

Ortiz-Somarriba v Somers

2014 NY Slip Op 32875(U)

September 17, 2014

Sup Ct, Westchester County

Docket Number: 51216/2011

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
CARLOS ORTIZ-SOMARRIBA

Plaintiff,

-against-

Index No. 51216/2011
DECISION & ORDER
Motion Sequence 7

DUANE SOMERS, MOTEL IN THE SKY, INC.
D/B/A RAMADA YONKERS; TOTONNO'S OF
YONKERS, LLC; MELISSA "DOE" [BARTENDER],
RALPH PELUSO; PATRICK GRIZZLE and
MADISON SECURITY GROUP, INC.,

Defendants.

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The following papers numbered 1 through 62 were received and considered in connection with the above-captioned matter:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/ Affirmation/Exhibits 1-54 (A-G)	1-56
Memorandum of Law in Support	57
Affirmation in Opposition (Motel in the Sky)	58
Memorandum of Law in Opposition (Plaintiff)	59
Reply Affirmation	60

This action arises from an altercation which occurred on or about October 4, 2007 in the parking lot of defendant Motel in the Sky, Inc ("the Motel") d/b/a Ramada Yonkers. Plaintiff was a guest staying at the Motel and had dined the previous evening with a co-workers, at Totonno's of Yonkers LLC ("Totonno's"), a restaurant located within the Motel. Later that evening, the plaintiff and one of his co-workers sat at the bar of Totonno's for a few hours watching a baseball game. Plaintiff and his co-worker decided to leave because of the alleged behavior of two other patrons in the bar, defendant Duane Somers ("Somers") and Matthew McConaughey ("McConaughey"), both of whom, according to Plaintiff, were intoxicated and acting belligerent.

The plaintiff and his co-worker decided to stop outside for a smoke before retiring to their respective rooms for the night. Somers then followed plaintiff outside and assaulted him, resulting in Somers' criminal conviction for assault in the second degree. A Totonno's employee/manager, Ralph Peluso ("Peluso") responded to the assault scene and summoned the security guard, Patrick Grizzle ("Grizzle") who was employed by Madison Security Group, Inc., ("Madison") to provide security services for the Motel from 11:00 PM to 7:00 AM.

Plaintiff brought this action seeking damages against Somers and against the Motel, its security agent, Madison, the security guard, Grizzle and Totonno's for negligence in failing to maintain adequate security at the Motel against reasonably foreseeable dangers and for serving alcohol to Somers while he was visibly intoxicated. Somers has failed to answer the summons and complaint and plaintiff was granted a default judgment against him, as to liability.

Defendants Grizzle and Madison moved for summary judgment pursuant to CPLR §3212 and to dismiss all cross-claims filed against them. By Decision and Order, dated April 22, 2014, this Court granted that motion.

Totonno's moved for summary judgment pursuant to CPLR §3212, to dismiss the plaintiff's complaint and to dismiss the Motel's cross-claim for contractual indemnification. The Motel moved for summary judgment pursuant to CPLR § 3212 to dismiss the plaintiff's complaint and for contractual indemnification against Totonno's. By Decision and Order, dated April 22, 2014, this Court denied Totonno's motion to dismiss the complaint against the plaintiff and granted the Motel's indemnification claim.

The defendant now moves to reargue. Totonno's motion to reargue claims misapplication by the Court of the appropriate legal standard on defendant's motion for summary judgment and a misapprehension of material facts upon which the Court based its Decision. Specifically, Totonno's motion argues that this Court erred in not granting Totonno's summary judgment motion to dismiss plaintiff's negligence claims and plaintiff's Dram Shop claims and that this Court further erred in granting the Motel's summary judgment cross-claim against Totonno's for contractual indemnification.

It is well settled that "[m]otions for reargument are addressed to the sound discretion of the trial court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or mistakenly arrived at its earlier decision." Viola v. City of New York, 13 A.D.3d 439 (2d Dept.2004); Carrillo v. PM Realty Group., 16 A.D.3d 611 (2d Dept. 2005); McNeil v. Dixon, 9 A.D.3d 481 (2d Dept.2004). A motion to reargue is not to afford an unsuccessful party with additional opportunities to

reargue issues previously decided, or to set forth arguments which differ in substance from those originally articulated. McGill v. Goldman, 261 A.D.2d 593 (2d Dept. 1999); Woody's Lumber Co., Inc. v. Jayram Realty Corp., 30 A.D.3d 590 (2d Dept. 2006); Gellert & Rodner v. Gem Cmty. Mgt., 20 A.D.3d 388 (2d Dept. 2005).

Plaintiff's negligence claims

The plaintiff alleges that Totonno's was negligent on the night of the incident and did not protect the plaintiff from the criminal actions of Somers. Totonno's argues that Somers' assault was spontaneous, extraordinary and unforeseeable and that Totonno's is not liable for such actions. The plaintiff asserts that there were hundreds of prior disturbances upon the Motel's premises that should have alerted the Motel and Totonno's to the probability that the incident would occur. Totonno's disputes this and claims that Yonkers Police Department records showing a history of calls from the Motel shows that there has never been an incident of this nature requiring arrest, at the premises and therefore, it could not have been alerted. Totonno's argues in its motion to reargue, that the plaintiff did not establish any issues of fact as to the foreseeability of the incident.

The history of criminal activities at a particular premise may give rise to an obligation on the part of the owner or manager to take reasonable steps to minimize the foreseeable danger. Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507 (1980). Here, Totonno's argues that the police record of the incident lists an "arrest of a person" and that no other report from the Motel listed any arrest of persons, therefore, none of the prior incidents were as serious in nature. However, this Court is not privy to the police department's record keeping requirements and whether they are required to note that an arrest was made when

called to an incident or when an arrest is required to be made and therefore, the Court cannot use an arrest notation in this incident and not in any other incident, as a barometer of the seriousness of the prior criminal activity at the Motel.

Furthermore, in Totonno's own motion, it states that some of the prior calls were for "fight", "dispute in progress", "has potential for violence", "domestic violence", "harassment/threats", "assault in progress" and "past assault". All of these incidents are of a violent nature and occurred at the Motel prior to the incident with the plaintiff, potentially putting the Motel and Totonno's on notice of the possibility for other violent incidents to occur and for it to take precautions against future incidents. The fact that none of the other incidents may have resulted in an arrest is of no consequence to the issue to be decided. Totonno's and the Motel presented differing histories of prior criminal activity from the plaintiff, and contended that the prior activities were not similar nor as serious in nature, thereby creating material issues of fact.

Totonno's also argues that even if Totonno's was negligent, that the plaintiff's injuries were not the result of any deficiency on Totonno's part, but only the criminal actions of Somers and that no security measures on the part of Totonno's could have prevented the assault. However, viewing the facts in the light most favorable to the plaintiff, Somers' attack on the plaintiff could be seen as a normal or foreseeable consequence of him and his friend drinking alcohol all night and more security in the Motel or Totonno's may have prevented the assault.

Plaintiff's Dram Shop claim

N.Y. Gen. Oblig. Law § 11-101 states in pertinent part that, any person injured by an intoxicated person, has a right of action against the person who unlawfully sells alcohol to or unlawfully assists in procuring alcohol for the intoxicated person. The plaintiff claims that the bartender at Totonno's continued to serve Somers alcohol when he was visibly intoxicated and therefore, violated the law known as the Dram Shop Act. Totonno's in its motion to reargue contends that it established that it did not serve alcohol to Somers while he was visibly intoxicated and that the sale of alcohol had no reasonable or practical connection to the assault upon the plaintiff.

However, the plaintiff testified that he observed the bartender serving Somers numerous drinks, that Somers and McConaughy were getting loud and obnoxious, that he and his co-worker decided to leave the bar to avoid an altercation and that he suggested to the bartender before he left that she should stop serving Somers and McConaughy because they looked intoxicated. This directly contradicts the testimony of Peluso who stated that Somers did not seem intoxicated and therefore creates an issue of fact.

Contractual Indemnification

Totonno's argues that this Court erred in granting the Motel's contractual indemnification claim, since the Second Department has consistently held that "[a] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor."

Mikelatos v. Theofilaktidis 105 A.D.3d 822 (2d Dept. 2013). Such case law stems from N.Y.

Gen. Oblig. Law § 5-322.1, which states in pertinent part that any contract relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances which indemnifies or holds harmless the promisee against liability for bodily injury or damage to property, contributed to, caused by or resulting from the negligence of the promisee is against public policy, void and unenforceable.

However, this action does not involve any construction, alteration, repair or maintenance of a building, structure, appurtenance or appliance. Furthermore, the statute specifically states that it "shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent. Therefore, the Motel's negligence need not be determined prior to granting the motion for contractual indemnification.

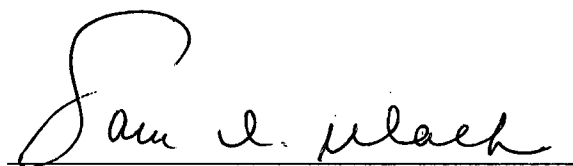
Totonno's further argues that the indemnification clause between itself and the Motel specifically excepts indemnification if negligence is caused by the owner, its agents, employees or servant. However, that exception does not apply to the entire indemnification agreement and is only included in one clause. In fact the following clause, which states that the Motel shall be indemnified for "[a]ny negligent or otherwise wrongful act or omission of Tenant or any of its employees, agents, contractor or guests...." does not include any exception for negligence on the part of the Motel and is applicable in the instant action, where the assault was committed by a guest and an employee of Totonno's is being accused of serving Somers alcohol while he was visibly intoxicated. A party is entitled to full contractual indemnification provided that the intention to indemnify can be

clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances, Drzewinski v. Atlantic Scaffold & Ladder Co., 70 N.Y.2d 774, 777; Watrel & Sons, Inc. V. OC Riverhead 58, LLC, 34 A.D.3d 560, 563. Here, the Court still finds that the intention to indemnify can be clearly implied and denies that portion of Totonno's motion.

Accordingly, defendant's motion to reargue the decision of this Court is hereby DENIED. The parties are directed to appear before the Settlement Conference Part, 914-824-5350 on October 8, 2014 at 9:15am in Courtroom 1600. To the extent any relief requested in Motion Sequence 7 was not addressed by the Court, it is hereby deemed denied. The foregoing constitutes the Opinion, Decision and Order of the Court.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, New York
September 17, 2014


HON. SAM D. WALKER, J.S.C.