

Schollaert v Red Rock Roadhouse, Inc.,

2010 NY Slip Op 32543(U)

September 15, 2010

Supreme Court, New York County

Docket Number: 103339/08

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN
J.S.C. Justice

PART 1

Index Number : 103339/2008
SCHOLLAERT, JOSEPH
VS.
RED ROCK ROADHOUSE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 103339/08
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-E
Answering Affidavits — Exhibits A
Replying Affidavits _____


PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

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

FILED
SEP 20 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: September 15, 2010


MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 1

-----X
JOSEPH SCHOLLAERT,

Plaintiff,

-against-

Index No. 103339/08

DECISION AND ORDER

RED ROCK ROADHOUSE, INC.,

Defendant.

-----X

MARTIN SHULMAN, J.:

Plaintiff, Joseph Schollaert, brings this action to recover for personal injuries he sustained when a nick in a shot glass lacerated and severed the ulnar digital artery and nerve of his right index finger while he was having a drink at the Red Rock West Saloon (s/h/a Red Rock Saloon), a bar located at 457 West 17th Street, New York, New York, and owned by the defendant Red Rock Roadhouse, Inc. ("Red Rock"). Red Rock now moves for summary judgment dismissing the complaint pursuant to CPLR 3212.

Schollaert alleges the following: at approximately 11:30 p.m. on the night of January 11, 2007, he was in the Red Rock Saloon, having a beer. Defendant's bartender, "Janice," offered him and another patron a shot "on the house." The bartender placed three shot glasses on the bar and poured the liquor into them. The bartender then turned to talk to someone else and Schollaert waited for her so that they could drink their shots together. While he was waiting for her he ran his finger on the glass and felt a slight nick. Schollaert alleges that he, Janice and the other patron then drank their shots and he placed the shot glass back on the bar. When he put the glass down, he noticed that the inside of his index finger was bleeding profusely. He went

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home. The next morning, Schollaert's finger was still bleeding and he went to the emergency room at a nearby hospital. Schollaert alleges that, as a result of the accident, he lacerated the digital artery and digital nerve of his right index finger, necessitating surgery and resulting in numbness, permanent nerve damage and sensory loss, and scarring of his right index finger.

Red Rock moves for summary judgment dismissing the complaint on the grounds that Schollaert has no evidence to establish how the nick came to exist on the glass, or for how long a period of time it was there. Further, according to defendant's attorney, the deposition testimony of John Yonkus, owner of Red Rock, indicates that the bartenders were trained to inspect glasses for cracks and nicks and that this was the procedure in place on the night of the plaintiff's accident. Thus, Red Rock reasons, since Schollaert is unable to establish the length of time the nick was on the glass, or to establish that the bar created the alleged condition, the plaintiff's complaint must be dismissed, especially in light of the fact that there is evidence that the bartenders routinely inspected the glasses and would have disposed of the subject glass had there been any defect with it.

It is well settled that a defendant moving for summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by proffering evidentiary proof in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]). Only if that burden is met does the burden then shift to the plaintiff to raise a triable issue of fact (*see Friends of Animals v Associated Fur Mfrs.*, 46 NY2d at 1068).

Here, defendant's attorney cites pages 16, 18 and 20 of John Yonkus' deposition testimony. Notably, those pages are omitted from the copy of the deposition that defendant submitted to this court. Thus, defendant's assertion as to the inspection procedures at the Red Rock rests solely on the affirmation of its attorney. While an attorney's affirmation may be used to introduce documentary evidence in support of a motion for summary judgment, an attorney's affirmation, standing alone, is of no probative value (*Lewis v Safety Disposal Sys. of Pa., Inc.*, 12 AD3d 324 [1st Dept 2004]). In addition, even if the missing deposition testimony had been included in defendant's submission, Yonkus acknowledged during his testimony that he could not recall if he was actually present at the Red Rock Saloon on the night of plaintiff's accident (*Ricigliano Aff.*, Ex. E, at 23). Thus, Yonkus had no personal knowledge as to whether the shot glass served to plaintiff had, in fact, been inspected. Defendant therefore failed to meet its initial burden of proof that it was free of negligence (see *Johnson v Panera, LLC*, 59 AD3d 1118 [4th Dept 2009]).

As to defendant's contention that Schollaert has no evidence to establish how the nick came to exist on the glass, or for how long a period of time it was there, it is not plaintiff's burden in opposing the motion to show, in the first instance, that defendant caused the nick in the glass or that it negligently failed to discover it. Rather, it was defendant's burden to show that it was not negligent or that there was no dangerous condition (see *Tiles v City of New York*, 262 AD2d 174 [1st Dept 1999]). Where, as here, defendant has failed to make its prima facie showing, it is not entitled to summary

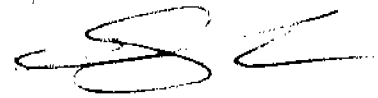
judgment, regardless of the sufficiency of plaintiff's opposing papers (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Accordingly, based upon the foregoing, it is

ORDERED that defendant's motion for summary judgment is denied.

The foregoing constitutes this Court's Decision and Order. Courtesy copies of this Decision and Order have been sent to counsel for the parties.

Dated: New York, New York
September 15, 2010



Hon. Martin Shulman, J.S.C.

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