

Badamo v Vogel

2009 NY Slip Op 32439(U)

October 19, 2009

Supreme Court, Suffolk County

Docket Number: 07-8004

Judge: Denise F. Molia

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SHORT FORM ORDER

INDEX No. 07-8004

CAL No. 09-00487-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 05/08/09 (002)
MOTION DATE 6/05/09 (003)
MOTION DATE 7/31/09 (004)
ADJ. DATE 08/31/09
Mot. Seq. # 002 - MotD
003 - XMD
004 - XWDN

-----X
JOSEPH C. BADAMO, :
 :
 :
 Plaintiff, :
 :
 :
 - against - :
 :
 CHRISTOPHER M. VOGEL, JEBPUB, INC., :
 d/b/a SHAMROCK PUB AND JAY :
 CASTRO CMB PUB, INC., d/b/a :
 SHAMROCK PUB, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 1-48 read on this motion summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-14, 15-25; Notice of Cross Motion and supporting papers 26-29; Answering Affidavits and supporting papers 30-33, 34-38, 39-41; Replying Affidavits and supporting papers 42-43, 44-46; Other 47; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Jay Castro CMB Pub, Inc. for judgment dismissing plaintiff's complaint against it is decided as follows; and it is further

ORDERED that the cross motion by defendant Christopher Vogel for summary judgment dismissing plaintiff's complaint is withdrawn in accordance with correspondence from Vogel's counsel dated August 26, 2009; and it is further

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ORDERED that the cross motion by plaintiff Joseph Badamo for summary judgment in his favor on the issue of liability as against defendant Jay Castro CMB Pub, Inc. is denied.

Plaintiff Joseph Badamo commenced this action to recover damages for personal injuries he sustained on March 17, 2006 as a result of an alleged assault by defendant Christopher Vogel ("Vogel") that took place on the premises of a bar owned and operated by defendants Jay Castro CMB Pub, Inc., d/b/a Shamrock Pub (herein known as "Shamrock"). By his bill of particulars, plaintiff alleges that Shamrock negligently operated its bar by serving alcoholic beverages to Vogel, an under-age and visibly intoxicated patron. Plaintiff also alleges that Shamrock failed to provide its patrons with adequate security safeguards and violated Alcohol and Beverage Law §106 (6) by permitting its premises to be run in a disorderly fashion. By order of this court, dated July 23, 2007, the court granted plaintiff's motion seeking a judgment of default as against defendant Jeb Pub Inc.

Shamrock now moves for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff failed to offer any proof that Vogel was served alcohol while visibly intoxicated, or that he was under age 21 at the time of the incident. Shamrock also contends that it had no duty to protect the plaintiff since Vogel's acts, which took place outside of the pub, were unforeseeable and occurred within such a short space of time that it could not have reasonably anticipated or prevented them. The cross motion by Vogel for summary judgment dismissing plaintiff's complaint was withdrawn in accordance with correspondence from Vogel's counsel dated August 26, 2009.

Plaintiff opposes the motion and cross-moves for summary judgment against Shamrock. Plaintiff asserts that there are no triable issues as to whether Vogel was a minor at the time of the alleged incident, or that he was served alcohol while visibly intoxicated. In support of the motions the parties have submitted copies of the pleadings, the parties deposition transcripts, and affidavits by non-party witnesses. Plaintiff's submissions also includes a copy of an arrest report dated June 12, 2006, indicating that Vogel was arrested for assault by the Suffolk County Police in relation to the alleged incident, as well as and a copy of the Unified Court System criminal conviction report, docket number 2006SU032697, stating that Vogel plead guilty to a one count of misdemeanor assault.

During his examination before trial, plaintiff testified that he arrived at Shamrock at approximately 10:00 p.m. on the night of the incident. He testified that he was underage at the time of the incident and, therefore was denied an identification bracelet permitting him to purchase alcoholic beverages while in the pub. Plaintiff testified that the incident occurred after he exited the club and was walking toward a car parked across the street. He testified that Vogel, who had been standing among a group of people who had been put-out of the club due to a verbal altercation on the dance floor, unexpectedly punched him in the face when he turned to look at the door of the pub. Plaintiff testified that he was punched within seven seconds of leaving the pub and had taken only a few steps in the direction of the parked car. He also testified that the group of people arguing before the pub's entrance had dispersed leaving a clear path toward the parked car. Plaintiff testified that he never met Vogel before the incident and only briefly observed his back as he ran away after punching him.

At his examination before trial, Robert DeCastro testified on behalf of Shamrock that all patrons seeking to enter the pub were required to show identification to the pub's bouncers, and only patrons 21

years or older were given an identification bracelet permitting them to purchase alcoholic beverages from the bar. DeCastro testified there were approximately four bartenders and five or six bouncers on duty on the night of the incident. He testified that he was neither personally aware nor subsequently informed of any physical or verbal altercations that occurred before the pub on the night of the alleged incident. DeCastro further testified he did not observe any of the pub's bartenders serving alcohol to underage patrons.

During his examination before trial Paul Jordan, Shamrock's former president, testified that he coordinated the pub's efforts to keep order outside its premises. He testified that his efforts included hiring five licensed security guards, maintaining a good relationship with the local police precinct and hiring a drive-by security company. Jordan testified the pub scanned all patrons driver's licenses and gave stamps and identification bracelets to those legally permitted to drink alcoholic beverages. He testified that he became aware of the alleged altercation when plaintiff contacted him by phone and referred him to a website that displayed a photograph of Vogel. Jordan testified that a patron of the pub who had connections to local party promoters identified Vogel's picture and he relayed this information to the plaintiff.

Plaintiff provided affidavits by nonparty witnesses Anthony Donohoe and Drew Arrigan. The affidavit by Donohoe states that he was present at the pub on the night of the alleged incident and observed the pub's bouncers put out approximately fifteen patrons who had been involved in a physical altercation that took place inside the bar. Donohoe also states that Vogel was among these patrons, and that he personally observed Vogel consuming alcohol while visibly intoxicated. He states that he knew Vogel was intoxicated, because he was acting aggressively, yelling loudly and slurring in his speech. Donohoe further states that he observed Vogel assault plaintiff in front of the pub's entrance at approximately 1:00 a.m.

The affidavit by Drew Arrigan states that he also observed the pub's security personnel ask a group of approximately fifteen patrons, including Vogel, to leave the pub following an altercation. Arrigan states that he was personally standing beside Vogel while he was being served alcoholic beverages by the pub's bartender. He further states that Vogel was acting aggressively, slurring in his speech and yelling at people.

It is well settled that owners of public establishments have a duty to control the conduct of third persons on their premises when they have an opportunity to control such persons and are reasonably aware of the need for such control (*see D'Amico v Christie*, 71 NY2d 76, 524 NYS2d 1 [1987]). Therefore, while the owner of a public establishment has a duty to act reasonably to control third persons so as to prevent harm to its patrons (*see Marianne OO v C&M Tavern*, 180 AD2d 998, 580 NY2d 549 [3d Dept 1992]), he or she has no duty to protect patrons against unforeseeable and unexpected assaults (*see Woolard v New Mohegan Diner*, 258 AD2d 578, 686 NYS2d 445 [2d Dept 1999]). Thus, while a defendant breaches this duty where its employees observed an escalating problem on the premises sufficient in time and intensity to give them notice of an impending harm and fail to take reasonable actions to prevent it (*see Ash v Fern*, 295 AD2d 869, 744 NYS2d 559 [3d Dept 2002]; *Heavlin v Gush*, 197 AD2d 773, 602 NYS2d 721 [3d Dept 1993]), no duty exists where the incident giving rise to the harm happened unexpectedly and in such a short space of time that they could not have reasonably

anticipated or prevented it (*see Curcio v East Coast Hoops, Inc.*, 24 AD3d 997, 805 NYS2d 489 [3d Dept 2005], *lv denied* 6 NY3d 710, 813 NYS2d 46 [2006]; *Browne v GMRI, Inc.*, 6 AD3d 640, 775 NYS2d 184 [2d Dept 2004]). Moreover, there is no private cause of action under Alcoholic Beverage Law §106 (6), since civil enforcement of this rule is exclusively within the purview of the New York State Liquor Authority (*see generally* Alcoholic Beverage Control Law §2). In any event, a finding that a licensee “suffered or permitted” the premises to become disorderly under the statute cannot be found where the single occurrence of alleged disorder was unexpected and lasted for only a brief duration (*see Matter of Playboy Club of N.Y. v State Liq. Auth.*, 23 NY2d 544, 297 NYS2d 926 [1968]; *Matter of Mal Rest. v State Liq. Auth.*, 74 AD2d 750, 425 NYS2d 583 [1st Dept 1980]).

The Dram Shop Act, read in conjunction with Alcoholic Beverage Control Law §65 (*see, Matalavage v Sadler*, 77 AD2d 39, 432 NYS2d 103 [2d Dept 1980]), provides that a person who is injured by an intoxicated person, or by reason of such intoxication, has a cause of action against dispensers of alcoholic beverages who continue to sell such beverages to a visibly intoxicated customer (*see Reuter v Flobo Enters.*, 120 AD2d 722, 503 NYS2d 67 [2d Dept 1986]). In addition to prohibiting the sale of alcohol to patrons under the age of twenty-one years, both statutes also provide the same cause of action for damages where alcohol is served to a visibly intoxicated minor (*see Rust v Reyer*, 91 NY2d 355, 670 NYS2d 822 [1998]). Whether a person is visibly intoxicated can be shown by circumstantial evidence, which can include either eyewitness or expert testimony (*see Kelly v Fleet Bank*, 271 AD2d 654, 706 NYS2d 67 [2d Dept 2000], *lv denied* 96 NY2d 702, 722 NYS2d 794 [2001]). However, in a Dram Shop cause of action, the defendant moving for summary judgment has the initial burden of first negating the possibility that alcohol was unlawfully served to a visibly intoxicated person. It is only after this initial burden has been met by the defendant that the burden shifts to the plaintiff to produce evidence in admissible form sufficient to create an issue of fact (*see Costa v 1648 Second Ave Rest.*, 221 AD2d 299, 634 NYS2d 108 [1st Dept 1995]).

Here, Shamrock has established its prima facie entitlement to summary judgment dismissing plaintiff’s fourth cause of action based upon the alleged breach of its proprietary duty to control the conduct of third persons on its premises, and permitting its premises to be run in a disorderly fashion. Plaintiff’s own testimony indicates that the alleged assault by Vogel occurred unexpectedly and in such a short space of time that Shamrock nor its employees could have reasonably anticipated or prevented it (*see Millian v AMF Bowling Ctrs., Inc.*, 38 AD3d 860, 833 NYS2d 173 [2d Dept 2007]; *Curcio v East Coast Hoops, Inc.*, *supra*; *Browne v GMRI, Inc.*, *supra*; *Stafford v 6 Crannel St.*, *supra*). Moreover, civil enforcement of Alcoholic Beverage Law §106 (6) is exclusively within the purview of the New York State Liquor Authority, and no such action may be maintained where, as in this case, the single occurrence of alleged disorder was unexpected and lasted for only a brief duration (*see Matter of Playboy Club of N.Y. v State Liq. Auth.*, *supra*; *Matter of Mal Rest. v State Liq. Auth.*, *supra*). However, with respect to plaintiff’s fifth cause of action premised upon violation of the Dram Shop Act and the Alcoholic Beverage Control Law, Shamrock has failed to meet its burden to negate the possibility that Vogel, who it admits was underage at the time of the alleged incident, was served alcohol while he was visibly intoxicated (*see Costa v 1648 Second Ave Rest.*, *supra*). The affidavits by the nonparty witnesses raise a triable issue as to whether Vogel was served alcohol while he was visibly intoxicated (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *see also Kelly v Fleet Bank*, *supra*).

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As for the plaintiff's cross motion, triable issues, including the time Vogel was served alcohol, whether he was visibly intoxicated at that time, and whether he was intoxicated when he allegedly assaulted plaintiff, precludes summary judgment in plaintiff's favor as against Shamrock (*see Aminov v East 50th St. Rest. Corp.*, 232 AD2d 592, 649 NYS2d 452 [2d Dept 1996], *lv denied* 89 NY2d 815, 659 NYS2d 855 [1997]; *Senn v Scudieri*, 165 AD2d 346, 567 NYS2d 665 [1st Dept 1991]).

Dated 10-19-09


DENISE E. MOLIA

J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION