seeing any blood on plaintiff afterwards, or even that the glass left her hand (MB EBT Tr. page 29 line 6). The record established on this motion, however, shows that plaintiff did, in fact, suffer cuts and she was bleeding from her head.

A claim under the dram shop act may be established through circumstantial evidence, including the testimony of eyewitnesses. Kish v. Farley, 24 AD3d 1198 (4th Dept 2005). It is for the jury to decide the issue of fact whether Rock Candy continued to serve drinks to a visibly intoxicated patron. Pierce v. Moreau, 221 A.D.2d 763 (3rd Dept 1995). The only evidence presented by Rock Candy that Bobola did not look intoxicated is based on Bobola's own (self-serving) statement that she was not drunk and had only consumed one drink when served the second one.

Rock Candy has also not proved that it is entitled to summary judgment on the claims against it related to the adequacy of security at the lounge. Although Knight Security has not answered, Bobola provides the sworn affidavit of Knight's principal, Eric Troiano in support of her opposition to Rock Candy's motion. Troiano states that he cannot find any contract with Rock Candy for security at the lounge. There is an issue of fact whether the security allegedly provided by Rock Candy was adequate based upon the size of the lounge (8,500 square feet), the number of people present, and where they were placed.

While at trial plaintiff will have to prove her common law and statutory negligence claims, on this motion it is Rock Candy's burden to prove it did not sell/ provide alcohol to

Bobola while she was intoxicated. See: Delamater v. Kimmerle, 104 AD2d 242, 243-244 (3rd Dept 1984). It is also Rock Candy's burden to prove they adequately supervised and controlled the patrons consuming alcoholic beverages within lounge. Murphy v. Chaos, 26 AD3d 231 (1st Dept. 2006). The court has also considered Rock Candy's argument that the incident took place over the course of just 3-4 minutes, and therefore, it did not have adequate notice of a potential altercation. This does not meet their burden, but only raises a triable issue of fact for the jury to decide. Murphy v. Chaos, supra.

For the reasons stated, Rock Candy has failed to prove there are not triable issues of fact. Therefore, its motion for summary judgment dismissing the complaint and all cross claims against it is denied.

Since the note of issue has been filed, this case is ready to be tried. **Plaintiff shall serve a copy of this decision/order on the Office of Trial Support so the trial can be scheduled.**

Conclusion

Defendants Ten's Cabaret, Inc. d/b/a Rock Candy's motion for summary judgment is denied in its entirety as there are triable issues of fact. **Plaintiff shall serve a copy of this decision/order on the Office of Trial Support so the trial can be scheduled.**

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
June 4, 2008

So Ordered:

Hon. Judith J. Gische, J.S.C.

FILED
JUN 10 2008
COUNTY CLERK'S OFFICE
NEW YORK