

Modica v Audubon

2011 NY Slip Op 32065(U)

June 30, 2011

Sup Ct, Nassau County

Docket Number: 12425/08

Judge: F. Dana Winslow

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

JESSICA MODICA,

**TRIAL/IAS, PART 4
NASSAU COUNTY**

Plaintiff,

-against-

**MOTION SEQ. NO.: 001, 002
003**

MOTION DATE: 4/4/11

**WILLIAM AUDUBON, KATHY AUDUBON,
S.B.C.L., INC d/b/a SAVANNAH CLUB a/k/a
ZACHARYS AND LSJC REST. CORP.**

INDEX NO.: 12425/08

Defendants.

The following papers having been read on the motion (numbered 1-7):

Notice of Motion Seq. 001.....1
Affirmation in Opposition.....2
Notice of Motion Seq. 002.....3
Notice of Cross Motion Seq. 003.....4
Affirmation in Opposition.....5
Reply Affirmation.....6
Affirmation in Partial Support of Co-Defendants.....7
Reply Affirmation to Plaintiffs Opposition.....8

Motion by defendants William Audubon and Kathy Audubon for an order pursuant to 22NYCRR 202.21(e) vacating the Note of Issue and Certificate of Readiness filed by plaintiff and striking this action from the Trial Calendar is decided as follows. Cross-motion by defendants William Audubon and Kathy Audubon for an order pursuant to CPLR 3212 dismissing the complaint and all cross-claims asserted against it is decided as follows. Motion by defendants S.B.C.L., Inc. d/b/a Zacharys i/s/h/a S.B.C.L., Inc. d/b/a Savannah Club, a/k/a Zacharys and LSJC Rest. Corp. d/b/a Savannah Club (hereinafter "Savannah") for an order pursuant to CPLR 3212 dismissing the complaint and any and all cross-claims against Savannah is decided as follows.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on October 27, 2007 at 2:20 AM in the parking lot known as 1900 Hempstead Turnpike, East Meadow, New York. Plaintiff alleges that Savannah unlawfully sold or furnished alcohol beverages to defendants William Audubon who was visibly intoxicated

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and that she was struck by the vehicle owned by defendant Kathy Audubon and operated by defendant William Audubon.

Savannah was a tenant in an office building that shared the parking lot with a strip mall known as the East Meadow Plaza.

Facts

On October 26, 2007, plaintiff Jessica Modica (“Jessica”) went to the Savannah Club with some friends to celebrate her birthday. Defendant William Audubon (“Audubon”) was also there that night. On October 27, 2007, after leaving the Savannah Club, defendant Audubon drove defendant Kathy Audubon’s car while he was intoxicated¹.

Plaintiff alleges that while walking in close proximity to the car, she was struck by the vehicle driven by Audubon and was severely injured. As a result of this incident, she allegedly suffered memory loss and cannot recall exactly what occurred. Jessica claims that Audubon was negligent and caused her injuries, and that Savannah over-served Audubon and is responsible under the Dram Shop Act. Defendants, claim that Jessica was wearing high heeled shoes and tripped over her own feet and as a result sustained the injuries.

Both defendants allege that Audubon’s car did not strike Jessica. Savannah claims that it is not responsible because it did not serve a visibly intoxicated Audubon and it did not control the parking lot where the accident occurred. Co-defendant Audubon opposes Savannah’s motion to the extent it alleges that Audubon was not visibly intoxicated. In its affirmation, co-defendant Audubon argues that “if the plaintiff’s testimony is to be believed, she believed that the defendant . . . was intoxicated.” (Audubon Affirmation in partial support of co-defendant’s motion and in partial opposition, ¶ 12).

In opposition to the motion and cross-motion for summary judgment, plaintiff submits her own deposition testimony, the Nassau County Police Dept. Case Report - Arresting Officer Frank E. Holguin (Exhibit J); the deposition testimony of Robert Vaughn, Audubon’s passenger; and the deposition testimony of Raymond Callahan, one of Savannah’s investors.

In support of his cross motion for summary judgment, defendant Audubon relies upon his deposition testimony wherein he testified that the vehicle he was operating did not come into contact with plaintiff (Exhibit I to Savannah’s motion, pgs. 24-26) and that plaintiff was standing a few feet away from the driver’s side of the vehicle as he exited

¹Defendant Audubon allocated to two separate criminal acts: Driving While Intoxicated and Assault (Exhibit K, at 5-6). Audubon allocated to driving while drunk and admitted a .138 blood alcohol level (Exhibit K at 7).

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the parking space (Id., pgs. 145, 146).

In opposition to the motion plaintiff relies upon the uncertified police report wherein Police Officer Frank Holguin states, in relevant part that:

“[H]e was assigned to a CB radio call for auto accident with injuries at 1900 Hempstead Take., E. Meadow along with Ramp 104 operated by Police Officer Moor Serial #8232. When police officers arrived at the scene, they found aided Jessica Modica laying in the parking lot of Savannah’s night club in a semi conscious state. Aided also appeared to be intoxicated. Next to aided Modica stood arrested William Audubon. Ambulance 2361 arrived at scene shortly afterwards and treated aided for contusion and laceration to the head and hand. When I P.O. Holguin asked arrestee what happened to the aided, arrestee Audubon stated that he was involved in a verbal argument with aided Modica. I immediately noted the odor of an alcoholic beverage from arrestee Audubon’s mouth as he spoke.

His verbal responses were slurred. His eyes were glassy and bloodshot. Arrestee Audubon then further stated he tried to drive away in his 2007 Nissan Altima with NY Reg. _____. Aided Modica was outside of the auto near the passenger side door holding onto the door handle. When arrested drove away, he struck aided with his vehicle. Arrested Audubon stated to P.O. Holguin “I didn’t know she was still holding onto the car when I drove away.” At 0245 hrs. I administered SFST Examinations, all of which confirmed my suspicions of the arrested’s intoxication, St. Goto then arrived at scene and administered a PBT test to arrested with positive results of .15% at 0257 hrs.

Arrested was then placed under arrest and transported to CTS in RAMP 105 along with the operator of RAMP 104. Once a CTS arrested was then searched by P.O. Moor. In the process of the search, P.O. Moor did recover a small, clear plastic baggie, which contained a white powdery substance believed

to be cocaine from arrested's back left pants pocket. The arrested evidence are held under Precinct Invoice No. 01-629-07 (emphasis added).

Arrested Audubon is charged as follows: VTL 1192.2 (Driving While Intoxicated), VTL 1192.4 (Operating While Impaired by Drug), VTL 1192.4a (Operating with Combined Influence of Drugs/Alcohol), VTL 509.2 (Operating out of class), PL 220.03 (Criminal Possession of a Controlled Substance 7'), PL 120.05 (Assault 2nd sub 3), PL 205.10 (Escape 2nd Sub 1)."

The uncertified police report should be disregarded as inadmissible hearsay. See *Rivera v GT Acquisition 1 Corp.*, 72 AD3d 525 [1st Dept 2010]; *Coleman v Maclas*, 61 AD3d 569 [1st Dept 2009].

In his affidavit, Audubon's passenger, Robert Vaughn states, in relevant part, as follows;

" . . . [O]n October 27, 2007, at approximately 2:20 AM I was a passenger in a motor vehicle operated by William Audubon that was in a parking lot near the Savannah Club located on Hempstead Turnpike, East Meadow. . . . Jessica Modica, the plaintiff, was already at the club when we arrived that evening. She had been dating William Audubon. William Audubon, Jessica, and her friends stood together, spoke, and had drinks.

During the time we spent at the bar, I observed William Audubon drink in excess. He was drinking over the entire course of the evening. I saw William Audubon consume approximately 6 to 7 shots of Soco and lime and approximately 5 Bud Lights. I remember him toasting Jessica with alcohol. I did not spend the entire evening with William Audubon because I spent some time dancing. During our time in the bar, I observed that William Audubon showed signs of intoxication; at one point he got into an altercation with a bouncer but he was allowed to remain in the bar. The

same bartenders at the same bar continued to serve William Audubon. William Audubon appeared to be intoxicated when we left the Savannah Club. As I exited the Savannah Club, I saw Jessica Modica and William Audubon arguing and at some point Jessica became physical with Mr. Audubon. I tried to end this altercation, but was unsuccessful.

When we left the Savannah Club, William Audubon said he was driving home. When we reached the car, William Audubon got into the driver's seat and I got into the front passenger seat. At that time, William Audubon opened his window and he and Jessica Modica continued to argue. At that time, Jessica Modica was hitting the car near the driver's side door. He backed up, stopped and they continued to argue. Jessica followed the car and walked next to the car staying next to the driver's side door. At some point Jessica fell and Billy immediately drove away. I looked back into the rear view mirror and saw Jessica lying on the ground parallel to the path the car was taking and she was not moving . . ."

Plaintiff also relies upon her affidavit wherein she states that "[w]hile I cannot remember being hit, there is no other rational explanation for my injuries. I was standing next to the car and the next thing I remember is waking up in the hospital. I understand that defendants imagine that I tripped on my shoes and fell, and I was injured by that fall. Defendants mischaracterize my shoes as stilettos, I was wearing two or three inch heels that I was able to dance in that evening. Even if I did fall, a fall does not explain my injuries."

On a motion for summary judgment, it is incumbent upon the movant to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*Mastrangelo v Manning*, 17 AD3d 326 [2nd Dept 2005]; *Roberts v Carl Fenichel Community Servs., Inc.*, 13 AD3d 511 [2nd Dept 2004]). Issue finding, as opposed to issue determination is the key to summary judgment (*see Kriz v Schum*, 75 NY2d 25 [1989]). Indeed, "[e]ven the color of a triable issue forecloses the

remedy” (*Rudnitsky v Robbins*, 191 AD2d 488, 489 [2nd Dept 1993]).

Viewing the evidence in the light most favorable to the party opposing the motion, as we must (*Makaj v Metropolitan Transp. Authority*, 18 AD3d 625 [2nd Dept 2005]; *Robinson v Strong Memorial Hosp.*, 98 Ad2d 976 [4th Dept 1983]; *Judice v DeAngelo*, 272 AD2d 583 [2nd Dept 2000]), we find that the Audubons have not established their entitlement to judgment as a matter of law dismissing the complaint.

As noted above, defendants assert that there is no *prima facie* evidence that Audubon struck plaintiff with his car; the evidence indicates that plaintiff fell in the parking lot before Audubon drove away (see Affidavit of Vaughn); and that plaintiff tripped over high heeled shoes.

According to Officer Holguin, Audubon admitted that he did not know plaintiff was still hanging onto the door handle when his car drove away. Significantly, defendant did plead guilty to assault in the third degree as well as driving while intoxicated on April 7, 2008. On June 16, 2008, Hon. Edward Maron signed an order of protection in favor of Jessica Modica.

In opposition, plaintiff only recalls being near Audubon’s car, arguing with Audubon, and then waking up in the hospital.

Generally, “[a] plaintiff who suffers amnesia as a result of a defendant’s act is not held to as high a degree of proof in establishing his right to recover for an injury as a plaintiff who can describe the events.” *Saywer v Dreis & Krump Mfg. Co.*, 67 NY2d 328, 333 [1986]; *Schechter v Klanter*, 28 NY2d 228, 232 [1971]. “It is only where the memory loss has effectively prevented a plaintiff from describing the occurrence that invocation of the rule in *Schechter v Klanter* is warranted.” *Jarrett v Modifari*, 67 AD2d 396, 403 [1st Dept 1979]; *Fitzgibbon v County of Nassau*, 182 AD2d 670 [2nd Dept 1992].

“In the absence of expert evidence establishing a loss of memory and its causal relationship to defendant’s fault, the jury may not consider the question or apply a lesser degree of proof in evaluating plaintiff’s claim” *Saywer v Dreis & Krump Mfg. Co.*, *supra*, at p. 334. Inasmuch as plaintiff has failed to provide expert testimony in support of her claim for amnesia, this Court denies at this time, and refers the subject to ultimate determination of the trial court, for a *Noseworthy* charge (*Noseworthy v City of New York*, 298 NY76, 80-81 [1948]; see *Wahid v Long Island R. Co.*, 59 AD3d 712 [2nd Dept 2009])

Savannah moves for summary judgment on the grounds that it did not own, control or maintain the subject parking lot. (See Wahler Affidavit and lease annexed as Exhibit C). Savannah further asserts that there is no evidence that plaintiff was struck by the vehicle driven by Audubon.

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Plaintiff does not oppose the portion of Savannah's motion that Savannah did not own, control nor maintain the subject parking lot.

Liability under the Dram Shop Act (General Obligations Law § 11-1011 and Alcoholic Beverage Control Law § 65) "requires a commercial sale of alcohol." *D'Amico v Christie*, 7 NY2d 76 [1989]; *Zamore v Bar None Holding Co., LLC*, 73 AD3d 601 [1st Dept 2010].

"To establish a cause of action under New York's Dram Shop Act, a plaintiff is required to prove that the defendant sold alcohol to a person who was visibly intoxicated and that the sale of that alcohol bore some reasonable or practical connection to the resulting damages" (see, *Poppke v Portugese American Club*, __ NYS2d __, 2011 WL 2279167 (N.Y.A.D. 2nd Dept 2011); *Sullivan v Mulinos of Westchester, Inc.*, 73 AD3d 1018 [2nd Dept 2010]; *McArdle v 123 Jackpot, Inc.*, 51 AD3d 743, 476 [2nd Dept 2008]; *McNeil v Rugby Joe's, Inc.*, 298 AD2d 369, 370 [2nd Dept 2002]; *Adamy v Ziriakus*, 231 AD2d 80, 88 [4th Dept 1997]; *Dugan v Olson*, 74 AD3d 1131 [2nd Dept 2010]). "Proof of visible intoxication can be established by circumstantial evidence, including expert and eyewitness testimony" *Poppke v Portugese American Club, supra*; see *Kish v Foiley*, 24 AD3d 12198 [4th Dept 2005]

Consequently, in order to establish its entitlement to judgment as a matter of law dismissing the Dram Shop Act cause of action, Savannah is required to establish either that it did not serve alcohol to Audubon while he was visibly intoxicated or that its sale of alcohol to him had no reasonable or practical connection to the infliction of injury upon plaintiff. *Dugan v Olson, supra*; *Zamore v Bar None Holding Co., LLC, supra*.

Contrary to its contentions, Savannah has failed to meet its burden of demonstrating, *prima facie*, that Audubon was not visibly intoxicated. *Poppke v Portugese American Club, supra*; *Aughenbough v Napper Tandy's of Northport*, 78 AD3d 745, 746 [2nd Dept 2010]. Notably, Savannah's witness Callahan testified that he kicked Audubon out of Savannah that evening at 11:40 p.m. for acting strange, talking to himself and trying to buy drugs. Plaintiff, Audubon and Vaughn all insist that they left Savannah at almost 2:00 a.m. that morning and that during that time Audubon was drinking in the Savannah.

"Evidence that a person has consumed alcohol, and has the odor of alcohol on his or her breath, is not conclusive proof of intoxication." *Coleman v New York City of New York Transit Authority*, 37 NY2d 137, 144-145 [1995]. "A factual determination of intoxication cannot be made solely on the basis of how much alcohol a person has consumed." *Senn v Scudieri*, 165 AD2d 346 [1st Dept 1991].

An issue of fact also exists as to whether "some reasonable or practical

connection” existed between the sale of alcohol at Savannah’s and the resultant damages. *Sullivan v Mulinos of Westchester, Inc., supra.*

Motion to Vacate

On October 8, 2010, plaintiff filed a Note of Issue and Certificate of Readiness. On October 21, 2010, the attorneys for the Audubons advised plaintiff’s counsel that certain discovery remained outstanding. Five days later, defendants filed the instant motion to vacate the Note of Issue on the grounds that the Certificate of Readiness is incorrect in that all discovery proceedings now known to be necessary has not been completed.

In response thereto, plaintiff submits that the letter dated October 21, 2010 and the instant motion are “disguised as Post-Note of Issue discovery demands.” Plaintiff further asserts that plaintiff previously provided the “outstanding” discovery and this motion is “baseless.” (Mr. Cristiano’s Affirmation in Opposition to Defendant’s Motion to Strike the Note of Issue.)

Specifically, plaintiff asserts that “[a]t best], defendant may not have received a pharmacy record and a “collateral source authorization;” however, these items were provided simultaneously with plaintiff’s papers.” (Id. at ¶ 17).

A court may properly vacate a Note of Issue if the Certificate of Readiness contains misstatements or material errors. *See Lynch v Vollono*, 6 AD3d 505 [2nd Dept 2004]; *see Savin v Brooklyn Marine Park Development Corp.*, 61 AD3d 954, 955 [2nd Dept 2009].

Here, defendants attached two sets of discovery demands to its motion labeled “Exhibits C & D” and plaintiffs provided responses to these demands.

Defendants’ motion is based upon the alleged non-disclosure of certain documents including but not limited to authorizations for records maintained by Oxford Insurance and Cottage Pharmacy; photographs taken of plaintiff during her 2009 trip to Jamaica; HIPPA compliant authorization for Zwanger-Pesiri Radiology Group and New Island Hospital.

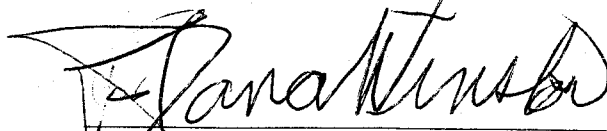
Given the volume of discovery provided by plaintiff and the fact that the disputed items were provided simultaneously with plaintiff’s opposition papers, it would be inequitable to strike the Note of Issue and Certificate of Readiness. *See, Salgar v Abvurtin*, 2009 WL 7166096 (N.Y. Sup.). Hence, defendants’ motion to strike is **denied** and the request for fees and costs is **denied**.

In view of the foregoing, defendants’ motion to vacate the Note of Issue is **denied**, the cross-motion by the Audubons for summary judgment is **denied** and the motion by Savannah’s is **denied**.

This constitutes the Order of the Court.

Dated: June 30, 2011

ENTERED
JUL 15 2011
NASSAU COUNTY
COUNTY CLERK’S OFFICE



J.S.C.