

Quinn v Irish Times Pub
2016 NY Slip Op 32403(U)
October 25, 2016
Supreme Court, Suffolk County
Docket Number: 12-33654
Judge: Peter H. Mayer
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SHORT FORM ORDER

INDEX No. 12-33654
CAL. No. 15-02020OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4-8-16
ADJ. DATE 6-10-16
Mot. Seq. # 001 - MD

-----X

ANTHONY QUINN,

Plaintiff,

- against -

THE IRISH TIMES PUB, "JOHN DOE"
SECURITY (a fictitious unknown name) and
"JOHN DOE" (a fictitious unknown name),

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion for summary judgment by the defendant The Irish Times Pub, dated March 8, 2016, and supporting papers (including Memorandum of Law dated ___); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiff Anthony Quinn, dated May 25, 2016, and supporting papers; (4) Reply Affirmation by the defendant The Irish Times Pub, dated June 8, 2016 and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED the motion of defendant The Irish Times Pub for summary judgment dismissing the complaint against it is denied.

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained as a result of an assault that occurred at the premises known as The Irish Times Pub located at 975 Main Street in Holbrook, New York. The complaint alleges that on January 22, 2012, plaintiff, a patron at the establishment, was struck in the face by two security guards and knocked to the ground. Plaintiff alleges

that defendant was negligent in hiring and supervising its security personnel, and that it is liable for the conduct of its security personnel under the theory of respondeat superior.

Defendant The Irish Times Pub (hereinafter The Pub) now moves for summary judgment dismissing the complaint on the ground that its employees were not the cause of plaintiff's injuries and that plaintiff cannot identify the cause of his injuries. Defendant further argues it cannot be liable under the doctrine of respondeat superior, as the alleged conduct of the security guards was not within the scope of their employment. Further, defendant argues that it is not liable for negligent supervision or hiring of the security personnel, as it had no knowledge of any prior similar acts committed by its security guards. In support of the motion, defendant submits copies of the pleadings, the bill of particulars, the transcripts of the parties' deposition testimony, and the affidavit of John Murphy.

Plaintiff testified that he arrived at The Pub at approximately 8:00 p.m. on January 22, 2012, and that he was accompanied by Jennifer Zichettella. He testified that he drank a Long Island Ice Tea and drank shots of tequila. Plaintiff testified that he and Jennifer were standing outside on the patio, and that Jennifer and a female acquaintance got into an argument. He testified that two bouncers approached them and asked him and Jennifer to leave the establishment, to which they refused. He testified that the bouncers grabbed his elbows and walked him to an alleyway at the rear of the patio, and that another bouncer picked up Jennifer and escorted her out the front door. He testified that he had words with the bouncers, but he does not remember what occurred until he was awoken by Jennifer. Plaintiff testified that he was laying on the ground bleeding, and that he observed one of the bouncers walking away from him and another bouncer looking down on him. He testified that he and Jennifer went into his vehicle and phoned the police, and that the police officer arrived and prepared a police report.

Jennifer Zichetella testified that she accompanied plaintiff to The Pub on the evening of the incident, and that he had been intoxicated. She testified that while she and plaintiff were at the outside bar, an acquaintance of hers made a negative comment about plaintiff, and that he responded in kind. She testified that two bouncers took plaintiff outside into the alleyway, and that she tried to follow them, but another bouncer "scooped her up" and carried her out the front door. She testified that she walked to the alleyway where she observed plaintiff from approximately 12 feet away laying on the ground with two bouncers hovering over him. She testified that the bouncers walked away as she got closer, and that she observed plaintiff laying on the ground with his face covered with blood. She testified that she helped him up and walked him to the car, and that they called the police.

At his deposition, John Murphy testified that he is the owner of The Pub which is located at 975 Main Street, Holbrook, New York. He testified that The Pub has a front entrance and a rear entrance, and that it has a bar inside of the premises and has a patio bar at the rear of the premises. Murphy testified that an alley that runs parallel to the patio bar, but is not part of the patio. He testified that on the weekend that the incident occurred, the main bar was the only bar that was open and that four bartenders and four security guards were working. Murphy testified that the security guards wear a uniform which consists of black pants and a black T-shirt with the word security printed in bold-white letters. He testified that two security guards were stationed at the front door to the premises and two were assigned to the rear patio doors. He testified that he did not maintain a policy of limiting drinks nor

did he instruct the bartenders how to determine if someone was intoxicated; rather, he left it up to the bartenders' judgment. Murphy testified that he did not maintain any written rules or regulations for security personnel, but that he verbally instructed them to separate patrons and escort them off the premises at different times in the event of an incident. He testified that he was working on the night of the incident, but that he was not aware that it occurred until the following day when a bartender, Ronan McAdaim, informed him of it. In his affidavit, Murphy avers that he is not aware of any similar incidents occurring at The Pub prior to January 2012, and avers that he did not receive any complaints from any patrons regarding the conduct of any of the security guards at The Pub.

Matthew Reece testified that he was working at The Pub as a security guard on the date of the incident. He testified that he is certified with the State of New York as a security guard/bouncer and that he participated in a 16-hour course to become certified. He testified that 8 of the 16 hours of instruction entailed on the job training, and that he trained with Robert Schumman who is the head of security at The Pub. He testified that Schumman instructed him on how to break up a fight, among other things. Reece testified that on the evening of January 22, 2012, his security duty was "roving" and that between 12:00 a.m. and 1:00 a.m., Benjamin Bellafiore (hereinafter Ben), another security guard/bouncer at The Pub, asked him to "keep an eye" on a group of four people who were on the patio, as he was concerned about the behavior of one of the males. He testified that he observed plaintiff, the subject male, slap one of the females across the face, and that he and Ben approached the group and warned plaintiff not to do it again. Reece testified that he and Ben continued to observe the group and observed the plaintiff slap the female again. He testified that he unlatched the back doors and Ben escorted plaintiff off of the premises. Reece testified that plaintiff's girlfriend, Jennifer Zichetella, followed plaintiff outside, and that he informed the security guard stationed at the front door of the incident.

Ronan MacAdaim testified that he is employed as a bartender at The Pub, and that he was working on the date of the incident. He testified that plaintiff and his girlfriend ordered drinks from him and gave him a credit to "run a tab." Ronan testified that a patron informed him that plaintiff was kicked off of the premises so he went outside to look for him. He testified that he observed plaintiff standing in the alleyway with his girlfriend, and that he observed a bruise and blood on plaintiff's eye. Ronan testified that he offered plaintiff an ice pack, and that plaintiff's girlfriend paid part of the bar bill with cash.

Benjamin Bellafiore testified that has worked at The Pub for 12 years as a bouncer/security guard, and that he had prior work experience with other similar establishments. He testified that he obtained a license to become a security guard when the New York State Law went into effect, and that he participated in a 16-hour, on-the-job training course at The Pub that was taught by a private company. Mr. Bellafiore testified that he does not know Anthony Quinn, does not recall the subject incident, and that he does not recall escorting anybody off of the subject premises in January 2012.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party

to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*Russo v Frankels Garden City Realty Co.*, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; *Ellers v Horwitz Family Ltd. Partnership*, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). Owners and occupants of stores, office buildings, and other places onto which members of the general public are invited have a nondelegable duty to provide the public with reasonably safe premises (*Blatt v L'Pogee, Inc.*, 112 AD3d 869, 978 NYS2d 291 [2d Dept 2013]; *Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.*, 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]).

The duty of care owed by proprietors of establishments is to use reasonable care under the circumstances, and the proprietor may be held liable for injuries caused by the conduct of third persons when the establishment has the opportunity to control such conduct and is aware of the need to do so (*Kranenberg v TKRS Pub, Inc.*, 99 AD3d 767, 952 NYS2d 215 [2d Dept 2012]). The burden is on the proprietor to demonstrate that the conduct that caused the plaintiff's injuries could not have been anticipated and prevented (*see Cole v JW's Pub*, 133 AD3d 815, 19 NYS3d 434 [2d Dept 2015]). Where the plaintiff alleges that his or her injuries were caused by an employee of the defendant, liability may be imposed under the doctrine of respondeat superior if the employee was acting within the scope of the employment at the time of the commission of the tort (*Rodriguez v Judge*, 132 AD3d 966, 18 NYS3d 692 [2d Dept 2015]; *Fernandez v Rustic Inn, Inc.*, 60 AD3d 893, 876 NYS2d 99 [2d Dept 2009]). If the tortious conduct is generally foreseeable and a natural incident of the employment, liability may be imposed (*Brandford v Singh*, 136 AD3d 726, 25 NYS3d 268 [2d Dept 2016]). Such determination is generally a question for the jury (*Riviello v Waldron*, 47 NY2d 297, 418 NYS2d 300 [1979]).

Defendant argues plaintiff's inability to identify the cause of his injuries is fatal to the cause of action because a finding that its negligence proximately caused plaintiff's injuries would be based on speculation (*Richichi v CVS Pharmacy*, 127 AD3d 951, 7 NYS3d 398 [2d Dept 2015]; *West v 1718 Pitkin Ave. Realty, LLC*, 123 AD3d 1020, 999 NYS2d 842 [2d Dept 2014]). However, in the context of premises security cases, a plaintiff's inability to identify his or her assailant does not destroy his or her cause of action (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 684 NYS2d 139 [1998]). Given the deposition testimony of the parties, a logical inference may be drawn to permit a finding of

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proximate cause based on more than speculation alone (*Grizzell v JQ Assoc., LLC*, 110 AD3d 762, 973 NYS 2d 268 [2d Dept 2013]). Here, defendant's negligence may be established through the circumstantial evidence presented by defendant's submissions (*Seelinger v Town of Middletown*, 79 AD3d 1227, 913 NYS2d 376 [3d Dept 2010]). Such circumstantial evidence creates material issues of fact which were required to be eliminated by defendant to obtain the requested relief (see *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS 2d 316. A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn, or where there are issues of credibility (*Ruiz v Griffin*, 71 AD3d 1112, 898 NYS2d 590 [2d Dept 2010]). Having failed to establish, prima facie, that it did not breach its duty of care owed to plaintiff, defendant's motion for summary judgment in its favor is denied.

Dated: October 25, 2016



PETER H. MAYER, J.S.C.