

Ingber v DaShark, Inc.
2013 NY Slip Op 31665(U)
July 23, 2013
Supreme Court, New York County
Docket Number: 108448/2009
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Sahann Scarpulla
Justice

PART 19

Index Number : 108448/2009
INGBER, JOSH
vs.
DA SHARK
SEQUENCE NUMBER : 004
RENEWAL

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

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

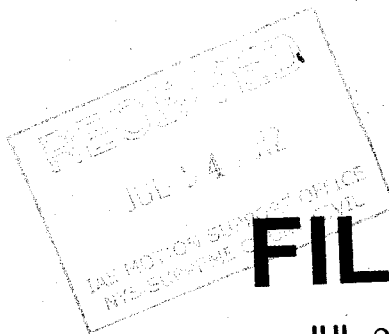
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) _____

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.

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



FILED

JUL 25 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/23/13

Sahann Scarpulla, J.S.C.

- 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 : IAS PART 19

-----X
JOSH INGBER, MATTHEW WALDMAN and
JIMMY ESCOBAR,

Plaintiffs,

Index No. 108448/2009

-against-

DECISION AND ORDER

DA SHARK INC., LESTON SIMPSON, VINO BAR
AND RESTAURANT and JBSR ENTERPRISES
t/a VINO,

Defendants.

-----X
HON. SALIANN SCARPULLA, J.:

FILED
JUL 25 2013
COUNTY CLERK'S OFFICE
NEW YORK

In this action to recover damages for personal injuries, defendants VINO Bar and Restaurant ("VINO Bar") and JBSR Enterprises t/a VINO (collectively referred to as "VINO") move pursuant to CPLR 2221 for leave to renew their prior motion for summary judgment dismissing all claims for violations of General Obligations Law § 11-101 ("the Dram Shop Act") asserted against them.

The relevant underlying facts and procedural history are fully set forth in this court's prior decision and order dated June 13, 2012 ("the prior order"), and will not be restated here, except as necessary for clarification.

Plaintiffs Josh Ingber, Matthew Waldman, and Jimmy Escobar allege that they sustained serious personal injuries in the early morning hours of December 13, 2008, when pro se defendant Leston Simpson ("Simpson") repeatedly stabbed each of them

during an allegedly alcohol-related altercation on premises operated by defendant DaShark Inc. in Monticello, New York.

Plaintiffs initially joined only DaShark and Simpson as defendants. DaShark then commenced a third-party action against Vino, alleging that the altercation between plaintiffs and Simpson had begun at Vino Bar in the late evening on December 12, 2008, and that Vino had served liquor to Simpson while he was visibly intoxicated. DaShark asserted claims for violation of the Dram Shop Act and common-law negligence against Vino. In the prior order, this court granted plaintiffs' motion for leave to amend the complaint to assert a direct cause of action for violation of the Dram Shop Act against Vino.

In the prior order, this court also granted that branch of Vino's motion for summary judgment in Vino's favor on the negligence claim, and denied that branch of the motion for summary judgment in Vino's favor on the Dram Shop Act claim. The court found that genuine triable issues of material fact existed regarding whether Simpson was present at Vino Bar, and was part of a group of individuals that were arguing with Escobar's cousin prior to leaving for DaShark's bar, and, if Simpson was present at Vino Bar, whether he was served alcohol by Vino, and was visibly intoxicated.

Vino now seeks to renew that branch of the prior motion for summary judgment on the Dram Shop Act claim on the ground that the second deposition of Escobar, held August 29, 2012, could not have been held any earlier, and revealed evidence that

conclusively demonstrates that even if Simpson had been present at Vino Bar, he could not have been served any liquor by Vino, and was not visibly intoxicated.

In opposition, plaintiffs and DaShark contend that the prior order is correct in all respects, that Vino has failed to present any new evidence warranting renewal of the prior motion, and that, in any event, the purported new evidence is consistent in all respects with Escobar's prior testimony, and similarly raises triable issues sufficient to preclude summary judgment on the Dram Shop Action claims.

Discussion

Pursuant to CPLR 2221(e), an application for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and . . . shall contain reasonable justification for the failure to present such facts on the prior motion." *American Audio Serv. Bur. Inc. v. AT & T Corp.*, 33 A.D.3d 473, 476 (1st Dept. 2006). Renewal "should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application." *See Shapiro v. State*, 259 A.D.2d 753 (2nd Dept. 1999).

Here, Vino fails to offer any reasonable excuse for not attempting to depose Escobar prior to filing the prior motion on December 6, 2011. While Vino was not yet a party to this action when Escobar's first deposition was held on July 22, 2010, Vino was joined as a third-party defendant in this action on December 8, 2010, and served an answer on March 8, 2011, approximately eight months prior to moving for summary

judgment. The length of time between Vino's answer and Vino's motion is more than enough to have permitted Vino to take Escobar's deposition.

Similarly immaterial is the fact that Vino was not joined as a direct defendant until after issuance of the prior order. A third-party defendant has the rights of a party adverse to the third-party plaintiff and the original plaintiff, and, thus, may conduct an examination before trial of the primary plaintiff. *See Sledz v. 333 E. 68 St. Corp.*, 254 A.D.2d 196, 197 (1st Dept. 1998); *Williams v. 55 Wall St.*, 239 A.D.2d 411, 411-412 (2nd Dept. 1997). Therefore, Vino was not prevented at any time from deposing Escobar about his knowledge of Simpson's presence at Vino Bar, and whether Simpson appeared intoxicated and was served alcohol by Vino prior to leaving and going to DaShark's bar.

Next, Vino fails to submit any new evidence that resolves any of the triable issues of fact cited by the court in the prior order. A party is not entitled to renewal of a motion based on the same facts asserted in the earlier motion, even if such facts are contained in new documents. *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27-28 (1st Dept 1992).

In the prior order, this court held, in relevant part, that:

"Vino argues that it is entitled to summary judgment because Simpson, the person who plaintiffs allege stabbed them, testified that he was not at Vino on the night of the stabbing. However, Escobar testified that Simpson was part of the group that argued with his cousin at Vino. Vino does not dispute that Escobar's testimony conflicts with Simpson's testimony. Escobar's testimony creates an issue of fact as to whether Simpson was at Vino that night.

Vino has not made an adequate showing to support dismissal based on Simpson's alleged lack of intoxication while at Vino. It is Vino's burden, in the first instance, to make a *prima facie* showing that Simpson was not intoxicated while at Vino. Vino has failed to present an affidavit or testimony of anyone with personal knowledge attesting that Simpson was not intoxicated at Vino, or that Vino did not serve him alcohol while he was intoxicated. Accordingly, the Court denies that part of Vino's motion in which it seeks dismissal of the DaShark's Dram Shop Act cause of action."

In the prior motion, Vino relied, in part, on deposition testimony given by Escobar on July 22, 2010. Escobar testified that he went to Vino Bar with some people at about 10:00 p.m. on December 12, 2008, and found the bar to be crowded. He also testified that at that time, he did not know Simpson, but recognized him later as a person he had seen at Vino Bar. Escobar testified that after leaving Vino Bar after the first altercation, his group and Simpson's group arrived at DaShark's parking lot at about the same time, and that Simpson's whole group appeared intoxicated. He further testified that he believed Simpson's group was intoxicated because he saw that they had droopy eyes, were very loud, and smelled of liquor.

In support of its motion to renew, Vino relies on Escobar's second deposition. At that deposition, Escobar testified that he and some friends arrived at Vino Bar at about 10:00 p.m. on December 12, 2008. He testified that he recognized some people at Vino Bar, and that a person he later discovered to be Simpson was with them. He further

testified that he realized that he had seen Simpson at Vino Bar, DaShark, and the hospital, the next day or so, when he put Simpson's name and face together.

Escobar also testified that he did not remember whether he saw Simpson ordering drinks at Vino Bar, drinking any alcoholic beverages, or appearing visibly intoxicated while there. He also testified that he saw plaintiffs and Simpson's group arrive nearly simultaneously at DaShark's parking lot, and that Simpson was part of a group of about 10 individuals who appeared intoxicated because they were loud and smelled of alcohol

Thus, while in his second deposition, the testimony provided by Escobar provides details not present in his first deposition, the basic factual allegations relevant to the Dram Shop Act claims asserted against Vino remain unchanged. At both depositions, Escobar testified that Simpson was present at Vino Bar, and was part of a group that appeared loud and intoxicated at Vino Bar and, a few minutes later, at DaShark's parking lot, just prior to the alleged assault. Therefore, no new facts were offered that would change the prior determination. In any event, Escobar's testimony from his second deposition merely raises triable issues of material fact regarding whether Simpson was present at Vino Bar,

whether he was visibly intoxicated, and whether Vino served Simpson alcoholic beverages.

In accordance with the foregoing, it is

ORDERED that defendants Vino Bar and Restaurant and JBSR Enterprises t/a Vino's motion pursuant to CPLR 2221 for leave to renew their prior motion for summary motion is denied.

This constitutes the decision and order of the Court.

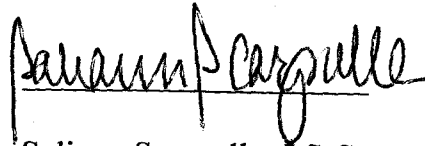
Dated: New York, New York
July 23, 2013

FILED

JUL 25 2013

ENTER:

COUNTY CLERK'S OFFICE
NEW YORK



Saliann Scarpulla, J.S.C.