

Tallerico v EZ-CR Corp.
2014 NY Slip Op 30900(U)
April 2, 2014
Supreme Court, Suffolk County
Docket Number: 11-6533
Judge: W. Gerard Asher
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

P R E S E N T :

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 9-17-13
ADJ. DATE 12-17-13
Mot. Seq. # 001 - MotD
002 - MotD

-----X
ANTHONY TALLERICO,

Plaintiff,

- against -

EZ-CR CORP., Individually, and d/b/a CEDAR
RAPIDS KAYAK & CANOE OUTFITTERS,
CR RESTAURANT RT. 97 CORP.,
FREDERICK H. REBER and PAULA F.
HECKLER,

Defendants.
-----X

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Upon the following papers numbered 1 to 42 read on these motions for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1 - 15; 27 - 40; Notice of Cross Motion and supporting papers ; Answering
Affidavits and supporting papers 16 - 24; Replying Affidavits and supporting papers 25 - 26; 41 - 42; Other ; (~~and~~
~~after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant CR Restaurant Rt. 97 Corp. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted to the extent of granting it summary judgment dismissing plaintiff's second cause of action, and is otherwise denied, and it is further

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ORDERED that the motion by defendants EZ-CR Corp. d/b/a Cedar Rapids Kayak & Canoe Outfitters and Frederick Reber for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted to the extent of granting summary judgment dismissing the first cause of action insofar as asserted against EZ-CR Corp. d/b/a Cedar Rapids Kayak & Canoe Outfitters and dismissing the third cause of action, and is otherwise denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff as a result of an assault which occurred on June 19, 2010 on the premises known as CR Restaurant Rt. 97 Corp. ("CR Restaurant"), located on 3799 Route 97, Highland, New York. The plaintiff commenced this action against the defendants for negligent security and violation of General Obligations Law § 11-101 (the "Dram Shop Act"). EZ-CR Corp. s/h/a EZ-CR Corp. d/b/a Cedar Rapids Kayak & Canoe Outfitters ("EZ-CR Corp.") is the owner of the premises. It leased the premises to CR Restaurant. Defendant Frederick Reber is a minority shareholder in EZ-CR Corp. and the president of CR Restaurant.

In the complaint, the plaintiff asserts four causes of action. The first cause of action is for negligent security and is asserted against all of the defendants. The second cause of action is asserted against CR Restaurant for violation of General Obligations Law § 11-101. The third cause of action is asserted against Frederick Reber for violation of General Obligations Law § 11-101, and the fourth cause of action is asserted against Paula Heckler for violation of General Obligations Law § 11-101. The plaintiff alleges that Ms. Heckler owned CR Restaurant.

CR Restaurant and EZ-CR Corp. and Frederick Reber now move separately for summary judgment dismissing the complaint.

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*).

At the outset, the Court notes that by stipulation of discontinuance dated June 30, 2011, the action was discontinued against Paula Heckler.

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It is well settled that an out-of-possession lessor is not liable for injuries that occur on the premises, including injuries caused by a criminal act of a third person, unless the lessor retained control over the premises or was contractually obligated to maintain or repair any alleged hazard, or in the case of criminal acts, to provide security (*see DeJesus v New York City Health & Hosps. Corp.*, 309 AD2d 729, 765 NYS2d 377 [2d Dept 2003]; *Ogilvie v McDonalds Corp.*, 300 AD2d 376, 751 NYS2d 414 [2d Dept 2002]; *Reidy v Burger King Corp.*, 250 AD2d 747, 673 NYS2d 441 [2d Dept 1998]).

Here, EZ-CR Corp. established its *prima facie* entitlement to judgment as a matter of law dismissing the negligent security claim asserted against it by demonstrating, through the affidavit of Richard Goldring, the president and majority shareholder of EZ-CR Corp., and a copy of the lease agreement entered into between EZ-CR Corp. and CR Restaurant, that EZ-CR Corp. was an out-of-possession landlord that did not retain control over the premises, was not contractually obligated to make repairs or provide security and, as a result, was not liable for the plaintiff's injuries (*see DeJesus v New York City Health & Hosps. Corp.*, *supra*; *Ogilvie v McDonalds Corp.*, *supra*). In his affidavit, Mr. Goldring states that EZ-CR Corp. owns the property on which CR Restaurant is located. EZ-CR Corp. has never operated the restaurant nor does it have any employees working at the restaurant. It merely leased the property to CR Restaurant. CR Restaurant managed and operated the restaurant on the property. In addition, the lease did not require EZ-CR Corp. to make repairs, provide security for the premises, nor did it provide that EZ-CR Corp. retained a right of re-entry.

In opposition, the plaintiff did not oppose that branch of EZ-CR Corp.'s and Reber's motion which sought summary judgment dismissing the complaint as against EZ-CR Corp. As a result, the plaintiff failed to raise a triable issue of fact as to whether EZ-CR Corp. could be held liable for negligence (*see Alvarez v Prospect Hosp.*, *supra*). Accordingly, the branch of the motion by EZ-CR Corp. and Reber which sought summary judgment dismissing the complaint as against EZ-CR Corp. is granted.

With respect to the plaintiff's claim of negligent security against Reber and CR Restaurant, generally, 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 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]). However, an "owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults" (*id.* at 522, 640 NYS2d at 617).

While Reber asserts that he cannot be held individually liable because he was acting in his capacity as president of CR Restaurant and there is no evidence that he committed any acts of malfeasance, a corporate officer can be held personally liable regardless of whether he was acting on behalf of the corporation in the course of his official duties where he participates in "misfeasance or malfeasance" (*Peguero v 601 Realty Corp.*, 58 AD3d 556, 559, 873 NYS2d 17, 21 [1st Dept 2009]). "[N]egligence in actually performing duties is actually misfeasance" (*Michaels v Lisperard Holding Corp.*, 11 AD2d 12, 14, 201 NYS2d 611, 614 [1st Dept 1960]).

Here, there are questions of fact as to whether defendants CR Restaurant and Reber should have been aware of the need to control the conduct of the patrons in light of the first altercation that occurred inside of the bar between two groups of individuals, whether they had the opportunity to control the conduct of the patrons after the first altercation, or whether the assault of the plaintiff in the parking lot was an unforeseeable and unexpected assault, against which the defendants had no duty to protect the plaintiff (*see Panzera v Johnny's II, supra; Pierce v Moreau*, 221 AD2d 763, 633 NYS2d 631 [3d Dept 1995]). In addition, an issue of fact exists as to whether there was an adequate amount of security present and whether Reber was negligent in escorting both groups of individuals out to the parking lot where the second altercation occurred. Specifically, the plaintiff testified at his deposition that on the night of the incident, he and his friend, Mike Larkin, walked over to CR Restaurant to play pool. There were approximately 20-30 people in the restaurant. They each bought a beer at the bar. Neither he nor Mr. Larkin were intoxicated, and he did not notice any intoxicated individuals in the restaurant. After they played one game of pool and were walking towards the restroom, an individual hit Mr. Larkin in the head and he fell down. The plaintiff testified that as he bent down to help Mr. Larkin, he got hit in each temple on his head and fell to the ground. He covered his face while he was hit repeatedly. After being hit, he crawled over to the wall, stood up, ran back over to Mr. Larkin, and picked him up. He helped him out of the front entrance of the restaurant. At that point, he saw his friends—Adam and Michelle—run into the restaurant. He heard screaming and when he turned around, he saw Adam getting hit and Michelle getting hit in the face in the parking lot. A group of men and women had surrounded her. They were swinging at her. The plaintiff testified that he saw a bar stool outside, picked it up, ran over to the group of people, and told them to get away from Michelle. A man and a woman tried to come near him while he was holding the bar stool. He was then struck on the left side of his face and he fell down. When he got back up, he ran towards the campsite where he was staying.

Non-party witness Damian Kolodiy testified that on the evening of the incident, he went to the bar with four guys, including the plaintiff and Mike Larkin. At one point, an individual in the bar started staring at Mr. Larkin and some words were exchanged. When Mr. Larkin was walking back from the bar, the individual who was staring at him came up behind him and punched him in the head. Mr. Larkin fell down and a few of the individual's friends started punching Mr. Larkin while he was on the floor. The plaintiff tried to break up the fight and the fight escalated from there. The other individuals started to punch and kick the plaintiff. The plaintiff fell to the ground and was continuing to be punched. At that point, his friend Adam tried to help the plaintiff and he got hit in the head. After Mike and the plaintiff got up, the plaintiff grabbed a bar stool. Mr. Kolodiy testified that he did not see the bartender or the owner try to break up the fight. Thereafter, the fight continued outside in the parking lot. The plaintiff was trying to defend himself with the bar stool when he was hit in the head from behind by one of the individuals from the other group. Mr. Kolodiy testified that at that point, he ran inside and told the owner to call the police. He further testified that neither he nor any of his friends were intoxicated that evening, and he did not think that any of the other individuals were intoxicated either.

Caesar Feltrin and Cassandra Biccum, bartenders working that evening at CR Restaurant, testified at their depositions that a fight broke out between two groups of individuals in the bar. Mr. Feltrin testified that at one point, he ran over to try and break the fight up. Thereafter, Mr. Reber escorted both groups outside. After he escorted them outside, 10-15 people left the bar. A few minutes

later, a patron came back in and asked him to call the police. At that point, Ms. Biccum called the police.

Mr. Reber testified that he was in charge of security. He did not have bouncers working on the evening of the incident because that month was slow. When the incident occurred, he had just walked upstairs to his apartment. After he went upstairs, he heard commotion coming from downstairs and he ran downstairs. He ushered two groups of individuals outside and closed the bar. He told them that the police were on their way and advised them to go home. At that point, one of the individuals, who had taken a bar stool outside, was swinging it over his head while yelling and threatening the individuals in the other group. A man from the other group ran over and hit the individual swinging the bar stool. In light of the foregoing, the Court finds that issues of fact exist as to whether CR Restaurant and Reber were negligent in failing to have an adequate amount of security at the bar and whether Reber was negligent in escorting both groups of individuals involved in the first altercation out to the parking lot. While CR and Reber assert that the altercation in the parking lot was unforeseeable and sudden, the Court finds that an issue of fact exists as to whether it was foreseeable in light of the first altercation which occurred inside of the bar and the fact that both groups involved in the fight were escorted out to the parking lot minutes after the first altercation. Therefore, CR Restaurant and Reber are not entitled to summary judgment dismissing the plaintiff's first cause of action for negligent security insofar as it is asserted against them.

Turning to the plaintiff's second and third causes of action, which asserted that defendants' CR Restaurant and Reber violated General Obligations Law § 11-101, 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 assault" (*Dugan v Olson, supra* at 1133, 906 NYS2d at 278).

CR Restaurant and Reber established their *prima facie* entitlement to judgment as a matter of law dismissing the claim for violation of General Obligations Law § 11-101 asserted against them by demonstrating, through the deposition testimony of the plaintiff and non-party witness Damian Kolodiy, that none of the patrons in the restaurant appeared or acted intoxicated prior to the altercation (*see Murphy v Chaos*, 26 AD3d 231, 810 NYS2d 39 [1st Dept 2006]; *Gaige v Kepler*, 303 AD2d 626, 756 NYS2d 644 [2d Dept 2003]). Specifically, the plaintiff and Damian Kolodiy testified that neither the plaintiff, the plaintiff's group or friends nor anyone else in the restaurant that evening was intoxicated or appeared to be intoxicated. Mr. Kolodiy testified that Mike Larkin—a friend of his and the plaintiff who was also involved in the altercation—told him that he believed that the altercation occurred because he had spoken to some girls at the restaurant who were friends with the other group of individuals involved in the fight. Mr. Larkin also told him that he thought that the other individuals got territorial because they were from that town while the plaintiff, Mr. Larkin, Mr. Kolodiy and the rest of their group was

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from out-of-town.

In opposition, the plaintiff failed to raise a triable issue of fact as to whether Reber or CR Restaurant could be held liable for violating General Obligations Law § 11-101 (*see Alvarez v Prospect Hosp., supra*). The plaintiff merely asserts that the testimony establishes that alcohol was served that evening to the patrons involved in the altercation. The Court notes that there is no evidence that the patrons involved in the altercation, including the plaintiff and his friends, appeared or acted intoxicated. Thus, the plaintiff's second and third causes of action against CR Restaurant and Reber for violation of General Obligations Law § 11-101 are dismissed.

Accordingly, the motion by defendant CR Restaurant for summary judgment dismissing the complaint is granted to the extent of dismissing plaintiff's second cause of action against CR Restaurant for violation of General Obligations Law § 11-101, and the motion by defendants EZ-CR Corp. and Reber for granting summary judgment dismissing the complaint is granted to the extent of dismissing the first cause of action for negligent security insofar as asserted against EZ-CR Corp. and dismissing the third cause of action against Reber for violation of General Obligations Law § 11-101.

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

Dated: April 2, 2014

W. Gerard Asher
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION