

<b>Zamore v Bar None Holding Co., LLC</b>
2009 NY Slip Op 30831(U)
April 6, 2009
Supreme Court, New York County
Docket Number: 601125/06
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

SHARON ZAMORE,  
Plaintiff,

Index No.: 601125/06

Motion Date: 12/02/08

- v -

Motion Seq. No.: 02

BAR NONE HOLDING COMPANY, LLC, and  
BAR NONE, N.Y.C.,  
Defendants.

Motion Cal. No.: 119

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits

PAPERS NUMBERED

1

Answering Affidavits - Exhibits

2

Replying Affidavits - Exhibits

3

**FILED**  
APR 15 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion:  Yes  No

Upon the foregoing papers,

In this action where plaintiff was assaulted with a bottle in defendants' bar, defendants move for summary judgment dismissing the complaint.

In her deposition, plaintiff asserts that her assailant, who has never been identified, had been dancing in an overly energetic manner and provocatively or rowdily on the dance floor, and was unable to stand up straight and appeared intoxicated for approximately 20 minutes prior to the attack. Plaintiff also testifies that the assailant appeared to be holding a drink;

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

plaintiff's friend who was with her at the time corroborates that the assailant was holding a glass filled with liquid. However, there is no evidence that the defendants served the assailant alcohol at any time.

While dancing, the assailant kept bumping into plaintiff's table and she eventually knocked over and spilled a little Dixie cup of water, and thereafter began flailing her arms and broke a few glasses. Plaintiff testified that around that time the defendants' bouncer came over to the assailant, and he spoke to the assailant and the assailant began to leave with her companion. As the assailant proceeded to leave the area, she turned and hurled a glass at the plaintiff striking the plaintiff in the face causing dental injuries.

Plaintiff brings claims for negligent security and Dram Shop violations against defendant bar owners. The court shall grant defendants' motion to dismiss the complaint.

With respect to plaintiff's second and third causes of action for violation of the Dram Shop Acts (General Obligations Law § 11-101 and Alcoholic Beverage Control Law § 65), the Court has stated that "the consistent interpretation of . . . the Dram Shop Act requires a commercial sale of alcohol." D'Amico v Christie, 71 NY2d 76, 84 (1987). "New York courts have interpreted the statute to require a direct sale" otherwise, "the Dram Shop Act does not apply." Lee v Holloway, 146 Misc2d 455,

459 (Sup Ct, Wayne County, 1989). In this case, while plaintiff's friend avers that the assailant had a glass in her hand while dancing, there is no evidence that the defendants sold alcohol to the assailant and therefore the Dram Shop Act claims must fail. See Sherman v Robinson, 80 NY2d 483, 488 (1992) (no Dram Shop Act liability where there were no facts or circumstances from which requisite knowledge of seller to violate statute could reasonably be inferred).

The evidence on this motion is also insufficient to sustain plaintiff's claim of negligent security. Instructive in this regard is the Court's holding in Ryan v Big Z Corp (210 AD2d 649 [3d Dept 1994]) which involved a bar incident similar to that alleged in this action. In Ryan, the assailant was a member of a group of patrons in a crowded bar who began placing empty beer bottles on a table where plaintiff was sitting and plaintiff asked a member of the group to place their bottles elsewhere. Id. "When plaintiff began placing the empty bottles on the floor under the table, [the assailant] allegedly approached plaintiff, called her a 'bitch' and punched her in the face, breaking her nose. . . We agree with Supreme Court that defendant met its burden as the proponent of the motion for summary judgment by submitting evidentiary proof in admissible form to establish its entitlement to judgment . . . Plaintiffs argue that the restaurant should have anticipated the incident, but plaintiff .

. . . admitted that he did not attempt to leave or seek assistance from restaurant personnel prior to the assault because he did not think anything serious was going to occur. Defendant could not reasonably be expected to have anticipated or prevented such a spontaneous assault." Id. at 649-650 citing Garofalo v Henrietta Italia, Inc., 175 AD2d 580, 581 (4<sup>th</sup> Dept 1991) (plaintiff submitted no evidence rebutting bar's showing that, prior to the altercation with plaintiff, assailant gave no indication that he posed a threat to any of its patrons). Similarly, the First Department has held that

Plaintiff was allegedly injured on defendant's premises when a fellow patron hit him over the head with a champagne bottle. Inasmuch as the incident was attributable to the sudden, unexpected and unforeseeable act of plaintiff's assailant, its prevention was beyond any duty defendant may have had as a landowner to its patrons. We note in this connection that plaintiff himself testified that he was totally taken by surprise by the assault and that it occurred so quickly that he did not even think to summon defendant's security guards.

Lewis v Jemanda New York Corp., 277 AD2d 134 (1<sup>st</sup> Dept 2000)

(citations omitted).

In this case, plaintiff's testimony was that defendants' security guard actually was in the process of "separating [the assailant] from the situation", without any request by the plaintiff or her friend, when the assailant unexpectedly turned around and hurled the glass at plaintiff. On the facts presented, defendants fulfilled any duty they had and the

proximate cause of plaintiff's injuries was the unforeseeable act of the assailant.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment dismissing the complaint is GRANTED; and it is further

ORDERED that the Clerk is directed to enter judgment DISMISSING the complaint against all defendants.

This is the decision and order of the court.

Dated: April 6, 2009

ENTER:

*[Handwritten signature]*  
\_\_\_\_\_  
J.S.C.

**HON. DEBRA A. JAMES**

**FILED**

APR 15 2009

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