

**Calano v McCaig**

2008 NY Slip Op 32729(U)

September 9, 2008

Supreme Court, Richmond County

Docket Number: 100316/07

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Index No.100316/07  
Motion No.:003**

**JOSEPH CALANO,**

*Plaintiff*

**DECISION & ORDER**

*against*

**HON. JOSEPH J. MALTESE**

**DAMIAN MCCAIG,  
ELEANOR VOLPE,  
as Administratrix of WAYNE VOLPE, deceased,  
BDGJ, INC., d/b/a BLACK DOG GRILL and/or  
BLACK DOG CAFÉ, and  
CHRISTOPHER PETRUNTI,**

*Defendants*

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The following items were considered in the review of this motion for preclusion and summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2, 3
Replying Affidavits	4
Exhibits	Attached to Papers
Memorandum of Law	3

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiff moves this court pursuant to CPLR §§ 3126 and 3212 for an order precluding defendant Damian McCaig (“McCaig”) from offering any evidence in defense and granting summary judgment on liability against defendants McCaig and Eleanor Volpe as Administratrix of the Estate of Wayne Volpe (“Volpe”). The plaintiff’s motion is granted in part and denied in part.

**Facts**

This action involves negligence, assault, battery and a Dram Shop violation. Specifically, the plaintiff alleges that on July 29, 2006 and July 30, 2006 the defendants, McCaig and Wayne Volpe severely beat him after being served alcoholic beverages, although underage, at the Black Dog Café (“Black Dog”) by defendant Christopher Petrunti. Subsequent to the incident, Wayne

Volpe died, and McCaig plead guilty to attempted assault in the second degree. On November 14, 2007 the plaintiff served a notice to admit on the defendants Volpe and Black Dog. Among other things, the plaintiff's notice to admit seeks to have Eleanor Volpe as administratrix to admit that Wayne Volpe was under the age of 21 at the time of the incident. It also sought to have Christopher Petrunti admit that he served Wayne Volpe an alcoholic beverage, and that Christopher Petrunti knew that defendant Wayne Volpe was under the age of 21. McCaig served no response to the plaintiff's notice to admit. Black Dog and Volpe served unsworn responses upon the plaintiff.

Additionally, after a compliance conference on November 14, 2007 it was discovered that a conflict of interest existed between McCaig's prior attorney and Volpe. This resulted in McCaig's prior attorney applying to this court by order to show cause to withdraw as counsel. This court granted that application and allowed McCaig ample time to appear by new counsel before any discovery commenced.

The plaintiff argues that the unsworn response of Volpe is insufficient to satisfy the requirements of CPLR § 3123 and the notice to admit is deemed admitted and summary judgment should be granted against both McCaig and Volpe. Volpe argues that irrespective of whether the estate's unsworn response is sufficient that the notice to admit is improper on its face and that the plaintiff offered no evidence to prove his case as a matter of law. Defendant McCaig offers no opposition.

### **Discussion**

The Appellate Division, Second Department held in *DeSilva v. Rosenberg*, that

[t]he purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial. It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial. A notice to admit which goes

to the heart of the matters at issue is improper . . . Also, the purpose of a notice to admit is not to obtain information in lieu of other disclosure devices, such as the taking of depositions before trial . . .<sup>1</sup>

After review of the notice to admit, this court finds that the facts the plaintiff seeks to admit except the age of the defendant, Wayne Volpe are facts at the heart of this litigation. Based on the facts before this court other disclosure devices are better suited to obtain the information sought in the notice to admit.

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact.”<sup>2</sup> Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion.”<sup>3</sup> Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.<sup>4</sup> As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.<sup>5</sup> On a motion for summary judgment, the function of the court is issue finding, and not issue determination.<sup>6</sup> In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party

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<sup>1</sup> *DeSilva v. Rosenberg*, 236 AD2d 508 [2d Dep’t 1997]. (internal citations omitted)

<sup>2</sup> CPLR §3212[b].

<sup>3</sup> *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 [2d Dept 1990].

<sup>4</sup> *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1<sup>st</sup> Dept 1994].

<sup>5</sup> *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

<sup>6</sup> *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff’d* 65 NY2d 732 [1985].

opposing the motion.<sup>7</sup> Here the plaintiff does not offer evidence sufficient to demonstrate that Volpe is liable as a matter of law. In the matter before this court, there are issues of fact surrounding the liability of defendant Volpe.

However, with respect to McCaig, the plaintiff offers evidence in the form of a transcript dated December 20, 2006 wherein McCaig plead guilty to attempted assault in the second degree in connection with the serious injuries sustained by the plaintiff.

In addition, after numerous adjournments granted by this court to allow McCaig the opportunity to appear in this action by counsel; McCaig failed to retain counsel or otherwise appear in his own defense. Furthermore, McCaig failed to comply with the previous discovery orders. As such, ample evidence exists to strike McCaig's answer and grant summary judgment in favor of the plaintiff with respect to liability against McCaig.

Accordingly, it is hereby:

ORDERED, that the branch of plaintiff's motion for summary judgment against Eleanor Volpe as Administratrix of the Estate of Wayne Volpe is denied without prejudice. However, the Estate shall verify in writing the date of birth of Wayne Volpe in a sworn statement; and it is further

ORDERED, that the defendant McCaig's answer is stricken from the record; and it is further

ORDERED, that the branch of plaintiff's motion for summary judgment against Damian McCaig, is granted, and the Clerk of the Court is directed to enter judgment on in favor of the

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<sup>7</sup> *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

plaintiff and against the defendant McCaig on the issue of liability, and the issue of the amount of a judgment to be entered thereon shall be determined at trial; and it is further

ORDERED, that the parties return to DCM Part 3 on October 28, 2008 for a Preliminary Conference.

ENTER,

DATED: September 9, 2008

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Joseph J. Maltese  
Justice of the Supreme Court