

USAA Cas. Ins. Co. v El-Waraky

2011 NY Slip Op 30172(U)

January 11, 2011

Supreme Court, Nassau County

Docket Number: 11292/09

Judge: Joel K. Asarch

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 17

-----X
USAA CASUALTY INSURANCE COMPANY
a/s/o MATTHEW T. GRANGER,

INDEX NO. 11292/09

Plaintiff,

- against -

DECISION AND ORDER

**SAYED KHALED EL-WARAKY, KHALED
SAYED ABDEL EL-WARA, CAB EAST LLC,
LONGSTEM RESTAURANT, INC., d/b/a
SOUNDVIEW RESTAURANT, MANAGEMENT
SOLUTIONS, LTD., HERB HILL MANAGEMENT
GROUP, INC., HERB HILL HOLDINGS LLC, and
HERB HILL LEASING, LLC,**

Original Return Date: 5/24/10
Motion Sequence Numbers: 002, 003

Defendants.

-----X

P R E S E N T :
HON. JOEL K. ASARCH
Justice of the Supreme Court.

The following named papers numbered 1 to 8 were submitted on these two Motions on May 28, 2010:

	<u>Papers numbered</u>
Notice of Motion and Affirmation (Seq. 2)	1-2
Memorandum of Law in Support	3
Affirmation in Opposition	4
Notice of Motion and Affirmation (Seq. 3)	5-7
Memorandum of Law in Support	8

Defendant Management Solutions, Ltd. moves pursuant to CPLR §3212, for an order granting summary judgment dismissing the plaintiff's complaint, together with any and all cross-claims asserted against it (Sequence #002).

Defendants Herb Hill Management Group, Inc., Herb Hill Holdings, LLC and Herb Hill Leasing, LLC move pursuant to CPLR §3212, for an order granting summary judgment dismissing

the plaintiff's complaint, together with any and all cross-claims asserted against it (Sequence #003).

On June 18, 2006 at 2:50 a.m., plaintiff's assignor, Matthew Granger, was present in the parking lot at Soundview Restaurant and Bar [hereinafter Soundview], located on Lattingtown Road within the City of Glen Cove (*see* O'Callaghan Affirmation in Support at Exh. C). Soundview was purportedly operated by defendant Longstem Restaurant, Inc. (and its principal Mike Stemcosky)¹, which had a lease with the City of Glen Cove (*id.* at ¶¶5,6). In connection thereto, in or about December 29, 2005, defendant Management Solutions, Ltd. [hereinafter Management Solutions] assumed Longstem's lease with the City of Glen Cove (*id.* at ¶5).

On the evening of June 17, 2006 and into the early morning hours of June 18, 2006, defendant Sayed Khaled El-Waraky was a patron at Soundview and was there to celebrate the 21st birthday of Joseph Abruzzo, a named defendant in a related action. During the course of the evening, El-Waraky became involved in an altercation and was consequently escorted therefrom by Sean Basdavanos, a plaintiff in a related action (*id.* at ¶9). At approximately 2:45 a.m., El-Waraky proceeded to get into a 2005 Jaguar, leased by his father, Sayed Abdel El-Wara, and owned by defendant Cab East, LLC, and struck several individuals including assignor, Matthew Granger (*id.*; *see also* Exh. A at ¶¶15-30). At the time of the subject accident, the 2005 Jaguar was uninsured (*see* Defendants Memorandum of Law at p. 2).

As a result of injuries sustained, USAA Casualty Insurance Company [hereinafter USAA] paid the sum of \$100,000 to its insured, Matthew Granger, pursuant to an uninsured motorist

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While defendant Longstem Restaurant Inc originally appeared in the within action by serving an answer, it has failed to thereafter appear at any court conferences or to produce anyone for a deposition (*see* Nolan Affirmation in Opposition to motion for summary judgment interposed by Management Solutions, Ltd. at ¶9).

provision contained in the policy it issued to Mr. Granger (*see* O’Callaghan Affirmation in Support at ¶3). The within subrogation action was subsequently commenced by USAA to recover the sum it paid to Mr. Granger (*id.* at Exh. A). The applications respectively interposed by the moving defendants thereafter ensued and are determined as set forth hereinafter.

Motion by Management Solutions

As adduced from the Verified Bill of Particulars, USAA alleges that by having sold alcohol to an underage and intoxicated individual, namely the defendant Sayed Khaled El-Waraky, Management Solutions has violated “Sections 11-100 and 11-101 of the General Obligations Law for the State of New York as well as applicable sections of the Alcoholic Beverage Control (ABC) law for the State of New York” (*id.* at Exh. C at ¶¶6,7).

In moving for dismissal of the within complaint, counsel for the defendant argues that Management Solutions was only a leaseholder on the subject premises which did not hold a liquor license, did not sell alcohol to El-Waraky, did not hire any of the bartenders employed thereat and did not collect any revenue from the sale of liquor and thus cannot be held liable under General Obligations Law §§11-100 and 11-101 (*id.* at ¶10,11; *see also* Defendant’s Memorandum of Law at pp. 2-3, 6,8). Counsel relies upon the deposition testimony of Mr. Joseph Graziore, who testified that other than security personnel, as well as some kitchen staff, the bartenders and the wait staff were “employed through Longstem” and that the Soundview was being operated by Longstem under its liquor license (*see* Defendants Memorandum of Law at p. 6; *see also* O’Callaghan Affirmation in Support at Exh. E at pp. 53-55).

In addition to the foregoing, counsel argues that subsequent to the assumption of Longstem’s

lease by Management Solutions, it was solely Longstem which continued to operate the bar and the defendant's primary purpose thereunder was to pay back rent and to undertake needed and significant capital improvements with regard to the subject premises (*see* Defendants Memorandum of Law at pp. 2,3).

In opposing the within application, counsel for USAA "incorporates by reference herein the opposition of its insured GRANGER" submitted in response to the motion for summary judgment interposed by Management Solutions in the related action, entitled Matthew Granger v Sayed Khaled El-Waraky et al, bearing Index No. 22680/2007 (*see* Serlin Affirmation in Opposition at ¶3). In those opposing papers, counsel for Mr. Granger argued that the pre-trial record established, at a minimum, the existence of questions of fact with regard to whether Management Solutions exercised control over the manner in which Soundview was operated and whether it unlawfully sold alcohol to defendant Sayed Khaled El-Waraky (*see* Nolan Affirmation in Opposition at ¶¶3,4,5,6,10, 11,16,19,20,21). In so arguing, counsel relied primarily, although not exclusively, upon the sections of the deposition testimony of Joseph Graziose, President of the corporate defendant, wherein he testified that "both" he, as well as Mike Stemcosky (the principal of Longstem Restaurant) had the authority to set bar policy (*id.* at ¶¶7, 11; *see also* Plaintiff's Memorandum of Law at pp. 5-8). Counsel also referred to the deposition testimony of Joseph Abruzzo, who stated that Joseph Graziose III, the son of Joseph Graziose, informed him that he was the manager of the bar and reported directly to his father (*see* Nolan Affirmation in Opposition at ¶15;*see also* Exh B at p. 67).

Standard for Summary Judgment

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 NY2d 395 [1957]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Bhatti v Roche*, 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering proof, in admissible form, sufficient to warrant the Court to direct judgment in the movant's favor as a matter of law (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 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 NY2d 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*, *supra* at 49 NY2d 557 [1980]).

In opposing a motion for summary judgment, it is well settled that "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat the application (*id.* at 562). 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 NY2d 338 [1974]; *Sillman v Twentieth Century Fox*, *supra* at 3 NY2d 395 [1957]).

Here, USAA is alleging theories of liability predicated upon the provisions embodied in General Obligations Law §§11-100 and 11-101 (*see* O'Callaghan Affirmation in Support at Exh. C;

see also Nolan Affirmation in Opposition at ¶5). 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 NY2d 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 Dram Shop Act was ultimately followed by the enactment of General Obligations Law §11-100, which created liability upon the gratuitous 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” (Alcoholic Beverage Control Law §65[1],[2]). While the Alcoholic 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, supra* at 80 NY2d 483; *Carr v Kaifler*, 195 AD2d 584 [2d Dept 1993]; *Sullivan v Mulinos of Westchester, Inc.*, 2010 WL 1999575 [2d Dept 2010]). In interpreting the statutory provisions, the Court of Appeals has held that liability thereunder “attaches only in the event of an ‘unlawful’ sale or delivery of alcohol” (*Sherman v Robinson, supra* at 80 NY2d 487).

“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 NY2d 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, supra* at 80 NY2d 487; *Senn v Scudieri*, 165 AD2d 346 [1st Dept 1991]).

In the instant matter, the Court has reviewed the record and determined that Management Solutions has demonstrated its *prima facie* case of entitlement to judgment as a matter of law (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, *supra* at 46 NY2d 1065). However, in opposing the application the Court finds that USAA has demonstrated the existence of material issues of fact which warrant the denial of the defendants’s application (*id.*). The deposition transcript of Mr. Graziose, annexed to the motion papers, reveals that while he testified that he “looked to Longstem” when making decisions “from an operations standpoint” and that the bar employees were all employed by Longstem, he also testified that “both” he and Mike Stemcosky determined how the bar was going to be operated. Accordingly, as the record reveals questions of fact as to the degree of control exerted by Management Solutions over Soundview, as well as questions as to whether the

defendant aided in the sale, delivery or procurement of alcohol to defendant Sayed Khaled El-Warakly, the application interposed by Management Solutions, seeking summary judgment dismissing the within complaint, together with any and all cross-claims asserted against it, is hereby DENIED. (Sequence #002).

Motion by Herb Hill Management Group Inc., Herb Hill Holdings, LLC and Herb Hill Leasing, LLC

The Court now turns to the application interposed by Herb Hill Management Group, Inc., Herb Hill Holdings, LLC and Herb Hill Leasing, LLC, which seeks dismissal of the within action. A review of the complaint indicates that USAA is alleging that said defendants maintained the business at Soundview and served defendant Sayed Khaled El-Warakly, while he was intoxicated and underage in violation of the Alcoholic Beverage Control Law, as well as General Obligations Law §§11-100, 11-101 (*see* Schlossberg Affirmation in Support at ¶6; *see also* Verified Complaint Exh. A at ¶¶29-32, 34-37,39-43,47).

In support of the within application and with particular respect to defendants Herb Hill Holdings, LLC and Herb Hill Leasing, LLC, counsel provides the affidavit of Mr. Joseph Graziose, President of the defendants, who avers that neither of these defendants had any interest in either the business of Soundview or in the premises upon which it was located (*see* Schlossberg Affirmation in Support at ¶10,11; *see also* Graziose Affidavit in Support at Exh. F at ¶¶5,6,7; *see also* Defendants' Memorandum of Law at Point I).

With respect to Herb Hill Management Group, Inc., counsel relies upon the deposition testimony of Joseph Graziose, wherein he stated that other than the security staff, as well as some employees in the kitchen, the bartenders and the wait staff were "employed through Longstem" and

that Soundview was being operated by Longstem under its liquor license (*see* Schlossberg Affirmation in Support at ¶13; Exh. E at 49-50, 53-55; *see also* Defendants' Memorandum of Law at Point II). Counsel argues that as the evidence demonstrates that Herb Hill Management, Inc. was not at all involved with the selling or serving of alcohol at Soundview, the within action must be dismissed (*see* Schlossberg Affirmation in Support at ¶¶13,14; *see also* Defendants' Memorandum of Law at Point II).

As with the above application interposed by Management Solutions, Ltd., counsel for USAA opposes the instant application by expressly adopting those opposition arguments posited by counsel for Mr. Granger, which were submitted in response to the motion by the moving defendants herein in the related action entitled *Matthew Granger v Sayed Khaled El-Waraky et al*, bearing Index No. 22680/2007 (*see* Serlin Affirmation in Opposition at ¶3).

In those opposing papers, counsel for plaintiff Granger confined his opposition arguments with respect to defendant Herb Hill Management Group, Inc. and stated that "even though Herb Hill Holdings, LLC and Herb Hill Leasing, LLC may be entities with no relationship to the subject property, business or premises at issue in this case, the same cannot be said for defendant 'Herb Hill Management Group, Inc.'" (*see* Nolan Affirmation in Opposition at ¶4). As to Herb Hill Management Group, Inc., counsel argued that there existed material questions of fact as to whether said defendant, as the employer of the security personnel, actually managed and operated the Soundview (*id.* at ¶¶4,5,6,8). Particularly, counsel posited that the deposition testimony of Mr. Graziose, wherein he stated that the security employees directly controlled who gained entry into the premises, clearly established questions of fact as to whether Herb Hill Management, Inc. played a role in the sale of alcohol with respect to how much liquor was served and to whom it was provided

(*id.*).

In the matter *sub judice*, the Court finds that the moving defendants have demonstrated their entitlement to judgment as a matter of law (*Alvarez v Prospect Hospital, supra* at 68 NY2d 320). As to Herb Hill Holdings, LLC and Herb Hill Leasing, LLC, the averments of Mr. Graziose, that said entities did not have any interest in the business conducted by Soundview or in the premises upon which it was located, are not disputed by the counsel for the plaintiff (*Zuckerman v City of New York, supra* at 49 NY2d 557).

With regard to Herb Hill Management Group, Inc., liability under General Obligations Law §§11-100, 11-101, which must be strictly construed, would attach “only in the event of an ‘unlawful’ sale or delivery of alcohol” (*Sherman v Robinson, supra* at 80 NY2d 487). Here, the evidence as adduced herein, including the deposition testimony of Joseph Graziose, demonstrates that the role of said defendant was circumscribed to that of providing security and kitchen personnel at Soundview, none of whom were engaged in either gratuitously providing alcohol to patrons or in the commercial sale thereof (*id.*; *D’Amico v Christie*, 71 NY2d 76 [1987]; *Gabrielle v Craft*, 75 AD2d 939 [1980]; *Casselberry v Dominick*, 143 AD2d 528 [4th Dept 1988]). The plaintiff’s opposition argument that questions of fact exist as to whether the defendant -- through the actions of its employees -- played a role in the sale of liquor to El-Waraky, is not supported by competent evidence and is rather predicated upon assertions and allegations which are unsubstantiated by the record and therefore insufficient to defeat the defendants’ within application (*Zuckerman v City of New York, supra* at 49 NY2d 562).

Finally, the Court notes that to extend liability to Herb Hill Management, Inc. simply as a consequence of its employees having controlled which individuals entered the premises, and without

any competent evidence of a commercial sale of alcohol, would be to impermissibly expand the scope of the statute and the legislative intent expressed thereby (*Sherman v Robinson, supra* at 80 NY2d 487; *D'Amico v Christie, supra* at 71 NY2d 84).

Based upon the foregoing, the application by defendants Herb Hill Management Group, Inc., Herb Hill Holdings, LLC, and Herb Hill Leasing, LLC, interposed pursuant to CPLR §3212, for an order granting summary judgment and dismissing the USAA's complaint, together with any and all cross-claims asserted against it, is hereby GRANTED (Sequence #003).

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
January 11, 2011

ENTER:



JOEL K. ASARCH, J.S.C.

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