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| Beck v 120 Orchard, LLC |
| 2013 NY Slip Op 30536(U) |
| March 14, 2013 |
| Supreme Court, New York County |
| Docket Number: 108073/2010 |
| Judge: Saliann Scarpulla |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Saliann Scarfella
Justice

PART 19

Index Number : 108073/2010
BECK, JOHANNA
vs.
120 ORCHARD LLC
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is *determined in accordance with the accompanying decision/order*

FILED
MAR 19 2013
COUNTY CLERK'S OFFICE
NEW YORK

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MAR 18 2013
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NYS SUPREME COURT-CIVIL

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MAR 18 2013
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NYS SUPREME COURT-CIVIL

Dated: 3/14/13

Saliann Scarfella, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
JOHANNA BECK,

Plaintiff,

Index No.: 108073/10
Submission Date: 12/12/12

- against-

120 ORCHARD, LLC AND BAR R THREE, LLC,

DECISION AND ORDER

Defendants.

-----X

For Plaintiff:
Padilla & Associates, PLLC
845 Third Avenue - 6th Floor
New York, NY 10022

For Defendants:
Alan J. Firestone
32 Court Street
Brooklyn, NY 11201

FILED

Papers considered in review of this motion for summary judgment:

MAR 19 2013

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|------------------------|---|
| Notice of Motion | 1 |
| Aff in Opp | 2 |
| Reply | 3 |

**COUNTY CLERK'S OFFICE
NEW YORK**

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants 120 Orchard LLC and Bar Three LLC (collectively "120 Orchard") move for summary judgment dismissing the complaint.

Plaintiff Johanna Beck ("Beck") commenced this action seeking to recover damages for the injuries she sustained at 120 Orchard's bar, Gallery Bar. According to the allegations of the complaint, on November 27, 2009, 120 Orchard was hosting an event at Gallery Bar, offering drink specials and bottle service. The bar was crowded. At approximately midnight, a glass bottle hit Beck on her head. She suffered a laceration

over her left eye, which allegedly has caused permanent scarring. She claimed, *inter alia*, that 120 Orchard was negligent in failing to prevent glass bottles from being carelessly distributed during the event taking place at the time of her accident, failing to maintain control over the glass bottles and safeguard them as potentially dangerous instruments, failing to prevent and actually encouraging glass bottles to come into the hands of visibly intoxicated patrons, failing to reasonably monitor the area, and failing to control the crowd.

At an examination before trial, Beck testified that she was dancing at the bar with her boyfriend and some friends, when she suddenly felt a “huge thud in the head.” She never saw the object that hit her, but her boyfriend told her that a bottle of Skyy Vodka hit her. She was not cut by any glass because the bottle did not break. She was hurt by the force of the bottle hitting her head. She claimed that the bottle came from above when it hit her. Beck explained that the bar was crowded. She did not know where the bottle was before it hit her. She did not observe any altercations at the bar, and she did not know whether she was hit because the bottle was thrown or because the bottle fell.

120 Orchard now moves for summary judgment dismissing the complaint, arguing that no evidence exists to support a finding that it is liable for Beck’s injuries. Specifically, it maintains that (1) Beck does not know how the bottle came to hit her on the head, and no other evidence or explanation has been provided as to the happening of

the incident; and (2) Beck's allegations of overcrowding, lack of crowd control, and/or unruly intoxicated patrons as causes of her accident are based on mere speculation.

In opposition, Beck first argues that 120 Orchard's motion must be denied because the deposition transcripts submitted in support of its motion are incomplete and unsigned.¹ Beck next contends that issues of fact exist as to 120 Orchard's negligence in failing to control the crowd and failing to provide a safe environment for its patrons. Specifically, Beck maintains that 120 Orchard did not design and implement safety protocols for bottle service, and allowed dancing even though it did not have a cabaret license to do so. Further, the bar was overcrowded at the time of the incident, as evidenced by bar manager Derrek Vernon's testimony that there were approximately 210 people on the floor on the night of the subject incident, when the floor plan for the premises fixed the capacity of the first floor at 70 people. Finally, Beck maintains that Gallery bar had a history of New York Division of Alcoholic Beverage Control violations which show a pattern of negligent crowd and control and safety at the premises.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to

¹ This defect was remedied in 120 Orchard's reply papers.

demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

The court finds that 120 Orchard has met its burden of establishing entitlement to judgment as a matter of law. According to Beck's examination before trial testimony, she can not identify how the bottle came to hit her on the head, and she has presented no other evidence or explanation as to the happening of the incident. While she testified that the bar was crowded at the time of the incident, she did not observe any altercations or other difficulty between patrons prior to her injury, she did not know whether the bottle hit her because it was thrown or because it fell, and she could not identify how any alleged overcrowding at the premises caused her injuries.

Although Beck refers to certain prior Division of Alcoholic Beverage Control violations issued to 120 Orchard, and claims that the bar was overcrowded, generally unsafe and lacking in safety protocols for bottle service on the night of her incident, she fails to submit any competent evidence sufficient to raise a material issue of fact as to whether any negligence on the part of 120 Orchard was a proximate cause of her injuries. *See generally Zalot v. Zieba*, 81 A.D.3d 935 (2nd Dept. 2011); *Maislin Bros. Transport, Ltd. v. State*, 15 A.D.2d 853 (3rd Dept. 1962).

In accordance with the foregoing, it is hereby

ORDERED that defendants 120 Orchard LLC and Bar Three LLC's motion for

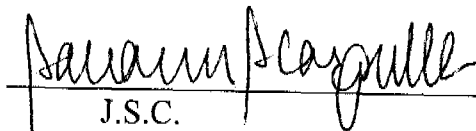
[* 6]
summary judgment dismissing the complaint is granted and the complaint is dismissed;
and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
March 4, 2013

ENTER:


J.S.C.

FILED

MAR 19 2013

**COUNTY CLERK'S OFFICE
NEW YORK**