

**Peters v Martinez**

2010 NY Slip Op 31220(U)

May 18, 2010

Supreme Court, Suffolk County

Docket Number: 00499/2008

Judge: Paul J. Baisley

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SHORT FORM ORDER

INDEX NO. 00499/2008

SUPREME COURT - STATE OF NEW YORK  
DCM-J - SUFFOLK COUNTY

**PRESENT:****Hon. Paul J. Baisley, Jr.** \_\_\_\_\_\_\_\_\_\_  
GLENN PETERS,

Plaintiff(s),

-against-

ANIBAL A. MARTINEZ, MUGG'S PUB, INC.,  
 JOHN DOE, A FICTITIOUS NAME FOR A  
 PERSON PRESENTLY UNKNOWN, JANE DOE,  
 A FICTITIOUS NAME FOR A PERSON  
 PRESENTLY UNKNOWN AND LONG ISLAND  
 PACIFIC, LLC,

Defendant(s).  
\_\_\_\_\_**ORIG. RETURN DATE:** September 29, 2008**FINAL RETURN DATE:** January 30, 2009**MTN. SEQ. #:** 001-MG**PLTF'S ATTORNEY:**

SANFORD & PIROTIN P.C.  
 323 MADISON STREET  
 WESTBURY, NY 11590

**DEFT'S ATTORNEY FOR MARTINEZ:**

DAVID J. SOBEL, ESQ.  
 811 WEST JERICHO TURNPIKE  
 SMITHTOWN, NY 11787

**DEFT'S ATTORNEY FOR LI PACIFIC:**

WHITE FLEISCHNER & FINO, LLP  
 61 BROADWAY-18TH FLOOR  
 NEW YORK, NY 10006

**PRO SE DEFENDANT:**

MUGG'S PUB, INC.  
 84 ORANGE AVENUE  
 SUFFERN, NY 10901

MUGG'S PUB, INC.  
 69 SMITHTOWN BLVD.,  
 SMITHTOWN, NY 11787

Upon the following papers numbered 1 to 42 read on this motion for summary judgment: Notice of Motion and supporting papers 1 - 17; Affirmation in opposition and supporting papers 18 - 22; Reply Affirmation and supporting papers 23 - 34; Supplemental (Reply) Affirmation 35 - 37; Sur-Sur Reply Affirmation and supporting papers 38 - 42; it is,

**ORDERED** that the motion (001) by the defendant Long Island Pacific, LLC for summary judgment dismissing the amended complaint and all cross claims as to them is granted and the amended complaint and the cross claims are dismissed only as to the defendant Long Island Pacific, LLC; and it is further

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**ORDERED** that the defendant Long Island Pacific, LLC is hereby severed from the caption and this action shall continue only as against the remaining named defendants, Anibal A. Martinez, Mugg's Pub, Inc., John Doe, a fictitious name for a person presently Unknown and Jane Doe, a fictitious name for a person presently Unknown; and it is further

**ORDERED** that the remaining parties who have appeared are directed to appear for a preliminary conference pursuant to 22 NYCRR 202.8(f) on May 27, 2010 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.

This is an action for personal injuries arising out of an accident in which the plaintiff was allegedly run over by a vehicle driven by the defendant Anibal A. Martinez (hereinafter Martinez) in the parking lot of a small shopping center (six stores) in which Mugg's Pub was located.

The shopping center is owned by the defendant Long Island Pacific, LLC (hereinafter LIP); the defendant Mugg's Pub, Inc. (hereinafter Mugg's Pub) is purportedly a tenant in the subject shopping center.

The amended complaint contains two causes of action. The first is based upon an alleged violation of the Dram Shop Act (GOL §11-101) as against LIP and Mugg's Pub; and, the second sounds in negligence as against Martinez.

The defendant Martinez's cross claim against LIP is for indemnification and contribution.

The defendant LIP now moves (001) for summary judgment dismissing the amended complaint and cross claims as to it on the ground that LIP is an out-of-possession landowner with no liability for the acts of its tenants, is not liable under the Dram Shop Act and, in any event, had no notice as to any prior wrongdoing at the subject premises.

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

In support of this motion for summary judgment, LIP submits, inter alia, copies of the applicable leases, deeds and assignments which show the chain of title to LIP for the subject premises and the landlord-tenant relationship as to Mugg's Pub. These documents are not controverted.

LIP also submits a copy of the police report for the accident which occurred on June 26, 2007 and reflects that the unidentified driver of the offending vehicle, now alleged to be Martinez, drove off without stopping after hitting the plaintiff. Also submitted are affidavits from LIP's vice-president and property manager.

LIP's vice-president, Yong Qiu, states that LIP owns the property in question and employs a property manager who collects rent from the tenants of the shopping center and makes recommendations as to any major repairs which may be required. Yong Qui also states that LIP "does not exercise any supervision or control over the operation of the bar and had no responsibilities with respect to how the bar conducted its business on [the day of the accident]; . . . did not supervise the day-to-day operations; . . . did not hire or employ [anyone] on behalf of the bar; . . . [and never] served alcohol to a patron at the bar" (Yong Qiu affidavit, ¶¶ 7-10).

The affidavit from LIP's property manager, Eva Lee-Wexler, repeats the statements made by Yong Qiu above and, in addition, states that her specific duties were to collect rent, to inspect the property and to report any problems to LIP (Eva Lee-Wexler's affidavit, ¶¶ 3, 6-9).

In order to sustain a cause of action under the Dram Shop Act (GOL §11-101), the plaintiff must show that the landowner directly sold alcohol to a person that the landowner knew or should have known was intoxicated, that the landowner had the opportunity to supervise that person's drinking and, moreover, the Dram Shop Act is construed narrowly as against a landowner (*see* GOL §11-101[1]; *Sherman v Robinson*, 80 NY2d 483, 591 NYS2d 974 [1992]; *D'Amico v Christie*, 71 NY2d 76, 524 NYS2d 1 [1987]; *Cavanaugh v Knights of Columbus Council 4360*, 142 AD2d 202, 204, 535 NYS2d 275 [3d Dept 1988], *lv denied* 74 NY2d 604, 543 NYS2d 396 [1989]).

As to common law negligence on the part of the landowner, Real Property Law §231 provides, in part, that a landowner or landlord is liable where it "knowingly" gives possession to a tenant "for any unlawful trade, manufacture or business" (Real Property Law §231[2]). Although the complaint contains no allegations in this regard, the bill of particulars does, and the parties raise and address this issue in the submissions on this motion.

Based upon the submissions on this motion by the defendant LIP, the court finds that LIP has made a prima facie showing of entitlement to summary judgment dismissing the amended complaint and the cross claim as to it.

With regard to the Dram Shop Act claim, LIP has satisfied the court that there is no proof that Martinez was ever a patron of Mugg's Pub or, in any event, that Martinez was intoxicated. In addition, there is no proof that LIP either served or was responsible for serving Martinez alcohol, or that LIP knowingly caused Martinez to become intoxicated (*see Furio v Palm Beach Club*, 204 AD2d 1053, 1054, 613 NYS2d 314 [4<sup>th</sup> Dept 1994]; *Haskell v Chautauqua County Fireman's Fraternity, Inc.*, 184 AD2d 12, 17, 590 NYS2d 637 [4<sup>th</sup> Dept]; *lv dismissed* 81 NY2d 954, 597 NYS2d 939 [1993]).

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Accordingly, LIP has made a prima facie showing of entitlement to dismissal of the Dram Shop Act claim.

As to negligence, LIP has shown that it had no prior notice of any repeated criminal activity on the premises such that posed a likely risk of injury and which had a causal relationship with the injuries suffered in this case (*see Neil v New York City Housing Auth.*, 48 AD3d 767, 768, 853 NYS2d 567 [2d Dept 2008]). In addition, LIP has satisfactorily shown that it was an out-of-possession landowner where it only had a limited right to enter and inspect and, in any event, there was no injury here due to the lack of repairs at the premises (*see Dalzell v McDonald's Corp.*, 220 AD2d 638, 639, 632 NYS2d 635 [2d Dept 1995], *lv denied* 88 NY2d 815, 651 NYS2d 17 [1996]). Lastly, LIP has shown under the facts of this case that it had no duty to Martinez or the plaintiff, thus there was no breach of a duty and no injury as a result of such a breach (*see Akins v Glens Falls City School Dist.*, 53 NY2d 325, 335, 441 NYS2d 644 [1981]; *Gaeta v City of New York*, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]).

Accordingly, LIP has made a prima facie showing of entitlement to dismissal of any negligence claims.

The burden now shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

In opposition, the plaintiff submits no evidence of the defendant Martinez ever entering Mugg's Bar or being intoxicated. Nor does the plaintiff offer any proof that the defendant Martinez was served any alcohol in the bar by or on behalf of the defendant LIP or anyone else. The plaintiff, thus, has failed to meet his burden to show a material issue of fact requiring trial as to the Dram Shop Act claim. Accordingly, the Dram Shop Act claim against the defendant LIP is dismissed.

In support of his negligence claim, the plaintiff submits, inter alia, a copy of the bill of particulars in which he says there were "illegal and dangerous conditions" which the defendant LIP "knowingly and negligently permitted." The plaintiff also submits affidavits from himself, an affidavit from a non-party witness, two unsigned statements from Martinez made to a police officer and signed statements from two other non-party witnesses made to the police.

The plaintiff Glenn Peters (hereinafter Peters) states in his affidavit that on June 26, 2007, at around 12:30 a.m., he arrived at Mugg's Pub to pick up his friend, Thomas Gonzalez. As Peters was walking to his vehicle in the parking lot, he saw an "SUV back up quickly, out of a parking spot." The SUV then accelerated forward quickly toward Peters, struck him and "continued to run over me."

Peters' friend, Thomas Gonzalez, states in his affidavit that as he exited Mugg's Pub, he saw two males in a fist fight in the parking lot. He then saw one of the two fighters run to his SUV, back out and then move forward abruptly," hitting Peters. The SUV continued to drive over Peters and left. Gonzalez drove Peters to the hospital.

Gonzalez also says that he was a frequent patron of Mugg's Bar and personally saw, on numerous occasions, fights, weapons, drug deals, loitering as well as police frequently responding to the location. Gonzalez does not state that he ever brought these activities to the attention of law enforcement, Mugg's Pub or LIP.

In two unsigned statements to the police four days after the accident, Martinez purportedly provided information about the "assault" in the parking lot but said nothing about hitting or running anyone over. According to the first unsigned statement, which is not being accorded any evidentiary value on this motion, Martinez was assaulted in front of the bar, surrounded by four males, jumped into his vehicle - which his girlfriend also got into - and while starting the vehicle, the four males were hitting it on the outside. The four males then got into a vehicle and left; Martinez followed them to get their license plate number, which he did, and then went home. The police then arrived at his home, apparently to get information as to the assault. Martinez did not mention hitting anyone with his vehicle.

In Martinez' second unsigned statement, he says he was shown some photos and picked out one of the alleged perpetrators.

In a signed statement to the police about three weeks after the incident, Daniel Golde, one of the four individuals who allegedly "assaulted" Martinez, stated that he was with three friends hanging out in front of Mugg's Pub that night when he saw Martinez arrive and exit his vehicle with a pipe, heading right toward Golde and yelling that Golde was a "snitch." According to Golde, Martinez hit him at least once and then they had a "mutual fight" which people broke up. Golde and his friends then got into a vehicle and while they were pulling away, saw Martinez back out of a parking "stall," then, "when he pulled forward he hit a kid I know as 'G.' He gunned the car pretty hard and made 'G' go flying . . . landing on the hood and windshield . . . then fell to the ground." Golde and his friends stopped to check "G," saw he was being helped and they left. Golde says Martinez was following them until they arrived at another bar's parking lot where Martinez yelled at them, "You don't know who you fucking with. I'm a LK {Latin King}." Martinez then left. Golde picked Martinez' picture out of a photo spread.

The last written statement submitted was made to a detective by one of Golde's friends from the incident, Ioannis Sklavanitis (apparently known as "Yanni") and is on a form with an acknowledgment of his being given his Miranda rights. However, only the first page of this three-page statement is submitted. This partial statement, made 17 days after the incident, corroborates Golde's version that they were hanging out in front of Mugg's Pub that night when Martinez drove up, exited his vehicle with a pipe and "started swinging" at Golde. According to Sklavanitis, Golde "laid him [Martinez] out."

In reply to those parts of the plaintiff's opposition which for the first time raises issues regarding LIP being on notice of dangerous and unlawful conditions, LIP submits supplemental affidavits from Yong Qiu and Eva Lee-Wexler in which they both state that they never received any notices or complaints of any "ongoing or persistent, dangerous or criminal activity at the bar" from anyone including police department officials "including loitering, violence, fights or drug dealings in the parking lot."

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Of particular significance from all these submissions is that there is no evidence whatsoever that Martinez ever entered Mugg's Bar, let alone that he was served alcohol there or was intoxicated. On this basis, LIP is clearly not liable under any legal theory under the Dram Shop Act.

As to a general allegation of negligence under Real Property Law §231(2), aside from the affidavit of Thoms Gonzalez in which he states that he personally observed criminal activity in the parking lot, there is no evidence of any notices from law enforcement agencies or any showing of any kind that LIP was given any notice of any persistent criminal activity (*see Neil v New York City Housing Auth.*, 48 AD3d 767, 768, 853 NYS2d 567 [2d Dept 2008]). Moreover, and in any event, even if there was such notice, there is no causal connection shown between such activity and the injuries to the plaintiff in this case (*id.*). Injuries due to a fight, the use of weapons or drug dealing are not causally connected to an independent act of running someone over with a car. This is especially so in this case where there is no indication of any relationship between Peters and Martinez and, indeed, Martinez may not have even known that he ran anyone over.

The plaintiff, thus, has failed to raise a material issue of fact as to the absence of negligence on the part of the defendant LIP. Accordingly, the negligence claim against LIP is dismissed.

As to the cross claim by the defendant Martinez, Martinez submits no opposition to this request. In any event, in view of the dismissal of the complaint in its entirety as to LIP, there is no basis, as a matter of law, for the cross claim brought against LIP by Martinez and that, too, is dismissed.

The plaintiff's argument that it is premature to grant summary judgment at this early stage when a preliminary conference has yet to be held is without merit. In the absence of any evidentiary support for his contention that discovery would likely produce any relevant evidence, such an argument must fail. Mere hope and speculation are not enough (*see Flores v City of New York*, 66 AD3d 599, 888 NYS2d 27 [1<sup>st</sup> Dept 2009]).

This constitutes the decision and order of the court.

Dated: May 18, 2010

**HON. PAUL J. BAISLEY, JR.**  

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**HON. PAUL J. BAISLEY, JR., J.S.C.**