

Corteselli v Wolfe

2009 NY Slip Op 32192(U)

September 10, 2009

Supreme Court, Nassau County

Docket Number: 21165/08

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

mod

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

CHRISTOPHER CORTESELLI,

TRIAL/IAS, PART 5
NASSAU COUNTY

Plaintiff(s),

MOTION DATE: 7/16//09
INDEX No. 21165/08
MOTION SEQ. NO. 5, 6, 7

-against-

TIMOTHY WOLFE, DIANE WOLFE, JOHN
SQUIRES, DORA ISRAEL, VIVIAN BARKAI,
TALIA BARKAI, LESLIE WATNIK, NEIL
WATNIK and SIDNEY STEIN,

Defendant(s).

The following papers read on this motion:

- Notice of Motion/ Order to Show Cause.....1-4
- Second Notice of Motion.....5-7
- Notice of Cross Motion.....8-13
- Answering Affidavits.....14-23
- Replying Affidavits.....24-29

Upon the foregoing papers, it is ordered that this motion by defendant Dora Israel for an order pursuant to CPLR 3212 granting summary judgment dismissing the first, second and third causes of action asserted against her in the complaint is granted.

Motion by plaintiff for an order pursuant to CPLR 3212 granting partial summary judgment on the issue of liability against defendant Timothy Wolfe on the first cause of action of the complaint and against defendants Diane Wolfe and John Squires on the second cause of action asserted against them predicated on their vicarious liability for the actions of Timothy Wolfe is granted.

Cross motion by defendants Vivian Barkai and Talia Barkai for an order pursuant to CPLR 3212 granting summary judgment dismissing the first, second and third causes of action asserted against them in the complaint is denied without prejudice to renewal upon completion of discovery.

On September 28, 2008 plaintiff, a back seat passenger in a vehicle operated by defendant Timothy Wolfe, sustained injuries in a one-car accident when Timothy Wolfe allegedly lost control of the vehicle at approximately 2:10 a.m. while traveling westbound on South Road in Sands Point, New York and crashed head-on into a tree. In addition to plaintiff, there were two other passengers in the subject vehicle at the time of the accident: Eric Parchment and Clara Tessler, both of whom have commenced actions against, *inter alia*, Timothy Wolfe, Diane Wolfe and John Squires. All of the passengers were under the age of 21 as was Timothy Wolfe and had attended a gathering at the home of Talia Barkai located at 62 Soundview Drive, Port Washington, New York, where defendant Timothy Wolfe allegedly consumed alcohol and /or used drugs.

The motions at bar are addressed to the first cause of action against defendant Timothy Wolfe sounding in negligence; the second cause of action asserted against defendants Diane Wolfe, Timothy Wolfe's mother, and her husband John Squires, sounding in vicarious liability and the first, second and third causes of action asserted against defendants Dora Israel, her daughter Vivian Barkai and her granddaughter Talia Barkai based on common law negligence and negligence per se arising from alleged violation of the Nassau County Social Host Law and violation of §11-100(1) of the General Obligations Law. Nassau County's Social Host Law provides in pertinent part as follows:

"It shall be unlawful for any person over the age of eighteen who owns, rents, or otherwise controls a private residence, to knowingly allow the consumption of alcohol or alcoholic beverages by any minor on such premises or to fail to take reasonable corrective action upon learning of the consumption of alcohol or alcoholic beverages by any minor on such premises. Reasonable corrective action shall include, but not be limited to: 1) making a prompt demand that such minor either forfeit and refrain from further consumption of the alcoholic beverages or depart from the premises; and 2) if such minor does not comply with such request, either promptly reporting such underage consumption of alcohol i) to the local law enforcement agency or ii) to any other person having a greater degree of authority over the conduct of such minor" (Nassau County Local Law No. 13-2007, Title 64).

In support of her motion for summary judgment, defendant Dora Israel attests that while she is the owner of the premises where the alleged underage drinking/drug use occurred, she does not live there. Rather, she purchased the premises to provide a home for her daughter, defendant Vivian Barkai, who was unable to obtain a mortgage. She further attests that she neither procured or supplied the beverages consumed at the location on that night and, prior to the occurrences thereof, had no knowledge or reason to know that alcoholic beverages would be furnished to underage partygoers at the premises.

In the absence of any evidence that defendant Dora Israel knowingly permitted the consumption of alcohol by underage drinkers at her daughter's residence or, furnished or procured the alcoholic beverages allegedly consumed by defendant Timothy Wolfe at the gathering, liability pursuant to General Obligations Law § 11-100(1), common law negligence or negligence per se is precluded. (*Nelson v Neng*, 297 AD2d 313, 314 [2nd Dept. 2002]). To establish statutory liability under § 11-100(1) of the General Obligations Law, defendant must demonstrate that he/she sustained injury:

"by reason of the intoxication or impairment of ability of any person under the age of [21] years . . . [which results in] a right of action to recover actual damages against any person who knowingly causes such intoxication or impairment of ability by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of [21] years."

In order for plaintiff to prevail on a claim of common law negligence, there must first be a legal duty owed by defendant to plaintiff. No such duty exists between defendant Dora Israel and plaintiff. In considering the claims asserted against defendant Dora Israel, it bears noting that in order to sustain a claim under General Obligations Law § 11-100(1), a plaintiff who has been damaged by reason of the intoxication or impairment of ability of an underage person must demonstrate that defendant knowingly furnished or unlawfully assisted the underage person in procuring alcoholic beverages (*Rust v Reyer*, 91 NY2d 355, 359 [1992]; *Sherman by Sherman v Robinson by Robinson*, 80 NY2d 483, 487-488 [1982]). No such showing has been made here.

A defendant who was nothing more than an unknowing bystander or an innocent dupe whose premises were used by minors seeking to

drink, or defendants who were passive participants who merely knew of the underage drinking and did nothing to facilitate it, will not be held liable under General Obligations Law § 11-100(1) (*Lane v Barker*, 241 AD2d 739, 740 [3rd Dept. 1997]). A defendant will not escape liability under the statute, however, where he/she played an indispensable role in a deliberate scheme to make alcohol available to underage party guests (*Rust v Reyer*, *supra* at p. 359).

The record is devoid of any evidence that defendant Dora Israel was either present at the subject location on the night in question or played any role, much less an indispensable role, in making alcohol or drugs available to underage party guests. Even crediting the argument advanced by plaintiff that defendant Dora Israel's motion is premature in that she has not yet been deposed, and considering the evidence in the light most favorable to plaintiff (*Pearson v Dix McBride, LLC*, 63 AD3d 895 [2nd Dept. 2009]), under the circumstances extant, the conclusory speculation that, as an absentee owner of the premises, defendant Dora Israel knew or should have somehow known that underage drinking regularly occurred there is insufficient to defeat her motion for summary judgment dismissing the claims asserted against her. Her connection with the premises and events leading up to the accident in which plaintiff was injured is far too attenuated and plaintiff has failed to proffer any facts or circumstances from which the requisite knowledge could reasonably be inferred.

While a landowner may be liable for injuries sustained by persons on her property where there is a proven violation of the landowner's duty to act in a reasonable manner, including prevention of harm caused by an intoxicated guest, such liability is premised on the opportunity, not here present, to control and supervise the intoxicated person (*Chalu v Hariraj*, 304 AD2d 515 [2nd Dept. 2003]). There is no evidence that defendant Dora Israel had an opportunity to control defendant Timothy Wolfe's conduct or was aware of the need to do so. In any event, it is undisputed that the accident in which plaintiff was injured occurred away from the party location on a public roadway (*D'Amico v Christie*, 71 NY2d 76, 85 [1987]; *Rudden v Bernstein*, 61 AD3d 736, 738 [2nd Dept. 2009]; *Place v Cooper*, 35 AD3d 1260, 1261 [4th Dept. 2006]; *Lombart v Chambery*, 19 AD3d 1110, 1111 [4th Dept. 2005]).

The court reaches a different conclusion, however, with respect to the cross motion by defendants Vivian Barkai and Talia Barkia for summary dismissal of the complaint. While defendant Vivian Barkai, whose daughter Talia hosted the party where the underage drinking allegedly occurred, attests that she was not at

home on the night of the party, was not aware that her daughter was having a party that night and had no knowledge of, and did not consent to, the consumption of alcohol or use of drugs at her home, and defendant Talia Barkai attests that during the time guests were at her home, she did not observe and was unaware of any drug use and any alcohol which may have been consumed was not supplied by her, the fact that plaintiff has not yet had an opportunity to examine either of the defendants with respect to these particulars mitigates against summary dismissal of the complaint. Plaintiff, in the opinion of the court, is entitled to a reasonable opportunity to conduct discovery on these issues which go to the essence of the claims asserted against the Barkai defendants (*Silver v Silver*, 63 AD3d 903 [2nd Dept. 2009]).

Whether defendant Vivian Barkai was aware of and/or gave permission for the consumption of alcoholic beverages by underage partygoers at her home-and whether her daughter, defendant Talia Barkai furnished alcohol within the purview of the statute are factual issues on which plaintiff is entitled to examine defendants. Thus, their motion for summary judgment dismissing the claims asserted against them in the complaint must be denied without prejudice to renewal upon completion of discovery.

Plaintiff herein seeks summary judgment against defendant Timothy Wolfe on the first cause of action of the complaint sounding in negligence, and on the second cause of action asserted against his mother defendant Diane Wolfe and her husband, defendant John Squires, based on their vicarious liability as owners of the vehicle Timothy was operating at the time of the accident. Plaintiff contends that defendants are precluded from relitigating these issues pursuant to the doctrine of collateral estoppel. In this regard, plaintiff relies on the order/decision of the Hon. John M. Galasso dated May 18, 2009 in the matter of *Eric M. Parchment v Timothy Wolfe, Diane Wolfe, John Squires, Dora Israel, Vivian Barkai, Leslie Watnik, Neil Watnik and Sidney Stein* (index no. 21643/08) wherein summary judgment was awarded to Eric M. Parchment, also a passenger in the Wolfe vehicle, who sustained injuries as a result of the accident, "on the liability of the driver and the vicarious liability of the vehicle's owner." The court specifically found that "liability under any other theory is yet to be explored through the discovery process."

The doctrine of collateral estoppel precludes a party from relitigating in a subsequent action an issue clearly raised in the prior action and decided against that party (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]; *Sainval v City of New York*, 57 AD3d

508, 509 [2nd Dept. 2008]). The party seeking the benefit of collateral estoppel must prove that the identical issue was necessarily decided in a prior action and is decisive in the present action. The party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the decision now said to be controlling (*Shaid v Consolidated Edison Co. of New York, Inc.*, 95 AD2d 610, 613-614 [2nd Dept. 1983]). As a corollary to the doctrine of *res judicata*, collateral estoppel permits, in certain situations, the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment on a different cause of action in which the same issue is necessarily raised and decided (*Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481, 485 [1979]). The burden is on the party attempting to defeat the application of collateral estoppel to establish the absence of a full and fair opportunity to litigate (*Kane v City of New York*, 287 AD2d 600 [2nd Dept. 2001]).

It is beyond cavil that the doctrine of collateral estoppel may be invoked by one who was not a party to the first action. The law is adamant, however, that the doctrine may not be used against one who was not a party, or was not in privity with a party who lost in the first action. Significantly, defendants Timothy Wolfe, Diane Wolfe and John Squires do not argue that they did not have a full and fair opportunity to litigate the particular issues of defendant Timothy Wolfe's liability for the accident or their vicarious liability for his actions in the *Parchment* action.

There being no question that the two requirements of collateral estoppel have been met, summary judgment against defendant Timothy Wolfe on the first cause of action of the complaint, and against defendant Diane Wolfe and defendant John Squires on the second cause of action asserted against them for vicarious liability, is appropriate. Clearly, the issues decided by Justice Galasso in the *Parchment* action i.e., the liability of Timothy Wolfe for his passenger's injury, and the vicarious liability of his mother and her husband for Timothy's negligence, are the same issues the court is called to resolve on plaintiff's motion for partial summary judgment in this action. The same factual circumstances constituting the accident itself and responsibility for the accident pertain.

Dated: SEP 10 2009

ENTERED

SEP 15 2009

Wolfe
J.S.C.

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**