

**Aughenbaugh v Napper Tandy's of Northport**

2009 NY Slip Op 32145(U)

September 17, 2009

Supreme Court, Suffolk County

Docket Number: 07-11876

Judge: Ralph F. Costello

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 27 - SUFFOLK COUNTY

**PRESENT:**

Hon. RALPH F. COSTELLO  
Justice of the Supreme Court

MOTION DATE 7-16-09  
ADJ. DATE 8-17-09  
Mot. Seq. # 002 - MG; CASEDISP

-----X  
LANI J. AUGHENBAUGH and DEBRA :  
AUGHENBAUGH, :  
 :  
 :  
 Plaintiffs, :  
 :  
 - against - :  
 :  
 NAPPER TANDY'S OF NORTHPORT d/b/a :  
 NAPPER TANDY's and PARKSTOWN, INC. :  
 d/b/a NAPPER TANDY'S OF SMITHTOWN, :  
 :  
 Defendant. :

WILLIAM D. WEXLER, ESQ.  
Attorney for Plaintiffs  
816 Deer Park Avenue  
North Babylon, New York 11703

WHITE FLEISCHNER & FINO, LLP  
Attorneys for Defendant/Third-Party  
Plaintiff Parkstown, Inc. d/b/a Napper  
Tandy's of Smithtown  
61 Broadway, 18<sup>th</sup> Floor  
New York, New York 10005

-----X  
PARKSTOWN, INC. d/b/a NAPPER TANDY'S :  
OF SMITHTOWN, :  
 :  
 Third-Party Plaintiff, :  
 :  
 - against - :  
 :  
 MATTHEW BOROWSKI and PHOENIX 4 :  
 CONTRACTING, INC., :  
 :  
 Third-Party Defendants. :  
-----X

NAPPER TANDY'S OF NORTHPORT  
ProSe  
229 Laurel Avenue  
Northport, New York 11768

Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/  
Order to Show Cause and supporting papers (002) 1 - 13; Notice of Cross Motion and supporting papers   ; Answering  
Affidavits and supporting papers 14-17; Replying Affidavits and supporting papers 18-19; Other   ; ~~(and after hearing~~  
~~counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this motion (002) by defendant, Napper Tandy's of Smithtown d/b/a Napper  
Tandy's and Parkstown, Inc. d/b/a Napper Tandy's of Smithtown, pursuant to CPLR 3212 for summary  
judgment on the issue of liability, or in the alternative, pursuant to CPLR 3211 dismissing the complaint

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for failure to state a cause of action is treated as a motion pursuant to CPLR 3212 and is granted and the complaint and the third-party complaint are dismissed with prejudice.

This is an action for damages for personal injuries allegedly sustained by the plaintiffs, Lani J. Aughenbaugh and Debra Aughenbaugh, arising out of a motor vehicle accident which occurred on August 11, 2005 on Route 25A, Town of Smithtown, County of Suffolk, State of New York, when their vehicle and the vehicle operated by Matthew Borowski (Borowski) and owned by Phoenix 4 Contracting, Inc. (Phoenix 4), came into contact when Borowski allegedly crossed over a double yellow line and struck the plaintiff's vehicle. Debra Aughenbaugh was a passenger in the vehicle operated by Lani Aughenbaugh, but to date, has not claimed any personal injury arising out of the accident in her bill of particulars, but appears instead to be asserting a derivative claim. The main action was commenced against Napper Tandy's of Northport d/b/a Napper Tandy's and Parkstown, Inc. d/b/a Napper Tandy's of Smithtown (Napper Tandy's), a bar located at 15 East Main Street, Smithtown, New York, wherein it is claimed that employees of Napper Tandy's served alcoholic beverages to Matthew Borowski in violation of Section 65 of the Alcoholic Beverage Control Law and Section 11-101 of the General Obligation Law of the State of New York (the Dram Shop Act). Napper Tandy's thereafter commenced a third-party action against Matthew Borowski and Phoenix 4 Contracting, Inc. seeking indemnification and contribution.

Napper Tandy's now moves pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint, or in the alternative, pursuant to CPLR 3211 for an order dismissing the complaint for failure to state a cause of action. In that issue has been joined and the Note of Issue was filed with this court on February 23, 2009, this court will consider this motion as one for summary judgment. Napper Tandy's claims that it did not violate the Dram Shop Act or Section 65 of the Alcoholic Beverage Control Law and cannot be held liable to the plaintiffs for their injuries.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499 [2<sup>nd</sup> Dept 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co., 79 AD2d 1014 [2<sup>nd</sup> Dept 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]).

In support of this motion the defendant has submitted, inter alia, an attorney's affirmation; a copy of the amended summons and complaint and third-party summons and complaint; defendant's answer; a copy of the verified and amended verified bill of particulars; copies of the transcripts of the examination before trial of Debra Aughenbaugh dated June 5, 2008, Lani Aughenbaugh dated June 5, 2008, Matthew Borowski dated March 4, 2008, and Laurie Marini dated September 3, 2008.

In opposing this motion the plaintiffs have submitted an attorney's affirmation, an uncertified copy of a misdemeanor information dated August 12, 2005, and the affidavit of Michael Lehrer with annexed report and curriculum vitae. Initially, the Court notes that the uncertified Misdemeanor Information is not in admissible form.

Laurie Marini testified at her examination before trial that she was employed by Napper Tandy's for about eight years as a bartender and served customers, made drinks or food, and set up the bar. She worked on August 11, 2005 from 11:00 a.m. to 7:00 p.m. and was the only bartender on duty. She knew Matthew Borowski for about six months at that time through his father who used to come in for lunch about once a month. She saw Matthew Borowski about three or four times during the six months prior to August 11, 2005 and served him Bud Light on those occasions. She never observed him in what she believed to be an intoxicated condition and no one ever told her they he had been drinking too much and cut him off. On the date of the accident, he was with about ten other people and his brother Josh whom she also knew for about six months and who had been at Napper Tandy's about three or four times prior to the accident. She thought Matthew Borowski arrived about 5:00 or 5:30 p.m. People from his group were buying rounds of beer and mixed drinks and a total of three rounds were purchased. She did not see him consume any alcoholic beverages or Bud Lite while she was on duty. Marianty Anthony was the bartender who replaced her when she left. As she left, she walked past Borowski at the pool table and said good night to him. She observed him to be visibly fine, sober. She did not know what time he left Napper Tandy's. It would have been her practice not to serve further drinks and to call a cab for a customer if she felt there was a problem with someone being intoxicated.

Matthew Borowski testified at his examination before trial that he was involved in a motor vehicle on August 11, 2005 around 8:30 p.m. He was about thirty years old. He had worked in construction from 7:00 a.m. until about 4:30 p.m. or 5:00 p.m. and after work, driving a truck owned by Phoenix 4, went directly to Napper Tandy's, arriving between 5:00 p.m. and 6:00 p.m. for a birthday party, to play pool and to just hang out. He did not drink any alcohol prior to arriving there and during the two hours he was there, he drank about four or five beers, Bud Lights. He bought some and one of his friends bought some. He stated he drank Bud Light and couldn't be sure if he drank one shot of vodka. He stated he believed he did not buy any drinks from the waitresses or bartender who bartends and waits, but could not be sure. He had no difficulty walking or negotiating the steps at the bar when he left after 8:00 p.m. No one told him that he appeared to be intoxicated, or had too much to drink or that his eyes were blood shot or red, or that his speech was slurred. He drove the truck about a mile before the accident happened. He had just used his cell phone, and when he went to put it back down in the middle of the seat, it fell to the floor. He bent down to pick the phone up when the accident happened on the left curve in the road. He was arrested and plead guilty to a DWI acknowledging his blood alcohol level was .18. He never had a prior conviction for anything and was never told he had too much to drink or was cut off on prior occasions. He did state he called a cab to take him home on some occasions.

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The plaintiffs did not testify as to whether Borowski appeared intoxicated at the accident scene.

General Obligations Law §11-101 (1) states in pertinent part, that “any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.”

In order for a court to determine whether there has been an illegal sale of liquor within the meaning of the Dram Shop Act, NY GOL §11-101, that act must be read and considered in conjunction with NY Alc. Bev. Cont. Law §65, Senn v Scudieri et al, 165 AD2d 346 [1<sup>st</sup> Dept 1991].

NY Alco. Bev. Cont. Law §65. Prohibited sales: provides in pertinent part that “no person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to 1. any person, actually or apparently, under the age of twenty-one years; 2. Any visibly intoxicated person; 3. Any habitual drunkard known to be such to the person authorized to dispense any alcoholic beverages....”

The key elements for recovery under the Dram Shop Act are (1) unlawful sale, (2) of liquor, (3) to an intoxicated person which (4) caused injury, see, McNally v Addis, et al, 65 Misc2d 204 [Supreme Court of New York, Westchester County 1970].

The adduced testimony establishes that the bartender did not see any signs of intoxication of Borowski while he was at Napper Tandy's or when she left at 7:00 p.m. As she was leaving, she observed him playing pool and he appeared fine, sober. She had not seen him appear intoxicated on other occasions. It has been demonstrated prima facie that Borowski was not visibly intoxicated at Napper Tandy's and that the bartender at Napper Tandy's did not unlawfully sell him alcoholic beverages while he was visibly intoxicated. Based upon the foregoing, it has been demonstrated prima facie by the moving defendant, Napper Tandy's, that, as a matter of law, the plaintiff was not visibly intoxicated to satisfy the element that there was a sale of alcohol to an intoxicated person under either NY Alco. Bev. Cont. Law §65 or GOL §11-101 prior to his leaving Napper Tandy's.

In opposing this motion, the plaintiff has submitted the affidavit of Michael Lehrer, the Laboratory Director and Chief Toxicologist at the Suffolk County Medical Examiner's Office. He states that Borowski's alcohol breath test (BAC-blood alcohol concentration) was .18% at 11:17 p.m., which reading, he opines, is more than twice the current motor vehicle laws defined impairment/DWI of 0.08%. He sets forth his basis for his opinion. However, in a Dram Shop action based on alleged violation of NY Alco. Bev. Cont. Law §65, the expert's assertion, based solely on blood and urine alcohol counts, that the intoxicated tortfeasor necessarily must have exhibited symptoms of intoxication familiar to trained bartenders is insufficient to establish “visible intoxication” so as to defeat defendant's summary judgment motion, in view of legislative goal of requiring innkeeper's actual knowledge or notice of customer's condition as predicate for “unlawful” sale, and fact that effects of alcohol consumption may differ greatly from person to person, Roman v Stanley, 90 NY2d44 [1997]; Nehme v Joseph, 160 AD2d 915 [2<sup>nd</sup> Dept 1990]; DeMarco v Oak Beach Inn Corp. 241 AD2d 538 [2<sup>nd</sup> Dept

1997]. The seller must have notice of a consumer's near intoxicated condition by means of objective outward appearance for the sale to be unlawful, and hence, within the Dram Shop Act, McNally v Addis, supra. Here, the expert's opinion that Borowski must have been visibly intoxicated prior to the accident is based on a BAC taken two and one half hours after the accident and does not address the blood level at the time of the accident, except with speculation and assumption, and does not address the accuracy of the BAC machine. The expert sets forth the visible clinical signs of intoxication of a BAC level at .18%, but does not indicate that Borowski demonstrated any of those signs at Napper Tandy's.

In Romano et al v Stanley et al, supra, the Court of Appeals reversed the lower courts and held that the plaintiff's expert gave conclusions that had no probative force and were not sufficient alone to defeat the motion for summary judgment by defendant restaurant, holding that while the technical or scientific basis for a testifying expert's conclusions ordinarily need not be adduced as part of the proponent's direct case, an expert's affidavit proffered as the sole evidence to defeat summary judgment must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation, and would, if offered alone at trial, support a verdict in the proponent's favor.

In the instant action there has been no admissible evidence submitted to demonstrate that Napper Tandy's knew or should have known that Mr. Borowski was intoxicated with a blood alcohol level of .18. The plaintiff's expert assumed the breathalyzer equipment was correctly calibrated and chemicals were correctly mixed. However, there had been no trial relating to Borowski's underlying arrest and no expert witness testimony to establish the accuracy of the reading. Nor has any admissible evidence been submitted concerning the accuracy of the breathalyzer test administered to Borowski, such as the affidavit of the operator of the machine.

In McNally v Addis, supra, the court set forth that a generally accepted definition of legal intoxication is an impairment of capacity to think and act correctly, coupled with a loss, in part, of control of physical and mental facilities.... Also, see, VTL §1192 and §1195. The court further stated that "Whether a person is in a state of intoxication depends on many factors, to wit: whether the beverages were consumed on an empty stomach, the percentage of alcohol content in each beverage, the potential elimination of alcohol through the processes of oxidation and excretion, the physical characteristics of the consumer; all of which tends to establish the rate of absorption of alcohol in the blood stream.... Moreover, it is important to know when the drinking commenced, the quantity consumed and the time interval between the last drink and the accident." In the instant action, the plaintiff's expert does not indicate the same and does not consider whether the last drinks consumed by Borowski were just prior to his leaving Napper Tandy's. Thus, it leaves it to this court to speculate as to whether the blood alcohol was on the rise from the time of the accident until the breathalyzer test was administered two and one half hours later. Nor has an affidavit been submitted by the operator of the breathalyzer machine setting forth the accuracy of the BAC test results. A breathalyzer test result is admissible at trial only if the People present evidence from which the trier of fact could reasonably conclude that the machine was working properly when the test was given, ie, properly calibrated, and that the chemicals used in conducting the test were of the proper kind and mixed in the proper proportions, People v State of the State of New York v Nieves, 143 Misc2d 734 [Criminal Court of the City of New York, New York County 1989].

At trial, the People must prove beyond a reasonable doubt that the breathalyzer was properly administered. A breathalyzer reading is admissible at trial only if the People present evidence from which the trier of fact could reasonably conclude that the machine was working properly when the test was given and that the chemicals used in conducting the test were of the proper kind and mixed in the proper proportions. Although the reliability in general of the breathalyzer is no longer open to question, its accuracy in any particular case is always open to investigation at the trial, see, People of the State of New York v Nieves, supra.

Even if this court were to consider the statement set forth by the officer on the Misdemeanor Information that Borowski had a strong smell of an alcoholic beverage on his breath, his eyes were glassy and bloodshot, his gait was unsteady, and he performed poorly on standardized field sobriety tests, it is determined that the report is conclusory and the officer does not set forth the specific findings on the standardized field sobriety tests in his report.

Here the gravamen of the plaintiffs' complaint is the right to recover damages under the Dram Shop or Civil Damage Act (General Obligations Law §11-101) and NY Alco. Bev. Cont. Law §65. Violation of their provisions is negligence per se and the contributory negligence of the injured person is no defense, see, Mitchell v The Shoals, Inc. 19 NY2d 338 [1965]. The burden of proof rests with the plaintiff and he must establish that there was an unlawful sale of liquor to an intoxicated person which caused him injury, see, McNally v Addis, supra. Pursuant to the Alcoholic Beverage Control Law §65, recovery may be had where a sale is made to an intoxicated person, or to one "actually or apparently, under the influence of liquor" and pursuant to the Dram Shop Act, an unlawful sale of liquor to an intoxicated person. Here it has been demonstrated prima facie that Borowski did not demonstrate signs of visual intoxication while present at Napper Tandy's, the plaintiffs have failed to raise a factual issue to preclude summary judgment, and thus, it is determined as a matter of law that Napper Tandy's did not unlawfully sell alcohol to an intoxicated person in violation of NY Alco. Bev. Cont. Law §5 or GOL §11-101.

Accordingly, motion (002) for summary judgment is granted and the complaint is dismissed as asserted against Napper Tandy's. In that the complaint has been dismissed as against Napper Tandy's, the third-party complaint wherein Napper Tandy's seeks indemnification and contribution against Borowski and Phoenix 4 is dismissed as well.

Dated: Sept 12, 2009

[Signature]  
J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION