Cohen v Bread & Butter Entertainment LLC
2009 NY Slip Op 31844(U)
August 17, 2009
Supreme Court, New York County
Docket Number: 105220/07
Judge: Shirley Werner Kornreich
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SCANNED ON 8/18/2009

[* 1]

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Justice

Index Number : 105220/2007

COHEN, LISKULA

VS.

BREAD & BUTTER ENTERTAINMENT

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

n this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
AUG 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/17/09

JUSTICE SHIRLEY WERNER KORNREICH
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: PART 54

-- X

LISKULA COHEN

Plaintiff,

-against-

BREAD & BUTTER ENTERTAINMENT LLC, Trading as ULTRA, THOMAS TARDIE, and SAMIR DERVISEVIC,

Defendants.

-- X

Index No.: 105220/07

DECISION and ORDER

FILED
AUG 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

KORNREICH, SHIRLEY WERNER, J.:

This is a personal injury action arising from an assault at a lounge by one patron against another. Plaintiff, the injured patron, sued the lounge, Bread & Butter Entertainment LLC (Ultra), Thomas Tardie, who owns 96% of Ultra, and Samir Dervisevic, the patron who assaulted her. Ultra and Tardie (collectively "movants") now move for summary judgment. CPLR §3212. They previously moved for dismissal pursuant to CPLR §3211(a)(7), arguing positions much the same as those asserted here. The court dismissed the second cause of action, *i.e.*, the Dram Shop claim, as against Tardie only. Movants now seek dismissal of the first cause of action, the negligence claim and dismissal of the Dram Shop claim as against Ultra only. They argue that: 1) Ultra is not liable under a negligence theory since the assault was not foreseeable; 2) Tardie is not personally liable under the negligence theory; and 3) Ultra is not liable under the General Obligations Law §11-101 and Alcoholic Beverage Control Law §65(2) (the Dram Shop Act) because Dervisevic was not served alcohol while *visibly* intoxicated. Plaintiff opposes.

I. Facts

Ultra, a limited liability corporation, owns and manages an upscale New York City bar and lounge. Tardie maintains his primary office on its premises and was working on the night of the assault. He, however, did not witness the event.

Ultra employs its own security personnel, which are supervised by Robert Fisco. Tardie delegated the training and hiring of those in non-managerial positions to his general manager, Flxx Chapparro Pitre ("Flxx"). Tardie did not involve himself personally in the hiring or training of the lounge's bartenders or security personnel. Flxx, who had decades of experience in the business, oversaw the nighttime operations and trained the security staff and bartenders. The training included instruction to the bartenders not to serve visibly intoxicated patrons. Tardie knew of no situations where a bartender had served a visibly intoxicated patron.

The lounge offers special drinking options, one of which goes by the term "bottle service" or, alternately, "table service." The lounge grants those patrons who choose to purchase bottle service a table at which they may sit and, in plaintiff's particular case, provided a pitcher of mixed drink, a bottle of vodka, some fruit, and an assortment of mixers and other drinking-related necessities and paraphernalia. Purchasers may only order bottle service in compliance with the lounge's two-bottle, minimum rule, but there is no rule or policy prohibiting drink sharing with others outside of the purchasing party. The only real cap on alcohol consumption under this option is the raw quantity of alcohol purchased.

Drinks at the bar were served as mixed drinks or as shots. A mixed drink or a shot contained an ounce and a half of alcohol.

Steve Di Leonardo, the floor manager of Ultra at the time of the incident, submitted an affidavit in which he averred that he recalled the evening in question, did not witness the

altercation, but saw Dervisevic when he ordered drinks, and Dervisevic exhibited no signs of intoxication. He further averred that Ultra had a strict policy of prohibiting the service of alcohol to a visibly intoxicated individual.

The direct circumstances giving rise to this action all occurred during the early hours of January 14, 2007. Plaintiff was accompanied by two male friends, and they partook in the lounge's table service. Dervisevic was present with his friend Josh. Beyond this, there remains some degree of variance among the submitted evidence as to what occurred.

Plaintiff testified that she overheard a fight in the lounge's bathroom and witnessed Dervisevic being escorted out of the bathroom by security guards. She also alleged that one of her companions told her that he had witnessed an altercation in the bathroom, although his understanding of the situation was fragmented and did not conclusively state that Dervisevic was actually involved in a fight. Plaintiff testified that subsequent to this incident, Josh helped himself to the pitcher of mixed drink on plaintiff's table, doing so on three occasions over a twenty minute period and gave the drinks to Dervisevic. According to plaintiff, she and her companions said nothing the first two times Josh took drinks. However, the third time, plaintiff said she took the drink from Josh and told him he could not take it. Plaintiff then testified that Josh said something to Dervisevic, who became agitated and verbally confronted plaintiff. A heated argument ensued, and a security guard came over, tried to calm Dervisevic and moved him away. Plaintiff claimed that Dervisevic returned to her table and with another drink in his hand. According to plaintiff, he cursed at her and she threw the alcohol in her glass at his feet. Dervisevic responded by throwing the tequila in his glass into her face and then hitting her in the face with the glass in his hand.

Dervisevic's testimony differs. Dervisevic testified that he had had two or three mixed drinks over several hours prior to arriving at the bar, and described himself as intoxicated because he was not used to drinking alcohol. He stated that he was served two shots of vodka by the lounge's bartenders and claimed he sipped the drinks over a twenty minute period. He was not aware of any fight in the lounge's bathroom. According to Dervisevic, at some point, he observed Josh arguing with plaintiff and three others. He walked over and asked what was going on. In response, plaintiff and the others cursed at him, and a heated verbal exchange ensued. Two bouncers arrived and separated Dervisevic and plaintiff's group, moving each away. Dervisevic testified that within a minute, plaintiff approached him with her friends and threw a drink in his face. He responded by throwing a drink in her face, whereupon she spit in his face and someone hit him on the back of his head. Dervisevic stated that he then swung at plaintiff. He had an empty glass in his hand as he did so. Dervisevic claimed that plaintiff was drunk.

II. Conclusions of Law

To obtain summary judgment, a movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. CPLR §3212(b). It must do so by tender of evidentiary proof in admissible form. *Zuckerman v New York*, 49 NY2d 557, 562-563 (1980). Once a movant has met the initial burden, the burden shifts to the party opposing the motion to show facts sufficient to require a trial of any issue of fact. CPLR §3212(b); *id.* at 560; *see also GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985) (complaint properly dismissed on summary judgment where affidavit of opposing counsel was insufficient to rebut moving papers showing case has no merit). The adequacy or sufficiency of the opposing party's proof is not an issue until the moving party

sustains its burden. *Bray v Rosas*, 29 AD3d 422 (1st Dept 2006). Moreover, the parties' competing contentions must be viewed "in a light must favorable to the party opposing the motion." *Lakeside Constr., Inc. v Depew & Schetter Agency, Inc.*, 154 AD2d 513, 515-516 (2d Dept 1989).

A. Negligence as against Ultra

Plaintiff's primary claim involves an assertion that Ultra's failure to control or remove Dervisevic was negligent and, therefore, that movants are liable to her for the resulting injury she sustained. Movants argue that Dervisevic's actions were unforeseeable. *Stevens v Spec, Inc.*, 224 AD2d 811, 812-813 (3d Dept 1996) (no duty to protect from extraordinary happenings); *Silver v Sheraton-Smithtown Inn*, 121 AD2d 711, 711 (2d Dept 1986) (innkeeper has no duty to protect patrons from unexpected altercations); *Ryan v Big Z Corp.*, 210 AD2d 649, 651 (3d Dept 1994) (restaurant owner has no duty to protect patrons from unforeseeable altercations between themselves). This court does not agree.

> Landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property. In particular, they have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control. Applying this rationale, lower courts have recognized that a landowner may have responsibility for injuries caused by an intoxicated guest. Significantly, however, these decisions have uniformly acknowledged that liability may be imposed only for injuries that occurred on defendant's property, or in an area under defendant's control, where defendant had the opportunity to supervise the intoxicated guest. That duty emanated not from the provision of alcohol but from the obligation of a landowner to keep its premises free of known dangerous conditions, which may include intoxicated guests. [citations omitted]

D'Amico v Christie, 71 NY2d 76, 85 (1987)

[* 7]

Given the heated nature of the verbal argument which preceded the assault, as well as the uncontested involvement of hard liquor and security's intervention prior to the assault, an issue of fact exists as to whether Ultra was on notice and *could have* anticipated a physically violent altercation and supervised the intoxicated guest(s). In none of the three cases relied upon by movants, *i.e.*, *Stevens*, *supra*, *Silver*, *supra*, and *Ryan*, *id.*, were there any indications that security or other personnel were even aware that an argument was underway until *after* plaintiff sustained injuries.

Nor does movants' argument that providing bottle service is legal and not *prima facie* negligent demand dismissal. While it may be true that bottle service is a widely adopted and lawful practice, this does not automatically exculpate movants from the need to exercise due care in its administration. *See, e.g., Siegel v Sweeney*, 266 AD2d 200, 202 (2d Dept 1999) ("[A] driver who lawfully enters an intersection with a green light may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision."). Notably, reasonableness is often a jury question by default and, thus, best reserved for trial. *Andre v Pomeroy*, 35 NY2d 361, 364 (1974) (suggesting this is true even if neither party contests facts material to case's disposition).

B. Negligence as against Tardie

In general, the actions of a corporation cannot provide a basis for liability with respect to its principal. *Billy v Cons. Mach. Tool Corp.*, 51 NY2d 152, 163 (1980). This is because the law treats as distinct a corporation's identity and, indeed, recognizes as absolutely fundamental the liability shield generated by one's decision to engage in business via the corporate form. *Id.*; *Morris v State Dept. of Taxation and Fin.*, 82 NY2d 135, 141-142 (1993). The Court of Appeals

has suggested that not even total dominance and control over a corporation on the part of the principal may bypass this rule. *Billy, supra.* The critical liability triggers are, instead: 1) utilization of said domination as the instrument for illegal fraud or misrepresentation or 2) direct intervention in the commission of the tort such that the "the paraphernalia of incorporation" are ignored.[1] *Id.*; *TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339 (1998); *Bartle v Home Owners Cooperative, Inc.*, 309 NY 103, 106-107 (1955); *Espinosa v Rand,* 24 AD3d 102, 102 (1st Dept 2005). Such triggers are often referred to as satisfied only where it can be fairly stated that the principal has acted in either "bad faith or outside his capacity as a corporate officer." *Worthy v New York City Hous. Auth.*, 21 AD3d 284 (1st Dept 2005) (Tom, J. concurring).

As to the first of these triggers, the uncontested facts make clear that, under the standard espoused by *Billy* and its ilk, Tardie is plainly immune to liability in the present case. Tellingly, no fraud has even been alleged, let alone supported by plaintiff through use of admissible material. As to the second, plaintiff essentially suggests that Tardie was personally responsible for the negligence alleged against Ultra and, therefore, should be amenable to suit. A principal

[1] Plaintiff, on the other hand, suggests that Tardie's liability rests primarily upon the level of control he exercised over Ultra at the time of the incident. *German v Bronx United in Leveraging Dollars, Inc.*, 258 AD2d 251, 252 (1st Dept 1999); *Mistrulli . McFinnigan,* Inc., 39 AD3d 606, 607 (2d Dept 2007). While this distorts the rule by shearing away the critical requirement of *fraudulent behavior*, it bears noting that the control Tardie exercised over Ultra and the lounge's maintenance was at best indirect and that no triable issue exists as to whether it reached the level of domination required to justify rendering him amenable to suit under even plaintiff's interpretation. For example, it is uncontested that Tardie delegated the majority of the lounge's "field management" to Flxx, including, relevantly, the hiring and training of both security forces and bartending personnel. It also is uncontested that Tardie did not know that something might be wrong on the lounge floor until after plaintiff sustained her injury. Plaintiff submits no evidence to the contrary, choosing instead to line her memorandum as to this claim with conclusory statements and allegations that Tardie simply "ought" to be liable based upon his 96% ownership stake and presence at the club on the morning of the incident. In light of the previously cited authority, such is simply insufficient. *Billy*, 51 NY2d at 163.

who does this loses the protection otherwise afforded by doing business under the laws governing corporations. *American Express Travel Related Servs. Co. v North Atl. Resources, Inc.*, 261 AD2d 310, 311 (1st Dept 1999); *Westminster Constr. Co. v Sherman*, 160 AD2d 867, 868 (2d Dept 1990); *German*, 258 AD2d at 252.

However, nothing in the present case can be fairly classified as active negligence committed by Tardie personally. He was not present on the floor at the time of the incident and, as was his prerogative, delegated managerial duties and control and training of security and wait staff, to Flxx. Plaintiff's allegations that Tardie established bottle service, are irrelevant, because Tardie acted on behalf of the corporation in establishing said service. As to plaintiff's contention that hiring Flxx was *prima facie* negligent, again, Flxx was hired by the corporation. Moreover, this court notes that, while he may have worked at clubs previously shut down, Flxx was *never* convicted of or held liable for anything. Plaintiff has not produced material evidencing anything beyond Flxx's mere presence in an employee capacity at these establishments. Conversely, Tardie testified repeatedly as to Flxx's credentials, recommendations and skill. In sum, while Tardie *owned* a large share of Ultra, it cannot be said that he directly micro managed the relevant circumstances, either within or without his duties as an Ultra manager, such that he might fairly be described as having personally committed active negligence.

C. Dram Shop Act as Against Ultra

It is well established that the Dram Shop Act must be narrowly construed. *Gabrielle v Craft*, 75 AD2d 939, 940 (3d Dept 1980); *Smith v Guli*, 117 AD2d 1017 (4th Dept 1986). For example, slurred speech, even if backed up by witness testimony that the allegedly intoxicated person actually appeared intoxicated, is insufficient so long as such speech maintains its

coherency. *Senn v Scudieri*, 165 AD2d 346, 351-352 (1st Dept 1991).

Given this restrictive approach and the material submitted by the parties in this case, Ultra has met its burden and plaintiff has not raised a triable issue of fact, thereby rendering summary judgment as to plaintiff's Dram Shop claim proper. *See Donato v McLaughlin*, 195 AD2d 685, 688 (3d Dept 1993) (granting summary judgment for insufficient evidence of visible intoxication). Here, there was no evidence to demonstrate that Dervisevic was visibly intoxicated when he was served alcohol by the lounge's bartenders. Rather, the evidence provided by Di Lonardo is otherwise.[2] The police reports describing Dervisevic as visibly intoxicated, composed long after the bartenders served the drinks and after Dervisevic, according to plaintiff, had consumed several more drinks, are immaterial. Relying upon *Kish v Farley*, 24 AD3d 1198, 1200 (4th Dept 2005), plaintiff attempts a rebuttal of this, arguing that that case renders the *ex post* nature of these police reports irrelevant. The holding in *Kish*, however, is not broad enough to support such a contention. The court in *Kish* merely stated that after-the-fact expert testimony suggesting, within a high degree of probability, that an allegedly intoxicated person was indeed visibly intoxicated prior to service of alcohol, can defeat summary judgment. Unlike *Kish*, the police reports in this case make no attempt whatsoever to imply that Dervisevic was intoxicated, let alone visibly intoxicated, at any point other than when arrested.

Plaintiff simply has not adduced evidence beyond the aforementioned police reports indicating anything beyond the fact that the lounge's bartenders served him some quantity of alcohol. There is nothing on record proving or indicating, *e.g.*, that his speech was incoherent or even that he slurred. Evidence that merely establishes that the allegedly intoxicated person drank

[2] The alleged bathroom incident occurred after Dervisevic was served.

alcohol is insufficient without more. *Wolf v Paxton-Farmer*, 23 AD3d 1046, 1046 (4th Dept 2005); *Pizzaro v City of New York*, 188 AD2d 591, 594 (2d Dept 1992), *lv denied* 82 NY2d 656 (1993). Dervisevic's own admission of intoxication also is insufficient to demonstrate that he *appeared* intoxicated at the time of service. *Nehme v Joseph*, 160 AD2d 915, 917 (2d Dept 1990).

As a final effort, plaintiff argues that Dervisevic's alleged aggression against her should qualify as evidence of visible intoxication. While courts have held that escalating aggression can constitute objective proof defeating summary judgment in Dram Shop actions, it must be noted that nothing submitted by plaintiff meets the preliminary requirement that such aggression be: 1) noticeable 2) *before or during service of alcohol*. *Cf. Catania v. 124 In-To-Go, Corp.*, 287 A.D.2d 476, 477 (2d Dept. 2001), *lv denied* 97 NY2d 699 (2002); *Ryan*, 210 A.D.2d at 650-651. Dervisevic's argument and the physical altercation with plaintiff occurred after he was served, as did the alleged incident in the bathroom.

Insofar as bottle service is concerned, Dervisevic's alleged consumption of plaintiff's purchased alcohol cannot in any sense be considered as a proxy for alcohol *served*. Plaintiff is correct in her assertion that *Montgomery v Orr*, 130 Misc2d 807 (Sup Ct, Oneida County, 1986), held that self-service can meet the Dram Shop Act's service requirement, but in *Montgomery* defendants actually and explicitly established alcohol self-service *for* the intoxicated person while here, conversely, Dervisevic allegedly drank alcohol served to others. *Zuccari v. Hoffman*, 267 AD2d 1067, 1067-1068 (4th Dep't 1999) (defendant not in violation of Dram Shop Act since it did not sell alcoholic beverage directly; person who causes injury must be individual to whom defendant furnished alcoholic beverage). Accordingly, it is

ORDERED that defendants' motion to dismiss the first cause of action alleging negligence against Ultra is denied; and it is further

ORDERED that defendants' motion to dismiss the first cause of action alleging negligence against Tardie is granted, the action against him is severed and dismissed and clerk is to enter judgment accordingly; and it is further

ORDERED that defendants' motion to dismiss the second cause of action alleging violation of the Dram Shop Act as against Ultra, is granted.

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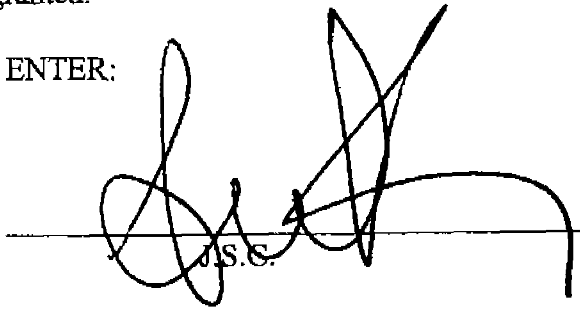

J.S.C.

Date: August 17, 2009

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