

**Ujkaj v Gormley**

2009 NY Slip Op 31737(U)

July 23, 2009

Supreme Court, New York County

Docket Number: 105416/05

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART 22

Ilda Ujkaj, an infant, by her Parent and  
Natural Gurardian, Fatbardha Ujkaj,  
Salma Purovic and Fatbardha Ujkaj  
Plaintiffs,

- v -

Gerard Gormley, 45-15 BWY, Rest. Inc.  
d/b/a Lavelle's Admiral's Club, Ann Lavelle,  
Lavelle's Admiral's Club and Maggie Mae's,  
Defendants.

INDEX NO. 105416/05  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 007  
MOTION CAL. NO. 90

The following papers, numbered 1 to 10, were read on these motions by defendants for summary judgment on the threshold "serlous injury" issue and motions by plaintiff and defendant for summary judgment on liability.

	PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause	1, 4,5 -	
Answering Affidavits — Exhibits (Memo)	2	6,7
Replying Affidavits (Reply Memo)	141B)	8,9

**UNFILED JUDGMENT**  
*This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).*

Cross-Motion:  Yes  No

On April 10, 2005, co-defendant Gerard Gormley, who was driving westbound on 35<sup>th</sup> Avenue in Astoria, allegedly went through a red light and crashed into a vehicle traveling north on 31<sup>st</sup> Street, which was being driven by plaintiff Ymer Ujkaj, and occupied by plaintiffs Fatbardha Ujkak, Salma Purovic, and infant plaintiff Ilda Ujkaj. Gormley, who fled the accident scene and was arrested 30 minutes later at his home residence, admitted to drinking alcohol at a pub called "Maggie Mae's." He was taken down to the precinct station after his blood alcohol level tested at .20, almost three times the legal limit of .08.

On or about July 26, 2006, plaintiffs commenced an action under Index No. 105416/05. Under motion sequence number 007 of that action, co-defendants "45-15 Bwy. Rest Inc. d/b/a Lavelle's Admiral's Club" and Ann Lavelle move for an order,

pursuant to CPLR 3215 (a) [default judgment], granting it summary judgment on the grounds that Gormley was never at Lavelle's Admiral's Club (LAC), nor was he served an alcoholic beverage by that establishment, on the date of the incident. A note of issue was filed under Index No. 105416/05 on June 6, 2008.

On or about May 26, 2006, plaintiff, Ymer Ujkaj commenced an action under Index No. 107401/06. Under motion sequence number 002 of that action, co-defendants "45-15 Bwy. Rest Inc. d/b/a Lavelle's Admiral's Club" and Ann Lavelle move for an order, pursuant to CPLR 3215 (a) [default judgment], granting it summary judgment on the grounds that Gormley was never at LAC, nor was he served an alcoholic beverage by that establishment on the date of the incident. A note of issue was filed under Index No. 107401/06 on June 25, 2008.

The actions under Index Nos. 105416/05 and 107401/06 were consolidated for joint trial pursuant to an order dated August 1, 2008, at which time the co-defendant Maggie Mae was added as a direct party under Index Nos. 105416/05 and 107401/06.<sup>1</sup> Motion sequence numbers 002 and 007 are consolidated and decided in accordance with this decision and order.

#### SUMMARY JUDGMENT STANDARD

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<sup>1</sup>Two other companion cases, "Ilda Ujkaj, et. al. v Maggie Mae's" under Index No. 103069/06 and "Ilda Ujkaj v Ymer Ujkaj" under Index No. 101293/07 were consolidated with Index Nos. 105416/05 and 107401/06 (see Notice of Motion under Index No. 107401/06, Exhibit B). Pursuant to an August 3, 2006 order under Index No. 105416/05, motion sequence number 004, Index No. 103669/06 was consolidated with 105416/05 for all purposes. Pursuant to an order dated August 2, 2007, Index Nos. 107401/06 and 101293/07 were consolidated with Index No. 105416/05 for joint trial. Notes of issue were filed for Index Nos. 103069/06 and 101293/07 on June 6, 2008.

The allegations in both complaints allege that Gerard Gormley consumed alcohol in excess amounts at LAC and as a result became visibly intoxicated. The movants' answers deny this allegation. The proponent of a motion for summary judgment is required to make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Thomas v Holzberg*, 300 AD2d 10, 10 [1st Dept 2002]; *Silverman v. Perlbinder*, 307 AD2d 230 [1st Dept 2003]). The motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof ..." (CPLR § 3212 [b]). A party may also demonstrate a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman v City of New York, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Where the proponent of a motion for summary judgment makes a *prima facie* showing of entitlement to summary judgment, the burden then shifts to the opposing party to demonstrate, by admissible evidence, the existence of a triable issue of fact, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY 2d 714 [1986]; *Zuckerman v City of New York, supra*; *Forrest v Jewish Guild for the Blind*, 765 NY2d 326 [1<sup>st</sup> Dept 2003], *lv to appeal granted* 1 NY3d 506 [2004], *affd* 3 NY3d 295 [2004]). Opposing parties are required to submit evidentiary proof in admissible form raising triable issues of material fact in order to

defeat the motion for summary judgment (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227 [1st Dept 2006]; *Perez v Brux Cab Corp.*, 251 AD2d 157 [1st Dept 1998]; *Zuckerman v City of New York*, *supra*). The party opposing the motion must present affirmative proof that there are genuine issues of material fact and may not rely upon mere conclusions, expressions of hope or unsubstantiated allegations (*Frank Corporation v Federal Insurance Company*, 70 NY2d 966 [1988]; *Corcoran Group, Inc. v Morris*, 107 AD2d 622 484 NYS2d 7 [1<sup>st</sup> Dept 1985] *affd* 64 NY2d 1034, 489 NYS2d 66 1985).

## DISCUSSION

### **Motion Sequence 007**

After the collision occurred, Gormley left the accident site and continued on in his vehicle to his home. The Ujkaj vehicle was propelled into a support pillar for the A train requiring extrapolation of the occupants using the "jaws of life." A license plate that was left at the scene of the accident led police to Gormley's home where he was given a breathalyzer test, placed in handcuffs and taken down to the 114<sup>th</sup> Precinct in Queens. Copies of the depositions of Gerard Gormley, Patrick Lavelle and Officer Steven B. Demoleas, plus a copy of Gormley's plea colloquy was submitted to the court. At his October 5, 2005 deposition, Officer Demoleas stated that during the administration of the breathalyzer test before he was taken to the precinct station, Gormley admitted that he had been drinking at a party at Maggie Mae's (*see* August 11, 2008 plaintiffs' Affirmation in Opposition, Exhibit I, at 39, lines 7-23). When Officer Demoleas was asked if had ever heard of an establishment called "Admiral's Cove" or a person named Anne Lavelle, he stated that he was not familiar with either (*id.* at 41, lines 6-10).

During his October 24, 2005 plea colloquy, Gormley admitted that he was drunk and had been drinking at a pub called Maggie Mae's on the date of the incident (see August 11, 2008 Affirmation in Opposition, Exhibit G, at 5, lines 14-25 and at 6 lines 1-4).

During this colloquy, he did not mention any pub other than Maggie Mae's. During his January 12, 2007 deposition, Gormley admitted that he had previously worked at LAC as a bartender and had been a patron at LAC on prior occasions, but qualified the fact that he had last been a patron there on New Year's Eve [December 31, 2006]. He stated that on the night of the incident, he had left his house at 8:00 pm, intending to go to Home Depot, but after missing the turn he ended up at Maggie Mae's (*id.*, Exhibit D, at 35; at 47; at 5). He drank more than one, but less than, ten beers (*id.*, at 71-72). He was served all his drinks by the same person, a female bartender. He had his last drink around 11:40 pm (*id.*, at 74).

He indicated that when he left Maggie Mae's it was his intention to return home via 39<sup>th</sup> Street onto to 35<sup>th</sup> Avenue past the accident site and onto 29<sup>th</sup> Street (*id.*, at 79, lines 13 -25). He states that he believed the light was green as he approached the intersection of 31<sup>st</sup> Street and 35<sup>th</sup> Avenue (*id.*, at 96). He indicated that he believes that Ymer Ujkaj is responsible for the accident because he [Gormley] had the green light (*id.*, at 145, lines 19-24; at 189, lines 9-23) and Ymer ran a red light (*id.*, at 167). The MV-104AN police accident report reflected that a witness at the accident scene stated that he saw the Ujkaj vehicle traveling southbound on 31<sup>st</sup> street with a green light and the Gormley' vehicle traveling westbound on 35<sup>th</sup> Avenue with a red light, pass through the intersection strike the Ujkaj vehicle and then leave the accident scene.

Gormley stated that Maggie Mae's was 2 and one half miles from the accident

site and LAC was one and a half miles in the opposite direction (*id.*, at 102; at 232 through 233). He indicated that after the accident he continued straight on 35<sup>th</sup> Avenue and made a right onto 29<sup>th</sup> Street, though he wasn't 100 per cent sure (*id.*, at 105). When the police came to his house and discussed with him where he had been drinking, he told the police he was at Maggie Mae's (*id.*, at 116, lines 13-24). He admitted that he stated at his sentencing that he had been drinking at Maggie Mae's (*id.*, at 132, lines 13-19). He stated that nobody had ever told him to say that he was drinking at Maggie Mae's (*id.*, at 142). When asked if he had drunk at any other place on the date of the accident other than Maggie Mae's, specifically mentioning the LAC his brother-in-law's bar, Gormley answered "No" (*id.*, at 143, lines 5-14; at 169, lines 22-25 and at 170 lines 1-4). When asked by the attorney for LAC and Anne Lavelle if he had been at LAC anytime on April 10, 2006 or had told anybody that he had been at LAC on that date or that he had been drinking at any other place other than Maggie Mae's twenty four hours before the accident he answered all three questions in the negative (*id.*, at 147-148).

When Gormley was asked about discussing the incident with his brother-in-law and sisters, he admitted talking to his sister and brother-in-law about the lawsuit (*id.*, at 144-145) and the fact that nobody knew why his brother-in-law's bar was named in the lawsuit (*id.*, at 181). He was questioned about an alleged witness who allegedly saw him drinking at LAC on the night of April 10, 2005. He said that he had learned of that allegation in a letter addressed to him from his lawyer, but that the allegation of his drinking at LAC was not true (*id.*, at 182 through 184).

Patrick Lavelle was deposed on behalf of LAC. He stated that he and Ann

Lavelle are listed as officers for LAC, but Anne Lavelle has Alzheimer's and no longer participates in the management and operation of LAC (see August 11, 2008 Affirmation in Opposition, Exhibit E, at 82-83). Medical documentaion supporting this diagnosis<sup>2</sup> was not provided to the court. Patrick works as a bartender and manager at LAC. He stated that a bartender by the name of Barry Murphy was working at LAC on the night of April 10, 2005, and that Murphy told Lavelle that Gormey was not at the LAC on the night of April 10, 2005 (*id.*, at 29, lines 16-21). When asked how he knew that his brother-in-law had been at Maggie Mae's on April 10, 2005, he stated that Gormley had told him (*id.*, at 50, lines 10-14). Lavelle's brother-in-law had also told Lavelle's wife that he had been drinking at Maggie Mae's (*id.*, at 70, lines 13-18). When asked about his knowledge regarding a witness who spoke about seeing Gormley drinking on April 10, 2005, Lavelle stated that he did not know about a specific witness. But, when asked if a reporter came to his bar, he stated that Nicole Bode came to his bar and questioned him. At his deposition, he was shown Exhibits 1A and 1B which were newspaper articles with Bode's name on the byline (*id.*, at 72 through 75). Copies of these deposition exhibits were not included in the opposition papers. Lavelle stated that it would be a lie if somebody said they had a witness who saw Gormley drinking at LAC on April 10, 2005 (*id.*, at 75, lines 15-20). Lavelle stated that he has seen Gormley three or four times at his bar since Gormley's plea allocution, the last being a New Year's Eve celebration (*id.*, at 78). He stated that LAC has never received a summons or citation from the New York State Liquor Authority as a result of Gormley's accident (*id.*, at 82). Lavelle only became aware that LAC was being sued when a processor server served papers at LAC.

The plaintiffs' expert witness makes no specific mention of LAC in his May 4, 2008 report, though he notes Gormley's presence at Maggie Mae's in his overview and states in his summary and conclusion "that the bartenders at Maggie Mae's (or any other establishment where he was drinking during the times noted) were remiss in their responsibilities" (see Affirmation in Opposition, Exhibit F). In her August 11, 2008 affidavit, Fatbardha Ujkaj states that "Nicole Bodie [sic], a reporter from the New York Daily news, stated to me that the Daily News did an investigation of the accident. She further stated that defendant Gormley was drinking at his brother-in-law's bar, Lavelle's Admirals' Club on the evening of the accident" (*id.*, Exhibit J). Other than the aforesaid hearsay statement in Fatbardha's affidavit, which was allegedly made by Nicole Bode, plaintiffs have not provided a copy of the alleged Daily News investigation report, nor produced either the name of the alleged eyewitness, or the eyewitness for a deposition. "Hearsay evidence may be sufficient to demonstrate the existence of a triable fact where it is not the only evidence submitted" (*Navedo v 250 Willis Avenue Supermarket*, 290 AD2d 246, 247; 735 NYS2d 132 [1<sup>st</sup> Dept 2002]). "However, in opposing a motion for summary judgment, hearsay evidence may be utilized as long as it not the only evidence submitted" (*Guzman v L.M.P. Realty Corp.*, 262 AD2d 99, 100; 691 NYS2d 483 [1<sup>st</sup> Dept 1999]).

The mere existence of a family relationship between Gormley and his in-laws, the corporate officers of LAC, without more, is insufficient to create a triable issue of fact. The fact that the distance between the accident site and either Maggie Mae's or LAC's is roughly equidistant, without more, is insufficient to create a triable question of fact. Moreso, the route home taken by Gormley before the accident, as detailed by him

at his deposition and as stated by him indicates a route taken from Maggie Mae's, not LAV's. Furthermore Gormley's plea colloquy, Officer DeMolea's testimony and Gormley's testimony all state that Gormley was drinking only at Maggie Mae's. The court notes its role as issue finder and to look at the allegations in a light most favorable to the non-movants. Nonetheless, neither plaintiffs nor the remaining co-defendants have met their burden of proving sufficient circumstantial evidence so as to raise a triable question of fact. Only the raising of material questions of fact mandate the denial of summary judgment (see CPLR 3212 [b]).

### **Motion Sequence Number 002**

Though the general rule is that a court officer who participates in a tort may be held liable, a corporate officer will not be held liable for the negligence of a corporation merely because of an official relationship to a corporation. It must be shown that the corporate officer was a participant in the wrongful conduct (see *Michaels v Lispernard Holding Corporation*, 11 AD2d 12, 13; 201 NYS2d 611 [1<sup>st</sup> Dept 1960]). Here, there has been no such showing that Anne Lavelle was a knowing participant related to the intoxication of Gormley on the night of April 10, 2005. The court reiterates that Patrick Lavelle testified that she is and was suffering from Alzheimer's disease on the date of the accident.

Upon the foregoing papers it is

ORDERED that co-defendants "45-15 Bwy. Rest Inc. d/b/a Lavelle's Admiral's Club"s and Ann Lavelle's motion for an order, pursuant to CPLR 3215 (a), granting it summary judgment under Index No. 105416/05, motion sequence number 007 is granted; and it is further

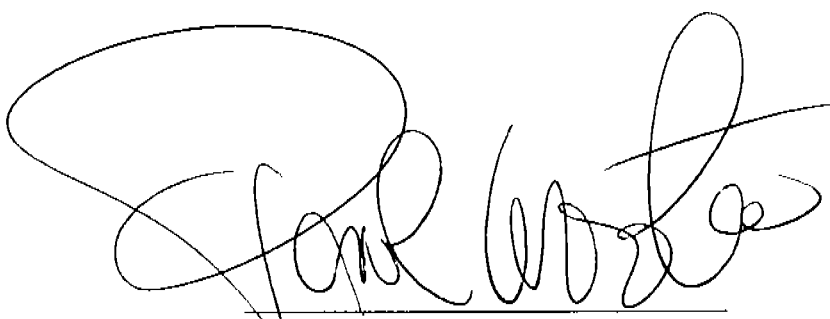
ORDERED that co-defendants "45-15 Bwy. Rest Inc. d/b/a Lavelle's Admiral's Club"s and Ann Lavelle's motion for an order, pursuant to CPLR 3215 (a), granting it summary judgment under Index No. 107401/06, motion sequence number 002 is granted; and it is further,

ORDERED that the motions for summary judgment are granted and the complaints under Index Nos. 105416/05 and 107401/06 are hereby severed and dismissed as against defendants "45-15 Bwy. Rest Inc. d/b/a Lavelle's Admiral's Club" and Ann Lavelle, and the clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of these actions shall continue.

This constitutes the Decision, Order and Judgment of the Court.

Dated: 7-23-09  
JUL 23 2009

  
Paul Wooten J.S.O.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).