

**Conklin v Travers**

2013 NY Slip Op 34031(U)

March 6, 2013

Supreme Court, Suffolk County

Docket Number: 27439/2009

Judge: William B. Rebolini

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This opinion is uncorrected and not selected for official publication.

Short Form Order



**SUPREME COURT - STATE OF NEW YORK**

**I.A.S. PART 7 - SUFFOLK COUNTY**

**PRESENT:**

**WILLIAM B. REBOLINI**  
Justice

Debra Conklin, as Administratrix of the  
Estate of Melissa Miller, deceased,

Plaintiff,

-against-

Ann Travers, Legends Harborside, Ltd.,  
doing business as Legends Restaurant,  
Dennis Harkoff, individually and doing business as  
Legends Restaurant, Diane Harkoff, individually  
and doing business as Legends Restaurant, and  
Legends Restaurant,

Defendants.

Motion Sequence No.: 005; MOT.D  
Motion Date: 10/5/12  
Submitted: 11/14/12

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Attorney for Plaintiff:

Parker Waichman, LLP  
6 Harbor Park Drive  
Port Washington, NY 11050

Attorney for Defendant Ann Travers:

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875 Merrick Avenue  
Westbury, NY 11590

Clerk of the Court

Attorney for Defendants Legends  
Harborside, Ltd., doing business as  
Legends Restaurant, Dennis Harkoff,  
individually and doing business as  
Legends Restaurant, Diane Harkoff,  
individually and doing business as  
Legends Restaurant, and Legends  
Restaurant:

Gallo, Vitucci, Klar & Pinter  
90 Broad Street, 3<sup>rd</sup> Floor  
New York, NY 10004

Upon the following papers numbered 1 to 24 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 19; Answering Affidavits and supporting papers, 20 - 22; Replying Affidavits and supporting papers, 23 - 24; it is

**ORDERED** that the motion by defendants Legends Harborside, Ltd. d/b/a Legends Restaurant and Legends Restaurant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and cross claims asserted against them is granted to the extent of granting summary judgment dismissing the complaint, and is otherwise denied.

This is an action brought by the Administratrix of the Estate of Melissa Miller (hereinafter "the plaintiff") for the wrongful death of her daughter on August 15, 2008 at 10:45 p.m. when, as a pedestrian, her daughter was struck by a vehicle operated by Ann Travers on Route 25 in Cutchogue, New York. The plaintiff asserts a cause of action against defendants Legends Harborside, Ltd. d/b/a Legends Restaurant and Legends Restaurant ("Legends Restaurant") for violation of General Obligations Law § 11-101 (the "Dram Shop Act"). Defendant Travers was a patron at Legends Restaurant where she was served alcoholic beverages prior to the accident.

In the complaint and the bill of particulars, the plaintiff alleges that Legends Restaurant was negligent in, *inter alia*, carelessly and unlawfully serving and selling alcoholic beverages in such a quantity as to cause Travers to be rendered intoxicated, and in carelessly and unlawfully serving and selling alcoholic beverages to Travers after she had been rendered intoxicated.

In her answer, Travers does not assert any cross claims. In its answer, Legends Restaurant asserts cross claims against Travers for contribution and common-law indemnity.

Legends Restaurant now moves for summary judgment.

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*).

In order “[t]o 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]). 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 [resulting damages]” (*Dugan v Olson, supra* at 1133, 906 NYS2d at 278).

As a preliminary matter, the Court notes that the action was discontinued as against defendants Dennis Harkoff, individually and doing business as Legends Restaurant and Diane Harkoff, individually and doing business as Legends Restaurant.

Legends Restaurant established its *prima facie* entitlement to judgment as a matter of law by demonstrating, through the deposition testimony of Travers, Vicki Edwards and Deborah Lindsay, bartenders at the restaurant, Jack Grismondi, Eric Wahl, and Christina Altman, non-party witnesses who were present with Travers at the bar, that Travers did not appear to be visibly intoxicated when she was served alcohol at the restaurant (*see Coffey v Esparra*, 88 AD3d 621, 931 NYS2d 600 [1st Dept 2011]; *Dugan v Olson, supra*; *Cohen v Bread & Butter Entertainment, LLC*, 73 AD3d 600, 95 NYS2d 4 [1st Dept 2010]). Travers testified at her deposition that she and her friend arrived at the restaurant at 7:30 p.m. and left at approximately 10:30 p.m. They were served by two different bartenders while they sat at the bar. During those three hours, they ordered and shared two appetizers, and each consumed two glasses of wine and two beers. When she left the restaurant, she did not feel intoxicated, her eyes were not bloodshot, and she was not slurring her words. Vicki Edwards testified at her deposition that she served Travers one glass of wine and one beer that evening. Travers was acting fine, she was not slurring her words, she was not loud, and her eyes did not appear sleepy. She did not exhibit any outward signs of intoxication. She saw Travers eat two appetizers at the bar. Deborah Lindsay testified at her deposition that she served Travers one glass of wine and one beer. She also testified that Travers did not exhibit any outward signs of intoxication. Her speech was not slurred, her eyes were not red, and she did not stumble when she walked. Jack Grismondi, Eric Wahl, and Christina Altman all testified at their depositions that while Travers was at the restaurant, her eyes were not glassy, she was not unsteady on her feet, and her speech was not slurred.

In response, the plaintiff failed to raise a triable issue of fact as to whether Travers was visibly intoxicated when she was served alcoholic beverages at the restaurant. The affidavit submitted by the plaintiff’s forensic toxicologist expert in which he concluded that based upon the amount of alcohol consumed by Travers, she would have exhibited visible signs of intoxication was, by itself, insufficient to raise a triable issue of fact since it was based on pure speculation as “it is well known that the effects of alcohol consumption may differ greatly from person to person . . . and

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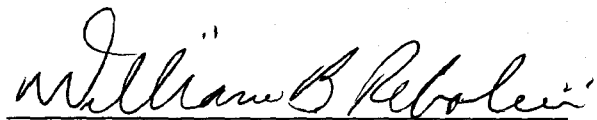
that tolerance for alcohol is subject to wide individual variation" (*Romano v Stanley*, 90 NY2d 444, 450, 661 NYS2d 589, 592 [1997] [internal citations quotation marks omitted]).

Accordingly, since there are no cross claims asserted against Legends Restaurant, its motion for summary judgment is granted to the extent of dismissing the complaint, and is otherwise denied.

The Court directs that the claims as to which summary judgment were granted are hereby severed and that the remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated:

3/6/2013

  
HON. WILLIAM B. REBOLINI, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION \_\_\_X\_\_\_ NON-FINAL DISPOSITION