

Reynoso v Rave Rest. Inc.
2010 NY Slip Op 31506(U)
May 18, 2010
Supreme Court, New York County
Docket Number: 104127/08
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Madley
Justice

PART 11

Index Number : 104127/2008
REYNOSO, MICHAEL
VS.
RAVE RESTAURANT
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 4/16/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in this motion to/for Summary Judgment

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

FILED

JUN 17 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 18, 2010

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
MICHAEL REYNOSO,

Plaintiff,

- against -

RAVE RESTAURANT INC., d/b/a HURLEY'S BAR,
and SEAN CUMMISKY,

Defendants.
-----X

Index No. 104127/08

FILED
JUN 17 2010
NEW YORK
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

Defendant Rave Restaurant Inc., d/b/a Hurley's Bar ("Rave") moves for summary judgment dismissing the complaint against it (motion seq. no. 001). Plaintiff Michael Reynoso ("Reynoso") opposes the motion, and separately moves, by order to show cause, for an order allowing him to supplement his opposition to Rave's motion for summary judgment (motion seq. no. 002).¹ Rave opposes the relief sought in the order to show cause. For the reasons set forth below, Rave's motion for summary judgment is denied, and Reynoso's motion to supplement his opposition is granted.

BACKGROUND

This action arises out of personal injuries sustained by Reynoso on April 13, 2007, at approximately 3:30 am, when he was assaulted at Hurley's Bar ("Hurley's") by another patron, defendant Sean Cummisky ("Cummisky"). Reynoso seeks damages against Rave, as the owner and operator of Hurley's, for allegedly serving Cummisky alcoholic beverages when he was visibly intoxicated in violation of the Dram Shop Act and the Alcoholic Beverage Control Law. Reynoso also seeks damages for negligence.

¹ Motion seq. no. 001 and 002 are consolidated for disposition.

The record reveals the following. On the evening of the incident, Reynoso went to Hawaiian Tropic Zone, a bar where three of his friends worked. He was there from 8:30 pm to around 12:45 am and had a few drinks during that time. Sometime between 12:45 am and 1:00 am, Reynoso, his friends who worked at Hawaiian Tropic Zone, and a few of their co-workers left and went to Hurley's Bar, arriving by around 1:10 am. Reynoso testified that they were at Hurley's for 2 to 2 ½ hours before the incident occurred, and during that time, Reynoso had more drinks. Cummisky testified that he decided to go to Hurley's between 2:30 am and 3:00 am and was there only for about ten minutes before the incident occurred. Cummisky's testimony in this regard is consistent with the testimony of Benjamin DeVuyst ("DeVuyst"), the bartender at Hurley's that evening. Cummisky stated that he had had four beers at home, starting around 12:00 am, but that he was not drunk and did not have any drinks at Hurley's. DeVuyst testified that he did not serve Cummisky at Hurley's that evening and, further, that Cummisky did not appear to be intoxicated.

Reynoso did not observe Cummisky inside the bar. However, two of his friends, sisters Sarah Schultz ("Sarah") and Kristen Schultz ("Kristen"), stated in their affidavits that they observed Cummisky for about ten minutes. Both stated that Cummisky was loud and acting in an aggressive manner. Both also stated that Cummisky was holding a beer and sitting at a table with drinks and beer bottles on it.

Testimony of the events just before the incident differs among the parties. Reynoso testified that his friend Sarah came back to their table, her face red, and said, "I just got smacked." She pointed out to Reynoso who had done it, and Reynoso moved towards the front of the bar to find out what was going on. Reynoso does not remember how he received his injuries, but he did state that he never made it outside.

Sarah stated in her affidavit that she was speaking with another of Reynoso's friends, Jose Carrion, when they were approached by Cummisky. According to Sarah, Cummisky was speaking "in a very aggressive manner" and was following Jose as he began to walk away, toward the front of the bar. Sarah then saw Cummisky choking Jose, and when she asked Cummisky to stop, Cummisky slapped her. Kristen also stated in her affidavit that she observed Cummisky choking Jose and then slapping Sarah. Sarah stated she went back to tell Reynoso what was happening, and Reynoso moved to go help Jose. Sarah then saw Cummisky punch Reynoso in the face, and Reynoso fell to the ground. Sarah stated that this occurred as Reynoso was opening the inner door of the bar, which leads to a vestibule, which then leads to the outer door. Kristen did not observe Reynoso being punched. Sarah then saw Cummisky "kicking" Reynoso in the head, while Kristen saw Cummisky "stomp" on Reynoso. Kristen observed this "stomping" while Reynoso was on the floor of the vestibule area.

Cummisky's version of events is different. Cummisky testified that he went to Hurley's to meet a friend; Cummisky's cousin was there as well. Upon meeting his friend, Cummisky threw a few punches to his friend as a joke. Cummisky testified that the problem began at this point, when he heard one of Reynoso's friends (Jose) say "look at the white boy, he thinks he's tough." Cummisky assumed Jose was referring to him. Cummisky testified that Jose asked him, "Is there a problem?" and that they had some words. Cummisky stated that Reynoso then came up to them and asked, "What's the problem?" Jose suggested that they all go outside and discuss or settle it. According to Cummisky, when they were two steps out of Hurley's, Jose threw a punch at him. Cummisky's cousin then got involved with pushing Jose away. Cummisky stated that Reynoso came out throwing punches at Cummisky, and Cummisky responded by hitting Reynoso in self-defense. The hit knocked Reynoso to the ground. Cummisky denied kicking or

stomping on Reynoso after Reynoso was on the ground, and posited that marks on Reynoso's face came from the sidewalk, not his (Cummisky's) shoe.

DeVuyst, meanwhile, testified that he did not see or hear any of the alleged events of that evening. DeVuyst testified that he saw Cummisky come in but did not talk to him at all. He saw Cummisky meeting up with a friend. He did not think Cummisky looked intoxicated. He did not serve Cummisky with any alcohol, but did serve Reynoso. He was unaware of the incident until it was over, at which point he went to take a look at the situation and saw Reynoso on the ground outside. DeVuyst testified that someone in the bar, a patron, called the police.

The police arrived shortly after the incident and Cummisky was arrested for assault after being identified by Jose. At the time of his arrest, the police reports list Cummisky's physical condition as intoxicated. Cummisky eventually pleaded guilty to second degree assault, received five years' probation, and entered a residential alcohol program. In pleading guilty, it was admitted that Cummisky's intoxication was a contributing factor to the assault.

As a result of the incident, Reynoso suffered severe head injuries which required a craniotomy and over twenty staples in his skull, and suffered permanent brain damage.

Rave argues that summary judgment is warranted in its favor as there is insufficient evidence demonstrating that Cummisky was visibly intoxicated and served or provided with alcohol for the purposes of the Dram Shop Act. It further argues that the common law negligence claims are without merit as the altercation was the result of a sudden and unforeseeable act by Cummisky, and occurred outside of the premises.

Reynoso opposes the motion, arguing that evidence that Cummisky was loud and acting in an aggressive manner creates a factual question as to whether Cummisky was visibly intoxicated. Reynoso also argues that evidence that Cummisky was seen holding a beer bottle

and sitting at a table where there were many glasses and beer bottles creates a factual question as to whether Cummisky was served or provided with alcohol while at Hurley's. Moreover, Reynoso argues that the same evidence creating a factual question of Cummisky's visible intoxication also creates a factual question as to whether the staff of Hurley's knew or should have known that the safety of its patrons was in jeopardy. Reynoso also argues that the record shows that the incident occurred inside of the premises.

In reply, Rave argues that the affidavits of Sarah and Kristen Schultz should be rejected in view of their lack of experience "in the area of inebriation recognition" and, in any case, that their statements are insufficient to defeat its summary judgment motion.

While Rave's summary judgment motion was pending, Reynoso moved, by an order to show cause, for an order allowing Reynoso to supplement his opposition to Rave's motion for summary judgment with an affidavit from Aldo Barrio ("Barrio"). In support of the motion, Reynoso states that after Rave made its motion, he met with his lawyer to discuss strategy to oppose the motion. According to Reynoso, at that time he mentioned to his lawyer "the names of several witnesses, including Kristen and Sarah Schultz and Jose Carrion." Reynoso Aff., ¶ 3. He also told his lawyer that "there were several other people there at the bar, but [he] could not remember their names, and that [he] would attempt to find out by through mutual friends." *Id.* Reynoso also stated that he "suffered a very extensive brain injury as a result of the assault, requiring emergency surgery," *id.* at ¶ 4, and that since the incident his "memory is not the same" and he forgets "familiar names and addresses." *Id.* at ¶ 5. He stated that he located Aldo Barrio through a friend and that he knew Mr. Barrio "had been a bartender at the Hawaiian Tropic Zone and was friends of the Schultz sisters and Jose Carrion, [and] that he spoke to Mr. Barrio for the first time since [the April 13, 2007] assault on January 23, 2010." *Id.* at ¶ 6.

In his affidavit, Barrio states that he knew Reynoso through his job as a bartender at Hawaiian Tropic Zone, where Sarah and Kristen Schultz, and Jose Carrion were employees. He stated that Reynoso “would come into [Hawaiian Tropic Zone] on a regular basis and we occasionally would socialize after working hours.” Barrio Aff., ¶ 2. On the night in question, Barrio stated he went to Hurley’s at around 2:00 am with his girlfriend. They sat at the end of the bar, twelve to fifteen feet away from Cummisky. Barrio stated he “had an unobstructed view of Mr. Cummisky. I saw him grasping a Coors Lite beer in both of his hands and I believe I also saw money on the bar in front of him.” Id. at ¶ 5. About an hour later, Barrio observed Cummisky “acting in a very aggressive and hostile fashion” and “belligerent” towards Sarah Schultz. Barrio described Cummisky as “loud, aggressive, and confrontational and his speech was slurred.” Id. at ¶ 6. Barrio also noted that as this time, Cummisky had a highball glass in one hand. Cummisky tried to strike Sarah. Reynoso came to Sarah’s aid. Shortly after, Cummisky “began pummeling [Reynoso] in the head and [Reynoso] fell to the floor.” Id. at ¶ 7. Cummisky then repeatedly kicked Reynoso in the head. Barrio also stated that he knew the bartender at Hurley’s, DeVuyst. Barrio recalled asking DeVuyst if he was going to do anything “[a]s this violent scene began to escalate.” Id. at ¶ 8. Barrio recalled DeVuyst’s answer as being “It’s not my job.” Id.

Rave opposes Reynoso’s application to permit Reynoso to supplement his opposition to Rave’s motion for summary judgment with Barrio’s affidavit, on the ground that Barrio is a non-party notice witness whose affidavit is being offered after the filing of the Note of Issue. Additionally, Rave argues that Barrio’s affidavit should not be allowed because Reynoso did not previously identify Barrio as a witness in response to Rave’s demand for identity of witnesses. In any event, Rave argues that Barrio’s affidavit is insufficient to raise a triable issue of fact.

DISCUSSION

The court will first consider whether Reynoso should be permitted to supplement his opposition with Barrio's affidavit. When a plaintiff submits an affidavit from a non-party witness who could not previously be located, or was otherwise unavailable, such an affidavit has been permitted to be used in opposition to a summary judgment motion. See Szentmiklosy v. County Neon Sign Corp., 276 AD2d 406 (1st Dep't 2000); Tesa v. The Transit Authority of the City of New York, 184 AD2d 421, 423 (1st Dep't 1992). Here, Barrio could not be located since as a result of the memory loss caused by his injuries, Reynoso could not recall that Barrio was at Hurley's on the night of the incident. Notably, there is no dispute that Reynoso was hospitalized for nearly one month following the incident or that a craniotomy was performed to relieve swelling in his brain, and that Reynoso has suffered significant memory loss since the incident, both about the incident and in his day-to-day life.² Thus, the court finds that the circumstances here warrant permitting Reynoso to supplement his opposition to the summary judgment motion with Barrio's affidavit.

In reaching this conclusion, the court has considered Rodriguez v. New York City Hous. Auth., 304 AD2d 468 (1st Dep't 2003) and Garcia v. Good Home Realty, Inc., 67 AD3d 424 (1st Dep't 2009), cited by Rave in opposition, and has found that these cases are not controlling here. Significantly, in both of these cases the plaintiffs provided an excuse for the failure to previously disclose the witnesses at issue and the witnesses' statements contradicted the deposition testimony given by each of the plaintiffs. In contrast, in this case, Reynoso's memory loss

²In this connection, the court notes that a plaintiff unable to testify due to memory loss of the events of the incident in question "is not held to as high a degree of proof in establishing his right to recover for injury as is a plaintiff who can describe the events." Sawyer v. Dreis & Krump Manufacturing Co., 67 NY2d 328, 333 (1986), citing Schechter v. Klanfer, 28 NY2d 228 (1971).

provides an excuse for his failure to identify Barrio earlier and, as indicated below, Barrio's statements are not inconsistent with Reynoso's deposition testimony. Furthermore, to the extent the submission of Barrio's affidavit following the filing of the note of issue may be considered "an additional pre-trial proceeding" warranting a finding of "unusual or unanticipated circumstances" under 22 NYCRR § 202.21(d), the court finds that Reynoso's memory loss constitutes an unusual circumstance. Accordingly, the court will consider the supplementary affidavit of Aldo Barrio in determining the summary judgment motion.

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case...". Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). Upon such a showing by the proponent, the burden of proof shifts to the party opposing the motion to establish with evidentiary proof that material issues of fact exist which require a trial. See Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986).

General Obligations Law § 11-101, also known as the Dram Shop Act, makes a defendant who "unlawfully" provides alcohol to another person liable for injuries resulting from that person's intoxication. Under Alcoholic Beverage Control Law § 65(2), it is unlawful to provide an alcoholic beverage to a person who is visibly intoxicated.

Here, in support of its motion for summary judgment, Rave relies on testimony from DeVuyst and Cummisky to argue that Cummisky was neither visibly intoxicated nor provided with alcohol while at Hurley's on the night in question. This evidence is sufficient to shift the burden to plaintiff to produce proof to raise a triable issue of fact. See Alvarez, supra, at 324.

Reynoso has met this burden based on the three non-party witness affidavits from Sarah Schultz, Kristen Schultz,³ and Aldo Barrio. In particular, in their affidavits, Sarah and Kristen Schultz both stated that Cummisky appeared intoxicated, spoke in an aggressive manner, in a loud voice, and made excited hand gestures. Both observed Cummisky carrying a beer and sitting at a table “filled with drinks and beer bottles.” See Aff. of Sarah Schultz, at 2, and Aff. of Kristen Schultz, at 2. Additionally, both stated that Cummisky’s “aggressive manner” continued for about ten minutes. Both indicated that Cummisky had slapped Sarah, an event Reynoso had indicated in his own testimony.

In addition, contrary to Rave’s position, the statements in the affidavits may be considered by the court as they amplify rather than contradict Reynoso’s deposition testimony. See Bosshart v. Pryce, 276 AD2d 314 (1st Dep’t 2000) (denying summary judgment when allegations by plaintiff in opposition to the motion, though more detailed, did not contradict her earlier deposition testimony); Lesman v. Weinrib, 221 AD2d 601 (2d Dep’t 1995) (court did not err in considering affidavit which did not contradict plaintiff’s deposition testimony); compare Phillips v. Bronx Lebanon Hosp., 268 AD2d 318, 320 (1st Dep’t 2000).

Barrio’s statements also do not contradict Reynoso’s deposition testimony and raise triable issues of fact precluding summary judgment. Barrio observed Cummisky holding a beer, holding a highball glass, acting “loud, aggressive and confrontational,” observed an argument between Cummisky and Sarah, saw Cummisky attempt to strike Sarah with his fist, saw Reynoso come to Sarah’s aid, and ultimately observed Cummisky knocking Reynoso to the floor and

³ Rave argues that Kristen Schultz was not timely identified as a witness as her name was not included in Reynoso’s first response to Rave’s discovery demands, but was only identified in Reynoso’s amended response filed after the note of issue was filed. This argument is unavailing as Reynoso identified Kristen Schultz as a potential witness during his deposition. See, e.g., Parra v. 167 Allison Meat Corp., 7 AD3d 451 (1st Dep’t 2004).

kicking Reynoso repeatedly in the head. Barrio stated that "it was clear to me that Mr. Cummisky was intoxicated." Barrio also stated that Cummisky's speech was slurred.

In addition, contrary to Rave's position, the opinion of a lay witness as to whether a person was intoxicated is probative. See Ryan v. Big Z Corp., 210 AD2d 649, 651 (3d Dep't 1994), citing Allan v. Keystone Nineties, 74 AD2d 992 (4th Dep't 1980), appeal dismissed, 52 NY2d 899 (1981). See also Burke v. Tower E. Rest., 37 AD2d 836 (2d Dep't 1971) (lay witnesses "may testify categorically that [a person] was sober or intoxicated."). It is not necessary for the plaintiff to provide direct proof of visible intoxication; circumstantial evidence, including eyewitness testimony, is sufficient to raise the issue of whether a person appeared to be intoxicated. See Adamy v. Ziriakus, 92 NY2d 396, 401 (1998). In this case, Sarah and Kristen Schultz's observations as lay witnesses are sufficient to raise an issue of fact regarding Cummisky's visible intoxication.

As for Barrio, since he is a bartender, trained to spot the signs of intoxication, (Barrio Aff., ¶6), he arguably qualifies as an expert. In any event, as a lay witness his statements would be sufficient to raise an issue of fact as to whether Cummisky was visibly intoxicated.

Moreover, the police reports regarding the incident indicate that Cummisky was intoxicated at the time of the incident. Specifically, on both the arrest report and OLBS Printout, Cummisky's physical condition is listed as "intox alcohol". Moreover, the Datasheet Information sent to the District Attorney's office includes supplemental facts that Cummisky was "extremely intox: odor of alc[ohol], swaying on feet, bloodshot eyes." These observations were made by the police shortly after the incident. Together, the three eyewitness affidavits and the police reports raise an issue of fact as to whether Cummisky appeared to be intoxicated while at Hurley's.

The next issue is whether Reynoso has countered Rave's showing that Cummisky was not served with alcohol at Hurley's on the night at issue. On a motion for summary judgment, "all reasonable inferences must be drawn in favor of the non-moving party". Gutierrez v. New York City Transit Auth., 59 AD3d 260, 261 (1st Dep't 2009). Additionally, where "conflicting inferences may reasonably be drawn from evidence, a question of fact is presented for resolution by the jury." Bravato v. Berkshire Life Ins. Co., 69 NY2d 916, 918 (1987). Thus, although both DeVuyst and Cummisky testified that Cummisky was not served alcohol, this evidence is not conclusive. Notably, the court cannot make a determination on issues of credibility, for "it is well settled that issues of credibility cannot be resolved on a motion for summary judgment." Rodino v. City of New York, 2009 N.Y. Slip Op. 33041(U) (Sup. Ct., N.Y. County, Dec. 23, 2009), citing Medina v. 203 W. 109th St. Realty, 16 AD3d 220 (1st Dep't 2005) ("issues of witness credibility ... cannot be resolved on a motion for summary judgment") and citing Santos v. Temco Serv. Indus., Inc., 295 AD2d 218 (1st Dep't 2002) ("issues as to witness credibility are not appropriately resolved on a motion for summary judgment").

Here, the evidence submitted by Reynoso, including the statements of Sarah Schultz and Kristen Schultz, that they saw Cummisky holding a beer bottle and sitting at a table with many drinks and beer bottles, and Barrio's statement that he saw Cummisky holding a Coors Lite beer and money on the bar in front of Cummisky about an hour before the incident, and saw Cummisky holding a highball glass just before the incident, are sufficient to raise factual issues as to whether Cummisky was served alcohol at Hurley's.

With respect to the negligence claims, the court finds that the record is sufficient to raise factual issues. As the owner of a public establishment, Rave owes a duty to exercise reasonable care to protect its patrons from injury, including 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.” D’Amico v. Christie, 71 NY2d 76, 85 (1987). In this case, DeVuyst stated that Cummisky did not appear to be a danger to other patrons, and there was no indication that an assault would occur. Accordingly, the burden shifts to Reynoso to raise a triable issue of fact with respect to the negligence claims. Reynoso satisfies this burden by providing affidavits from Sarah and Kristen Schultz, stating that Cummisky was being loud and acted in an aggressive manner, Cummisky choked one of Reynoso’s companions and slapped another before attacking Reynoso. Likewise, in his affidavit Barrio stated that Cummisky was “loud, aggressive and confrontational,” “acting in a very aggressive and hostile fashion,” “belligerent,” attempted to strike Sarah Schultz, and that the events leading to the assault were escalating, not sudden. During this escalation, Barrio’s affidavit described asking DeVuyst if he would intervene in the conflict, with DeVuyst’s response being, “It’s not my job.” This evidence is sufficient to raise an issue of fact as to whether Rave’s employees knew or should have known of an impending danger due to Cummisky’s behavior.

The remaining issue concerns where the incident took place. It is well established that “liability may be imposed only for injuries that occurred on defendant’s property, or in an area under defendant’s control, where defendant had an opportunity to supervise the intoxicated guest.” D’Amico, 71 NY2d at 85. Cummisky and DeVuyst agree that the incident occurred outside of the bar. However, Reynoso stated that he never made it out of the bar. The Schultz affidavits offered by Reynoso place the location of the incident in the vestibule area between the inner and outer doors of the bar. Barrio’s affidavit does not specify where inside the bar the incident took place, but states that Reynoso was knocked to the floor and was still on the floor

