Ciambra v Perry
2016 NY Slip Op 32538(U)
October 7, 2016
Supreme Court, Suffolk County
Docket Number: 12-19554
Judge: W. Gerard Asher

SHORT FORM ORDER

INDEX No. 12-19554
CAL. No. 15-01112OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 11-17-15
ADJ. DATE 2-9-16
Mot. Seq. #006 - MG

JOHN CIAMBRA,

Plaintiff,

- against -

EUGENE PERRY, KATHRYN PERRY, JONATHAN BARNETT, JOSEPH R. CRAIG and MICHAEL AROWANA,

Defendants.

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Upon the following papers numbered 1 to 29 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 19 - 21; 22 - 25; 26 - 27 ; Replying Affidavits and supporting papers 28 - 29 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Eugene Perry and Kathryn Perry for an order granting summary judgment in their favor dismissing the complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff John Ciambra as a result of an incident on July 3, 2011 at the residence of defendants Eugene Perry and Kathryn Perry, which is located at 67 Smith Road, Shirley, New York. Plaintiff allegedly was injured when co-defendants Jonathan Barnett, Joseph Craig, and Michael Aruanna, incorrectly sued herein as Michael Arowana, attempted to throw him into an above-ground swimming pool. Plaintiff alleges that defendants Eugene Perry and Kathryn Perry provided alcohol to defendants Craig, Barnett, and Aruanna when they were visibly intoxicated in violation of General Obligations Law §§ 11-100 and 11-101, and were negligent "in failing to properly regulate the guests."

According to the deposition testimony, on the evening of July 3, 2011, plaintiff was co-hosting a backyard barbecue with Eugene Perry and Kathryn Perry in celebration of the Fourth of July at the Perry residence where he had been living for six months due to being separated from his wife. Plaintiff testified that he was cooking at the grill as he had been doing most of the day when defendant Craig called him over to the grass-covered area by the Perrys' above-ground swimming pool. He testified that Craig then grabbed him and restrained him in a "full Nelson" so plaintiff could not escape the contact. Defendant Aruanna approached plaintiff and Craig, grabbed plaintiff's legs around the shins, and attempted to lift him up. Plaintiff testified that defendant Barnett then ran into his knee with his shoulder while defendants Craig and Aruanna were simultaneously holding him and trying to lift him up.

The Perry defendants now move for summary judgment dismissing the complaint and all cross claims against them, arguing, among other things, that no minors were served alcohol in violation of General Obligations Law § 11-100, and that no alcohol was unlawfully sold, provided, or served on their property in violation of General Obligations Law § 11-101. In support of their motion, defendant homeowners submit a copy of the pleadings, a copy of the deposition transcripts of plaintiff and Eugene Perry, and an affidavit of Eugene Perry. Plaintiff opposes the motion, arguing that the Perry defendants failed to eliminate triable issues of fact as to whether they properly supervised the guests at the party and whether they served alcohol to intoxicated guests. In opposition, plaintiff submits his attorney's affirmation and his own affidavit. Defendant Barnett opposes the motion and submits his deposition transcript and the deposition transcript of defendant Aruanna. Defendant Aruanna also opposes the motion and submits his attorney's affirmation joining in the arguments made by plaintiff and Barnett. In reply, defendant homeowners submit their attorney's affirmation.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function on a motion for summary judgment is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, so 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 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

General Obligations Law § 11-100, commonly known as the "social host law," imposes liability upon persons who unlawfully furnish alcoholic beverages to intoxicated individuals who have not reached the legal drinking age and cause injuries as a result of their intoxication (*see* ***Rust v Reyer***, 91 NY2d 355, 670 NYS2d 822 [1998]). To establish liability under the social host law, a plaintiff must demonstrate that he was injured as a result of the intoxication or impairment of another individual under twenty-one years of age, and that the defendant knowingly caused such intoxication or impairment by unlawfully furnishing or unlawfully assisting in procuring alcoholic beverages for such person even though the defendant knew or had reasonable cause to believe that such person was under the age of twenty-one years (*see* General Obligations Law § 11–100 [1]; ***Holiday v Poffenbarger***, 110 AD3d 841, 973 NYS2d 276 [2d Dept 2013]; ***Sherman v Robinson***, 80 NY2d 483, 591 NYS2d 974 [1992]; ***Smith v Taylor***, 304 AD2d 902, 757 NYS2d 617 [3d Dept 2003]).

The Perry defendants made a prima facie case of entitlement to summary judgment in their favor dismissing the cause of action alleging a violation of General Obligations Law § 11-100 (*see* ***Holiday v Poffenbarger***, *supra*; ***Sherman v Robinson***, *supra*). Here, plaintiff's own testimony demonstrates that defendants Barnett, Craig, and Aruanna were all over the age of twenty-one at the time of the incident (*see* General Obligations Law § 11-100; ***Sherman v Robinson***, *supra*). The burden now shifts to the opposing party to submit admissible evidence that raises a triable issue of fact (*see* ***Zuckerman v City of New York***, *supra*). In opposition, neither plaintiff nor defendants Barnett and Aruanna offer any evidence to show or prove that the Perry defendants supplied alcohol to minors or that plaintiff was injured by an intoxicated minor (*see* ***Smith v Taylor***, *supra*).

General Obligations Law § 11-101, the "Dram Shop Act," provides in pertinent part that

> [a]ny person who shall be injured in person ... 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 unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication.

For liability to attach under the Dram Shop Act, an unlawful sale of alcoholic beverages is required (***D'Amico v Christie***, 71 NY2d 76, 524 NYS2d 1 [1987]; ***Conigliaro v Franco***, 122 AD2d 15, 504 NYS2d 186 [2d Dept 1986]). The unlawful sale of alcohol is defined to include "giv[ing] away" alcohol to any person visibly intoxicated (Alcoholic Beverage Control Law § 65 [2]; *see* ***Morris v Bianna, Inc.***, 69 AD3d 910, 894 NYS2d 84 [2d Dept 2010]; ***Sherman v Robinson***, *supra*). To establish a cause of action under the Dram Shop Act, plaintiff must prove (1) that the defendant sold alcohol to a person who was visibly intoxicated, and (2) that the sale of that alcohol bore some reasonable or practical connection to the resulting damages (*see* ***Pinilla v City of New York***, 136 AD3d 774, 24 NYS3d 710 [2d Dept 2016]; ***Dugan v Olson***, 74 AD3d 1131, 906 NYS2d 277 [2d Dept 2010]). To establish prima facie entitlement to summary judgment dismissing a Dram Shop Act cause of action, a defendant must prove

either that he did not serve alcohol to the visibly intoxicated wrongdoer, or that the sale of alcohol to the wrongdoer had no reasonable or practical connection to the incident (***Covert v Wisla Corp.***, 130 AD3d 966, 14 NYS3d 455 [2d Dept 2015]; ***Dugan v Olson***, *supra*).

The Perry defendants made a prima facie case of entitlement to summary judgment in their favor on the claim that they violated General Obligations Law § 11-101 (*see* ***Covert v Wisla Corp.***, *supra*; ***Dugan v Olson***, *supra*). Here, movants submitted Eugene Perry's testimony and affidavit that there was no sale of alcohol at the party as no fee to attend the party was collected and that guests brought their own alcohol and served themselves. Also provided by the Perry defendants is plaintiff's testimony that he did not see Eugene Perry or Kathryn Perry provide beer. Plaintiff further testified that Eugene Perry provided Jack Daniels whiskey and another alcohol in a dark bottle that the Perry defendants typically stored on a sill along the basement stairs. However, such testimony does not preclude a grant of summary judgment because even if the Perry defendants "unlawfully sold" alcohol by giving it to his guests, plaintiff testified that he was unaware if co-defendants were visibly intoxicated and that he only saw Craign, Barnett, and Aruanna drink beer (*see* Alcoholic Beverage Control Law § 65 [2]; ***Pinilla v City of New York***, *supra*; ***Dugan v Olson***, *supra*).

Plaintiff and the nonmoving defendants have failed to raise a triable issue of fact as to whether the Perry defendants violated General Obligations Law § 11-101, as their submissions fail to show that the Perry defendants "unlawfully sold" them alcohol by providing liquor to them while they were visibly intoxicated. Affidavits presented in opposition to summary judgment may establish a triable issue of fact, unless they are tailored to raise "a feigned factual issue designed to avoid the consequences of the plaintiff's earlier admissions" (***Israel v Fairharbor Owners, Inc.***, 20 AD3d 392, 798 NYS2d 139 [2d Dept 2005]; *see* ***Ackerman v Iskhakov***, 139 AD3d 987, 30 NYS3d 850 [2d Dept 2016]; ***Blochl v RT Long Is. Franchise, LLC***, 70 AD3d 993, 895 NYS2d 511 [2d Dept 2010]; ***Knox v United Christian Church of God, Inc.***, 65 AD3d 1017, 884 NYS2d 866 [2d Dept 2009]). In opposition, plaintiff submits his affidavit stating that the liquor supplied by Eugene Perry "was the obvious fuel that drove the 'horseplay'" which led to his injury, therefore suggesting that co-defendants Craig, Barnett, and Aruanna drank the alcohol provided by Eugene Perry and became intoxicated. However, plaintiff's affidavit is inconsistent with his deposition testimony, as he previously testified that Craig, Barnett, and Aruanna drank only beer and that the Perry defendants did not provide beer. Therefore, plaintiff's affidavit merely raises feigned issues of fact unsupported by plaintiff's own description of the surrounding circumstances, and has failed to raise a triable issue of fact sufficient to defeat summary judgment (*see* ***Denicola v Costello***, 44 AD3d 990, 844 NYS2d 438 [2d Dept 2007]; ***Tejada v Jonas***, 17 AD3d 448, 792 NYS2d 605 [2d Dept 2005]; ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]). Also in opposition, defendant Barnett, as joined by co-defendant Aruanna, submits his and Aruanna's testimony that the Perry defendants did not provide alcohol, that they each drank beer, and that Aruanna also drank the Jägermeister that he brought. Such testimony fails to raise a triable issue of fact as to whether the Perry defendants provided them alcohol while they were visibly intoxicated.

In general, landowners have a duty to act in a reasonable manner to prevent harm to those on their property (*see* ***D'Amico v Christie***, *supra*). A landowner may be liable for injuries caused by an intoxicated guest, but it may only be imposed for injuries that occurred on the defendant's property, or in an area under the defendant's control, where the defendant had the opportunity to supervise the

intoxicated guest and was reasonably aware of the need for such control (***Heyman v Harooni***, 132 AD3d 950, 18 NYS3d 699 [2d Dept 2015]; ***Colon v Pohl***, 121 AD3d 933, 995 NYS2d 139 [2d Dept 2014]; ***Holiday v Poffenbarger***, 110 AD3d 841, 973 NYS2d 276 [2d Dept 2013]). A landowner is not the insurer of a visitor's safety and has no duty to protect them from unforeseeable and unexpected assaults (***Scharff v LA Fitness Intl., LLC***, 139 AD3d 929, 30 NYS3d 574; ***Millan v AMF Bowling Ctrs., Inc.***, 38 AD3d 860, 833 NYS2d 173 [2d Dept 2007]). The duty to protect depends on whether the landowner knows or has reason to know from past experience that there is a likelihood of conduct by third parties which is likely to endanger the safety of a guest (***Crowningshield v Proctor***, 31 AD3d 1001, 820 NYS2d 330 [3d Dept 2006]). If there is no awareness of the risk or threat, there is no duty imposed on the landowner (***Heyman v Harooni***, *supra*, quoting ***Crowningshield v Proctor***, *supra*; ***Colon v Pohl***, *supra*). Alcohol consumption by minors creates a factual issue of whether it was foreseeable that someone would become intoxicated, engage in a fight, and cause injury to a third party, but alcohol consumption by adults, in and of itself, does not raise such an issue of awareness (***Crowningshield v Proctor***, *supra*). To establish prima facie entitlement to summary judgment dismissing a common-law negligence cause of action, defendant must prove that he or she did not have the requisite awareness of the risk or threat that would give rise to the duty to protect guests (***Crowningshield v Proctor***, *supra*).

The Perry defendants made a prima facie case of entitlement to summary judgment dismissing the claim of common-law negligence (*see* ***Scharff v LA Fitness Intl., LLC***, *supra*; ***Colon v Pohl***, *supra*; ***Kiely v Benini***, 89 AD3d 807, 932 NYS2d 181 [2d Dept 2011]). Here, the Perry defendants rely on the deposition testimony of plaintiff and Eugene Perry that plaintiff was injured as a result of sudden and unexpected contact by Craig, Barnett, and Aruanna. Plaintiff also admitted that the Perry defendants could not have done anything to prevent the incident from occurring. The Perry defendants cannot be held liable for plaintiff's injuries that occurred as a result of a sudden and unexpected incident that could not have been reasonably anticipated or prevented (***Katekis v Naut, Inc.***, 60 AD3d 817, 875 NYS2d 212 [2d Dept 2009]).

In opposition, plaintiff, Barnett, and Aruanna fail to offer any evidence raising a triable question as to whether the Perry defendants were aware of a need to supervise the guests on their property (***Colon v Pohl***, *supra*; ***Kiely v Benini***, *supra*).

Accordingly, the Perry defendants' motion for summary judgment is granted.

Dated: oct. 7, 2016

W. Gerard Asher
J.S.C

HON. W. GERARD ASHER

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**