

<b>Sinnona v Whale's Tale Seafood Bar &amp; Grill</b>
2011 NY Slip Op 30906(U)
March 14, 2011
Supreme Court, Nassau County
Docket Number: 17285/08
Judge: F. Dana Winslow
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.



**SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK**

**Present:**  
**HON. F. DANA WINSLOW,**  
**Justice**

\_\_\_\_\_  
**DOMINICK SINNONA,** **TRIAL/IAS, PART 4  
NASSAU COUNTY**

**Plaintiff,** **MOTION DATE: 12/20/10**  
**-against-** **MOTION SEQ. NOS.: 004,**  
**005**

**WHALE'S TALE SEAFOOD BAR & GRILL aka** **INDEX NO.: 17285/08**  
**WHALE'S TALE, HIGH TIDE PARTNERS, INC.,**  
**JEANINE SOFIELD, ATHENAIA, INC., JANET**  
**C. SINGER, ESQ., and ALBERT PESCE,**  
**Defendants.**

**The following papers having been read on the motion (numbered 1-5):**

**Notice of Motion.....1**  
**Notice of Cross Motion.....2**  
**Memorandum of Law.....2a**  
**Reply Affirmation.....3**  
**Affirmation in Partial Opposition.....4**  
**Affirmation in Opposition.....5**

This is an action for personal injuries arising out of an incident occurring on January 1, 2006, when plaintiff claims he was struck in the head and face by an allegedly intoxicated non party assailant at a premises known as WHALE'S TALE SEAFOOD BAR & GRILL ("WHALE'S TALE"), a bar and grill located at 916 West Beech Street, Long Beach (the "Premises"). Plaintiff's complaint alleges causes of action sounding in negligence, violation of **General Obligations Law §§11-100 and 11-101** (known as the 'Dram Shop Act') and breach of warranty. Defendants HIGH TIDE PARTNERS, INC. d/b/a THE WHALE'S INN s/h/a WHALE'S TALE SEAFOOD BAR & GRILL a/k/a WHALE'S TALE, JEANINE SOFIELD and ALBERT PESCE (the "WHALE'S TALE Defendants") now move for summary judgment pursuant to **CPLR §3212**. Plaintiff cross moves to amend the verified complaint and bill of particulars, to strike defendants' answer, compel defendants to answer certain deposition questions and for attorney's fees, costs and disbursements. By Order, dated June 19, 2009, the Court granted the motion of

defendant JANET C. SINGER, ESQ. for summary judgment pursuant to CPLR §3212 dismissing the complaint, and the cross claim asserted against her, and by Order, dated May 5, 2010, the Court denied plaintiff's motion for default judgment pursuant to CPLR §3215 against defendant ATHENAIA, INC.

Motion for Summary Judgment by the WHALE'S TALE Defendants

The WHALE'S TALE Defendants move for summary judgment dismissing (1) plaintiff's Dram Shop cause of action on grounds that there is no evidence that the non party assailant was served alcohol beverages while intoxicated; (2) plaintiff's cause of action for negligence on grounds that there is no evidence that the WHALE'S TALE Defendants had notice of a dangerous condition or failed to provide adequate security; and (3) plaintiff's cause of action for breach of warranty on grounds that there were no warranties or representations made to plaintiff.

In support of their motion for summary judgment, the WHALE'S TALE Defendants proffer (1) copies of the deposition testimony of plaintiff, conducted on December 28, 2009 [Motion Exh. F] and the deposition testimony of Gregg LaPenna ("LaPenna"), owner of WHALE'S TALE, conducted on February 5, 2010 [Motion Exh. G]; and (2) an affidavit of LaPenna, sworn to on July 21, 2010 [Motion Exh. H].

At his deposition, plaintiff testified as follows. He arrived at WHALE'S TALE at approximately 1:00 a.m. on January 1, 2006 with several friends after celebrating New Year's Eve at the house of one of those friends. He went to WHALE'S TALE because some of his friends had previously enjoyed spending time there. He had not seen any glossies or posters promoting the restaurant. When he and his friends arrived, there was a bouncer at the door checking IDs and a bouncer inside the bar. The restaurant never became "jam packed", was comfortable and well lit. Immediately prior to the incident, plaintiff was situated outside of WHALE'S TALE, waiting for cabs to arrive. After the cabs arrived, plaintiff went inside to tell his friend Anthony Dudick ("Dudick") that the cabs had arrived. As plaintiff was walking inside, he was "hit with something", and consequently fell down with people falling on top of him. Plaintiff did not see his assailant prior to or during the incident. Likewise, plaintiff's friends had not seen the assailant or made any comments about him before the incident nor did they see him after the incident. Plaintiff was "blindsided." After the police arrived, a woman identified the assailant as Michael Briand ("Briand"). Dudick did not tell the police that he had witnessed the incident. Most significantly, plaintiff did not see Briand on the night of the incident and did not see Briand being served with alcohol.

At his deposition, Lapenna testified as follows. At the time of the incident, LaPenna was owner and manager of WHALE'S TALE, the business owned by HIGH TIDE PARTNERS, INC. Beginning in 2003, defendant JEANINE SOFIELD no longer owned part of the business. Defendant ALBERT PESCE is the owner of the Premises and leases the Premises to LaPenna. WHALE'S TALE is a seafood bar and grill, serves food and alcohol and has a capacity of forty-eight people. On the night of the incident, WHALE'S TALE did not exceed capacity. There were six to eight employees on duty including bartenders, a security person, a cook and a 'bar-back.' LaPenna left WHALE'S TALE sometime during the evening of December 31, 2005 the bartender with the most seniority acted as manager. Lapenna returned to the bar on January 1, 2006. Lapenna was not familiar with an individual named Michael Briand and there were no reports that Briand was on the Premises.

In his Affidavit, Lapenna attests that during the time he was present at WHALE'S TALE on December 31, 2005 and January 1, 2006, WHALE'S TALE was not crowded, was calm and no one was served while in a visibly intoxicated condition.

"In order to establish liability for violation of the Dram Shop Act, the plaintiff is required to prove that the defendants sold alcohol to [the assailant] while he was 'visibly intoxicated.'" **Sullivan v. Mulinos of Westchester, Inc.**, 73 AD3d 1018 *citing Alcohol Beverage Control Law §65(2); General Obligations Law §11-101; Adamy v. Ziriakus*, 92 NY2d 396. The Court finds that the WHALE'S TALE Defendants have submitted sufficient evidence to establish that plaintiff's assailant, Briand, was not served alcohol while in an intoxicated state. In fact, the record does not even contain evidence that Briand was actually served any alcohol beverages while at WHALE'S TALE. *See Kelly v. Fleet Bank*, 271 AD2d 654; *Pizzaro v. City of New York*, 188 AD2d 591. Plaintiff testified at his deposition that he and his friends had not seen Briand either prior to or during the incident. Lapenna testified that there were no reports of an intoxicated person at WHALE'S TALE during the period of time covering the incident and he was not familiar with Briand.

In opposition, plaintiff fails to present admissible evidence sufficient to raise an issue of fact that the WHALE'S TALE Defendants served alcohol to plaintiff's assailant while the assailant was intoxicated. The only admissible evidence proffered by plaintiff is an affidavit of Dudick, sworn to on November 1, 2010. Dudick attests in two separate sentences, that "this person [plaintiff's assailant] had been served alcohol by the WHALE'S TALE earlier" and "this person had appeared to me to be intoxicated." Most significantly, Dudick fails to state that plaintiff's alleged assailant, was visibly intoxicated at the time he was served by WHALE'S TALE. Dudick also fails to state when it was that he observed the assailant in an intoxicated state or whether or not he was intoxicated

at the time of the incident. See **Aminov v. East 50<sup>th</sup> Street Restaurant Corporation**, 232 AD2d 592; **Pizzaro v. City of New York**, *supra*. In fact, at their depositions, plaintiff testified that he never saw the assailant served with alcohol and LaPenna testified that nobody at the bar mentioned that there was a problem with an individual named Briand. The Court notes, that the affirmation of plaintiff's attorney contains speculative allegations and is by itself insufficient to defeat summary judgment. **Aminov**, *supra*.

In addition, the Court finds that the WHALE'S TALE Defendants have demonstrated their *prima facie* entitlement to judgment as a matter of law with respect to plaintiff's negligence claims and cause of action alleging that the WHALE'S TALE Defendants had notice of a dangerous condition. Plaintiff's claims of negligence are entirely conclusory and not supported by the record. Plaintiff himself testified at his deposition that during the time that he and his friends were at WHALE'S TALE, it never became jam packed, the crowd was calm, the bar was well lit and there were two bouncers providing security, one outside and one inside. "Although a property owner must act in a reasonable manner to prevent harm to those on its premises, an owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such conduct, and is reasonably aware of the need for such control." **Giambruno v. Crazy Donkey Bar and Grill**, 65 AD3d 1190, 1192. See **D'Amico v. Christie**, 71 NY2d 76; **Katekis v. Naut, Inc.**, 60 AD3d 817. "The owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults." **Giambruno v. Crazy Donkey Bar and Grill**, *supra* at 1192. See **Milan v. AMF Bowling Centers, Inc.**, 38 AD3d 860; **Petras v. Saci, Inc.**, 18 AD3d 848; **Aminov v. East 50<sup>th</sup> Street Restaurant Corporation**, *supra*. There is no evidence demonstrating that the WHALE'S TALE Defendants could have reasonably anticipated Briand's assault. The deposition testimony reveals that when plaintiff walked back into WHALE'S TALE, he was blindsided and struck by an assailant whom neither he nor his friends had ever seen and there were no previous reports that Briand was on the Premises. In opposition, plaintiff's conclusory assertions that a duty arose because the incident occurred on New Year's Eve and New Year's Day when patrons visit the bar to imbibe alcohol, and when the bar was in a celebratory mode, is insufficient to raise an issue of fact. Likewise, the fact that WHALE'S TALE had previous experience escorting intoxicated persons out of the bar does not, without more, demonstrate that WHALE'S TALE owed a duty to protect plaintiff from a sudden and unexpected assault. See **Languilli v. Argonaut Restaurant and Diner, Inc.**, 232 AD2d 375.

The WHALE'S TALE Defendants have also established *prima facie* that they made no warranties or representations to plaintiff. The WHALE'S TALE Defendants argue that this cause of actions appears to be based on an advertisement for WHALE'S

TALE which sets forth meal specials and provides discount coupons. The Court finds that said advertisement in no way contains any representations or warranties, and the record is otherwise devoid of evidence that any representations or warranties were made to plaintiff that WHALE'S TALE was safe. In opposition, plaintiff offers only conclusory assertions which fail to raise an issue of fact.

#### Plaintiff's Cross Motion for Summary Judgment

Plaintiff's cross motion seeks an Order (1) amending the verified complaint and the bill of particulars to eliminate the reference to a "parking lot"; (2) striking the defendants' answer for failing to provide the report of defendants' medical examination of plaintiff; (3) compelling LaPenna to answer certain questions annexed for rulings at his deposition; and (4) awarding attorney's fees, costs and disbursements to plaintiff.

Plaintiff's cross motion seeking amendment of his verified complaint to delete the term 'parking lot' is granted without opposition as there is no parking lot on the WHALE'S TALE premises.

At this late juncture, after this case has been certified for trial and a note of issue filed, the Court denies plaintiff's remaining requests. Although it is conceded that WHALE'S TALE did not exchange the medical report covering an ophthalmological exam of plaintiff until service of the WHALE'S TALE Defendants' Affirmation in Partial Opposition on November 29, 2010, and that plaintiff's counsel filed the Note of Issue under objection on the basis that she did not receive defendants' medical report, the Court finds that the WHALE'S TALE Defendants' late submission is not a basis to strike their answer. Plaintiff has failed to demonstrate that defendants' delay in providing said medical report was wilful or contumacious. In any event, plaintiff's alleged injuries have no bearing on the WHALE'S TALE Defendants' motion for summary judgment.

Plaintiff's request to compel LaPenna to answer certain deposition questions is equally unavailing. The questions which defendants' counsel objected to and forbade LaPenna to answer pertained to whether there had been similar incidents at WHALE'S TALE within the five year period prior to the incident. The Court notes that defendants' counsel objected to the form of the questions and suggested plaintiff's counsel rephrase the question to ask whether LaPenna ever had to escort someone out of the bar during such time. Plaintiff's counsel appeared to agree and the deposition proceeded. Plaintiff's counsel has also provided no basis to award plaintiff attorney's fees, costs and disbursements.

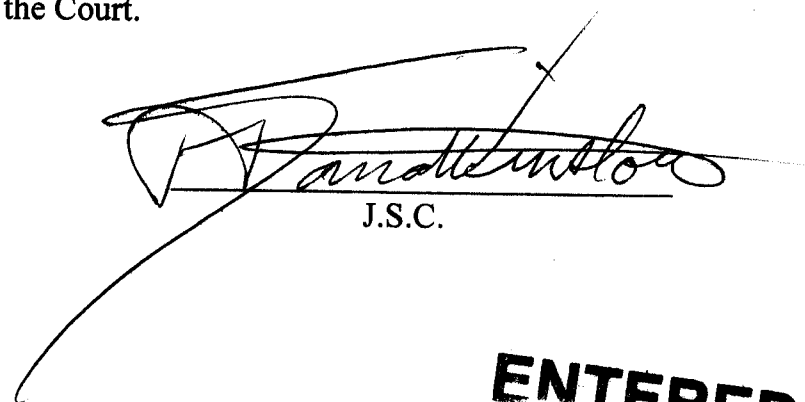
Based on the foregoing, it is

ORDERED, that the motion of WHALE'S TALE SEAFOOD BAR & GRILL aka WHALE'S TALE, HIGH TIDE PARTNERS, INC., JEANINE SOFIELD and ALBERT PESCE for summary judgment pursuant to CPLR §3212 dismissing the complaint as to them is **granted**; and it is further

ORDERED, that the cross motion by plaintiff DOMINICK SINNONA to amend the verified complaint and bill of particulars to delete the reference to 'parking lot' is **granted**; plaintiff's cross motion is in all other respects **denied**.

This constitutes the Order of the Court.

Dated: *March 14*, 2011



J.S.C.

**ENTERED**  
APR 04 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE