

Keily v Benini

2010 NY Slip Op 31448(U)

May 26, 2010

Supreme Court, Queens County

Docket Number: 23845/06

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES,
Justice

PART 17

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GARY KEILY JR. and KRISTY KIELY,
Plaintiff,

Index No.: 23845/06
Motion Date: 5/19/10
Motion Cal. No.: 36

-against-

BRYAN BENINI and THE GREY LAKE INC.
d/b/a METRO 53

Defendant.

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The following papers numbered 1 to 10 read on this motion by defendant **THE GREY LAKE INC. d/b/a METRO 53** ("Metro 53") for an order, pursuant to CPLR § 3212, granting summary judgment in its favor as against plaintiffs and dismissing all claims by them against Metro 53.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum Of Law.....	5
Affirmation in Opposition-Exhibits.....	6-8
Reply Affirmation.....	9-10

Upon the foregoing papers it is ordered that the motion by defendant Metro 53 for an order, pursuant to CPLR § 3212, granting summary judgment in its favor as against plaintiffs and dismissing all claims by them against Metro 53 is decided as follows:

The action herein stems from plaintiffs' claims that on October 8, 2005, they were injured while inside the premises of the Metro 53, bar/restaurant, that was owned and operated by defendant The Grey Lake Inc., located at 307 East 53rd Street, New York, New York. According to the complaint, plaintiffs were struck about their person, stabbed with sharp objects and forced to the ground, due to the negligence of defendants. Thereafter, plaintiffs commenced this action against defendants for physical injuries they received from the assault on their persons.

Defendant Metro 53 now moves for summary judgment in its favor and against plaintiffs on the ground that the plaintiffs' assaults were sudden and unforeseeable acts for which the defendant cannot be held liable, while there is no evidence that the assailants were visibly intoxicated and served with alcohol at such time so as to support a Dram Shop violation claimed by plaintiffs. Plaintiffs oppose this motion and claim that there are issues of fact

regarding the credibility of witnesses as to whether the altercations at issue were such that Metro 53 had constructive notice of the risk of violence and that such was foreseeable.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v. County of Albany*, 50 NY2d 247 (1980); *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v. March*, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in *Daliendo v Johnson*, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

In support of his motion, defendant Metro 53 has submitted, *inter alia*, the deposition testimony of plaintiff Gary Kiely, plaintiff Kristy Kiely's brother, that indicates he was involved in an incident at Metro 53 on October 8, 2005 after he had been dancing with an unknown female. As he was dancing, a person, whom he believe to be "a little intoxicated" suddenly and without warning punched him and then a big commotion started. He had not noticed this male prior to the punch, but he recalled that the puncher told him that the girl you are dancing with is his girlfriend. Plaintiff claimed that the puncher was slurring his words as he asked if plaintiff was hitting on his girl. The puncher then jumped on plaintiff and wrestled him to the floor, although other unidentified males joined in the fight, plaintiff was able to free himself and go downstairs to the bathroom. At about this time, plaintiff noticed his sister get punched by the male who punched him. As he went to the bathroom, plaintiff saw Metro 53 security staff go toward the area where the fighting was going on, however, he did not speak with any of them. Gary Kiely then remained in the bathroom for about fifteen minutes and when he exited, about four or five persons immediately assaulted him. He did not know if any of his attackers were involved in the fight on the dance floor. Security personnel arrived and escorted plaintiff and the others out of Metro 53. Once outside, plaintiff claims to have been attacked by a group of nine to ten persons, one of them was defendant Bryan Benini. This fight lasted a few minutes until police officers arrived and ended the fighting. Plaintiff Gary Kiely does not claim to have been injured during this outside fight.

Defendant also has submitted the deposition testimony of Kristy Kiely which indicates that she was involved in an incident at Metro 53 on October 8, 2005 and she witnessed her brother being assaulted on the dance floor by three or four people, one of which was defendant Bryan Benini. She was punched and fell to the ground and blacked out, but she does not know who punched her or threw a glass at her. When she regained consciousness, she was helped off of the dance floor and she saw there was no more fighting going on, only dancing on the dance

floor.

Defendant also has submitted the deposition testimony of defendant Benini, which indicates that he was at Metro 53 on October 8, 2005 and saw a big scuffle that night. He was introduced to plaintiffs that night and saw plaintiff Gary Kiely consume more than five alcoholic drinks. At some point, he saw a friend injured and Benini was then escorted out of the Metro 53. Outside, he confronted Gary Kiely about whether he threw a glass at Benini's friend, but prior to any physical contact, police officers separated them. He stated that he did not hit Gary Kiely that night, and did admit to being a little drunk, having consumed about three shots and maybe four drinks during the night.

Defendant has submitted the deposition testimony of Michael Haynes, its owner, who was working at Metro 53 the night of the incident. He stated that he observed a heated discussion between two unidentified men, with one of them knocking glasses and bottles off of a table. Security staffers went to these two men immediately thereafter and escorted them out of the bar, one at a time, the second male remaining in the bar for a few minutes after the other was led out. This second male left with a female, who noticed her leg was bleeding and she came back into the bar and had her wound attended to by a Metro 53 waitress.

Defendant has also submitted the deposition testimony of Brandon Lynch, a bartender with Metro 53, who was working on October 8, 2005. He had been trained on alcohol consumption and serving customers and was certified to serve by New York State with a Tipis Certificate. He stated that at some point that evening he observed two males arguing and heard the sound of breaking glass. These two males were escorted out of the bar by security staffers shortly after Lynch had informed Haynes of the incident. Neither of these two males had been served alcoholic beverages by Lynch.

Defendant also has submitted portions of the deposition testimony of Jade Kiely, plaintiffs' sister, that indicates they were at the Metro 53 celebrating a birthday and she saw people attacking others, however, she did not see any person attack her sister. She did see defendant Benini and others punch and kick her brother Gary Kiely.

In order to establish a prima facie case of negligence, the plaintiff must demonstrate: (1) a duty owed by defendant to plaintiff; (2) a breach of that duty; and (3) an injury suffered by plaintiff as the result of that breach. Solomon v City of New York, 66 NY2d 1026, 1027 (1985.) Landowners and business proprietors have a duty to maintain their properties in reasonably safe condition and this duty may extend to controlling the conduct of third persons who frequent or use the property, at least under some circumstances. *See*, DiPonzio v Riordan, 89 NY2d 578 (1997.) Liability for the negligent acts of a third party is not ordinarily imposed unless the defendant has the authority, as well as the ability, to control that party's actions; the mere fact that the defendant could have exercised that control " 'as a practical matter' " does not create a duty to do so (Purdy v Public Adm'r of County of Westchester, 72 NY2d 1, 8,

quoting D'Amico v Christie, 71 NY2d 76, 88.)

Furthermore, it is an elementary tenet of New York law that the risk reasonably to be perceived defines the duty to be obeyed, otherwise stated, the inquiry is whether the accident was within the reasonably foreseeable risks. The particular facts and circumstances to a large extent determine whether a duty arises, however, considerations of public policy are also important. Thus, a person is held to be at fault only when the injury-producing occurrence is one that could have been anticipated. This policy is necessary since “every untoward consequence can theoretically be foreseen with the wisdom born of the event, the law draws a line between remote possibilities and those that are reasonably foreseeable because no person can be expected to guard against harm from events which are so unlikely to occur that the risk would commonly be disregarded.” DiPonzio v Riordan, *supra*, at 583.

In the instant case, defendant Metro 53 has established prima facie entitlement as a matter of law that it did not fail in its duty to protect plaintiffs while they were inside Metro 53. Alvarez v Prospect Hosp., 68 NY2d 320 [1986].) The testimony of Gary Kiely indicates that when he was punched on the dance floor he was taken by surprise and did not expect such to happen. Clearly, if this punch was sudden and unexpected to him, a participant, it was also sudden and unexpected to Metro 53 staffers. Similarly, when Gary Kiely had extricated himself from the fighting on the dance floor and went to the bathroom, there was no indication that he was followed by other males to continue fighting or that he was observed leaving the fight by any staffers. As he stated, he remained in the bathroom for fifteen minutes and upon exiting was immediately attacked. Clearly, another example of a sudden and unexpected event. Regarding the alleged assault outside the bar, Gary Kiely stated he was not injured as a result of this altercation and thus any negligence in escorting him from Metro 53, cannot be the basis for his injuries suffered previously while within Metro 53. Regarding Kristy Kiel's common law causes of action, these too fail since she stated that she was punched and had glass thrown at her without any warning or indication and she in no way expected such to happen.

In opposition to this branch of the motion, the plaintiff has failed to raise a triable issue of fact. Plaintiffs refer to the same deposition testimony relied upon by Metro 53 and seek to ignore their own statements that clearly establish the lack of any events that preceded and anticipated their assaults. Their reliance upon the observation of an individual knocking over bottles fails to raise any issues of fact since it is unclear who knocked over the bottles and at what point in the evening. However, it is clear that the knocking over of bottles was a sudden unexpected event. Based on the evidence presented, the plaintiffs were injured as the result of a sudden and unexpected altercation by unidentified assailants and one identified assailant which the defendant Metro 53 could not have reasonably anticipated or prevented. Therefore, defendant Metro 53 cannot be held liable for the plaintiffs' injuries based on Metro's common law duty to protect plaintiffs. Accordingly, the branch of the motion seeking to dismiss the

causes of action based on the common law duty to protect is granted and these causes of action are dismissed. Katekis v. Naut, Inc., 60 A.D.3d 817 (2d Dep't 2009) Petras v. Saci, Inc., 18 A.D.3d 848 (2d Dep't 2005.)

Metro 53 has also established its prima facie entitlement as a matter of law that any of its alleged negligence concerning failing to provide adequate security was not a substantial cause of the subject accident. Alvarez v Prospect Hosp., 68 NY2d 320 [1986].) To raise an issue of fact concerning proximate cause, a plaintiff must demonstrate that the defendant's negligence was a substantial cause of the events which produced the injury. Maheshwari v City of New York, 2 N.Y.3d 288 (2004). The plaintiffs have failed to submit sufficient evidence that the alleged negligence of Metro 53 was a substantial cause of their being attacked and injured. Regardless of the security at the bar, the intervening acts of the assailants was the proximate cause of the accident. The causal connection between their acts and any alleged negligence on the part of the defendant is too attenuated, as a matter of law, to serve as a basis for liability. This is especially so given the relatively quick pace at which the altercation between plaintiffs and the assailants developed. In any event, it is only speculation by plaintiffs to claim that the security staffers could have prevented the attacks. Abramian v. Travellers Hotel Assocs., 203 A.D.2d 398 (2d Dept 1994.) Moreover, any violation of internal rules are not sufficient to establish Metro 53's negligence.

Metro 53 has also established prima facie entitlement as a matter of law to the dismissal of Kristy Kiely's claims based on the Dram Shop Act. Alvarez v Prospect Hosp., 68 NY2d 320 [1986].) However they have not established prima facie entitlement as a matter of law to the dismissal of Gary Kiely's claims based on the Dram Shop Act. Under the Dram Shop Act, a cause of action was created that was unknown at common law. Catania v. 124 In-To-Go, Corp., 287 A.D.2d 476 (2d Dept 2001.) The Act allowed recovery against a bar owner for injuries caused as a result of a patron's intoxication. Under the statute, a party who unlawfully sells alcohol to a visibly-intoxicated person is liable for injuries caused by reason of that person's intoxication. General Obligations Law § 11-101. In order to show that the damages suffered by the plaintiff in a Dram Shop action arose "by reason of the intoxication" of a patron to whom alcohol was illegally sold, there must be "some reasonable or practical connection" between the sale of alcohol and the resulting injuries. Adamy v Ziriakus, 231 AD2d 80, (4th Dept 1997), affd 92 NY2d 396, 400. However, proximate cause, as must be established in a conventional negligence case, is not required. Catania v. 124 In-To-Go, supra. See also, McNeill v Rugby Joe's, Inc., 298 AD2d 369 (2d Dept 2002.)

Here, Metro 53 has shown that Kristy Kiely cannot identify the person who punched her or threw glass at her. Plaintiff Kristy Kiely has not presented any evidence that suggests she can identify her assailant and, in fact, this Court, in a separate Short Form Order, has dismissed her causes of action against defendant Benini. Consequently, any evidence regarding

defendant Benini is irrelevant as to the Dram Shop violation claims by Kristy Kiely. As such, there is no evidence that her assailant was intoxicated or served alcohol by Metro 53's staffers while intoxicated. Accordingly, the branch of the motion seeking to dismiss Kristy Kiely's causes of action based on a Dram Shop violation is granted.

Regarding the branch of the motion seeking to dismiss Gary Kiely's causes of action based on a Dram Shop violation, Metro 53 has not established its prima facie entitlement to judgment as a matter of law. Metro 53's evidence shows that Kristy Kiely identified defendant Benini as having assaulted Gary Kiely while they were on the dance floor. This evidence also shows that Benini purchased alcoholic beverages at Metro 53, and was drunk, albeit perhaps only a little bit, but drunk nonetheless, and slurring his words. It has been held that since the effect of alcohol differs greatly from person to person, a factual determination of intoxication cannot be made solely on the basis of how much alcohol a person has consumed. Burkhard v. Sunset Cruises, Inc., 191 A.D.2d 669 (2d Dept 1993.) The Court is aware that the slurring of one's speech, in of itself, when that person is otherwise coherent, is insufficient to conclude that person is intoxicated. Senn v. Scudieri, 165 A.D.2d 346 (1st Dept 1991.) Furthermore, the single fact that alcohol has been consumed by a person, does not in of itself constitute intoxication. *Id.* However, a lay witness is competent to testify that a person appears to be intoxicated when such testimony is based on personal observation and consists of a description of the person's conduct and speech. Rivera v. City of New York, 253 A.D.2d 597 (1st Dept 1998) Here, the person accused of being intoxicated admits that he was drunk and had three shots and four drinks and there is inconclusive testimony regarding the time Benini was in the bar drinking those drinks. Accordingly, the Court finds that Metro 53's evidence is insufficient to establish a prima facie case that Benini was not intoxicated when he was served alcohol at Metro 53.

Furthermore, defendant has not demonstrated that no reasonable connection existed between the alcohol served to Benini at Metro 53 and the injuries sustained by plaintiff Gary Kiely. McNeill v Rugby Joe's, Inc., supra at 370.) Additionally, it is significant that the evidence shows Benini was not of legal age to be served liquor at Metro 53. Accordingly, the branch of the motion seeking dismissal of plaintiff Gary Kiely's causes of action for the Dram Shop Act violation is denied.

In sum, the branch of the motion seeking to dismiss plaintiffs causes of action that are based on Metro 53's violation of its common law duty to protect is granted and those causes of action are dismissed. The branch of the motion seeking to dismiss plaintiff Kristy Kiely's claims based on a Dram Shop violation is granted and that cause of action is dismissed. The branch of the motion seeking to dismiss plaintiff Gary Kiely's claims based on a Dram Shop violation is denied.

Dated: May 26, 2010

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ORIN R. KITZES, J.S.C.