

Calano v McCaig

2011 NY Slip Op 30487(U)

February 28, 2011

Supreme Court, Richmond County

Docket Number: 100316/07

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 100316/07
Motions No.: 7 & 8**

JOSEPH CALANO

Plaintiff

against

**DAMIAN MCCAIG;
ELEANOR VOLPE, as proposed Administratrix of
WAYNE VOLPE, deceased;
BDGJ, INC., d/b/a BLACK DOG GRILL and BLACK
DOG CAFÉ; and
CHRISTOPHER PETRUNTI**

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of the following motions for summary judgment

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1 & 2
Answering Affidavits	3
Replying Affidavits	4 & 5
Exhibits	Attached to Papers
Memorandum of Law	6 & 7

Upon the foregoing cited papers, the Decision and Order on these Motions is as follows:

The motions for summary judgment and for sanctions against the plaintiff Joseph Calano by the defendant Eleanor Volpe as Administratrix of Wayne Volpe, deceased (“Volpe”) are denied in their entirety. The motion for summary judgment by the defendants BDGJ, INC., d/b/a Black Dog Grill and Black Dog Café and Christopher Petrunti (“Black Dog Grill”) is denied in the entirety.

Facts

On the night of July 29, 2006 and the early morning of July 30, 2006, the plaintiff was present on the premises of the Black Dog Grill, 382 Forest Avenue, Staten Island, New York 10301. Also present within the Black Dog Grill were the patrons, Damian McCaig and Wayne

Volpe. Christopher Petrunti, an employee of the Black Dog Grill was on duty during this time as a bartender. During that time, instances of identification checks were seen by Petrunti, although he did not do checks after 9:00 PM. Checks would have been done by others, the names of whom Petrunti does not fully recall. Petrunti did not admit Calano into the bar, and does not remember admitting McCaig or Volpe into the bar.

The plaintiff alleges that McCaig was less than 21 years old at that time, had a bottle of beer in his hand, was drinking the beer and was intoxicated. The plaintiff stated that McCaig sounded intoxicated because he had slurred speech. The plaintiff further asserts that Volpe had red eyes, from which observation he deduced intoxication. Despite Volpe's intoxication, the plaintiff alleges Volpe was served beer by a bartender. At some time in the early morning, the plaintiff asserts that McCaig and Volpe requested that all three proceed outside the Black Dog Grill. The three proceeded to a point at the corner of the block upon which the Black Dog Grill is located.

The plaintiff states that Volpe was standing behind him. The plaintiff remembers a blow was delivered to the back of his head. The plaintiff surmises he was struck by Volpe. It is alleged that McCaig then struck the plaintiff in the face below the left eye. The plaintiff further states he then passed out. Subsequent medical and surgical evaluation revealed extensive serious injuries.

Petrunti has stated he saw no one who appeared to be intoxicated in the Black Dog Grill during the time of the incidents. Petrunti described identification checks. An employee of the Black Dog Grill, Corey Spellman, stated in his deposition that identification was checked at the entrance to the Black Dog Grill. Spellman stated that everyone in the Black Dog Grill was intoxicated, but not overly so.

A deposition was taken from the plaintiff and is appended to Volpe's motions. A verified bill of particulars and certified medical records pertaining to the plaintiff are also appended to

Volpe's motions.

Procedural History

Summons and complaint was served upon the defendants on January 29, 2007. Issue was joined by the Black Dog Grill and Petrunti with an answer on April 16, 2007. Answer was made by McCaig on April 18, 2007. Answer was made for Volpe on November 8, 2007. The date of the Note of Issue was October 20, 2010. Motion for summary judgment in favor of Volpe was filed on December 7, 2010. Motion for summary judgment in favor of the Black Dog Grill was filed on December 7, 2010. Affirmation in opposition by the plaintiff is dated January 21, 2011. Reply affirmations by the Black Dog Grill were served on January 31, 2011. Reply affirmations for Volpe were served February 3, 2011.

On May 24, 2010, Volpe served a notice for discovery and inspection upon the plaintiff. On September 29, 2010, the court ordered that the plaintiff furnish to Volpe a bill of particulars and comply with the discovery and inspection notice.

Discussion

Under the New York Civil Practice Law and Rules ("CPLR") § 3212, a motion for summary judgment requires that "the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."¹ The Court of Appeals states that "summary judgment is a drastic remedy and should not be granted when

¹CPLR § 3212 (b).

there is any doubt as to the existence of a triable issue.”² Notwithstanding facts presented by any party, “the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.”³ When the Appellate Division, Second Department evaluates for summary judgment, all evidence must be examined in the light most favorable to the non-moving party;⁴ and the non-movant must be given the benefit of every favorable inference.⁵

The proponent of a motion for summary judgment has the burden of tendering sufficient evidence to show the absence of competing material issues of fact.⁶ Once a moving party has made a showing of sufficient evidence, the burden shifts to the opposing party to put forth evidence in admissible form to establish a triable issue for the fact finder.⁷ Evidence must be refuted with opposing evidence, and not with mere assertions.⁸

Volpe’s motion for summary judgment must be denied.

In arguing for this motion for summary judgment, Volpe asserts that the plaintiff told “conflicting stories” in his deposition. Volpe asserts that the plaintiff stated at one point during deposition that he spoke with the defendants and at another that he argued with them. Volpe argues these are mutually exclusive assertions. Additionally, the plaintiff stated at one point that

²*Rotuba Extruders, Inc. v. Ceppos*, 46 NY 2d 223, 231 [1978], quoting *Moskowitz v. Garlock*, 23 AD 2d 943, 944 [1965]; *Herrin v. Airborne Freight Corp.*, 301 AD 2d 500, 500-501 [2d Dept 2003]; and *American Home Assurance Co. v. Amerford International Corp.*, 200 AD 2d 472 [1st Dept 1994].

³*Id.*

⁴*Nicklas v. Tedlen Realty Corp.*, 305 AD 2d 385, 386 [2d Dept 2003].

⁵*Gray v. N. Y. City Transit Auth.*, 12 AD 3d 638, 639 [2d Dept 2004]; *Perez v. Exel Logistics, Inc.*, 278 AD 2d 213, 214 [2d Dept 2000]

⁶*Wasserman v. Carella*, 307 AD 2d 225, 226 [1st Dept 2003].

⁷*Zuckerman v. City of New York*, 49 NY 2d 557, 562 [1980]; see also *Judith M. v Sisters of Charity Hosp.*, 93 NY 2d 932, 933 - 934 [1999].

⁸*Matter of O’Shea v. Bd. of Assessors of Nassau Cty.*, 8 NY 3d 249, 259 [2007].

he was assaulted by a group of people and at another that he was assaulted by two people. Volpe asserts that a statement made by the plaintiff that he was assaulted by a group of people is exclusive of being assaulted by a duo of assailants. Further, Volpe alleges the plaintiff was himself intoxicated at the time of the assault. In summary, Volpe asserts that these distinctions and allegations create unbelievable testimony.

However, findings of fact, especially those that rely upon judging the credibility of witnesses, are best determined by a jury during a trial.⁹ Here, there are fine distinctions in the plaintiff's assertions that are pointed out by Volpe's counsel. There is also an issue of whether the plaintiff was intoxicated at the time of the assault. These issues may reflect upon the credibility of the plaintiff's evidence. However, the adverse assertions do not necessarily make the plaintiff's evidence incredible or unbelievable. Finally, Volpe submits no evidence in admissible form to oppose the plaintiff's evidence pertaining to the assault. Consequently, Volpe has not presented a prima facie entitlement to summary judgment and has not shifted the burden to the plaintiff. Therefore, summary motion must be denied to Mr. Volpe.

Volpe's motion for sanctions against the plaintiff is denied.

"If any party ... refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such order with regard to the failure or refusal as are just."¹⁰ This provides to the Supreme Court a broad empowerment to impose sanctions.¹¹

Volpe moves to have sanctions applied against the plaintiff for refusal to conform with an order of May 24, 2010, requiring compliance with notice of discovery and inspection, a demand

⁹*Kahen v. Blum*, 185 AD 2d 875 [2d Dept 1992]; *quoting Claridge Gardens, Inc. v. Menotti*, 160 AD 2d 544 [1st Dept 1990].

¹⁰CPLR § 3126.

¹¹*Gibbs v. St. Barnabas Hosp.*, ___ NY 3d ___, 2010 NY Slip Op 9198, 4 [2010].

for authorizations, and a demand for a verified bill of particulars. The order was not conditional. Failure to comply with a conditional order must be cured by providing both a reasonable excuse, and a meritorious claim or defense.¹² The plaintiff defends by stating that an extensive deposition complied with discovery and additional demands are harassment. Although there is no documentation that authorizations were supplied by the plaintiff, certified medical records are appended to Volpe's motion. Finally, a verified bill of particulars is annexed to Volpe's motion, and is dated July 3, 2007. Although not required by the compulsion of an actual conditional order, the plaintiff offers a reasonable excuse, meritorious defenses and compliance in response to the order of May 24, 2010. Therefore, the court exercises its sound discretion by refusing to consider sanctions against the plaintiff.

Black Dog Grill's motion for summary judgment is denied.

Under the New York Alcoholic Beverage Control Law, it is contrary to law to "sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to ... 1. Any person, actually or apparently, under the age of twenty-one years; ... [or] 2. Any visibly intoxicated person."¹³ The plaintiff seeks to find the Black Dog Grill liable for damages under the Dram Shop Act based upon the principle that "[a]ny 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."¹⁴

The Black Dog Grill asserts that there was no legally adequate evidence that Volpe was intoxicated at the time he was served. The plaintiff asserts during his deposition that Volpe was intoxicated while in the Black Dog Grill and based this upon Volpe's eyes appearing red. The

¹²*Gibbs v. St. Barnabas Hosp.*, ___ NY 3d ___ at 4.

¹³Alcoholic Beverage Control Law § 65 (1.) and (2.).

¹⁴New York General Obligations Law (GOL) § 11-101 (1).

plaintiff alleges he saw Volpe being served a beer while he was intoxicated. From the evidence, a reasonable jury might infer that Volpe was intoxicated, but nonetheless was served liquor by the Black Dog Grill.

Additionally, the plaintiff stated that McCaig had slurred speech while in the Black Dog Grill, and was seen with a beer bottle in his hand. The defendant cites an Appellate Division, Second Department action in which it was stated that evidence must be given that a patron was provided an alcoholic beverage by a purveyor in order for liability to attach.¹⁵ However, that opinion was based on common law, and not statutorily based.¹⁶ From the evidence, a reasonable jury might infer that McCaig was intoxicated, and nonetheless was served liquor, or was permitted to be provided with liquor or to have liquor procured for him by the Black Dog Grill despite his intoxication.

The evidence that one is intoxicated may be circumstantial and a jury may rely on its everyday experience in a determination.¹⁷ Consequently, these issues are matters of fact for a fact finder to determine. The Black Dog Grill cites the preclusion of solely conclusory and unsubstantiated claims of intoxication at the time of service of intoxicating beverages.¹⁸ However, circumstantial evidence is an adequate form of evidence for this issue.¹⁹ While there are several possible signs of intoxication, no single one or combination is dispositive, rather the critical determinant of intoxication is the determination of intoxication by a fact finder.²⁰ Therefore, whether an individual was visibly intoxicated at the time of service of intoxicating

¹⁵*Pizzarro v. City of New York*, 188 AD 2d 591, 594 [2d Dept 1992].

¹⁶*Id.*

¹⁷*Adamy v. Ziriakus*, 92 NY 2d 396, 401 & 403 [1998].

¹⁸*Kelly v. Fleet Bank*, 271 AD 2d 654, 655 [2d Dept 2000].

¹⁹*Id.*

²⁰*Adamy v. Ziriakus*, 92 NY 2d at 403.

beverages is a matter for a jury to determine and the inference of intoxication is appropriate to defeat a motion for summary judgment.

The Black Dog Grill asserts it had no duty to protect the plaintiff. “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.”²¹ Contrary to the assertion by the Black Dog Grill that it had no duty to protect the plaintiff, there is a basis for statutorily imposed liability.

Here, the plaintiff has asserted in a sworn deposition that the ages of the Volpe and McCaig were respectively nineteen years old and twenty years old on the day of the assault. The Black Dog Grill has not provided evidence in admissible form to the contrary. Although the Black Dog Grill has provided testimony that its policy is to check identification of patrons, there is no particularized admissible evidence that it actually checked the identification of Volpe and McCaig. There is no evidence presented as to the apparent age of Volpe or McCaig. Consequently, the Black Dog Grill has not borne a burden of refuting the evidence of the stated actual or apparent ages of the defendants when they were allegedly served beverages at the Black Dog Grill. Hence liability on these grounds attaches to the Black Dog Grill if either of the alleged assailants was actually less than twenty-one years of age or appeared to be so, and were nonetheless served liquor. Liability would also attach to the Black Dog Grill if either alleged assailant had been served intoxicating beverages by the Black Dog Grill while in an intoxicated state.

²¹GOL §11-100 (1.).

The Black Dog Grill asserts a defense that the assault upon the plaintiff occurred at some point distant from its premises. The Black Dog Grill asserts that this unmeasured distance precludes liability because the distance of the assault from its premises precludes foreseeability. Although it has been represented that the assault occurred at the corner of the block containing the Black Dog Grill, the actual physical distance is not specified. It has been long held that foreseeability is for a finder of fact to determine.²² A reasonable jury could determine that the distance between the place of the assault and the Black Dog Grill does not preclude a duty to protect. Therefore, foreseeability should not be determined here as a matter of law, nor would it deflect liability as a matter of statute.

The defendant Black Dog Grill asserts that expert testimony would be required to determine that the plaintiff's assailants were intoxicated at the time of the assault. The plaintiff states in deposition that McCaig's speech was still somewhat slurred at the time of the assault. From this, a reasonable finder of fact might infer McCaig was intoxicated. Further, a reasonable finder of fact might infer that Volpe had not had time to become sobered at the time of the assault. At best, expert evidence is reliable evidence, subject to foundation, that may be provided to a finder of fact as an aid to deliberation.²³ Consequently, expert testimony might aid the fact finder, but "[i]t is for the jury to determine the extent of the intoxication..."²⁴ Therefore, the Black Dog Grill would be liable if either alleged assailant's actions resulted from an intoxicated state and if either alleged assailant had been served alcoholic beverages while intoxicated. The Black Dog Grill would also be liable if either alleged assailant were actually or apparently less than twenty-one years of age and were served alcoholic beverages. Further, the determination of intoxication must be made by a trier of fact. Consequently, none of the grounds proposed by the defendant Black Dog Grill are sufficient to support a finding of summary judgment against the plaintiff.

²²*McCrink v. New York*, 296 NY 99, 106 [1947].

²³*Parker v. Mobil Oil Corp.*, 7 NY 3d 434, 447 [2006].

²⁴*People v. Higgins*, 5 NY 2d 607, 631 (*concurring opinion*) [1958].

Accordingly, it is hereby

ORDERED, that the motion for summary judgment against Joseph Calano made by Eleanor Volpe as Administratrix of Wayne Volpe, deceased is denied in the entirety; and it is further

ORDERED, that the motion for sanctions against Joseph Calano made by Eleanor Volpe as Administratrix of Wayne Volpe, deceased is denied in the entirety; and it is further

ORDERED, that the motions for summary judgment made by the defendants BDGJ, INC., d/b/a Black Dog Grill and Black Dog Café and by Christopher Petrunti are denied in the entirety; and it is further

ORDERED, that the parties return for a pre-trial conference to **DCM Part 3, 130 Stuyvesant Place, Third Floor at 9:30 AM on Monday, March 28, 2011.**

ENTER,

DATED: February 28, 2011

Joseph J. Maltese
Justice of the Supreme Court