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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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LISA GATOFF and JOSH GATOFF,

Plaintiffs,

-against-

HOSPITALITY EVALUATION SYSTEMS, INC., ELISA DEIXLER and LAURIE BALLAN,

Defendants.

----------x

HOSPITALITY EVALUATION SYSTEMS, INC.,

Third-Party Plaintiff,

-against-

JILL GERSTENBLATT,

Third-Party Defendant.

----------x

TRIAL/IAS PART 20
INDEX No.: 1770/10
Motion Date: 05/30/12
Motion Sequence: 002, 003

DECISION & ORDER

Papers Numbered

Sequence #002
Notice of Motion 1
Affirmation in Partial Opposition 2
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Upon the foregoing papers, defendant, Hospitality Evaluation Systems, Inc., application for summary judgment pursuant to CPLR §3212 and third-party defendant, Jill Gerstenblatt's, motion for summary judgment are determined as set forth below.

This is an action to recover damages allegedly sustained by plaintiff in June 2009 at a 50th birthday party hosted by third party defendant, Jill Gerstenblatt, at the restaurant known as "H on the Harbor" d/b/a Hospitality Evaluation Systems, Inc. ("HES"), the defendant herein.

Defendant "HES" claims plaintiff's cause of action pursuant to GOL 11-101, the Dram Shop Act, must be dismissed because the testimony of plaintiff as well as four (4) witnesses, to wit: Jill Gerstenblatt, Brad Bernstein, Elisa Deixler and Josh Gatoff, fail to establish that defendant HES sold alcohol to defendant Deixler while she was visibly intoxicated. Additionally, defendant HES contends that plaintiff's negligence based cause of action must be dismissed because the dancing that occurred leading up to the event was not a foreseeable risk.

In opposition, plaintiff asserts that a triable issue of fact exists because plaintiff testified that defendant Deixler appeared intoxicated at the time of the occurrence. Plaintiff's opposition papers alleges that defendant Deixler and defendant Bellan were drinking throughout the night, breaking glasses on the dance floor and dancing and/or twirling on the dance floor in an uncontrolled manner. Plaintiff also asserts that defendant Deixler made a recorded statement to an investigation that contradicts her deposition testimony, raising another triable issue of fact.

Initially, the Court notes that in order "to establish a cause of action under General Obligations Law § 11–101[1], also known as "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" (*Dugan v. Olson*, 74 AD3d 1131, 1132-1133; *Sullivan v. Mulinos of Westchester, Inc.*, 73 AD3d 1018; *McNeill v. Rugby Joe's*, 298 AD2d 369, 370 *see*, *Kaufman v Quickway, Inc.*, 14 NY3d 907, 909 [2010]; *Adamy v. Ziriakus*, 92 NY2d 396 [1998]; *Romano v Stanley*, 90 NY2d 444, 447 [1997] *see, Kiely v. Benini*, 89 AD3d 807, 809; *Kelly v Fleet Bank*, 271 AD2d 654 *see also*, Alcoholic Beverage Control Law § 65[2]). While "proof of visible intoxication can be established by circumstantial evidence, including expert and eyewitness testimony" (*Poppke v Portugese Am. Club of Mineola*, 85 AD3d 751 *see*, *Adamy v. Ziriakus*, *supra*; *Romano v Stanley, supra,* 90 NY2d at 450; *Roy v Volonino*, 262 AD2d 546 *cf., Wolf v Paxton-Farmer*, 23 AD3d 1046 *see, Zamore v. Bar None Holding Co., LLC*, 73 AD3d 601, 602), there also must be a reasonable or practical nexus between the selling or procuring of the alcohol and the resulting injuries. (*See, Kaufman v Quickway, Inc.*, *supra*, 14 NY3d at 909; *Kiely v. Benini*, *supra*, 89 AD3d 807, 809; *Zamore v. Bar None Holding Co., LLC, supra*; *Dugan v. Olson, supra*, 74 AD3d 1131).

With these principles in mind, the Court finds that Hospitality has established its *prima facie* entitlement to judgment as a matter of law dismissing the Dram Shop Act cause of action. Specifically, Hospitality has submitted, *inter alia*, deposition evidence demonstrating that it did not sell alcohol to either Bellan or Deixler when they were visibly intoxicated (*Dugan v. Olson*, 74 AD3d 1131, 1132-1133). Now the burden shifts to plaintiff to provide this Court with sufficient evidence demonstrating a triable issue of fact.

In the instant matter, the deposition testimony of plaintiff, Josh Gatoff, establishes that he observed defendants Deixler and Bellan ordering martinis at the beginning of the party. (J. Gatoff dep., 11-13; 45-47). Mr. Gatoff testified that he saw them ordering a second round of

martinis approximately 20 minutes later (J. Gatoff dep., 12; 45-47). He further testified that he did not see defendants Deixler and Bellan again until two (2) hours later when defendants apparently shattered their glasses after an attempted "toast". (J. Gatoff dep. 13-14). During his deposition, Mr. Gatoff admitted that he did not see defendants order additional drinks during the course of the party (J. Gatoff dep. 46-47).

The testimony of plaintiff, Lisa Gatoff, neglects to offer this Court additional evidence demonstrating a violation of the Dram Shop Act. Mrs. Gatoff admits that she did not observe anyone at the party who appeared to be intoxicated (Lisa Gatoff Dep. 19). She also testified that she did not observe the defendants drinking alcohol at any time before the accident occurred (Lisa Gatoff Dep. 24; 27). She simply testified that she only saw the defendants dancing "a little wildly" and spinning fast just prior to the accident (Lisa Gatoff Dep. 23-25; 27).

It is clear that the record is void of any testimony that defendant HES served alcohol to the defendants Deixler and Ballan while they were visibly intoxicated. It is well settled that proof of mere consumption of alcohol is not enough to defeat a motion for summary judgment in a Dram Shop action. *Costa v. 1648 Second Ave. Rest.*, 221 A.D.2d 299; *Pizzaro v. City of New York*, 188 A.D.2d 591. Nor is there any evidence of probative import relating to their level of sobriety when (or if) Hospitality allegedly sold them the alcohol prior to accident. The evidence relating to the defendants' alleged wild dancing and the subsequent injury-producing collision, does not establish that the consumption of alcohol was the proximate cause of the accident (*Kiely v. Benini, supra*, 89 AD3d 807, 809; *Zamore v. Bar None Holding Co., LLC, supra*, 73 AD3d 601, 602) – much less that the defendants must therefore have been visibly intoxicated at some unspecified point in time prior to the incident (*Kelly v Fleet Bank, supra*, 271 AD2d at 655 *see, Wolf v Paxton-Farmer, supra*, 23 AD3d 1046-1047).

Further, this Court is cognizant of CPLR 105(u) which provides that a verified pleading may be utilized as an affidavit whenever required. With respect to applications for summary judgment, the Court deems a verified pleading as the statutory equivalent of a responsive affidavit. *Sanchez v. National Railroad Passenger Corp.*, 92 A.D.3d 600; *Talansky v. Schulman*, 2 A.D.3d 355. However, in the case at bar, Plaintiff, Lisa Gatoff's, verified complaint sharply contradicts her deposition testimony. The testimony elicited from Lisa Gatoff during her deposition demonstrates that she has little or no knowledge about the circumstances leading up to the accident. She fails to offer this Court evidence that defendant HES possessed knowledge that defendants Deixler and Ballan were visibly intoxicated and that their intoxication resulted in the injuries she allegedly sustained.

Based upon all of the foregoing, defendant HES's application seeking summary judgment with respect to GOL §11-101(1) is granted.

Conversely, defendant HES's application seeking summary judgment with respect to

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Plaintiff's first, negligence-based cause of action is denied.

It is settled that "[a] property owner must act in a reasonable manner to prevent harm to those on its premises, which includes a duty to control the conduct of persons on its premises when it has the opportunity to control such conduct, and is reasonably aware of the need to do so" (*Rishty v DOM, Inc.*, 67 AD3d 662, 663 *see, Martino v. Stolzman,* 18 NY3d 905, 908 [2012]; *Afanador v. Coney Bath, LLC*, 91 AD3d 683; *Kaplan v. Roberts*, 91 AD3d 827, 829). On the other hand, "the owner of a public establishment has no duty to protect patrons from unforeseeable" injuries (*Rishty v DOM, Inc., supra*, 67 AD3d at 663). Nor is a restaurant an insurer of its patrons' safety (*Cutrone v Monarch Holding Corp.*, 299 AD2d 388; *Elba v. Billie's 1890 Saloon, Inc.*, 227 AD2d 438, 439).

Generally, the very question of negligence is itself a question for the trier of fact. See, *Ugarriza v. Schmeider,* 46 N.Y.2d 471. Viewing the evidence most favorable to plaintiffs (*Mosheyer v. Pilevsky*, 283 AD2d 469) in the instant matter, the record demonstrates that there remains a triable question of fact as to whether the alleged wild dancing of defendants Deixler and Ballan created a foreseeable risk of injury to others on the dance floor that could have been prevented by defendant HES.

With respect to third party defendant, Jill Gerstenblatt's, cross motion seeking dismissal of the defendant/third party plaintiff, HES's, complaint, General Obligations Law §5-322 provides:

> Every covenant, agreement or understanding in or in connection with or collateral to any contract entered into with any caterer or catering establishment exempting the said caterer or catering establishment from liability for damages caused by or resulting from the negligence of the caterer or catering establishment, his agents, servants, employees or patrons at the affair contracted therefor, shall be deemed to be void as against public policy and wholly unenforceable.

The third party defendant asserts that plaintiffs' claims are based solely upon the alleged negligence of defendant/third party plaintiff, HES. In addition, defendant Gerstenblatt asserts that the indemnification agreement in the instant action is void and unenforceable because it does not exclude indemnification to the indemnitee for its own negligence and also fails to limit the indemnitee's recovery to insurance proceeds.

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In light of the foregoing, third party defendant's application seeking summary judgment is granted without opposition.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: July 26, 2012
Mineola, New York

ENTER:

Hon. Robert A. Bruno, J.S.C.