

**Dunn v Newcombe**

2013 NY Slip Op 32201(U)

September 9, 2013

Supreme Court, Suffolk County

Docket Number: 09-39282

Judge: Hector D. LaSalle

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 48 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. HECTOR D. LaSALLE  
Justice of the Supreme Court

MOTION DATE 2-19-13 (#002)  
MOTION DATE 3-21-13 (#003)  
ADJ. DATE 5-21-13  
Mot. Seq. # 002 - MotD  
# 003 - MG

-----X  
MICHAEL DUNN,

Plaintiff,

- against -

RICHARD NEWCOMBE, ANTHONY  
CONSTANTINO, POPEI'S OF DEER PARK,  
POPEI'S CLAM BAR LTD OF DEER PARK  
d/b/a POPEI'S CLAM BAR, POPEI'S CLAM  
BAR LTD. OF DEER PARK d/b/a POPEI'S OF  
DEER PARK,

Defendants.  
-----X

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Upon the following papers numbered 1 to 25 read on this motion for summary judgment; and this motion for late jury demand; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 13 - 17; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 18 - 23; Replying Affidavits and supporting papers 24 - 25; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motions (# 002 and # 003) by defendants Popei's of Deer Park and Popei's Clam Bar Ltd. of Deer Park are consolidated for the purposes of this determination; and it is

**ORDERED** that the motion by defendants Popei's of Deer Park and Popei's Clam Bar Ltd. of Deer Park for summary judgment dismissing the complaint against them is granted to the extent indicated herein, and is otherwise denied; and it is

**ORDERED** that the motion by defendants Popei's of Deer Park and Popei's Clam Bar Ltd. of Deer

(RR)

Park for an order permitting them to serve a late demand for a jury trial is granted.

Plaintiff Michael Dunn commenced this action to recover damages for personal injuries he sustained on January 5, 2008 as a result of an alleged assault by defendants Richard Newcombe and Anthony Constantino that took place on the premises of a bar owned and operated by defendant Popei's of Deer Park, d/b/a Popei's Clam Bar Ltd. of Deer Park (herein collectively known as "Popei's"). By his complaint, plaintiff alleges causes of action for assault against Newcombe and Constantino, and causes of action against Popei's for violation of General Obligations Law § 11-101 (the "Dram Shop Act") and for failure to provide him with adequate security. The altercation allegedly arose from an incident that occurred during a memorial service attended by plaintiff and the individual defendants. While participating in a practice known as a "burnout," where the tires of a stationary motor vehicle are spun rapidly to produce smoke and skid-like sounds, rubber fragments from the tires of a motor vehicle owned by a friend of the plaintiff allegedly caused damage to a motor vehicle owned by defendant Constantino. Plaintiff alleges that while at Popei's, where the parties ran into each other following the memorial service, Constantino and Newcombe verbally confronted him until their dispute became physical, resulting in plaintiff being punched in the face, knocked from a bar stool, and struck repeatedly while on the floor.

Popei's now moves for summary judgment dismissing the complaint against it on the grounds plaintiff failed to offer any proof that Newcombe and Constantino were served alcohol while visibly intoxicated, or that Popei's could have prevented the alleged assault since it was sudden and unforeseeable. Plaintiff did not oppose the branch of Popei's motion seeking summary judgment dismissing his claims under the Dram Shop Act. However, plaintiff opposes the branch of the motion seeking dismissal of his negligence claim based on Popei's alleged failure to provide him with adequate security on the night in question. Specifically, plaintiff argues triable issues exist as to whether Popei's failed to prevent the assault despite its notice of an escalating verbal altercation between plaintiff and the individual defendants that continued for at least 20 minutes before the fight. By way of a separate motion, Popei's further moves for an order permitting it to serve a late demand for a jury trial on the ground its failure to timely request a jury trial resulted from its reliance on the note of issue filed by plaintiff which erroneously requested both a "jury" and "nonjury" trial. Alternatively, Popei's argues that its request for leave to file a late demand for jury trial should be granted, because its delay was as a result of inadvertent law office failure related to the deleterious effects of Hurricane Sandy.

At his examination before trial, plaintiff testified that he and a friend, Ralph Feliciano, were sitting at the bar for approximately 20 minutes before the individual defendants arrived at Popei's. Plaintiff testified that Constantino looked angry when he entered the bar, and that he was yelling about the rubber that was deposited on his car during the memorial ceremony. Plaintiff testified that he did not know if Constantino was stumbling or slurring when he arrived at the bar, but that he recalled Constantino yelling intermittently about the damage to his car for approximately 20 or 30 minutes before the physical confrontation ensued. Plaintiff testified that Popei's employees failed to intervene as the verbal confrontation escalated, and that the fight began after he declined Constantino's request that they go outside to settle the dispute. Plaintiff testified that Constantino responded to his refusal to "take it outside" by walking over to the area of the bar where he was sitting and punching him in the face. Plaintiff testified that he fell to the ground, and that Newcombe then joined Constantino in repeatedly punching and kicking him while he attempted to get to his feet. Plaintiff testified that he did not know if the bartender did or said

anything to break up the fight, and that he did not recall anyone attempting to help him. He further testified that it took a very long time for the police to arrive, and that he received serious injuries to his face, ears, shoulders and knees as a result of the assault.

At this examination before trial, Newcombe testified that he witnessed the burnout which caused rubber fragments to be deposited on Constantino's motor vehicle, and that, with the exception of requesting that the car be detailed, he was not aware of any heated exchange between Constantino and Ralph Feliciano that would indicate that there was going to be a physical confrontation later that night. Newcombe testified that plaintiff and his friend were jeering Constantino from the other side of the bar at Popei's for approximately 30 minutes prior to the altercation. He testified that he did not witness any bouncers while he was at the bar, that he only observed one bartender, and that he did not recall whether the bartender ever threatened to call the police if the verbal confrontation between the men was not discontinued. Newcombe further testified that it was plaintiff who initiated the physical confrontation when he charged at Constantino and began beating him, and that plaintiff turned on him moments later after he was through assaulting Constantino. Newcombe testified that he witnessed Popei's chef unsuccessfully attempt to break up the fight, but he did not recall anyone threatening to call the police. Newcombe also testified that while he and Constantino consumed alcoholic beverages prior to their arrival at Popei's, neither of them appeared intoxicated or slurred their speech.

At his examination before trial, Constantino testified that he and Ralph Feliciano had a verbal confrontation across the bar about the damage Feliciano caused to his car earlier that night. Constantino testified that plaintiff, who was sitting beside Feliciano on the other side of the bar, was acting aggressively and warned that he would meet Constantino outside the bar, because he was prepared to fight "win, loose, or draw." Constantino further testified that he did not recall the bartender saying anything during the verbal confrontation, and that no other member of Popei's staff attempted to prevent the physical confrontation. Constantino testified that plaintiff approached him in a threatening manner prior to the fight, and that he tore a ligament in his knee while attempting to escape plaintiff. He testified that plaintiff punched him in the face several times before Popei's chef momentarily pulled plaintiff away, and that plaintiff resumed hitting him in the face until one of Constantino's companions intervened. Constantino testified that he did not recall having any conversations with the bartender prior to the altercation, and that he had no problems walking or talking prior to the incident.

At her examination before trial, Cynthia Walker testified that she worked as the bartender for Popei's on the night of plaintiff's alleged assault, and that only three employees were present at that time. Ms. Walker testified that no doormen or bouncers were at the bar, and that it was not Popei's practice to utilize such staff. She testified that she recalled other fights at the bar, including one in which a patron smashed a glass in her face after she refused to serve him more alcohol. She further testified that despite several other incidents, including robberies of the bar, no additional security measures were undertaken to secure the bar or its patrons. Ms. Walker testified that she never received any training on what should be done if a fight occurs, and that it was her practice to simply run into the kitchen and alert the chef. According to Ms. Walker, there were approximately ten people involved in the fight in question, and she observed them shouting at each other across the bar for approximately five minutes before the physical confrontation started. She testified that she did not intervene while the men were shouting at each other, but that she called the police immediately after the fight began hoping they would end the confrontation.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a prima facie showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp., supra*).

“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” (*Dugan v Olson*, 74 AD3d 1131, 1132, 906 NYS2d 277, 278 [2d Dept 2010]; *accord Sullivan v Mulinos of Westchester, Inc.*, 73 AD3d 1018, 901 NYS2d 663 [2d Dept 2010]; *McArdle v 123 Jackpot, Inc.*, 51 AD3d 743, 746, 858 NYS2d 692 [2d Dept 2008]). So long as “there is a reasonable and practical connection between the unlawful sale and the resulting injuries, the presence of intervening acts or independent wrongdoing does not eliminate liability under the Dram Shop Act” (*Oursler v Brennan*, 67 AD3d 36, 43, 884 NYS2d 534, 541 [4th Dept 2009]; *see also McNeill v Rugby Joe's*, 298 AD2d 368, 751 NYS2d 241 [2d Dept 2002]). Thus, “in order to establish its entitlement to judgment as a matter of law dismissing the Dram Shop Act cause of action, [a defendant is] required to establish either that [it] did not serve alcohol to [the patron] while he was visibly intoxicated or that its sale of alcohol to him had no reasonable or practical connection to the assault” (*Dugan v Olson, supra* at 1133, 906 NYS2d at 278).

Here, Popei's established its prima facie entitlement to summary judgment dismissing the Dram Shop claims against it by submitting evidence that neither of the individual defendants were served alcoholic beverages while visibly intoxicated on the night of the alleged assault (*see Dugan v Olson*, 74 AD3d 1131, 906 NYS2d 277 [2d Dept 2010]; *Wolf v Paxton-Farmer*, 23 AD3d 1046, 803 NYS2d 468 [4th Dept 2005]; *Kelly v Fleet Bank*, 271 AD2d 654, 706 NYS2d 190 [2d Dept 2000]). Significantly, neither plaintiff nor the bartender recalled the individual defendants stumbling or slurring in their speech on the night of the incident. Furthermore, while the individual defendants conceded that they consumed alcoholic beverages prior to arriving at Popei's, both men testified that they were not inebriated and did not display any visible signs of intoxication. Plaintiff, who did not oppose this branch of the motion, failed to raise any triable issues warranting its denial. Therefore, the branch of Popei's motion seeking summary judgment dismissing plaintiff's claims under the Dram Shop Act is granted.

As to the branch of the motion seeking dismissal of plaintiff's claim that Popei's failed to take adequate security measures to prevent the attack against him, an owner of a public establishment has a “duty to control the conduct of third persons on their premises when they have the opportunity to control such

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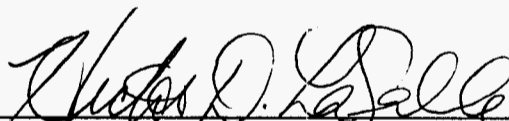
persons and are reasonably aware of the need for such control” (*Panzer v Johnny’s II*, 253 AD2d 864, 865, 678 NYS2d 336, 337 [2d Dept 1998]; accord *D’Amico v Christie*, 71 NY2d 76, 524 NYS2d 1 [1987]; *Scotti v W.M. Amusements*, 226 AD2d 522, 640 NYS2d 617 [2d Dept 1996]). While no such duty exists with respect to unforeseeable and unexpected assaults (*Scotti v W.M. Amusements, supra* at 522, 640 NYS2d 617), a defendant breaches this duty where its employees observes an escalating confrontation on its premises sufficient in time and intensity to give them notice of an impending harm and fail to take reasonable actions to prevent it (*see Ash v Fern*, 295 AD2d 869, 744 NYS2d 559 [3d Dept 2002]; *Heavlin v Gush*, 197 AD2d 773, 602 NYS2d 721 [3d Dept 1993]).

Here, viewed in the light most favorable to the non-moving party, conflicting deposition testimony by plaintiff and Popei’s bartender regarding the length and intensity of the verbal confrontation preceding the fight raises triable issues as to whether Popei’s should have been aware of the need to control the individual defendants, and whether its employees had the opportunity to do so (*see Carver v P.J. Carney’s*, 103 AD3d 447, 962 NYS2d 3 [1st Dept 2013]; *Ash v Fern*, 295 AD2d 869, 744 NYS2d 559 [3d Dept 2002]; *Panzer v Johnny’s II, supra*; *Pierce v Moreau*, 221 AD2d 763, 633 NYS2d 631 [3d Dept 1995]; *Heavlin v Gush*, 197 AD2d 773, 602 NYS2d 721 [3d Dept 1993]). Accordingly, the branch of Popei’s motion for summary judgment in its favor dismissing plaintiff’s claim that it was negligent in failing to take minimal security precautions to prevent the attack against him is denied.

Finally, the unopposed motion by Popei’s for an order permitting it to file a late demand for a jury trial is granted. A party seeking an extension of the time to file a demand for a jury trial must make a factual showing that the failure to timely file such a demand was the result of inadvertence or other excusable conduct indicating a lack of intention to waive the right to a jury trial (*see A.S.L. Enterprises v Venus Labs., Inc.*, 264 AD2d 372, 694 NYS2d 686 [2d Dept 1999]; *Breezy Point Coop. v Young*, 234 AD2d 410, 651 NYS2d 896 [2d Dept 1996]; *Ossory Trading, S.A. v Geldermann, Inc.*, 200 AD2d 423, 606 NYS2d 221 [1st Dept 1994]; *Lane v Marshall*, 89 AD2d 579, 452 NYS2d 238 [2d Dept 1982]). Here, Popei’s submitted evidence that the note of issue filed by plaintiff demanded both a “jury” and “nonjury” trial, and that it failed to take immediate action due to its initial erroneous belief that a trial by jury was requested. Moreover, plaintiff submitted evidence that it was served the note of issue four days prior to Hurricane Sandy, and that its delay in making the instant demand resulted from the displacement of its attorney’s law office, which is located in lower Manhattan.

The foregoing constitutes the Order of this Court.

Dated: September 9, 2013  
 Riverhead, NY

  
 HON. HECTOR D. LASALLE, J.S.C.

\_\_\_ FINAL DISPOSITION       X  NON-FINAL DISPOSITION