

Dugan v Olson

2009 NY Slip Op 32065(U)

September 3, 2009

Supreme Court, New York County

Docket Number: 529/07

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
GREGORY DUGAN,

TRIAL TERM PART: 47

Plaintiff,

-against-

INDEX NO.: 529/07

MOTION DATE: 7-6-09

SUBMIT DATE: 8-21-09

SEQ. NUMBER - 004

**BRIAN OLSON, MINNESOTA'S GRILL &
BAR and THE BEECH BACKYARD INC.,**

Defendants.
-----x

The following papers have been read on this motion:

- Notice of Motion, dated 6-8-09.....1**
- Affirmation in Opposition, dated 8-4-09.....2**
- Reply Affirmation, dated 8-12-09.....3**

The motion of defendant Minnesota's Grill & Bar (the Bar) for summary judgment pursuant to CPLR §3212 (Seq. 4), on the issue of liability under General Obligation Law §11-101 and ABC Law §65(2) (Dram Shop Act), is denied. That prong of the motion which seeks summary judgment in effect as to Third and Fifth Causes of Action based on negligence, is granted and those causes of actions are dismissed. The motion of defendant The Beech Backyard Inc., for summary judgment (Seq. 3) has been withdrawn as the action against that defendant has been discontinued.

This action is based on an altercation which took place in the City of Long Beach on July 5, 2004, at approximately 2:00 a.m. between the plaintiff and defendant Olson. Plaintiff claims that he was assaulted by Olson who struck him with a bottle and that he had never seen him before in his life. The incident occurred two or more blocks from the Bar, after Olson, who had spent about two and three quarter hours consuming 5-4 beers, had left. There is no testimony from any witness who observed Olson at the Bar. Olson was arrested for and convicted of Assault in the First Degree and Possession of a Weapon and although he has not given an examination before trial, he testified before the grand jury and at his criminal trial.

In his testimony before the grand jury and at trial, Olson stated in sum and substance that he had dinner and two beers earlier at 6:30 p.m. at the premises of the former co-defendant and from 8:30 to 10:30 p.m. watched July 4th fireworks on the beach, after which, at about 11:00 p.m., he repaired to the Bar where he remained with friends until 1:45 a.m., during which time he had 4 or 5 beers and "was not drunk" but "feeling good". The encounter with plaintiff began after Olson had left the Bar.

A representative of the Bar testified at an EBT that he has no recall of seeing Olson that evening and doesn't know anyone else who saw him. Plaintiff testified that until the incident, he had no prior contact with and did not share any common location with Olson.

The Court has not been directed to any evidence or testimony describing Olson's appearance, demeanor, actions or conduct while at the defendant Bar.

The Bar argues on this motion that Olson was not visibly intoxicated and thus the Bar should escape responsibility under the Dram Shop Act. Plaintiff argues that there is sufficient indicia of intoxication to create an issue of fact as to whether Olson was visibly intoxicated and that, in any event, defendant has failed to make a *prima facie* showing of entitlement to relief warranting the denial of this motion.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept. 1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). A party cannot establish its entitlement to summary judgment by pointing out gaps in the opponents proof but rather must

offer affirmative evidentiary proof to support its contentions. *Falah v. Stop & Shop Companies, Inc.*, 41 AD3d 638 (2d Dept. 2007). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton*, 29 AD3d 975 (2d Dept. 2006); *Cicccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol*, 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC*, 27 AD3d 684 (2d Dept. 2006).

Under the Alcoholic Beverage Control Law, it is unlawful to sell, deliver or give away alcoholic beverages to “[a]ny visibly intoxicated person” (§65[2]). New York’s Dram Shop Act affords a person injured “by reason of the intoxication” of another person a right of action against the party that unlawfully purveyed the alcohol (General Obligations Law § 11-101[1]; *see Mitchell v. The Shoals, Inc.*, 19 NY2d 338, 340-341 (1967)). The Dram Shop Act is remedial in nature and serves the dual purposes of deterring bar owners and their employees from selling alcoholic beverages to intoxicated persons and of compensating

individuals injured as a result of the unlawful sale of alcohol. *Ourlser v. Brennan* 2009 WL 2636522 (4th Dept. 2009).

As the proponent of the motion for summary judgment, it was incumbent on the Bar to negate the possibility that it served alcohol to a visibly intoxicated person. However, the Bar has failed to submit such proof and hence the burden has not shifted to the plaintiff to adduce evidence that the Bar did serve alcohol to Olson despite visible signs of intoxication. *McGovern v. 4299 Katonah Inc.*, 5 AD3d 239 (1st Dept. 2004); *Darwish v. The City of New York*, 287 AD2d 407 (1st Dept. 2001).

Here, the Bar has not submitted any evidence to show that Olson was not visibly impaired or intoxicated when it served him alcoholic beverages and thus the sufficiency of plaintiff's responsive papers is irrelevant. *Hayward v. Rose & Thistle, Ltd.*, 278 AD2d 455 (2d Dept. 2000); *cf Greco v. Begley*, 4 AD3d 505 (2d Dept. 2004).

The Bar's motion for summary judgment based upon the Dram Shop Act is denied as the Bar has failed to make a prima facie showing of entitlement to relief, *Winegrad v. New York University Medical Center, supra*; *Wolff v. New York City Transit Authority*, 21 AD3d 956 (2d Dept. 2005).

In any event, the Bar's own submission contains evidence which establishes issues of fact concerning Olson's condition.

To sustain a claim under the Dram Shop Act a plaintiff must establish that the defendant unlawfully sold an alcoholic beverage to a visibly intoxicated person. However, use of the term "visible" does not create a rigid requirement that there be an eyewitness and circumstantial evidence may be used to establish visible intoxication. *Romano v. Stanley*, 90 NY2d 444 (1997).

In this case, the cumulative effect of the evidence presented consists of sufficient facts from which a trier of fact could reasonably and rationally conclude that Olson was visibly intoxicated when served alcoholic beverages. *Adamy v. Ziriakus*, 92 NY2d 396 (1998). Such evidence includes Olson's own admissions, the testimony of plaintiff and other witnesses to Olson's conduct at the event, all of which were made in close temporal and spatial proximity to Olson's presence at the Bar. *McGiveary v. Baron*, 4 AD3d 844 (4th Dept. 2004); *See also Kish v. Farley*, 24 AD3d 1198 (4th Dept. 2005); *Roy v. Volonino*, 262 AD2d 546 (2d Dept. 1999); *Marconi v. Reilly*, 254 AD2d 463 (2d Dept. 1998); *cf Sorensen v. Denny Nash, Inc.*, 249 AD2d 745 (3d Dept. 1998).

With respect to the causes of action based on common law negligence, there are no facts from which it can be argued that the actions of the Bar were in any way connected to the assault. The parties were never together in the Bar and plaintiff was not himself there that evening, the fight took place in another location, blocks away from the Bar and, other than the Dram Shop claims, there is simply no conduct or activity on the part of either of the participants that could give rise to liability on the part of the Bar for Olson's conduct. Innkeepers have a duty to exercise reasonable care in protecting patrons from injury arising from reasonably anticipated causes and the Bar has established, as a matter of law, that the incident was extraordinary or one that could not have been reasonably anticipated or prevented by the Bar personnel. *Wolf v. Paxton-Farmer*, 23 AD3d 1046 (4th Dept. 2005); *Santos v. City of New York*, 269 AD2d 585 (2d Dept. 2000); *Mujisce v. Powell*, 264 AD2d 765 (2d Dept. 1999).

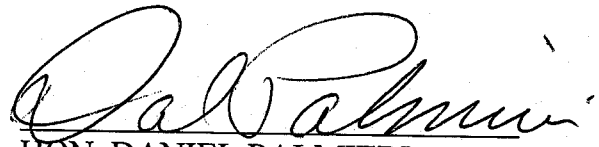
Based on the foregoing, the Bar's motion for summary judgment as to the First Cause of Action, based upon the Dram Shop Act is denied, however, the motion is granted as to the Third and Fifth Causes of Action and those claims are dismissed.

In view of the denial of the motion as it relates to the Dram Shop Act, it is not necessary to address plaintiff's contention that the motion is premature since Olson's deposition has not been taken but, in any event, Olson's grand jury and criminal trial testimony has been presented, plaintiff has never moved to stay this action pending a final determination of Olson's criminal action (*See DeSiervi v. Liverzani*, 136 AD2d 527 [2d Dept. 1988]) and plaintiff has placed the case on the trial calendar, thus a deposition of Olson in this case is not required for the determination of this motion.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: September 3, 2009



HON. DANIEL PALMIERI
Acting Supreme Court Justice

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SEP 08 2009
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