Cowan v Creole Restaurant
2016 NY Slip Op 30983(U)
May 26, 2016
Supreme Court, New York County
Docket Number: 150731/2013
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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JAQUAN COWAN,

Plaintiff,

- against-

CREOLE RESTAURANT (a/k/a LA PACHANGA INC.), KEVIN WALTERS, AKARI EQUITIES, LLC., and JOHN DOES 1-10,

Defendants.

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Index No. 150731/2013
Motion Seq: 005

DECISION/ORDER

ARLENE P. BLUTH, JSC

The motion for summary judgment by defendants Creole Restaurant, Kevin Walters and Akari Equities, LLC is granted and all claims against these defendants are dismissed.

The instant action arises out of alleged shooting that occurred on April 30, 2011 at Creole Restaurant (Creole), an establishment owned and operated by defendants, located at 2167 Third Avenue, New York, NY.

Plaintiff claims that he went to Creole during the evening of April 30, 2011 to celebrate a friend's birthday. Plaintiff alleges that there were two security guards outside Creole, and that one security guard cursorily patted down plaintiff and his friends. Plaintiff further claims that he witnessed the security guards fail to pat down other patrons.

Plaintiff claims that the restaurant was filled with guests and that there was an altercation in the VIP area between four or five females and security guards. At some point during this altercation, plaintiff claims that he heard a gunshot. Plaintiff and his friends ran outside. Plaintiff

claims that it was at this point when he realized that he had been shot in the legs. Plaintiff asserts that he had bullet wounds in each leg.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"A party appearing in opposition to a motion for summary judgment must lay bare his proof and present evidentiary facts sufficient to raise a genuine triable issue of fact. Mere conclusory assertions, devoid of evidentiary facts are insufficient for this purpose, as is reliance

upon surmise, conjecture or speculation" (*Smith v Johnson Products Co.*, 95 AD2d 675, 676, 463 NYS2d 464 [1st Dept 1983]).

Foreseeability

"A landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Bass v Miller*, 40 NY2d 233, 241, 386 NYS2d 564 [1976] [internal quotations and citation omitted]). "A landowner has a legal duty to take minimal precautions to protect members of the public from reasonably foreseeable criminal acts by third parties" (*Evans v 141 Condominium Corp.*, 258 AD2d 293, 295, 685 NYS2d 191 [1st Dept 1999]).

Foreseeability means "past experience that there is a likelihood of conduct on the part of third persons which is likely to endanger the safety of the visitor" (*Jacqueline S. by Ludovina S. v City of New York*, 81 NY2d 288, 294, 598 NYS2d 160 [1993] [internal quotations and citation omitted]). "There is no requirement . . . that the past experience relied on to establish foreseeability be of a criminal activity at the exact location where plaintiff was harmed or that it be of the same type of criminal conduct to which plaintiff was subjected" (*id.*). Instead, foreseeability "must depend on the location, nature and extent of those previous criminal activities and their similarity, proximity or other relationship to the crime in question" (*id.* at 295).

Defendants move for summary judgment on the ground that the shooting was unforeseeable. Defendants argue that although a commercial establishment has a duty to protect patrons from reasonably foreseeable harm, the shooting was not foreseeable. Defendants claim

that prior police reports at the restaurant were limited to a single simple assault, which occurred three years before the alleged incident. Defendants further claim that they had no duty to take additional security measures to protect plaintiff because there was no evidence of any risk of harm to plaintiff on the night of the alleged incident. Defendants conclude that because there were no prior shootings in its establishment, the instant shooting was unforeseeable.

Defendants have met a prima face showing for summary judgment. The burden now shifts to the plaintiff to raise triable issues of fact.

In opposition, plaintiff argues that the New York Police Department (NYPD) responded to Creole on many prior occasions for various incidents involving violence. Plaintiff argues that in October 2007, a male customer got into a fight with a female customer; in October 2008, a male threatened his girlfriend and threw bottles in her direction; in May 2008, a female customer suffered a broken nose during an altercation with two other customers; in March 2009, an employee stole $1,500 from the restaurant after a verbal dispute; and in June 2009 a former employee swept about 20 wine bottles off of the bar.

Plaintiff also offers the affidavit of Ben Wade, who visited Creole in the winter of 2008. Mr. Wade claims that during his visit, Mr. Wade's cousin got into an altercation with another customer. During the disagreement, Mr. Wade claims that he was hit in the back of his head. Mr. Wade further claims that he was cut with some type of sharp object on the top of his head and that he received medical treatment at Metropolitan Hospital. Mr. Wade acknowledges that he did not contact the NYPD or the restaurant about the incident.

Plaintiff further alleges that he was aware of a shooting that took place outside of the restaurant.

Plaintiff has failed to raise a triable issue of fact regarding foreseeability.

Plaintiff cites to three prior incidents involving patrons (the other two involved current or former employees) that are substantially dissimilar and bear no relationship to the instant shooting. First, these disagreements occurred several years prior to the alleged incident involving plaintiff. The most recent incident involving a patron occurred in October 2008, more than two and half years before the shooting.

Second, none of the prior incidents involved a weapon. Although some events included physical altercations, others included *only* verbal arguments. It is unclear how a male patron allegedly threatening his girlfriend or how an employee allegedly stealing $1,500 makes a shooting foreseeable. Plaintiff attempts to link all of the incidents cited, including the shooting, by arguing that they all involved violence. However, if violence constitutes a similarity sufficient to deny summary judgment, then countless incidents would be foreseeable and the foreseeability standard would be vitiated.

The affidavit of Mr. Wade fails to raise an issue of fact because he acknowledges that he did not inform the restaurant or the NYPD of the alleged incident where he was injured. Mr. Wade's affidavit also fails to provide an exact date when this alleged incident occurred or attach any documents that indicate that he received medical attention. Further, the alleged incident involving Mr. Wade did not involve a shooting and it occurred in 2008.

Further, plaintiff's claim that there was a shooting in the area near the restaurant fails because plaintiff failed to identify when the shooting occurred, plaintiff admits that he did not personally witness the alleged shooting, and he claimed that the shooting he "heard about" did not occur inside the restaurant (*see* Cowan tr at 78-79). This vague and unsubstantiated claim

fails to make the alleged incident foreseeable.

Security Measures

Plaintiff also claims that the very existence of a security policy involving searching patrons and for dealing with disputes creates an issue of fact regarding whether the incident was foreseeable. Plaintiff relies on *Haber v Precision Sec. Agency* (24 Misc3d 1229[a], 2009 NY Slip Op 51667[U] [Sup Ct, Kings County 2009]) in support of the proposition that the presence of a policy to intervene with rowdy patrons indicates that there is an issue of fact. Plaintiff claims that because there was a policy at Creole to pat down *and* wand down patrons, and because plaintiff was patted down *but not* wanded down on the night of the incident, a jury must consider the issue of foreseeability. Plaintiff further argues that the reasonableness of the security measures creates an additional issue of fact requiring the Court to deny defendants' summary judgment motion. Plaintiff also claims that defendants could have prevented the shooting by acting more expeditiously once the alleged initial physical altercation began.

In reply, defendants argue that the security measures they employed were reasonable. Defendants claim that security personnel were present at the scene of the initial disturbance between female patrons and that there was no indication that the this altercation would escalate to one involving a firearm.

Plaintiff's argument regarding security measures fails. First, *Haber* is distinguishable because the plaintiff in *Haber* was injured when the defendants' security guards allegedly failed to intervene during a physical altercation whereas the plaintiff in the instant action was injured in a shooting.

Second, if the Court were to embrace plaintiff's argument, it would create an impossible

situation for the instant defendants and similarly-situated restaurant/nightclub owners. Plaintiff's claim is that "the very existence of a security policy at the club with respect to searching patrons and dealing with disputes is sufficient to create a material issue of fact with respect to foreseeability" (plaintiff's memorandum of law in opposition at 10). If implemented, this rule would present defendants with a stark choice. Defendants could utilize security measures, including searching patrons who enter the establishment, and potentially incur liability for a broad array of incidents regardless of whether similar incidents had occurred previously. Or, defendants could refuse to institute any security measures in order to preserve a claim that any incident is unforeseeable. To deny summary judgment under these circumstances would encourage venues to avoid implementing reasonable security provisions.

Accordingly, it is hereby

ORDERED that the motion by defendants seeking summary judgment dismissing plaintiff's complaint is granted and all claims against these defendants are dismissed; and it is further

ORDERED that because a note of issue has already been filed and no John Does have been identified, the entire case is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: May 26, 2016
New York, New York

HON. ARLENE P. BLUTH, JSC