

Granger v El-Waraky

2011 NY Slip Op 30174(U)

January 11, 2011

Supreme Court, Nassau County

Docket Number: 22680/07

Judge: Joel K. Asarch

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

-----x
MATTHEW GRANGER,

Plaintiff,

- against -

INDEX NO. 22680/07

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,
HERB HILL LEASING, LLC, and
CITY OF GLEN COVE,**

Defendants.

Original Return Date: 3/15/10
Motion Sequence Numbers: 004,
005, 006

-----x

P R E S E N T :

**HON. JOEL K. ASARCH
Justice of the Supreme Court.**

The following named papers numbered 1 to 18 were submitted on these three Motions on
May 28, 2010:

	<u>Papers numbered</u>
Notice of Motion and Affirmation (Seq. 4)	1-2
Memorandum of Law in Support of Motion (Seq. 4)	3
Affirmation in Opposition	4
Memorandum of Law in Opposition to Motion	5
Reply Affirmation	6
Reply memorandum of Law	7
Notice of Motion, Affirmation and Affidavit (Seq. 5)	8-10
Affirmation in Opposition	11
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Amended Notice of Motion, Affirmation and Affidavit (Seq. 6)	13-15
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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 #004).

Defendant City of Glen Cove moves pursuant to CPLR §3212, for an order dismissing the plaintiff's complaint, together with any and all cross-claims asserted against it (Sequence #005).

Defendants, the 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 and dismissing the plaintiff's complaint, together with any and all cross-claims asserted against it (Sequence #006).

On June 18, 2006 at 2:50 a.m., the plaintiff, Matthew T. Granger, was present in the parking lot at Soundview Restaurant and Bar [hereinafter Soundview], which was operated by defendant Longstem Restaurant, Inc. (and its principal Mike Stemcosky)¹, which had a lease with defendant City of Glen Cove [hereinafter the City] (*see* O'Callaghan Affirmation in Support 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 (*id.*).

On the evening of June 17, 2006 into the early morning hours of June 18, 2006, defendants Sayed Khaled El-Warakly and Joe Abruzzo² were patrons at the Soundview to celebrate Abruzzo's

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While defendant Longstem Restaurant 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 par. 9)

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Joe Abruzzo was a named defendant in a related action entitled *Basdavanos v. Sayed Khaled El-Warakly, et al.*, bearing Index No. 010506/2007.

21st birthday. At some point during the course of the evening, defendant El- Waraky became involved with an altercation with a female patron at the Soundview and was consequently escorted therefrom by Sean Basdavanos, the plaintiff in a related action (*id.* at ¶9). At approximately 2:50 a.m., El-Warakly 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 the plaintiff herein, Matthew Granger (*id.* at Exh. A at ¶¶10-13; *see also* Exh. C). The parking lot in which the accident occurred is owned by the City and is adjacent to Soundview (*id.* at Exh. C). At the time of the subject accident, it is undisputed that Sayed Khaled El-Warakly was intoxicated and underage.³

The plaintiff commenced the underlying action to recover damages for the injuries he sustained as a result of the subject accident. The applications respectively interposed by the moving defendants herein thereafter ensued and are determined as set forth hereinafter.

Motion by Management Solutions

With respect to Management Solutions, the plaintiff is alleging that said defendant has violated "the applicable provisions of the General Obligations Law as well as the ABC law [the Alcoholic Beverage Control Law]. . . by virtue of its sale and distribution of alcohol to an underage and intoxicated patron, namely the defendant, SAYED KHALED EL-WARAKLY" (*id.* at Exh. C at ¶5).

In moving for summary judgment, 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

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Sayed Khaled El-Warakly was born on November 14, 1986 (*see* Nolan Affirmation in Opposition to Management Solutions Motion for Summary Judgment at Exh. A at p.8).

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 requiring dismissal of the within complaint (*id.* at ¶10; *see also* Defendant's Memorandum of Law at pp. 2-4, 6-8). Counsel relies upon the deposition testimony of Mr. Joseph Graziose, 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 Soundview was being operated by Longstem under its liquor license (*see* Defendants Memorandum of Law at pp. 6; *see also* O'Callaghan Affirmation in Support at Exh. E at pp. 53-55).

Counsel further argues that subsequent to the assumption of Longstem's lease by Management Solutions, it was solely Longstem which continued to operate the bar and Management'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 p. 2).

In opposition to the application, counsel for the plaintiff argues that the pre-trial record establishes, at a minimum, the existence at to questions of fact with regard to whether Management Solutions unlawfully sold alcohol to defendant Sayed Khaled El-Warakly (*see* Nolan Affirmation in Opposition at ¶¶3,4,5,6,0,11,16,19,20,21). Counsel relies 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 makes reference 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). 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).

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* 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, while Management Solutions has demonstrated its *prima facie* case of entitlement to judgment as a matter of law, the Court finds that the plaintiff has demonstrated the existence of material issues of fact which warrant the denial of the within application (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, *supra* at 46 NY2d 1065). A review of the deposition transcript of Mr. Graziose reveals that while he testified that when making decisions "from an

operations standpoint", he "looked to Longstem" and that the bar staff at Soundview were all employed by Longstem. He also clearly testified that "both" he and Mike Sterncosky determined how the bar was going to be operated (*id.*). Thus, as the record reveals the existence of questions of fact as to the degree of control exerted by Management Solutions over Soundview and therefore concomitantly questions as to whether said 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 plaintiff's complaint, together with any and all cross-claims asserted against it, is hereby DENIED. (Sequence #004).

Motion by The City of Glen Cove

As to the City, the plaintiff claims that said defendant violated "the applicable provisions of the General Obligations Law as well as the ABC law [Alcoholic Beverage Control Law] of the State of New York" by allowing alcohol to be served to underage and intoxicated individuals including defendant Sayed Khaled El-Warakly (*see* Meehan Affirmation in Support at Exh. C). In support of the within application, counsel argues that said defendant is an out-of-possession landlord which did not own, operate, manage, control or supervise the Soundview, and which neither sold nor provided liquor to Sayed Khaled El-Warakly, thus warranting dismissal of the plaintiff's claims predicated upon the General Obligations Law (*id.* at ¶¶18-21,23,26,27,31,36-38).

Counsel provides that affidavit of Ralph V. Suozzi, Mayor of the City of Glen Cove, who avers, *inter alia*, that based upon his personal familiarity with the terms of lease, "the City is an out of possession landlord with respect to Soundview" which "has no business relationship with Management Solutions, Ltd. other than that of landlord and tenant" (*id.* at Exh. I at ¶¶4,5). Mr.

Suozzi further states that the "City does not own, operate, manage, control, supervise or otherwise oversee the daily operations of Soundview" and on June 17, 2006 and June 18, 2006, the City "was not involved" and "had no knowledge" with respect to the sale of alcohol to any individuals and did not receive any profits from any sale thereof (*id.* at ¶¶7,8,9,11). Counsel additionally makes reference to the portions of the deposition testimony of Mr. Graziose wherein he stated that no one from the City ever directed or supervised the day to day operations of Soundview with respect to the amount of alcohol served (*id.* at ¶21).

In opposition, counsel for the plaintiff argues that the record demonstrates the existence of material issues of fact as to whether the City is a genuine out-of-possession landlord, thus requiring denial of the instant application (*see* Nolan Affirmation in Opposition at ¶4,9). Specifically, counsel posits that both the lease, which exists by and between the City and Management Solutions, as well as the deposition testimony of Joseph Graziose, clearly establishes that the City shares in the profits derived from "catered" events at Soundview for parties of 20 or more and that such arrangement contradicts the Mayor's statement that there is no business relationship between the parties (*id.* at ¶¶ 4,5,7,9). Counsel further argues that such profit sharing is indicative that the City was more than a mere out-of-possession landlord and due to the profit sharing relationship there exists questions of fact as to whether Management Solutions was acting on behalf of the City *vis a vis* the sale of alcoholic beverages (*id.* at ¶¶9,13).

In the instant matter, having reviewed the record, the Court finds that the defendant has demonstrated its entitlement to judgment as a matter of law (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, *supra* at 46 NY2d 1065). "[A]n out-of-possession landlord cannot be held liable for injuries occurring on the premises unless he or she has retained control over the premises or over the

operation of the business conducted on the property" (*Archie v Ma's & Papa Joe's, Inc.*, 70 AD3d 985 [2d Dept 2010]). Here, Joseph Graziose unequivocally testified that no one from the City communicated with Management Solutions or rendered any supervision thereto with respect to the daily operations of Soundview in terms of how much alcohol was to be served at the subject premises (*id.*; *see also Borelli v 1051 Realty Corp.*, 242 AD2d 517 [2d Dept 1997]).

Moreover, the Court finds unavailing the plaintiff's contention that because the City shares the profits for certain catered events, questions of fact are necessarily raised as to whether the City was a *bona fide* out-of-possession landlord. Initially, the record establishes that the Abruzzo birthday celebration was not a "catered" event from which the City derived financial gain. Here, while the subject lease indeed provides that the City is to share in the profits for "catered" events for a party of 20 or more people, the record herein demonstrates, and plaintiff's counsel concedes, that on the evening and morning in issue, the party of which El-Waraky was a part, consisted of approximately six people.⁴ Further, Mr. Graziose testified that the Abruzzo birthday celebration was not considered a catered event as contemplated by the lease.

The record herein does not contain any evidence that the City directly sold, furnished or procured alcohol for El-Waraky, which would be required for liability to attach under General Obligations Law §§ 11-100, 11-101 (*Sherman v Robinson, supra* at 80 NY2d 483). As noted above, Joseph Graziose testified that the City did not exercise any supervision or control over the amount of alcohol served at the Soundview (*Archie v Ma's & Papa Joe's, Inc., supra* at 70 AD3d 985).

Based upon the foregoing, the application by defendant City of Glen Cove, interposed

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See Nolan Affirmation in Opposition to Management Solution's Motion for Summary Judgment at ¶4).

pursuant to CPLR §3212, for an order dismissing the plaintiff's complaint, together with any and all cross-claims asserted against it, is hereby GRANTED (Sequence #005).

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 Amended Verified Complaint indicates that the plaintiff is claiming that said defendants maintained the business at Soundview and served defendant Sayed Khaled El-Waraky, 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 ¶5; *see also* Amended Verified Complaint Ex. A at ¶¶30-32,35-37,40-42,43,47).

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 these 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 ¶9,10; *see also* Graziose Affidavit in Support at Ex. F at ¶¶5,6,7; *see also* Defendants' Memorandum of Law at Point I).

As 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 11,12; Ex. D 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 ¶¶11,12,13; *see also* Defendants' Memorandum of Law at Point II).

In opposing the within application, the Court notes that counsel for the plaintiff limits his opposition arguments to those posited by defendant Herb Hill Management Group, Inc. and states 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). However, with respect to Herb Hill Management Group, Inc., counsel argues that there exist 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 posits that the deposition testimony of Mr. Graziose, wherein he states that the security employees directly controlled who gained entry into the premises, clearly establishes 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 record 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 is therefore insufficient to defeat the defendants' within application (*Zuckerman v City of New York, supra* at 49 NY2d 557).

Finally, the Court finds that to extend liability to Herb Hill Management Group, Inc. under the Dram Shop Act simply by virtue of its employees having controlled which individuals entered the premises, and without any competent evidence of a direct sale of alcohol, would be to impermissibly expand the scope of the statute and the legislative intent expressed thereby (General Obligations Law §11-101; *Sherman v Robinson, supra* at 80 NY2d 487; *D'Amico v Christie, supra* at 71 NY2d 83).

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 dismissing the plaintiff's complaint, together with any and all

cross-claims asserted against it, is hereby GRANTED (Sequence #006).

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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Attorneys for Defendant City

Longstem Restaurant, Inc., Defendant
c/o Michael Stemcosky

ENTERED

JAN 13 2011

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COUNTY CLERK'S OFFICE**