

Nicolau v Old Blackthorn Inn, Inc.

2011 NY Slip Op 31542(U)

May 25, 2011

Sup Ct, Nassau County

Docket Number: 21685/09

Judge: John M. Galasso

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....
MANOLIS NICOLAU,

Plaintiff,

Index No. 21685/09
Sequence #s 001,002
Part 37

- against -

05/05/11

OLD BLACKTHORN INN, INC., STEVE
FLEMING, JAMES M. FLEMING, STEPHEN
HOLIHAN, JOHN DOE "1 and JOHN DOE
"2", said names being fictitious and unknown,

Defendants,

.....	
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Upon the foregoing papers, plaintiff's and defendant's motions for summary judgment on the issue of liability pursuant to CPLR 3212 are determined as follows:

Initially, the Court amends the caption with regard to the first named defendant, movant herein, to read "Old Blackthorn Inn, Inc., d/b/a Cannon's Blackthorn." This defendant will be referred to as Blackthorn.

Plaintiff, a patron of Blackthorn, claims that he was assaulted by other Blackthorn patrons on the evening of May 8 through 9, 2009 and that defendant/movant is liable for the assault under the New York Alcoholic Beverage Control Law Sec. 65 and the General Obligations Law Sec. 11-101 (the Dram Shop Act) by unlawfully selling liquor to visibly intoxicated individuals.

A person is visibly intoxicated when a reasonable person would conclude, based on the observation of the subject's appearance and conduct, that the person is intoxicated (PJI 2:28). The visibly intoxicated person to which plaintiff refers, Kevin Pye, is not a party to this action.

According to plaintiff's testimony, he and Kevin Pye, an acquaintance from high school, had an altercation in the back patio area wherein plaintiff was assaulted and sustained injuries.

According to plaintiff, who submits his deposition testimony in his supporting papers as the only witness account of the confrontation, Pye had ordered and drank a shot and a mixed drink within 15 minutes of the occurrence. Plaintiff observed Pye acting in a boorish manner toward a female acquaintance, at the time appearing to be loud, sloppy and very drunk.

When plaintiff walked over to Pye and told him the girl was dating a friend, Pye was verbally belligerent. The first physical exchange was when Pye pushed plaintiff. When plaintiff pushed him back, Pye "head butted" him. In turn, plaintiff hit Pye in the mouth, thereby sustaining an injury to the knuckle on his hand. *

Within 20 to 30 seconds three bouncers interrupted and broke up the fight and instantly one escorted plaintiff out behind the patio area while Pye and his four friends were also escorted out by 3 other bouncers. This was the same entrance plaintiff and his friends had used earlier which was adjacent to a parking lot.

While those 3 bouncers had their backs to plaintiff blocking the exit so no other patrons could leave via the back patio gate, plaintiff turned to his escort bouncer to tell him what happened. It was then plaintiff was "blind sided" by someone who was with Pye's group of friends from before the first altercation. Plaintiff's nose was broken and he suffered other injuries as a result of the assault.

Plaintiff was hit several more times while Pye and some others of the group scattered. Some bouncers allowed the man who broke his nose and another of Pye's friends back into the bar patio area.

Plaintiff was warned by a bouncer to leave because the police were being called. As a squad car arrived, plaintiff and his friends dispersed.

Plaintiff, who was underage, admits to having gained access to the back patio area with his friends through the rear entrance without being checked for or showing any identification.

Plaintiff also submits the deposition of Leon Sciascia, an assistant manager at Blackthorn, who testified regarding familiarizing himself regarding the Dram Shop Act.

On the evening in question Mr. Sciascia was in charge of shutting down the kitchen and, generally speaking, making sure the security staff was in position. Two bouncers would be at the front door and entrance to check ID's using an ID scanner, two staff members would be inside the building portion of the establishment, there would be one "floater", one at the back door to the patio area and one by the back gate patio entrance.

* Plaintiff believes it is possible he was bitten during the altercation.

Patrons entering by the back would be directed around to the front to have their ID's checked.

To his knowledge there were no incident reports prior to and including the date at issue about security having to escort out an underage patron. Although there have been incident reports regarding intoxicated or troublesome patrons, none was filed for that evening.

Although the complaint expresses two causes of action, including one for common law negligence, plaintiff's motion is solely for partial summary judgment for liability under the Dram Shop Act. In this regard plaintiff has established his entitlement to judgment in the first instance (see *Alvarez v. Prospect Hospital*, 68 NY2d 320), by evidence that Pye was visibly intoxicated, thereby demonstrating defendants' *per se* liability for negligence (see *Mitchell v. The Shoals, Inc.*, 19 NY2d 338).

In order to successfully oppose plaintiff's application, defendants must raise an issue of fact regarding whether Kevin Pye was a visibly intoxicated person (see New York Alcoholic Beverage Control Law Sec. 65). This defendants have accomplished by affidavits from the bartenders on duty that evening attesting they personally did not, nor did they observe other bartenders, sell or serve alcoholic beverages to any patron who appeared visibly intoxicated.

Consequently, since there is a material issue of fact whether Kevin Pye, or any other patron allegedly responsible for plaintiff's injuries was visibly intoxicated, as limited by plaintiff's application, his motion for partial summary judgment is denied (Seq. #001). *

Defendants also move for summary judgment; however they seek to have both the cause of action under common law negligence and the cause of action based on the alleged violation of the Dram Shop Act dismissed.

Concerning first the common law negligence cause of action, defendants submit plaintiff's deposition testimony to establish that although the proprietor of a business must exercise reasonable care in protecting its patrons, the proprietor does not have a duty to protect its patrons from sudden, unforeseen and unexpected incidents (see *D'Amico v. Christie*, 71 NY2d 76; *Silver v. Sheraton-Smithtown Inn*, 121 AD2d 711).

In considering the complaint's first cause of action which focuses on defendants' alleged failure to protect its patrons and/or provide proper security and in viewing the evidence in the light most favorable to plaintiff, the Court determines as a matter of law that Pye's spontaneous conduct was not foreseeable and that the security staff's swift intervention to separate plaintiff from his assailant is proof that the security was proper and the guards well trained (see *Giambruno v. Crazy Donkey Bar and Grill*, 65 AD3d 1190). **

* While much is made about plaintiff gaining entrance and being served a beer although underage, that question is irrelevant to a determination under the Dram Shop Act.

** The Court also keeps in mind the deposition of Leon Sciascia, submitted by plaintiff in support of his motion.

Plaintiff's attempt to create a material question of fact of common law negligence in opposition to defendants' motion is speculative and without evidentiary foundation (see *Millan v. AMF Bowling Centers, Inc.*, 38 AD3d 860).

Moreover, there is no affidavit from a security expert to bolster his claim of inadequate protection or security.

Accordingly, defendants' application to dismiss the first cause of action in the complaint is granted. *

Defendants' motion for summary judgment on the Dram Shop Act cause of action is denied in part and granted in part.

Defendants have not presented a *prima facie* case of their entitlement to judgment in that portion of the application that addresses Pye's alleged visible intoxication. Movants have included plaintiff's EBT as well as bartender affidavits, thus demonstrating this is a credibility issue.

Nevertheless, defendants' argument that the entire happening that evening actually consists of two separate incidents has merit. The second incident occurred after plaintiff, Pye and his friends were removed by security from the patio area to the parking lot to the rear of the premises.

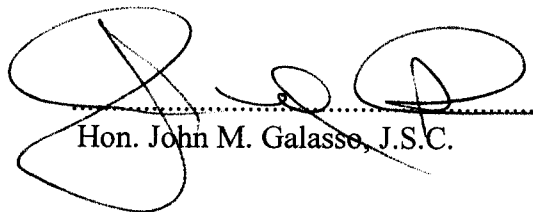
There is no testimony that Kevin Pye was one of the individuals who struck plaintiff or broke plaintiff's nose. Indeed, plaintiff submits eyewitness evidence that Pye was not the person who struck him.

There is no testimony whatsoever that any of these persons were visibly intoxicated. Consequently, plaintiff has failed to raise a material issue of fact in this regard. **

Accordingly, plaintiff complaint of injuries sustained is limited to the Dram Shop Act cause of action only as it pertains to the first altercation between plaintiff and Pye.

May 25, 2011

ENTERED
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Hon. John M. Galasse, J.S.C.

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* That apparently plaintiff was able to gain access to the patio area without his ID being checked is irrelevant to his claim of being attacked by a patron who was already in the bar. Even if defendants were negligent in that regard, plaintiff's minority was not a proximate cause of his injuries as a matter of law.

** Indeed, there is testimony that one of these individuals was not actually a patron.