

Lameray v Mirabi Inc.
2008 NY Slip Op 31996(U)
July 11, 2008
Supreme Court, New York County
Docket Number: 0108864/2006
Judge: Doris Ling-Cohan
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PRESENT: Hon. Doris Ling-Cohan

PART 3c

Justice

Index Number : 108864/2006

LAMERAY, PETER T.

VS.

MIRABI, INC.,

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 108864-06

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

read on this motion to/for _____

PAPERS NUMBERED

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

1,2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

for summary judgment is denied in accordance with the attached memorandum decision.

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

FILED
JUL 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 7/15/08

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: PART 36

-----X
PETER LAMERAY,

Plaintiff,

-against-

Index № 108864/06

MIRABI INC., d/b/a "JAKE'S DILEMMA" and "JOIN
DOES 1 and 2," the names being fictitious, the persons
intended being employees, servants, and/or agents of
MIRABI INC., involved in an assault and battery,

Defendants.

-----X
DORIS LING-COIHAN, J. :

509 001
FILED
JUL 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

Defendants Mirabi Inc., d/b/a "Jake's Dilemma" and "John Does 1 and 2 (Jake's Dilemma

Dilemma or the bar), who are referenced by defense counsel as "Third Avenue Rest. Inc. d/b/a
Jake's Dilemma i/s/h/a Mirabi Inc. d/b/a Jake's Dilemma,"¹ move for an order, pursuant to CPLR
3212 (b), dismissing the complaint.

In this personal injury action, plaintiff Peter Lameray (Lameray) seeks to recover damages
from defendants for injuries he allegedly sustained on April 27, 2006, at Jake's Dilemma, which
is located in Manhattan at West 81st Street and Amsterdam Avenue. Lameray commenced the
instant action, by service of a summons and complaint, on or about June 26, 2006, alleging that
he sustained serious bodily injuries as a result of an assault by one or more of the defendants'
employees. He alleges that after he entered Jake's Dilemma around 3:00 A.M. to use the men's
room, he was approached by a tall, white, male, bouncer² in his late 20's or early 30's, who

¹Although no entity named "Third Avenue" is identified in the caption, it appears to be a
corporation involved in the ownership of the bar, Jake's Dilemma, where the alleged incident
occurred, and John Does 1 and 2 are alleged to be employees of this entity.

²The parties alternately use the terms bouncer and security guard.

forcefully threw him outside and then punched him in the mouth, nose, and eye while another bouncer looked on. Plaintiff's causes of action essentially sound in negligence. Issue was joined by service of defendants' answer on or about September 28, 2006, and discovery ensued. The note of issue was filed on September 14, 2007, and defendants now move for a summary dismissal of the complaint. Plaintiff opposes the motion.

As the proponent of the summary judgment motion, defendants have the burden of producing sufficient evidence to demonstrate, as a matter of law, the absence of any material issue of fact, and that plaintiff's cause of action has no merit (CPLR 3212 [b]; Alvarez v Prospect Hospital, 68 NY2d 320 [1986]). Here, defendants assert that plaintiff was so intoxicated in the early morning hours of April 27, 2006, that he tripped and fell as he exited the bar and struck his face on a metal railing, causing injury to his face. Defendants also assert that the evidence does not support Lameray's account of the incident because the physical appearance of the man on security duty that night does not match Lameray's description as to the man who purportedly assaulted him. Lameray's description of a tall, white, male, in his 20's or 30's is inconsistent with the physical make-up of the bar's former security guard Danny Jernigan (Jernigan) who was on duty that night. In a sworn affidavit submitted in support of defendants' motion, Jernigan states, in relevant part:

on the night of [the incident], I was the only security guard working at Jake's Dilemma. At no point . . . did I assault any patrons of the bar . . . I am also aware that the plaintiff has alleged that his assailant was a Caucasian man, with short brown hair, in his late 20s-early 30s, standing approximately 6'2" tall and weighing approximately between 200 and 220 pounds. I am an African-American man, standing 5'8" tall, with short black hair and in April of 2006, I weighed approximately 175 pounds.

Jernigan Aff. ¶ 2-3.

Defendants also submit the deposition testimony of Joshua Cohen (Cohen), the manager of Jake's Dilemma on April 27, 2006. Although he was not on duty that evening, Cohen provided testimony regarding the bar's personnel schedules as it was his job to handle their schedules. Cohen testified that, based upon both the day of the week (Wednesday, April 26, 2006 into Thursday, April 27, 2006) and the time of the alleged incident (after midnight), he would have assigned only three employees to work the shift from 9:15 P.M. Wednesday evening until 4:15 A.M. Thursday morning. Cohen explained that these employees would have been a bartender, a "bar back," and a security guard, and that pursuant to the schedule for that specific night, Jernigan was the security guard on duty, Stephen Keszey (Keszey) was the bartender, and Brian Byrd (Byrd) was the "bar back." Cohen described Keszey as a six foot tall, white male with brown hair, and Byrd as a 5'8" black male with brown hair.

When asked about the bar rules regarding disorderly patrons, Cohen stated that it was each employee's responsibility to make sure the bar was a safe environment, that if a customer refused to leave when asked, the police would be called, and that security personnel were not permitted to physically remove persons from the premises. On the date in question, because Cohen himself was not scheduled to work, Keszey worked as both the bartender and as the assistant manager at Jake's Dilemma.

Defendants also submit the deposition testimony of Police Officer (PO) Joseph Pagano (Pagano) who, along with his partner, PO Peter Velazco (Velazco), responded to an "assault in progress" at 3:05 A.M. at the location of Jake's Dilemma. Pagano testified that, when he and his partner arrived on the scene, he observed approximately 20 people on the sidewalk, including two officers from his precinct (the 20th police precinct), one of which was his supervisor,

Sergeant Michael King (King). According to Pagano, King approached him, pointed toward an individual (Lameray) who appeared to be yelling and intoxicated, and ordered him to escort Lameray to the hospital and to fill out the requisite Aided Report. Pagano testified that he tried, unsuccessfully, to interview Lameray while they were in the ambulance together, but that Lameray, who smelled of alcohol, was yelling incoherently. The deposition of Pagano, included the following narratives:

I was approached by my sergeant, Sergeant King, he pointed towards an individual who looked intoxicated and was screaming and said this gentleman was causing a scene in the bar and he was asked to leave by the bouncers. He refused to leave and one of them tried to physically escort him out and he took a swing at him and fell down, fell on his face as they were bringing him outside the bar

(Pagano Dep. at 12). The Aided Report filled out by Pagano, included the following narratives:

At [time, place of occurrence], aided sustained bruising around his left eye and a small cut on his nose while intoxicated inside a bar. Witnesses state aided was acting violent and falling down while attempting to leave location. Aided struck face while falling outside location.

(Ex. D, Scharaga Afl).

Pagano explained that his narratives were based both on his own personal observations and on the information provided to him by King who obtained the information from witnesses at the scene. Pagano stated that when he arrived at the scene, he observed about four or five staff members taking with the sergeant and/or with other police officers present at the scene.

In response to questions posed, Pagano stated that he had responded to incidents outside Jake's Dilemma about 25 times over the course of a year, that five to ten of these calls involved assaults, and that the other calls involved general fighting, without weapons. He explained that some five to ten of these fights involved bouncers ejecting patrons and patrons attempting to

driving by, from prior incidences, and from their physical size.

Defendants also rely on King's deposition transcript, a copy of which was submitted both as an exhibit to plaintiff's affirmation in opposition and as an exhibit to defendants' reply affirmation. According to the transcript, King, along with his assigned driver that evening, PO Kurt Lewis, received a radio run of a "male assaulted" at the subject location. King testified that, when he arrived at the scene, he spoke with other police officers from the 20th precinct who were already on the scene, and that they informed him that a male patron claimed to have been assaulted. King identified Velazco, not Pagano, as one of the officers he recalled seeing when he arrived on the scene, and he identified Velazco, not Pagano, as the officer he spoke with and the officer he directed to fill out the requisite Aided Report.

As to Lameray, King stated that he appeared to be intoxicated but that he never got to speak with him. Moreover, it was because Lameray was on his cell phone and was waiving him off, that he spoke with two witnesses at the scene, an unidentified male and a female. These witnesses informed King that plaintiff was asked to leave the bar because he was fondling women, and that when he refused to leave, he was escorted to the door. They stated that plaintiff was not followed as he walked out the door, and that plaintiff tripped and fell.

When questioned about Jake's Dilemma's bouncer/security guards, King, who did not recall an African-American security guard, did recall speaking with a tall, white, well-built male, who told King that after he escorted Lameray out the door, he did not see what happened to him. When asked if he saw anyone else who he believed to be a bouncer, King stated that he did see

another white male whom he understood to be a bouncer because he was dressed in a similar manner to the bouncer he spoke with, that being a black shirt and black pants.

Finally, King testified that he spoke with a shorter, white male who identified himself as the manager, and who acknowledged that the incident involved one of his employees and he wanted to know what police action would be taken.

Defendants contend that based on its evidence, they have demonstrated entitlement to summary judgment because they did not owe a duty of care to Lameray, and that even if a duty of care existed, there is no proof that they breached that duty or that the purported breach was the proximate cause of plaintiff's injuries. Specifically, defendants argue that, if Lameray did sustain his injuries as a result of an assault, as opposed to a trip and fall, there is no evidence that the perpetrator was employed by defendants as a bouncer or security guard, or in any other capacity. Moreover, based upon the police investigation, including Pagano's testimony, there was no assault and plaintiff caused his own injuries when he fell due to his intoxication. From this, defendants conclude, and ask the motion court to conclude, that there is no basis for Lameray's claims against Jake's Dilemma based on negligent hiring, retention, supervision, or training, and that the complaint must be dismissed as a matter of law.

Plaintiff responded to the summary judgment motion to dismiss by submitting an attorney's affirmation together with a transcription of Lameray's sworn deposition testimony disputing defendants' claim as to how he sustained his injuries. Defendants' assertions notwithstanding, plaintiff's submissions in opposition constitute admissible evidence as to material facts at issue in this dispute (O'Connor v G & R Packing Co., 53 NY2d 278, 283 - 84 [1981]).

At his deposition, Lameray offered the following testimony. He arrived at Jake's Dilemma around 3:00 A.M. He noticed two bouncers standing outside the bar, one was African-American, one was white, and both were in their late 20s or early 30s, and wearing the same shirts. He entered the bar, went into the bathroom and when he came out of the bathroom, he was confronted by the white bouncer who wanted to know whether he came in just to use the bathroom or whether he was going to buy a drink. When Lameray indicated that he wanted to leave and tried to walk around the bouncer, the bouncer grabbed him by his shirt, and forcefully threw him outside. They began to argue, with Lameray telling the bouncer that he was being ridiculous and not to touch him, and the bouncer responding by punching him, two or three times, with his right fist, striking him in his eye, nose, and mouth. According to Lameray, this interaction occurred in front of the African-American bouncer and various people standing outside the bar, but he did not learn their names. He stated that the bouncer who had just assaulted him, paced in and out of the bar while he called 911, and that the African-American bouncer used profanity as he told him to leave. Both an ambulance and police officers responded to the scene. The police officers took a statement from the bouncer and for reasons unclear to plaintiff, refused to take his statement or to arrest the bouncer.

Plaintiff's sworn testimony presents a scenario which varies in material aspects from that offered by defendants. It is a viable account of how plaintiff sustained his injuries and raises questions of fact as to what took place in or around defendants' establishment in the early morning hours of April 27, 2006. It is well settled that the motion court must accept the proof of a party opposing summary judgment as true (Assaf v Ropog Cab Corp., 153 AD2d 520, 521 [1st Dept 1989]). It must also draw all reasonable inferences in favor of the nonmoving party and not

pass on issues of credibility (id.). Therefore, to grant defendants' motion would require this court to pass on issues of credibility and to discount plaintiff's version of the incident, which is not proper.

In fact, in their respective depositions, King and Pagano each testified that: (1) when he arrived on the scene, the other, or the other's partner (Velazco) was already present; (2) the other, or the other's partner, spoke with witnesses at the scene; and (3) he received the information from the other or other's partner. The deposition testimony of King and of Pagano is material to the defense as it supports the defendants' account of the events of April 27, 2006. However, not only do their accounts conflict with plaintiff's account, but they conflict with each other. The discrepancies between King and Pagano's versions bear on their credibility as witnesses, which, as stated above, is not an issue for resolution by the motion court (id.).

Based on the conflicting evidence, defendants, as the proponents of the summary judgment motion, have not met their burden of producing sufficient evidence to demonstrate, as a matter of law, the absence of any material issue of fact, and that plaintiff's cause of action has no merit (CPLR 3212 [b]; Alvarez v Prospect Hospital, 68 NY2d 320 [1986]).

Accordingly, it is

ORDERED that the motion for summary judgment is denied; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

Dated: 7/15/08

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NEW YORK
Hon. Doris Ling-Cook