

**Jaeger v Jones**

2010 NY Slip Op 31736(U)

July 2, 2010

Sup Ct, Nassau County

Docket Number: 019238/08

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

**JUSTICE**

TRIAL/IAS PART 20

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ERIK JAEGER,

Plaintiff,

Index No.: 019238/08  
Motion Sequence...01  
Motion Date...04/09/10

-against-

STEVEN JONES, JR, STEVEN JONES, SR.  
and THE DIZZY LIZARD, INC.,

Defendants.

\_\_\_\_\_ X

**Papers Submitted:**

- Notice of Motion.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

The Plaintiff moves pursuant to CPLR §3212 for an order granting summary judgment as to the issue of the liability on behalf of the Defendant, The Dizzy Lizard, Inc., and directing an assessment of damages to be determined by a jury.

**Facts:**

On April 13, 2008, the Plaintiff was injured in a motor vehicle accident, while he was a passenger in the automobile operated by the Defendant, Steven Jones, Jr., and owned by the Defendant, Steven Jones, Sr. (*see* Levine Affirmation in Support at Exhibits

3, 8, 9). Said accident occurred at approximately 1:45 a.m. on Hempstead Turnpike, in Farmingdale, New York, when the Jones vehicle collided with a train overpass (*id.* at Exhibit 7). On the date of the accident, both Steven Jones Jr., as well as Erik Jaeger, were each 18 years of age (*id.* at ¶ 4). The Defendant, Steven Jones, Jr., was arrested and charged with DWI in violation of Vehicle and Traffic Law § 1192.3 (*id.* at Exhibit A)<sup>1</sup>. Prior to the subject accident, the Defendant, Steven Jones, Jr., was a patron at The Dizzy Lizard [hereinafter Dizzy Lizard], which is a tavern located 736-738 Fulton Avenue in Hempstead, New York (*see* Levine Affirmation in Support at ¶¶ 2, 4; *see also* Exhibit 3).

As a result of the injuries sustained, the Plaintiff commenced the underlying action against individual Defendants, Steven Jones, Jr. and Steven Jones, Sr., based upon negligence and against the Defendant, Dizzy Lizard, predicated upon General Obligations Law §§ 11-100 and 11-101 (*id.* at Exhibit 3 at ¶¶ 13, 14).<sup>2</sup> The Plaintiff's instant application seeking summary judgment as to the liability of the Defendant, Dizzy Lizard thereafter ensued and is determined as set forth hereinafter.

**Plaintiff Motion for Summary Judgment:**

In support of the within application, counsel for the Plaintiff contends that the record herein conclusively demonstrates that Steven Jones, Jr. was intoxicated at the time of

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<sup>1</sup> On January 11, 2010, Steven Jones, Jr. was convicted of Driving While Intoxicated, as a misdemeanor.

<sup>2</sup> While the within action was originally commenced against Steven Jones, Sr., Steven Jones, Jr. and Dizzy Lizard, the Plaintiff has since settled his claims against both Steven Jones, Sr., as well as Steven Jones, Jr. (*see* Boule Affirmation in Opposition at ¶ 4; *see also* Levine Affirmation in Support at ¶ 7).

the accident and that said intoxication was the direct result of the several hours he spent drinking at Dizzy Lizard (*id.* at ¶ 8). In so arguing, counsel makes particular reference to the annexed police report, which states that Mr. Jones was charged with DWI at the time of the accident (*id.*; *see also* Exhibit 1).

Counsel additionally provides various pleadings attendant to a Federal Court action commenced against Dizzy Lizard by Landmark American Insurance [hereinafter Landmark], which issued a series of liquor liability insurance policies to the Defendant. Landmark sought rescission of three such policies based upon Dizzy Lizard’s alleged misrepresentations in the applications for the insurance coverage (*id.* at Exhibits 12, 13). Counsel further points to several building violations<sup>3</sup>, in connection to which Dizzy Lizard plead guilty to reduced charges, as well as to pleadings relating to other prior incidents involving Dizzy Lizard, but which are not related to the within action<sup>4</sup> (*id.* at ¶¶ 10, 12, 14; *see also* Exhibits 16, 17, 18, 19, 20).

In addition to the foregoing, counsel provides one page of the deposition transcript of Joseph Lynch, General Manager of Dizzy Lizard, who testified that on certain nights anyone over the age of 18 may gain entry to the establishment, but that in order to purchase alcohol, “you have to have a bracelet” (*see* Levine Reply Affirmation at Exhibit B).

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<sup>3</sup> These violations, which occurred in 11/19/05, involved overcrowding and the failure to obtain a permit to erect a tent (*see* Levine Affirmation in Support at Exh. 17).

<sup>4</sup> These prior actions, entitled Thomas Walsh v The Dizzy Lizard, Inc. d/b/a The Dizzy Lizard Saloon and Brian C. Lynch, Jason H. Yacoub v The Dizzy Lizard, Inc. d/b/a The Dizzy Lizard, and Alex Pace v The Dizzy Lizard, Inc., each involved allegations of assault (*see* Levine Affirmation in Support at Exhs.18,19,20).

Counsel additionally provides one page of the deposition transcript of the Plaintiff, Erik Jaeger, wherein he stated that he recalls going up to the bar and “getting a beer or two with him [Steven Jones, Jr.]” and that “the bartenders didn’t care if you had a bracelet or not” (*id.* at Exhibit C).

Counsel argues that based upon the litigation history as recited hereinabove involving other actions, coupled with the fact that Mr. Jones was arrested for DWI at the time of the accident, this Court should conclude, *inter alia*, that Dizzy Lizard “made illegal sales of intoxicating liquor to Jones Jr. causing his intoxication” and thus the Plaintiff is entitled to an order granting summary judgment as to the issue of liability (*id.* at ¶ 14). The within application is opposed by the Defendant, Dizzy Lizard.

**Decision:**

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v. Twentieth Century Fox*, 3 N.Y.2d 395 [1957]; *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]; *Bhatti v. Roche*, 140 A.D.2d 660 [2d Dept. 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant’s favor (*Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 [1979]). Such evidence may

include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR § 3212 [b]; *Olan v. Farrell Lines*, 64 N.Y.2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980], *supra*).

A motion for summary judgment is the procedural equivalent of a trial, and when entertaining such an application, the Court is not to determine matters of credibility, but rather is to confine its inquiry to determining whether material issues of fact exist (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338 [1974]; *Sillman v. Twentieth Century Fox*, 3 N.Y.2d 395 [1957], *supra*).

As noted above, the Plaintiff is alleging theories of liability predicated upon the provisions embodied in General Obligations Law §§ 11-100 and 11-101 (*see* Levine Affirmation in Support at Exhibit 3 at ¶¶ 13, 14, 15). The Dram Shop Act, codified in General Obligations Law § 11-101, was promulgated by the legislature to create a private right of action which could be instituted against sellers of alcoholic beverages for injuries occasioned by the sale thereof (*Sherman v. Robinson*, 80 N.Y.2d 483 [1992]). The statute provides the following:

Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of

the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.

“The duty, under the Dram Shop Act, imposed on the owner of an establishment selling intoxicating liquor, has been set forth as follows: ‘[o]ne in control or possession of the premises has the duty to control the conduct of those permitted or invited to enter upon the premises and such person in control is required to exercise it for the protections of others. This duty arises when the one in possession knows that he can and has the opportunity to control the third party’s conduct and is reasonably aware of the necessity of such control’ ” (*Senn v. Scudieri*, 165 A.D.2d 346 [1<sup>st</sup> Dept. 1991], quoting *Bartkowiak v. St. Adalbert’s Roman Catholic Church Soc.*, 40 A.D.2d 306 [4<sup>th</sup> Dept. 1973] at 309-310 [internal citations omitted]).

The Dram Shop Act was ultimately followed by the enactment of General Obligations Law § 11-100, which created liability upon the providers of liquor to minors, irrespective of whether or not the providing of such liquor was accompanied by an actual sale (*id.*).

General Obligations Law §11-100 provides the following:

Any person who shall be injured in person, property, means of support or otherwise, by reason of the intoxication or impairment of ability of any person under the age of twenty-one years, whether resulting in his death or not, shall have a right of action to recover actual damages against any person who

knowingly causes such intoxication or impairment of ability by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of twenty-one years.

Within the purview of these statutes, liability thereunder will attach upon the unlawful “selling”, “furnishing” or “assisting in procuring” of alcohol (General Obligations Law §§ 11-100 [1], 11-101 [1]). The term “unlawful” is defined in Alcoholic Beverage Control Law as follows: “No person shall sell, deliver, or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to any person, actually or apparently, under the age of twenty-one years” or to “any visibly intoxicated person” (Alcohol Beverage Control Law § 65 [1], [2]). While the Alcohol Beverage Control Law defines the term “unlawful”, the provisions therein contained do not create an independent statutory cause of action and such actions are rather the progeny of General Obligations Law §§ 11-100 [1], 11-101 [1] (*Sherman v. Robinson*, 80 N.Y.2d 483 [1992], *supra*; *Carr v. Kaifler*, 195 A.D.2d 584 [2d Dept. 1993]; *Sullivan v. Mulinos of Westchester, Inc.*, 2010 WL 1999575 [2d Dept. 2010]).

“At common law, one who provided intoxicating liquor was not liable for injuries caused by the drinker” and rather the drinker was held solely responsible for his or her own actions (*D’Amico v. Christie*, 71 N.Y.2d 76 [1987]). Thus, as General Obligations Law §§ 11-100 [1], 11-101 [1] are in derogation of common law principles, the statutes must be strictly construed and “be read narrowly and not enlarged beyond [their] borders” (*id.*;

*Sherman v. Robinson*, 80 N.Y.2d 483 [1992], *supra* at 487; *Senn v. Scudieri*, 165 A.D.2d 346 [1<sup>st</sup> Dept. 1991], *supra*).

In interpreting the statutory provisions, the Court of Appeals has held that liability under General Obligations Law §§ 11-100, “may be imposed only on a person who knowingly caused intoxication by furnishing alcohol to \* \* \* persons known or reasonably believed to be underage” (*id.* at 487-488). The Court went on to state that “while section 11-101 does not explicitly refer to knowledge, that same requirement must be inferred because the legislative history makes plain that section 11-100 was intended to parallel the Dram Shop Act” (*Sherman v. Robinson*, 80 N.Y.2d 483 [1992] at 488).

Further, within the particular context of General Obligations Law § 11-101, in order to establish a *prima facie* case of liability against Dizzy Lizard, the Plaintiff bears the burden of proffering sufficient evidence that when the bar served alcohol to Steven Jones, Jr., it was on notice that he was visibly under the influence thereof (*Senn v. Scudieri*, 165 A.D.2d 346 [1<sup>st</sup> Dept. 1991], *supra*). Such evidence is not limited to direct proof in the form of testimonial evidence from an individual who witnessed the alleged intoxicated person at the moment the alcohol was provided, but may include circumstantial evidence to demonstrate the visible intoxication of such individual (*Romano v. Stanley*, 90 N.Y.2d 444 [1997] at 450).

In the instant matter, the Court finds that the Plaintiff has failed to demonstrate his entitlement to judgment as a matter of law (*Friends of Animals, Inc. v. Associated Fur*

*Mfrs., Inc.*, 46 N.Y.2d 1065 [1979], *supra*). As noted above, the Plaintiff has tendered proof in the form of pleadings attendant to other actions involving Dizzy Lizard, the police report relevant to the subject accident, as well as limited portions of the depositions of the General Manger of the Defendant bar, and the Plaintiff. However, none of the purported evidence proffered unequivocally resolves the issues relevant herein.

With particular respect to the matter of Mr. Jones' age, the annexed police report, while stating that Mr. Jones was indeed charged with DWI, is not dispositive as to the issue of whether the Defendant knew that Mr. Jones was underage when he was served alcohol on the premises. Additionally, while the Plaintiff testified that he and Steven Jones, Jr. obtained alcohol at the bar and the bartenders "didn't care if you had a bracelet or not", said testimony does not demonstrate conclusively that the Ddefendant was cognizant or reasonably believed Mr. Jones to be underage. There is nothing in the limited testimony produced herein, which clearly indicates whether Mr. Jones was or was not in possession of the requisite bracelet - perhaps even one improperly procured - when he was served alcohol. While the Plaintiff's counsel appears to have proffered said testimony to prove that the Defendant knew that Mr. Jones did not possess the necessary identification when served liquor and was thus underage, it is not possible to extrapolate such a conclusion from the one page of testimony provided for this Court's review.

Thus, on the record as currently developed, there clearly exists questions of fact as to whether Dizzy Lizard knew or reasonably believed Mr. Jones to be underage when he

was served alcohol at said establishment. Accordingly, an order granting summary judgment as to the issue of the Defendant's liability is inappropriate (*Sherman v. Robinson*, 80 N.Y.2d 483 [1992], *supra*). As to the issue of Mr. Jones' intoxication, there is absolutely no evidence, either direct or circumstantial, proffered by the Plaintiff which establishes that when served alcohol at Dizzy Lizard, Mr. Jones was visibly intoxicated (GOL §11-101; *Senn v. Scudieri*, 165 A.D.2d 346 [1<sup>st</sup> Dept. 1991], *supra*; *see also Adamy v. Ziriakus*, 92 N.Y.2d 396 [1998] at 400 ).


Based upon the foregoing, the motion interposed by the Plaintiff, Erik Jaeger, for an order granting summary judgment as to the issue of liability against defendant, Dizzy Lizard, and setting the matter down for a trial as to the issue of damages is hereby **DENIED**.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are **DENIED**.

This decision constitutes the order of the court.

DATED: Mineola, New York  
July 2, 2010

  
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Hon. Randy Sue Marber, J.S.C.

**ENTERED**

JUL 07 2010

NASSAU COUNTY  
COUNTY CLERK'S OFFICE