

Perez v U & S Amusements Corp.
2016 NY Slip Op 31904(U)
October 12, 2016
Supreme Court, New York County
Docket Number: 152355/13
Judge: Leticia M. Ramirez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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DAMIEN PEREZ,

Plaintiff(s),

-against-

U & S AMUSEMENTS CORPORATION, NEW
ESCUELITA, RAYVON S. JONES, ZIPCAR NEW
YORK INC. and ZIPCAR, INC. and JOHN DOES 1-10
(said names being fictitious and unknown),

Defendant(s).
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Mot. Seq: 03

DECISION/ORDER
HON. LETICIA M. RAMIREZ

Defendants U & S Amusements Corporation and New Escuelita's motion, pursuant to CPLR §3212, for summary judgment on the issue of liability is denied.

It is well settled that summary judgment is a drastic remedy and cannot be granted where there is any doubt as to the existence of triable issues of fact or if there is even arguably such an issue. *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974); *Zuckerman v City of New York*, 49 N.Y.2d 557 (1980); *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985). The function of a court in deciding a summary judgment motion is to determine whether any issues of fact exist which preclude summary resolution of the dispute between the parties on the merits. *Winegrad v New York Univ. Med. Ctr.*, *supra.*; *Menzel v. Plotnick*, 202 A.D.2d 558, 610 N.Y.S.2d 50 (2nd Dept. 1994). A movant's failure to submit sufficient evidence to eliminate any material issues of fact mandates denial of the motion, regardless of the sufficiency of opposing papers. *Winegrad v New York Univ. Med. Ctr.*, *supra.* Furthermore, in deciding summary judgment motions, the Court must accept, as true, the non-moving party's recounting of the facts and must draw all reasonable inferences in favor of the non-moving party. *Assaf v Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dept. 1989); *Menzel v. Plotnick*, *supra.*

To prevail on a summary judgment motion on the issue of liability, the movant has the burden of establishing, with admissible evidence, that the movant is free from any comparative negligence, as a matter of law. *Thoma v Ronai*, 82 N.Y.2d 736 (1993); *Maniscalco v New York City Transit Auth.*, 95 A.D.3d 510 (1st Dept. 2012); *Villa v Leandrou*, 94 A.D.3d 980 (2nd Dept. 2012). Credibility determinations must be resolved by the trier of fact. *Assaf v Ropog Cab Corp.*,

153 A.D.2d 520 (1st Dept. 1989). In addition, evidence demonstrating alternate theories of the cause of the accident raise material issues of fact that must be determined at trial. *Mitchell v The Maguire Co., Inc.*, 151 A.D.2d 355 (1st Dept. 1989).

Plaintiff's claims against the defendants in this action are based upon the Dram Shop Act, common law negligence and negligent hiring, training and supervision. As defendants did not set forth any arguments as to why the plaintiff's negligent hiring, training and supervision claim should be dismissed, that portion of defendants' motion seeking dismissal of said claim is denied.

The Dram Shop Act, which is codified in *General Obligations Law §11-100*, *General Obligations Law §11-100 and Alcoholic Beverage Control Law §65*, imposes a statutory duty on the seller of alcohol to protect a plaintiff from the conduct of others. More specifically, the Dram Shop Act states that

“[a]ny 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 a right of action against any person who shall, by unlawfully selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication...” *General*

Obligations Law §11-101(1).

An essential element of an action where the Dram Shop Act is at issue is whether the defendant sold alcohol to a visibly intoxicated person. *Alcoholic Beverage Control Law §65(2)*. See also, *Leconte v LVMH Moet Hennessy Louis Vuitton, Inc.*, 2009 Slip Op 31166U (Sup Ct. NY 2009).

At common law, a property owner or one in control or possession of real property “has a duty to act in a reasonable manner to prevent harm to those on their property.” *D'Amico v Christie*, 71 N.Y.2d 76, 85 (1987). As the Court stated in *D'Amico v Christie*,

“[i]n particular, they have 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. Applying this rationale, lower courts have recognized that a landowner may have responsibility for injuries caused by an intoxicated guest. Significantly, however, these decisions have uniformly acknowledged that liability may be imposed only for injuries that occurred on defendant's property, or in an area under defendant's control, where defendant had the opportunity to supervise the intoxicated guest. That duty emanated not from the provision of alcohol but from the obligation of a landowner to keep its premises

free from known dangerous conditions, which may include intoxicated guests. *D'Amico v Christie*, 71 N.Y.2d 76, 85 (1987).

However, it is well settled that a plaintiff cannot maintain a cause of action under the Dram Shop Act or under the common law, if his injuries resulted from his own voluntary intoxication. *Sheehy v Big Flats Community Day, Inc.*, 73 N.Y.2d 629 (1989).

According to the plaintiff in this action, the subject occurrence took place as the defendants' club was closing at approximately 4:30 a.m. on February 3, 2012. Plaintiff, who was a DJ at the club, was standing in front of the club waiting for a friend. Defendant Jones, a club patron who was drinking alcohol in the club prior to the subject occurrence, became involved in an incident with several people as he was leaving the club. Thereupon, defendant Jones entered his rented vehicle and struck several people and vehicles. Plaintiff tried to remove the keys from the ignition of defendant Jones' vehicle, but defendant Jones continued to operate the vehicle as plaintiff did so, resulting in plaintiff's claimed injuries.

Defendants allege that the subject occurrence took place 45 minutes after the club closed at 4 a.m. on February 4, 2012¹. Plaintiff, who was "nearby," saw defendant Jones "driving a vehicle and involved in a commotion with some of the security from the club." Plaintiff attempted to intervene by entering defendant Jones' vehicle and attempting to "wrest control" of the vehicle from defendant Jones, who drove off with the plaintiff hanging out of the car. Defendants claim that both plaintiff and defendant Jones had blood/alcohol levels in excess of .01 at the time of the subject occurrence.

In light of the foregoing, this Court finds that there remains triable issues of fact as to (1) whether defendant Jones was visibly intoxicated when he was sold alcohol at the defendants' club; (2) whether the subject occurrence began inside the club as the club was closing and continued outside of the club or whether the subject occurrence occurred 45 minutes after the club had closed; (3) whether the plaintiff's injuries resulted from his own voluntary intoxication; and (4) whether plaintiff otherwise caused his own injuries, which precludes the grant of summary judgment in favor of the moving defendants. *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974);

¹The relevant police Complaint Follow-Up Informational Report notes that the subject occurrence took place on February 3, 2012.

Thoma v Ronai, supra.; Maniscalco v New York City Transit Auth., supra.; Villa v Leandrou, supra.; Assaf v Ropog Cab Corp., supra.

Accordingly, defendants U & S Amusements Corporation and New Escuelita's summary judgment motion is denied, in its entirety.

Plaintiff's time to file the Note of Issue in this matter is extended until October 31, 2016.

Plaintiff is directed to serve a copy of this Decision, with Notice of Entry, upon all parties within 20 days of this Decision.

This constitutes the Decision/Order of the Court.

Dated: October 12, 2016
New York, New York


HON. LETICIA M. RAMIREZ, J.S.C.