Bellamy v TGI Friday's Inc.
2017 NY Slip Op 30047(U)
January 9, 2017
Supreme Court, New York County
Docket Number: 161870/2013
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. PART 35
Justice

Index Number : 161870/2013
BELLAMY, SHADAI
vs
TGI FRIDAY'S INC.
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 11/9/17
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | **No(s).** _____

Answering Affidavits — Exhibits _____ | **No(s).** _____

Replying Affidavits _____ | **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

This action against defendant TGI Friday's Inc. ("Friday's) alleges negligence and violation of the Dram Shop Act as a result of a physical altercation between two former friends at a Friday's parking lot in Westbury, Long Island.

Friday's now moves for summary dismissal of the complaint, arguing that there is no evidence that it violated the Dram Shop Act.[1] Friday's also argues that plaintiff cannot establish a *prima facie* case of negligence against it, in that (1) Friday's owed no duty to protect plaintiff against the unforeseeable criminal assault; (2) in any event, Friday's satisfied its duty by providing reasonable security measures at the restaurant; (3) any negligence on its behalf was not the proximate cause of plaintiff's injuries; and (4) there is no evidence that Friday's was negligent in hiring the security company engaged at the time of the incident.[2]

In opposition, plaintiff argues that Friday's was on actual notice of the criminal assault, first, through the verbal, profane, and threatening words of her former friend, Crystal Martin ("Martin") and when plaintiff told Friday's that Martin was getting a weapon, and that she, plaintiff, needed assistance. Further, the absence of any affidavit of an employee from Friday's, coupled with the bartender's deposition which is silent as to prior similar, criminal incidents, is insufficient to support Friday's claim that it satisfied its duty to plaintiff. Causation is indicated by the fact that Martin initiated the confrontation with profanity and threatening body language,

[1] Plaintiff does not object to dismissal of Dram Shop Act claim (Memorandum of Law, ¶15).

[2] Plaintiff does not object to dismissal of the negligent hiring claim. (Memorandum of Law, ¶14)

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: _____ _____, **J.S.C.**

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☒ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

was permitted to remain at the bar even after plaintiff advised Friday's that Martin was getting a weapon and asked for assistance, and no escort was provided to plaintiff when she attempted to walk to her car in the parking lot. Friday's did not separate Martin from plaintiff, in violation of its own manual, or engage in reasonable efforts to avoid the violence, even after being warned that Martin retrieved a weapon. And, the absence of an incident report for the plaintiff's incident, or reports of prior similar incidents, raises a credibility issue for the trier of fact, and merits an adverse inference.

In reply, Friday's argues that it submitted sufficient evidence to support dismissal, and that the cases plaintiff cites are distinguishable.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84 [2014]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212 [b]; *Farias v Simon*, 122 AD3d 466 [1st Dept 2014]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose" (*Kosovsky v. Park South Tenants Corp.*, 45 Misc.3d 1216(A), 2014 WL 5859387 [Sup Ct New York Cty 2014] *citing Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

"It is well settled that restaurants and bars have a duty to exercise reasonable care to protect their customers from injuries arising from reasonably anticipated causes, including 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'" *(Wirth v. Wayside Pub, Inc.*, 142 A.D.3d 1346, 38 N.Y.S.3d 302 [4th Dept 2016] *citing D'Amico v. Christie*, 71 N.Y.2d 76, 85, 524 N.Y.S.2d 1, 518 N.E.2d 896 [1987]; *see also, Florman v. City of New York*, 293 A.D.2d 120, 741 N.Y.S.2d 233 [1st Dept 2002] *citing Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544, 548, 684 N.Y.S.2d 139, 706 N.E.2d 1163). However, this duty arises only when such party "knows or has reason to know that there is a likelihood that third persons may endanger the safety of those lawfully on the premises [citations omitted], as where the landlord [or permittee] is aware of prior criminal activity on the premises [citation omitted]" (*Florman , supra citing Brewster v. Prince Apts.*, 264 A.D.2d 611, 614, 695 N.Y.S.2d 315, appeal dismissed, 94 N.Y.2d 875, 705 N.Y.S.2d 6, 726 N.E.2d 483, appeal denied 94 N.Y.2d 762, 708 N.Y.S.2d 51, 729 N.E.2d 708). "[T]he possessor of land, be he landowner or leaseholder, is not an insurer of the safety of those who use his premises [citations omitted]" (*Florman , supra*

citing Leyva v. Riverbay Corp., 206 A.D.2d 150, 152, 620 N.Y.S.2d 333.) "Moreover, while a landowner must provide reasonable security measures, it need not provide 'optimal [or] the most advanced security system available [citation omitted].'"((*Florman , supra*).

In *Wirth v. Wayside Pub, Inc.* (Supra), plaintiff's deposition established that, "until the moment the fight broke out, she and her companion stayed on the opposite side of the bar from the other group of customers, the two groups had little interaction other than occasional 'staring,' and any unpleasant interaction that did occur was subtle and fleeting. " Further, "there was no evidence of past incidents involving plaintiff's alleged assailant of which they were aware." Therefore, according to the Appellate Division, Fourth Department "defendants met their initial burden on their motion by establishing that they were not aware of the need to control the alleged assailant and did not have the opportunity to do so."

Defendant established the following facts:

On February 12, 2011, plaintiff and her friend Andrea Booth, went to Friday's restaurant and sat at the bar. (Plaintiff EBT, at 37-40, 52).

While plaintiff and Booth were having their second drink, Martin came in with her friend Jarnell Carr, and took seats also at the bar, but across from plaintiff and plaintiff's friend (Plaintiff EBT, at 57-59). Upon making eye contact, plaintiff and Martin "immediately exchanged words with one another. . . [Martin] did a lot of cursing. It was very loud." (Plaintiff EBT, at 57-58). The exchange lasted for "Two minutes" (Plaintiff EBT, at 59). Then, one of the bartenders asked plaintiff "is everything ok," to which plaintiff replied, "me and that girl, we don't get along" (Plaintiff EBT, at 60). The bartender then went to Martin and Carr to serve them and the verbal exchange ceased (Plaintiff EBT, at 61).

Plaintiff then got up to meet another friend who arrived at Friday's, and Martin also got up and said the words, "Let me go outside for this b----"(Plaintiff EBT, at 61). Plaintiff then told the bartender that Martin went out to get a weapon and that she "needed assistance . . . ." (Plaintiff EBT, at 61-62). The bartender "got the security guard and the security guard stood behind me." (Plaintiff EBT, at 62).

Plaintiff's additional friend (Tasia) arrived to the restaurant, and "We were all just talking. I totally forgot [Martin] was even across the room" (Plaintiff EBT, at 64). By then, the arguments subsided (Plaintiff EBT, at 64).

Approximately 10 minutes later, plaintiff's cousin arrived and Martin also returned to the restaurant.

Plaintiff then ordered her cousin food, and after he received his food, he told plaintiff to leave (Plaintiff EBT, at 67-68). The security guard was still located near the bar, about three or four feet from plaintiff (Plaintiff EBT, at 68–69).

Plaintiff and Booth then proceeded to leave; plaintiff "forgot all about [Martin], . . .I'm laughing . . . [and] see's [a mutual friend] Lania's car parked out in front of [Friday's], so we're walking towards [Booth's] car. And I open her car door. I said what are you doing here" to Lania (Plaintiff EBT, at 69). According to plaintiff, "That's when I got hit in the head" (Plaintiff EBT, at 70). According to Martin, Lania was outside in her car waiting for Martin, and plaintiff "turned around to attempt ot hit me and that's when I proceed to defend myself" and "hit her with

it to try to stop . . . . (Plaintiff EBT, at Martin EBT, at 40-41).[3]

Although restaurant owners are "required to exercise reasonable care for the protection of patrons on their premises" the record indicates that the incident at issue "is not a situation that [Friday's] could reasonably have been expected to have anticipated or prevented (*Davis v. City of New York*, 183 A.D.2d 683, 584 N.Y.S.2d 64 [1st Dept 1992]).

Here, Friday's established that it owed no duty to protect plaintiff against the unforeseeable criminal assault.

According to plaintiff's affidavit in opposition, the verbal altercation had ceased for approximately one hour prior to her assault in the parking lot, after which plaintiff herself forgot about Martin, and at that point, had not requested anyone from Friday's to escort her to the parking lot (*see Lewis v. Jemanda New York Corp.*, 277 A.D.2d 134, 716 N.Y.S.2d 58 [1st Dept 2000] ("Inasmuch as the incident was attributable to the sudden, unexpected and unforeseeable act of plaintiff's assailant, its prevention was beyond any duty defendant may have had as a landowner to its patrons . . . plaintiff himself testified that he was totally taken by surprise by the assault and that it occurred so quickly that he did not even think to summon defendant's security guards")). While plaintiff arguably left Friday's at the suggestion of her cousin, there is no indication in the record that *Friday's* was on notice that Martin was threatening or planning to attack plaintiff any time after the bartender interceded and the verbal altercation ceased.

There is no indication that plaintiff told Friday's that she was being threatened and harassed by Martin, or was made aware of Martin's previous altercations with plaintiff (*compare*, *Kandil v. 199 Bowery Rest LLC*, 2010 N.Y. Misc. LEXIS 1252 (Sup. Ct. NY Co. 2010) (Edmead, J.) Notably, plaintiff's own affidavit in opposition states that she was assaulted "about an hour after" she told the bartender that Martin had a weapon. (Plaintiff's Affidavit in Opposition, ¶19). The record indicates no knowledge on behalf of Friday's of any threatening acts toward plaintiff by Martin. Indeed, plaintiff's claim that Friday's breached a duty to call the police is belied by the record showing that plaintiff, with full knowledge of Martin's animus toward, and potential to attack, plaintiff, did not herself call the police as she had forgotten about Martin when plaintiff proceeded to leave the restaurant.

As to Friday's duty, that defendant did not submit an affidavit from a manager, bartender, security guard or other employee is inconsequential. The motion for summary judgement is supported by the pleadings, deposition testimonies of the parties and witnesses, and other documentation.

In light of the absence of any evidence of a pattern of criminal activity or of even one similar incident involving different patrons, Friday's is entitled to dismissal of the action (*see Davis v. City of New York, supra*).

And, the absence of an incident report for the plaintiff's incident, or reports of prior similar incidents, does not raise credibility issues sufficient to defeat summary judgment. Plaintiff's claim that Friday's failed to follow its internal policies is unsupported by record and

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[3] Plaintiff and Martin were life-long "best" friends until an altercation in 2011, during which Martin attempted to use a weapon against plaintiff (Plaintiff EBT, at 19-24). Plaintiff and Martin had a previous physical altercation during their first year in college.

insufficient to defeat summary judgment in any event.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within 20 days of entry.

This constitutes the decision and order of the Court.

J

DATED: 1/9/17

J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

1. CHECK ONE : ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

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3. CHECK IF APPROPRIATE : ☐ SETTLE ORDER ☐ SUBMIT ORDER

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