

Sapra v Ten's Cabaret, Inc.

2009 NY Slip Op 31435(U)

June 29, 2009

Supreme Court, New York County

Docket Number: 100118/2008

Judge: Joan A. Madden

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

PRESENT: Ho v Joan A. Middle
Justice

PART II

Index Number : 100118/2008
SAPRA, ANUJ
vs.
TEN'S CABARET
SEQUENCE NUMBER : 002
REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE 5/21/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 + cross motion are decided in accordance with the attached Memorandum Decision + Orders

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

FILED
JUL 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 29, 2009

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: JAS PART 11

-----X
ANUJ SAPRA and ARTI SAPRA,

Plaintiffs,

Index No. 100118/2008

-against-

TEN'S CABARET, INC. d/b/a CLUB 9 ½,
CHRISTOPHER REDA, LF GRAMERCY PROPERTY
CO., LLC, and JOHN DOES 1-10,
SO NAMED AS THEIR IDENTITIES HAVE
YET TO BE ESTABLISHED,

Defendants:

JOAN MADDEN, J.:

FILED
JUL 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

In this personal injury action arising out of an altercation at a bar, defendant Ten's Cabaret, Inc. d/b/a Club 9 ½ ("Ten's") moves, pursuant to CPLR 2221(d) and (e), for an order granting renewal and reargument of this court's decision and order dated February 8, 2009 which denied its motion to dismiss the complaint against it. Defendant LF Gramercy Property Co., LLC ("Gramercy") cross moves to dismiss the complaint against it. Plaintiffs opposes the motion and cross motion.

This action arises out of personal injuries sustained by the plaintiffs on the evening of January 8, 2005, at Ten's, a nightclub and lounge located at 33-39 East 21st street in Manhattan ("the premises"), a building owned by Gramercy. The complaint alleges that two of Ten's patrons, Mohammed Abdul-Shakoor ("Shakoor") and Mohammed Asif ("Asif") chased plaintiffs directly in front of Ten's down a street and beat plaintiffs with a metal baseball bat.

Plaintiffs allege that on the evening of the incident, they were attending a party for a friend at Ten's when Shakoor grabbed plaintiff Arti Sapra ("Arti") and asked her to dance.

When Arti refused, Shakoor became angry and her brother, plaintiff Anuj Sapra (“Anuj”) came to Arti’s assistance. As Anuj approached Shakoor, Asif joined Shakoor and both men struck Anuj and pushed him onto a couch. Ten’s security lifted Anuj off the couch and removed Anuj, Shakoor and Asif from the dance floor. Ten’s security restrained Anuj in front of the club while security led Shakoor and Asif to another area. Shakoor then appeared outside of Ten’s with a metal baseball bat while security restrained Anuj. Security informed Shakoor that he could not bring the bat into the club and Shakoor got into an automobile and drove off.

When security released Anuj, Shakoor and Asif appeared and chased Anuj and Arti down the street where they were attacked with the metal baseball bat. Anuj was struck on the head, face and arms and sustained serious and life threatening injuries. Arti sustained injuries to her arm. Subsequent to the attack, the assailants were arrested and prosecuted.

The complaint alleges that both Shakoor and Asif were intoxicated as a result of the alcoholic beverages they were served at Ten’s on the night of the incident, that the defendants knew or should have known that the men were intoxicated, that both were under the age of 21, and that by reason of their intoxication they caused the plaintiffs to suffer their injuries.

On January 4, 2008, plaintiffs commenced this action asserting claims based on defendants’ alleged violation of New York General Obligations Law (“GOL”) §11-101, for serving alcohol to visibly intoxicated patrons and GOL §11-100, for serving alcohol to patrons under 21 years of age (known as the Dram Shop Act), and for common law negligence. Defendants did not answer the complaint, but instead made a motion to dismiss the complaint for failure to state a cause of action and based on documentary evidence.

By decision and order dated February 8, 2009 (“the original decision”), this court granted

the motion to dismiss with respect to the individual defendant but denied it as to Ten's. With respect to the Dram Shop Act claims, the court found that the allegations in the complaint adequately supported these claims. Specifically, the court found that the complaint sufficiently stated a cause of action for negligence even though "the injuries to plaintiffs were sustained outside the premises [since] the complaint alleges that the altercation leading to the injuries began at the premises and resumed in front of the premises shortly after the parties involved in the altercation were removed from the premises by Ten's employees, and this sequence of events [is] delineated in the complaint."

Ten's now moves to renew and reargue the original decision, asserting that the court erred in holding that the altercation occurred outside the premises, noting that the record from criminal trial of the assailants demonstrates that the assault occurred on Park Avenue South between East 20th and East 21st Street, while the premises is on East 21st Street. Ten's argues that given the distance between the premises and the assault the court erred in finding that Ten's could be held liable to it.

Plaintiffs oppose the motion, asserting that the facts raised on the motion were known to Ten's at the time of the prior motion, that the court did not misapprehend the law, and that Ten's does not raise any issue with respect to that part of the original decision which found that the claims based on the alleged violations of the Dram Shop Act state a cause of action.

In its affirmation in further opposition, Ten asserts that the Dram Shop Act claims should also be dismissed since plaintiffs have not proven "a reasonable connection between Ten's sale of alcohol and the resultant injuries." (Ten's Affirmation In Further Opposition, at 3).

A motion for reargument is addressed to the discretion of the court, and is intended to

give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, “[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided.” William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part, 80 NY2d 1005 (1992) .

“A motion for leave to renew is intended to bring to the court’s attention new facts or additional evidence which, although in existence at the time the original motion was made, were unknown to the movant and were therefore not brought to the court’s attention.” Tishman Constr. Corp. of New York v. City of New York, 280 AD2d 374, 376 (1st Dept 2001)(citations omitted).

Here, even assuming arguendo, that the information regarding the location of the assault was known at the time of the original motion and the granting of renewal would therefore not be appropriate, as the court erroneously stated that the assault occurred in front of the premises, reargument should be granted. In addition, upon reargument, the motion to dismiss the common law negligence claim should be granted since once the assailants left the premises and were blocks away from it, Ten did not owe a duty to plaintiffs to protect them from harm. D’Amico v. Christie, 71 NY2d 76, 88-89 (1987) (dismissing common law negligence claim against employer where injuries were caused by intoxicated employee who was involved in a car accident after he was terminated from his employment and ordered to leave the workplace).

In contrast, the claims under the Dram Shop Act are sufficient to state a cause of action since the complaint adequately alleges that Ten’s sold alcoholic beverages to a person under the age of 21 and to a visibly intoxicated person, and that plaintiffs’ injuries arose “by reason of the intoxication” McNeill v. Rugby Joe’s, Inc., 298 AD2d 369, 370 (2d Dept 2002). In particular,

contrary to Ten's position, the complaint adequately alleges that plaintiffs' injuries were caused by the alleged violations of the Dram Shop Act and by alleging "'some reasonable or practical connection' between the sale of alcohol and the resultant injuries," and no showing of proximate cause is required to establish liability under the Dram Shop Act. Id; see also Church v. Burdick, 227 AD2d 817 (3d Dept 1996).

Accordingly, Ten's motion to reargue is granted and, upon reargument, the motion to dismiss is granted to the extent of dismissing plaintiffs' claim for common law negligence.

Gramercy's cross motion for summary judgment on the ground that as an out-of-possession owner, it owes not duty to plaintiffs and is not liable for their injuries is granted. Cavanaugh v. Knights of Columbus Council 436, 142 AD2d 202 (3d Dept 1988), appeal denied, 74 NY2d 604 (1989). Contrary to plaintiffs' opposition, the lease agreement submitted with Gramercy's cross motion, together with the subsequent renewal lease, governs the relationship between Gramercy and Ten's at the time of the incident. Moreover, while plaintiffs' counsel asserted at oral argument that an addendum to the lease imposing restrictions on Ten's use of the premises, including hours of operation and the service of food, such restrictions do not give rise to a duty owed to third-parties, like the plaintiffs, to provide reasonable security at the premises. Accordingly, Gramercy's cross-motion for summary judgment dismissing the complaint is granted.

Gramercy is also entitled to conditional summary judgment as to liability on its cross claim for contractual indemnification against Ten's based on paragraph 64 to the rider to the lease.¹ Although the action has been dismissed against Gramercy since the indemnification

¹Paragraph 64 of the rider of the lease states in pertinent part:

Tenant (Ten's) shall, and does hereby indemnify and save harmless

provisions provides for the recovery of reasonable attorneys' fees, the cross-claim is not moot.

In view of the above, it is

ORDERED that the motion for renewal and reargument by defendant Ten's Cabaret, Inc. d/b/a Club 9 1/2 is granted to the extent of granting reargument of the original decision and, upon reargument, dismissing the claim for negligence, and is otherwise denied; and it is further

ORDERED that the cross motion by defendant LF Gramercy Property Co., LLC for summary judgment dismissing the claims against it is granted; and it is further


ORDERED that cross motion for summary judgment on LF Gramercy Property Co., LLC's cross claim for contractual indemnification against defendant Ten's Cabaret, Inc. d/b/a Club 9 1/2 is conditional granted as to liability subject to Ten's being found liable after trial; and it is further

ORDERED the remainder of the action, consisting of plaintiffs' Dram Shop Act claims against Ten's shall continue; and it is further

ORDERED that Ten's is directed to answer the complaint within 30 days of the date of this decision and order, a copy of which is being mailed to the parties; and it is further

ORDERED the remaining parties shall appear on July 16, 2009 for a preliminary conference in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: ~~May 29, 2009~~
June 29, 2009


V.S.C.

FILED
JUL 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

Owner (Gramercy)...against and from any and all claims, liability, suits, damages, judgments, costs, fines, penalties (including reasonable attorneys' fees) (a) arising from the conduct or management of the demised premises or of any business therein....