

<b>Lombardi v PVF Holding, LLC</b>
2014 NY Slip Op 32880(U)
April 22, 2014
Sup Ct, Westchester County
Docket Number: 53536/2011
Judge: James W. Hubert
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*To commence the statutory time period 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.*

**FILED and ENTERED  
APRIL 22, 2014  
WESTCHESTER COUNTY CLERK**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

P R E S E N T: HON. JAMES W. HUBERT  
ACTING SUPREME COURT JUSTICE

-----X

PETER LOMBARDI,  
Plaintiff,

**DECISION and ORDER**

-against-

Index No. 53536/11  
Motion Date: Sept. 26, 2013

PVF HOLDING, LLC d/b/a O'MALLEY'S BAR and  
RESTAURANT,  
Defendant.

-----X

PVF HOLDING, LLC d/b/a O'MALLEY'S BAR and  
RESTAURANT,  
Defendant/Third-Party Plaintiff,

-against-

STEPHEN DEGROAT, as Public Administrator of the Estate of  
RICHARD SERPICO,  
Third-Party Defendant.

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The following papers were read on this motion brought pursuant to CPLR 3212 by  
defendant PVF Holding, LLC d/b/a O'Malley's Bar and Restaurant seeking an Order granting  
summary judgment dismissing plaintiff's complaint:

Notice of Motion/Attorney Affirmation/Exhibits  
Affirmation in Opposition/Affidavit/Exhibits  
Affirmation in Reply

Upon the foregoing papers, the motion is decided as follows.

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained in a one-vehicle accident on July 16, 2010. The plaintiff was a passenger on a motorcycle owned and operated by the deceased Richard Serpico (“Serpico”). Plaintiff alleges that Serpico was intoxicated, that his condition caused the accident, and that the defendant violated New York General Obligations Law §11-101, the “Dram Shop Act”, by selling alcohol to Serpico while he was visibly intoxicated.

Defendant now moves for summary judgment dismissing this action as a matter of law, asserting that plaintiff knowingly and voluntarily rode as a passenger on the motorcycle with Serpico, while knowing of his intoxication, thus eliminating any duty of care owed by the defendant based on his assumption of the risk of “a known, open and obvious hazard.” Defendant also argues that the evidence “rules out” an illegal sale of alcohol to Serpico by the defendant under the statute in that defendant did not sell alcohol to Serpico while he was visibly intoxicated. In opposition, plaintiff argues that the doctrine of assumption of risk does not apply to Dram Shop actions and that there is direct and circumstantial evidence of a Dram Shop action.

To prevail on a motion for summary judgment, it must be clear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). The proponent has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires that the motion be denied, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then

shifts to the party opposing the motion who must proffer evidence in admissible form and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499 [2d Dept 1989]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the proponent as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

General Obligations Law §11-101 (1) states in pertinent part, that

“any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.”

In order for a court to determine whether there has been an illegal sale of liquor within the meaning of the Dram Shop Act, *NY GOL §11-101*, that act must be read and considered in conjunction with *NY Alco. Bev. Cont. Law §65*. *NY Alco. Bev. Cont. Law §65* provides in pertinent part:

No person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to (1) any person, actually or apparently, under the age of twenty-one years; (2) any visibly intoxicated person; (3) any habitual drunkard known to be such to the person authorized to dispense any alcoholic beverages.

To establish a cause of action under the 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 ( *see Sullivan v Mulinos of Westchester, Inc.*, 73 AD3d 1018 [2d Dept 2010]; 1133 *McArdle v 123 Jackpot, Inc.*, 51 AD3d 743 [2d Dept 2008]; *McNeill v Rugby Joe's*, 298 AD2d 369 [2d Dept 2002]; *Adamy v Ziriakus*, 231 AD2d 80 [4<sup>th</sup> Dept 1997], *affd* 92 NY2d 396[1998].

In order for defendant to establish its entitlement to summary judgment, defendant is required to present evidence excluding the possibility that it served Serpico alcohol when he was visibly intoxicated (*Wasserman v Godoy*, 136 AD2d 631 [2d Dept 1988]); *Marconi v Reilly*, 254 AD2d 463 [2d Dept 1998]; *Hurtado v Williams*, 112 AD3d 1047 [3d Dept 2013].

Contrary to defendant's assertions that the evidence "rules out" that Serpico was visibly intoxicated, the adduced testimony establishes that Serpico was served between 8-10 beers and 1-2 shots of liquor during a two and a half hour period. Plaintiff testified that after 3 or 4 beers, Serpico was loud, his eyes bloodshot, using crazy hand gestures, slapped him and was stumbling. He further testified that when Serpico was ordering drinks, he was stumbling and unsteady. While the bartenders who worked the night at question testified that they did not observe Serpico to be visibly intoxicated, such testimony is contrary to plaintiff's testimony and presents a credibility issue.

Moreover, in a Dram Shop action based on alleged violation of *NY Alco. Bev. Cont. Law* §65, the failure to provide direct proof of visible intoxication is not itself dispositive (*Romano v. Stanley*, 90 NY2d 444 [1997]). As the Court of Appeals has explained:

"The Legislature's use of the term 'visible,' however, does not create a rigid requirement that that essential element of the claim be established by direct proof in the form of testimonial evidence from someone who actually observed the allegedly intoxicated person's demeanor at the time and place that the alcohol was served. To the contrary, as was recognized at the time section 65(2) was amended,

the statutory language “[does] not preclude the introduction of circumstantial evidence to establish the visible intoxication of the customer’ ” (*id.*, at 450, quoting Governor's Approval Mem., 1986 McKinney's Session Laws of N.Y., at 3194).

Here, while defendant has submitted the testimony of the two bartenders that they did not observe Serpico being visibly intoxicated, the circumstantial evidence is contrary to these claims. In opposing this motion, the plaintiff has proffered the affidavit of Elizabeth Spratt, M.S., a forensic toxicologist. She states that Serpico's blood alcohol concentration was .113% at 11:55 p.m., which reading, she opines, is well above the legal limit three to three and one-half hours after Serpico left the bar. She concludes that Serpico would have had a blood alcohol concentration of .143% and would have been exhibiting signs of intoxication when he was at the bar. Standing alone, “an expert's affidavit proffered as the sole evidence to defeat summary judgment must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor” (*id.*, at 451–452). Assuming, arguendo, the Spratt affidavit was not sufficient, unlike in *Romano*, here, plaintiff has also introduced the testimony of the plaintiff and the undisputed testimony that Serpico drank numerous alcoholic drinks at defendant's establishment during a short time period (*see Adamy v Ziriakus*, 92 NY2d 396 [1988]; *Sullivan v Mulinos of Westchester, Inc.*, 73 AD3d 1018 [2d Dept 2010]). Since defendant has not provided evidence excluding the possibility that it served alcohol to Serpico when he was visibly intoxicated, it has not met its burden to demonstrate its entitlement to summary judgment (*Wasserman v Godoy*, 136 AD2d 631 [2d Dept 1988]); *Marconi v Reilly*, 254 AD2d 463 [2d Dept 1998]; *Hurtado v Williams*, 112 AD3d 1047 [3d Dept 2013]).

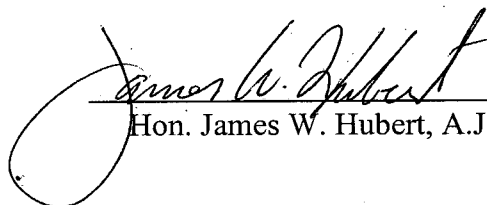
Further, defendant's argument that plaintiff's claims are barred on a theory that plaintiff assumed the risk of "a known, open and obvious hazard" is without merit. The statute creates a cause of action sounding in strict liability and defendant's argument is not supported by any of the cases upon which it relies. Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied in its entirety; and it is further

ORDERED that the parties appear for a settlement conference in the Settlement Conference Part, Room 1600, at 9:30 a.m. on May 8, 2014.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
April 22, 2014

  
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Hon. James W. Hubert, A.J.S.C.

TO:

Cerussi & Gunn, PC  
Attorneys for Plaintiff  
1325 Franklin Avenue  
Suite 225  
Garden City, NY 11530  
by NYSCEF

Lewis, Brisbois, Bisgaard & Smith, LLP  
Attorneys for Defendant  
77 Water Street, 21<sup>st</sup> Floor  
New York, NY 10005  
by NYSCEF