

Sapra v Ten's Cabaret, Inc.

2010 NY Slip Op 30594(U)

March 17, 2010

Supreme Court, New York County

Docket Number: 100118/2008

Judge: Joan A. Madden

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

PRESENT: Hon. Jacob A. Mendel

PART 11

Index Number : 100118/2008
SAPRA, ANUJ
 VS.
TEN'S CABARET
 SEQUENCE NUMBER : 003
 REARGUMENT/RECONSIDERATION

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for reargument

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision order.

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

FILED
 MAR 23 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: March 17, 2010

 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

-----X
ANUJ SAPRA and ARTI SAPRA,

Plaintiffs,

Index No. 100118/2008

-against-

TEN'S CABARET, INC. d/b/a CLUB 9 ½,
CHRISTOPHER REDA, LF GRAMERCY PROPERTY
CO., LLC, and JOHN DOES 1-10,
SO NAMED AS THEIR IDENTITIES HAVE
YET TO BE ESTABLISHED,

Defendants.

-----X
JOAN A. MADDEN, J.:

FILED
MAR 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiffs Anuj Sapra ("Anuj") and Arti Sapra ("Arti") move for reargument of the court's June 29, 2009 order to the extent it granted, upon reargument and renewal, the court's February 9, 2009 decision and order, defendant Ten's Cabaret's (hereinafter "Ten's") motion to dismiss the negligence cause of action, and granted Gramercy Property Company's ("Gramercy") cross motion to dismiss the complaint. Plaintiff's motion is granted as to defendant Ten's and denied as to defendant Gramercy.

This action arises out of personal injuries sustained by the plaintiffs on the evening of January 8, 2005, at Ten's, a nightclub and lounge located at 33-39 East 21st Street in Manhattan, a building owned by Gramercy. The complaint alleges that two of Ten's patrons, Mohammed Abdul-Shakoor ("Shakoor") and Mohammed Asif ("Asif") chased plaintiffs directly in front of Ten's down a street and beat plaintiffs with a metal baseball bat.

Plaintiffs allege that on the evening of the incident, they were attending a party for a friend at Ten's when Shakoor grabbed plaintiff Arti and asked her to dance. When Arti refused, Shakoor became angry and her brother, plaintiff Anuj came to Arti's assistance. As Anuj

approached Shakoor, Asif joined Shakoor, and both men struck Anuj and pushed him onto a couch. Ten's security lifted Anuj off the couch and removed Anuj, Shakoor and Asif from the dance floor. Ten's security restrained Anuj in front of the club while security led Shakoor and Asif to another area. Shakoor then appeared outside of Ten's with a metal baseball bat while security restrained Anuj. Security informed Shakoor that he could not bring the bat into the club. Shakoor got into an automobile and drove away.

When security released Anuj, Shakoor and Asif appeared and chased Anuj and Arti down the street, where they were attacked with the metal baseball bat. Anuj was struck on the head, face and arms, sustaining serious and life threatening injuries. Arti sustained injuries to her arm. Subsequent to the attack, the assailants were arrested and prosecuted.

The complaint alleges that both Shakoor and Asif were intoxicated as a result of the alcoholic beverages they were served at Ten's on the night of the incident, that the defendants knew or should have known that the men were intoxicated, that both were under the age of 21, and that by reason of their intoxication they caused the plaintiffs to suffer their injuries.

On January 4, 2008, plaintiffs commenced this action asserting claims based on defendants' alleged violation of New York General Obligations Law ("GOL") §11-101, for serving alcohol to visibly intoxicated patrons and GOL §11-100, for serving alcohol to patrons under 21 years of age, and for common law negligence. Defendants did not answer the complaint, but instead moved to dismiss it for failure to state a cause of action and based on documentary evidence.

As to defendant Ten's, in the original decision of February 8, 2009, this court found sufficient basis for the negligence action on the grounds that the complaint alleged the altercation began in the premises and resumed in front of the premises shortly after the parties

were removed from the premises by Ten's employees, and that this sequence of events was sufficient to state a negligence cause of action. In the decision, it was noted that viewing the assertions in the complaint in the light most favorable to plaintiff, as the court must in a motion to dismiss, the assertions were sufficient to state a cause of action for negligence, as they describe an altercation that escalated over time and not a sudden unexpected event. This court cited Ash v. Fern, 295 AD2d 869 (3d Dept 2002) in support of this conclusion, noting that in Ash, the defendant's motion for summary judgment dismissing the negligence claim was denied where the record showed that the confrontation escalated over a time period of 10 or 15 minutes and several warnings were given by defendant's employees.

In its June 29, 2009 decision, this court granted reargument to Ten's, and upon reargument, dismissed the cause of action for negligence against Ten's on the grounds that the decision erroneously stated the assault occurred in front of the premises on East 21st Street when the record for the criminal court revealed that the assault occurred on Park Avenue South between East 20th and East 21st Street. This court found that the cause of action for negligence should be dismissed since at the time of the assault, assailants had left the premises and were blocks away, that Ten's did not owe a duty to plaintiffs, and cited D'Amico v. Christie, 71 NY2d 76, 88-89 (1987). The issue turns on the duty of an owner of a club such as Ten's in protecting its patrons from foreseeable injuries in the area in front of or contiguous to the club.

Plaintiff urges reargument should be granted as in its June 29 decision, the court erred in finding the location of the assault as 254 Park Avenue South as alleged by the defendants from the Bill of Particulars and in the People's Voluntary Disclosure in criminal court, as dispositive of the issue of negligence.

Plaintiff argues that in a pre-answer motion to dismiss the court must accept the facts and permissive inferences to be drawn from the facts as stated in the complaint as true. Plaintiff points to the following allegations in the verified complaint:

Plaintiffs were initially assaulted inside Ten's by the two assailants, who were patrons. The two assailants were escorted out of Ten's by Ten's personnel, and Ten's personnel restrained plaintiff Anuj and brought him to the front of Ten's. One of the assailants was outside Ten's with a baseball bat and was told by Ten's employees he could not come in the club with the bat. The assailant entered a car. Ten's personnel left Anuj alone outside the club. The assailants chased the plaintiffs down and caught them one block from Ten's. Plaintiffs were assaulted by assailants with the bat.

Plaintiffs argue that the conflict began in Ten's, and that Ten's was aware it placed plaintiffs in danger when they left them alone outside the club. As plaintiffs were patrons of Ten's, as were the assailants, plaintiffs argue Ten's owed plaintiffs a duty to protect them from the assailants.

Specifically, plaintiffs argue Ten's had actual notice that there existed a likelihood of harm to plaintiffs and failed to take reasonable steps to insure their safety and that Ten's personnel placed plaintiff Anuj in imminent peril by leaving him in front of the premises. Plaintiffs further argue that the assault was a continuous sequence of events that occurred while plaintiffs were attempting to flee down the streets.¹

¹ It must be noted that plaintiffs' arguments rely on the following paragraphs of the complaint: ¶ 52 (Ten's personnel, while restraining Anuj, saw Shakoor with a baseball bat and told him he could not come in); ¶¶ 58 and 59 (Ten's personnel had reason to know the assailants intended to harm the plaintiffs); ¶ 63 (Ten's personnel left Anuj alone outside after seeing Shakoor with the baseball bat); ¶ 64 (plaintiffs were obligated and attempted to flee, however Shakoor and Asif were in a Lexus automobile and chased plaintiffs, who were on foot, and caught them).

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See Foley v Riche, 68 AD2d 558, 567 (1st Dept 1979).

Here, plaintiffs' motion to reargue is granted as he correctly argues that in a pre-answer motion to dismiss, the court is limited to ascertaining whether the pleading states any cause of action and not whether there is evidentiary support for the cause of action. Guggenheimer v. Ginzburg, 43 NY2d 268 (1977). The complaint must be liberally construed in the light most favorable to the plaintiff and all the factual allegations must be accepted as true. *Id.* Morone v. Morone, 50 NY2d 481 (1980). At the same time, "[in] those circumstances where the legal conclusions and factual allegation are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference." Morgenthow & Latham v. Bank of New York Co. Inc., 305 AD2d 74, 78 (1st Dep't), ly denied, 100 NY2d 512 (2003) (citations omitted). However, dismissal based on documentary evidence may result "only where it has been shown that a material fact as claimed by the pleader... is not a fact at all and... no significant dispute exists regarding it. Acquista v. New York Life Ins. Co., 285 AD2d 73, 76 (1st Dep't 2001) (citations omitted).

In its motion to reargue, Ten's submitted the Bill of Particulars indicating that the location of the assault as 254 Park Avenue South, and also a map of the area showing the flow of traffic.

The court takes judicial notice of the following: the flow of traffic on East 21st Street, where the club is located, runs west; that East 21st Street, where the club is located, is bounded

by Broadway on the west and Park Avenue South on the east; that the flow of traffic on Broadway runs south and that on Park Avenue it runs north and south with a concrete divider.

Ten's argues since the assailants entered a car on East 21st Street, they necessarily had to go west to Broadway, take a left onto Broadway and make a left onto East 20th Street, and then a left onto Park Avenue to arrive at 254 Park Avenue South, where the assault occurred.

However, as plaintiffs argue the allegations in the complaint are sufficient to show that Ten's had a duty to plaintiff based on the actions of its employees, ejecting plaintiffs and leaving plaintiffs on the street when they knew the assailants had a baseball bat and that these actions were contrary to their duty to protect their patrons from assault by a third person on the premises and in the area in front of and contiguous to the premises. D'Amico v. Christie, 71 NY2d at 85 (1987) (there is 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."). See also Rivera v. 21st Century Rest. Inc., 199 AD2d 14, 15 (1st Dep't 1993). This duty was in effect when Ten's employees left Anuj outside alone after observing Shakoor, a patron who had immediately beforehand been ejected from Ten's, in front of Ten's with a baseball bat.

Notwithstanding the flow of traffic on the streets, under the circumstances here, where there has been no discovery, and giving plaintiff the benefit of every inference, it cannot be said that the cause of action for negligence should be dismissed. This is not to say, however, that the evidence will support the claim of negligence.

In reaching this conclusion, the court notes that Shakoor, after being ejected from the club, returned within a short period of time with a bat, was refused admittance, and this was at around the same time plaintiff Anuj was being ejected. Under these circumstances, the complaint adequately alleges that Ten's had a duty to insure Anuj's safety and potential issues exist as to

whether it violated that duty by ejecting Anuj and leaving him in the area where the assailant from the club had just returned with a baseball bat. See D'Amico, 71 NY2d at 85.

As to defendant Gramercy, the case of Winter v. Motel Associates of La Guardia, 127 Misc2d 486 (Sup. Ct. Queens County 1985), relied upon by plaintiff, is inapplicable as it did not involve an out-of-possession landlord.

Nor do plaintiff's arguments regarding lease provisions providing for the class of cabaret Ten's was to operate on the premises and the provision giving the owner the right to enter to make repairs create a duty of care on behalf of Gramercy to a third party such as plaintiff regarding the operation of Ten's. "[I]t is well settled that the mere reservation of a right to enter property for the purpose of effecting repairs, without more, does not create a duty on the part of the landlord to assure the safety of the premises." Winter v. Jimmy's Lakeside Inn, Inc., 200 AD2d 826 (3d Dep't 1994) (also holding that the out-of-possession landlords had no duty to protect plaintiff from the furnishing of alcohol on the premises, which allegedly caused a dangerous condition). See also Nikolaidis v. La Terna Rest., 40 AD3d 827 (2d Dep't 2007) (no liability for an out-of-possession landlord unless he has "retained control over the premises or is contractually obligated to perform maintenance and repairs."). Accordingly, the motion is denied as to Gramercy.

In view of the above, it is

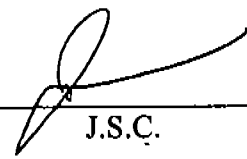
ORDERED that plaintiffs' motion for reargument is granted as to defendant Ten's and, upon reargument, plaintiffs' negligence claim against Ten's is reinstated; and it is further

ORDERED that plaintiffs' motion for reargument is denied as to defendant Gramercy; and it is further

ORDERED that the remaining parties shall appear on March 25, 2010 in Part 11, room 351 for a compliance conference.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

DATED: March 17 2010



J.S.C.

FILED
MAR 23 2010
NEW YORK
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