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| Martinez v El-Waraký |
| 2011 NY Slip Op 30175(U) |
| January 11, 2011 |
| Supreme Court, Nassau County |
| Docket Number: 22993/07 |
| Judge: Joel K. Asarch |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 17

-----X
SALVATORE MARTINEZ,

Plaintiff,

- against -

INDEX NO. 22993/07

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, FRANK ABRUZZO,
and JOE ABRUZZO,**

Defendants.

Original Return Date: 3/15/10
Motion Sequence Numbers: 003,
004, 005

-----X
P R E S E N T :

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

The following named papers numbered 1 to 14 were submitted on these three Motions on
May 28, 2010:

| | <u>Papers numbered</u> |
|--|------------------------|
| Notice of Motion and Affirmation (Seq. 3) | 1-2 |
| Notice of Motion and Affirmation (Seq. 4) | 3-4 |
| Memorandum of Law in Support of Motion | 5 |
| Affirmation in Opposition | 6-7 |
| Reply Affirmation | 8 |
| Reply Affirmation | 9 |
| Reply Memorandum of Law | 10 |
| Notice of Motion, Affirmation and Affidavit (Seq. 5) | 11-13 |
| Memorandum of Law in Support of Motion | 14 |

Defendants Frank and Joe Abruzzo 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 them (Sequence #003).¹

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).

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 #005).

On June 18, 2006 at 2:50 a.m., the plaintiff, Salvatore Martinez, 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)², which had a lease with the City of Glen Cove [hereinafter the City] (*see* O'Callaghan Affirmation in Support at ¶¶6,8.). In connection thereto, in or about December 29, 2005, defendant Management Solutions, Ltd. [hereinafter Management Solutions] assumed Longstem's lease with the City (*id.* at ¶6).

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

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The Court notes that the plaintiff has voluntarily discontinued the within action against defendants Frank Abruzzo and Joe Abruzzo (*see* Levinson Affirmation in Opposition at ¶¶1,2). Additionally, the application interposed by the Abruzzo defendants is unopposed by the remaining co-defendants and accordingly the remaining branch of the defendants' application seeking dismissal of any and all cross-claims asserted against them is hereby GRANTED.

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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 conference or to produce anyone for a deposition.

Defendant's Memorandum of Law at pp. 2-4, 6-7). Counsel relies upon the deposition testimony of Mr. Joseph Graziose, President of Management Solutions³, who testified that other than security personnel, as well as some kitchen staff, the bar tenders 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. 2,3,6; *see also* O'Callaghan Affirmation in Support at Exh. E at pp. 53-55).

In addition to 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 that 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 pp. 2,3).

In opposition, counsel for the plaintiff argues that subsequent to Management Solutions assuming the lease from Longstem, it sold liquor without a license and improperly utilized the license actually issued to Longstem, the usage of which constitutes a violation of the Alcoholic Beverage Control Law (*see* Levinson Affirmation in Opposition at ¶8). Counsel further argues that the portions of the deposition testimony of Joseph Graziose, wherein he stated that he would "have the authority" to tell Longstem how the bar was going to be operated, clearly demonstrates that Management Solutions was more than a mere leaseholder on the subject premises and rather exercised dominion and control over the day to day operations of the bar, thus subjecting it to liability under General Obligations Law §§11-100 and 11-101 (*id.* at ¶¶4,8,9,13,18,19)

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Mr. Graziose is also President of co-defendants, Herb Hill Management Group, Inc., Herb Hill Holdings, LLC and Herb Hill Leasing, LLC.

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*). 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*).

As noted above, the plaintiff is alleging theories of liability predicated upon the provisions

embodied in General Obligations Law §§11-100,11-101 (*see* Levinson Affirmation in Opposition at ¶4; *see also* O'Callaghan Affirmation in Support at Exh. C). 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.*, 46 NY2d 1065 [1979], *supra*). However, in opposing the application, the plaintiff 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 (*id.*). Accordingly, as the record reveals questions of fact as to the degree of control exerted by Management Solutions over Soundview and thus 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 plaintiff's complaint, together with any and all cross-claims asserted against it, is hereby DENIED. (Sequence#004).

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 the plaintiff 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 ¶5; *see also* Verified Complaint Exh. A at ¶¶38-41,43; *see also* Exh. C at ¶¶5,6).

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 corporate 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 D).

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 bar tenders 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. 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 ¶¶12,13,14; *see also* Defendants' Memorandum of Law at Point II).

The within application is unopposed by counsel for the plaintiff who states that it "is unnecessary to consider the summary judgment motion by HERB HILL MANAGEMENT GROUP, INC." (*see* Levinson Affirmation in Opposition to Management Solution's Motion for Summary Judgment at ¶1). Additionally, a careful reading of counsel's submission reveals that no arguments were set forth as to defendants, Herb Hill Holdings, LLC and Herb Hill Leasing, LLC, notwithstanding that both defendants also moved for affirmative relief (*id.* at ¶¶1,19, 22). However, while the defendants' instant motion is unopposed, given that the plaintiff has not formally withdrawn the action against said defendants, and given that this motion is still pending, the Court will address the application.

Having reviewed the record, the Court finds that the moving defendants have demonstrated their entitlement to judgment as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). 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).

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 Graziouse, 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 the commercial sale of alcohol (*id.*; *D'Amico v Christie*, 71 NY2d 76 [1987]; *Gabrielle v Craft*, 75 AD2d 939 [3rd Dept. 1980]; *Casselberry v Dominick*, 143 AD2d 528 [4th Dept 1988]). In failing to oppose the application, the plaintiff has obviously not provided any competent evidence through which to demonstrate the existence of a material issue of fact with respect to this issue (*Zuckerman v City of New York*, 49 NY2d 557 [1980], *supra*).

Therefore, 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 #005).

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
January 11, 2011

ENTER:


JOEL K. ASARCH, J.S.C.

ENTERED
JAN 13 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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