

**Martucci v Oxeer Bar, Inc.**

2009 NY Slip Op 31313(U)

June 12, 2009

Supreme Court, New York County

Docket Number: 110044/07

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 110044/2007

**MARTUCCI, NICHOLAS**

VS.

**OXER BAR**

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for summary judgment

PAPERS NUMBERED	
1	2
3	
4	

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

**FILED**

JUN 17 2009

COUNTY CLERK'S OFFICE

NEW YORK

HON. DORIS LING-COHAN

J.S.C.

Dated: 6/12/09

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X  
NICHOLAS MARTUCCI,

Plaintiff,

Index No.:  
110044/07

- against -

Motion Seq.  
No.: 003

OXER BAR, INC. d/b/a DING DONG LOUNGE  
and NEAL ASTWOOD,

**FILED**  
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**DORIS LING-COHAN, J:**

In this personal injury action, defendant Oxe Bar, Inc. d/b/a Ding Dong Lounge (Oxe Bar) moves, pursuant to CPLR 3212, for an order granting it summary judgment.

For the following reasons, the motion for summary judgment is denied.

**Background**

On April 1, 2007, plaintiff, Nicholas Martucci, was a patron at the Oxe Bar, located at 929 Columbus Avenue, New York, New York. According to plaintiff, at approximately 12:30 a.m., a bouncer at the bar, defendant Neal Astwood (Astwood), assaulted plaintiff inside the bar without provocation. Plaintiff sustained a number of injuries, including jaw fractures.

On July 29, 2008, a default judgment was ordered against Astwood. According to the Oxe Bar, the remaining claims of negligent supervision and respondeat superior are based on an incorrect assertion that, at the time of the incident, Astwood

was employed by Oxer Bar. Oxer Bar claims that Astwood was a former employee, who on the night in question, was simply a patron of the bar.

#### Discussion

In order to grant summary judgment, the movant must proffer admissible evidence to make a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to show the absence of any material issue of fact (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Uni. Med. Ctr.*, 64 NY2d 851, 853 (1985); see also *Vitiello v Mayrich Const. Corp.*, 255 AD2d 182, 183-184 (1st Dept 1998). Once the moving party has made this showing, the burden is on the opposing party to demonstrate "the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do" (*Zuckerman*, 49 NY2d at 560; see also *Sheridan v Bieniewicz*, 7 AD3d 508, 509 [2<sup>nd</sup> Dept 2004]).

An employer may be liable for the tortious actions of its' employees "on a theory of respondeat superior only if they were committed in furtherance of the employer's business and within the scope of employment" (*Bowman v State of New York*, 10 AD3d 315, 316 [1<sup>st</sup> Dept 2004]). It must be shown that there was an

existing employer/employee relationship at the time of the alleged incident (*K.I. v New York City Bd. of Educ.*, 256 AD2d 189, 191 [1<sup>st</sup> Dept 1998]).

Here, Oxer Bar claims that at the time of the incident, Astwood was not an employee of Oxer Bar, and had not worked at the Oxer Bar for several months. In support of its position, Oxer Bar offers the unsworn statements of six employees. However, these unsworn statements are not in admissible form and therefore cannot be considered on a motion for summary judgment (*Municipal Testing Lab., Inc. v Brom*, 38 AD3d 862 [2d Dept 2007]; *Tejeda v Six Ten Mgt. Corp.*, 15 AD3d 265 [1<sup>st</sup> Dept 2005]). Moreover, Oxer Bar's reliance on the deposition testimony of Steven Naidich, president of Oxer Bar, is misplaced, as Naidich admitted during his testimony that he has no firsthand knowledge about the incident, was not present on the night in question, and is not responsible for the hiring and firing of employees at the Oxer Bar (see Naidich dep., at 8-9; Notice of Motion, Ex. C). Naidich's testimony is based on speculation and hearsay and is therefore insufficient to warrant the granting of summary judgment of dismissal. Oxer Bar has failed to make a prima facie showing that Astwood was not an employee at the time of the subject incident and therefore, summary judgment as to the respondeat superior claim is denied.

Oxer Bar further contends that the negligent supervision

claim must also be dismissed since Astwood was not an employee and his acts were not foreseeable. Negligent supervision claims arise from the employer "having placed the employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee" (*Sheila C. v Povich*, 11 AD3d 120, 129 [1<sup>st</sup> Dept 2004]). As discussed above, since Oxer Bar has failed to set forth a prima facie showing that Astwood was not an employee at the time of the subject incident, Oxer Bar is not entitled to summary judgment of dismissal of the negligent supervision claim.


Conclusion

Accordingly, it is

ORDERED that the motion for summary judgment by defendant Oxer Bar, Inc. d/b/a Ding Dong Lounge is denied; and it is further

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

Dated: 6/12, 2009

  
 Hon. Doris Ling-Lohan, J.S.C.

J:\Summary Judgment\Martucci.oxer bar.wpd

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