

Igneri v Arrasate

2017 NY Slip Op 30631(U)

March 22, 2017

Supreme Court, Suffolk County

Docket Number: 24583/12

Judge: Paul J. Baisley, Jr.

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

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

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STEVENIGNERI,

Plaintiff,

-against-

JAMES ARRASATE and NANCY ARRASATE, as Trustees under the JAMES ARRASATE TRUST, NANCY ARRASATE and JAMES ARRASATE, as Trustees under the NANCY ARRASATE TRUST, CASEY'S DANCE HALL AND SALOON, SKIP-RICH LTD., "JOHN DOES" 1-6, whose names are unknown to the plaintiff at this time, but are intended to be individuals who caused personal injury to the plaintiff, ANTHONY M. GALGANO, KEVIN MOYNIHAN and "JACK DOES" whose names are unknown to the plaintiff at this time, but were intended to be the individuals who owned the premises,

Defendants.

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INDEX NO.: 24583/12
CALENDAR NO.: 201600727OT
MOTION DATE: 10/13/16
MOTION NO.: 002 MD; 003 MD;
004 MD

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Upon the following papers numbered 1 to 87 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-30; 39-63; Notice of Cross Motion and supporting papers 66-85; Answering Affidavits and supporting papers 31-38; 86-87; Replying Affidavits and supporting papers 64-65; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 002) of defendant James Arrasate, the cross-motion (motion sequence no. 003) of plaintiff Steven Igneri, and the motion (motion sequence no. 004) of defendants Casey's Dance Hall and Saloon, Skip-Rich Ltd., Anthony Galgano and Kevin Moynihan, are consolidated for the purposes of this determination; and it is further

ORDERED that the motion of defendant James Arrasate for summary judgment dismissing the complaint against him is granted, and this action is severed as against him; and it is further

ORDERED that the motion of defendants Casey's Dance Hall and Saloon, Skip-Rich Ltd., Anthony Galgano and Kevin Moynihan for summary judgment dismissing the complaint is denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on the issue of liability is denied.

Plaintiff Steven Igneri commenced this action to recover damages for injuries he allegedly sustained as a result of an assault committed by a bouncer at Casey's Dance Hall and Saloon on October 15, 2011. The complaint contains causes of action against defendants for assault, negligent hiring, violation of the Dram Shop Act, violation of the Americans with Disabilities Act, violation of the New York State Human Rights Law, and punitive damages.

Defendant James Arrasate, as Trustee under the James Arrasate Trust, and as Successor Trustee of the Nancy Arrasate Trust, now moves for summary judgment dismissing the complaint and cross claims against him on the ground that the James Arrasate Trust was an out-of-possession landlord which transferred the obligation to maintain the leased premises to the tenant, Skip-Rich Ltd., and Casey's Dance Hall and Saloon and, thus, he cannot be held liable for plaintiff's injuries. In support of the motion, Arrasate annexes copies of the pleadings, the bill of particulars, the police incident report, an affidavit by James Arrasate, and portions of the transcripts of the parties' deposition testimony. Further submitted is a copy of the lease agreement between the James Arrasate Trust and Skip Rich, Ltd.

At his deposition, plaintiff, who suffered a hearing loss from Pendred Syndrome, testified through a sign language interpreter. He testified that on the evening of October 14, 2011, he and his friend Daniel Geiger arrived at Casey's Dance Hall and Saloon located at 239-257 Montauk Highway in Westhampton Beach at 11:00 p.m. and stayed until 4:00 a.m.

Dennis Groth, a nonparty witness, testified that he observed Daniel Geiger in the parking lot causing a commotion, throwing rocks at the establishment and antagonizing the bouncers. He testified that plaintiff was standing in the parking lot when he was attacked by a bouncer, who beat him up and threw him into his car.

In his affidavit, James Arrasate states that the subject property was devised to him by his mother, Mary Preg, and that title to such property subsequently was held by the James Arrasate Trust. He states that Nancy Arrasate, his wife, died in November 2010, and he became the successor trustee of the Nancy Arrasate Trust. Arrasate states that the subject property was leased to Skip Rich, Ltd. in 1973 by Mary Preg and that the lease was renewed five times. Eventually the subject property was leased to Casey's Dance Hall and Saloon by the James Arrasate Trust. He states that the James Arrasate Trust sold the building and the property in two parts in 2013 and 2014. He avers that he played no role in the business activities at Casey's and never hired any security or other employees at the establishment.

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 Town of 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]). A landowner has a nondelegable duty to maintain the property in a reasonably safe condition to prevent the occurrence of foreseeable injuries (see *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]). This duty also requires a landowner to act in a reasonable manner to prevent harm to those on his or her property, which includes the duty to control the conduct of third persons on their premises when the homeowners have the opportunity to control such persons and are reasonably aware of the need for such control (see *D'Amico v Christie*, 71 NY2d 76, 524 NYS2d 1 [1987]; *Victor C. v Lazo*, 30 AD3d 365, 816 NYS2d 547 [2d Dept 2006]; *Chalu v Hariraj*, 304 AD2d 515, 758 NYS2d 132 [2d Dept 2003]). However, "the criminal conduct at issue must be shown to be reasonably predictable based on prior occurrences of the same or similar criminal activity at a location sufficiently proximate to the subject location" (*Bryan v Crobar*, 65 AD3d 997, 999, 885 NYS2d 122 [2d Dept 2009]). A property owner has no duty to take protective measures against acts of third persons which endanger their visitors unless he or she either knows or has reason to know from past experience that such conduct is likely (*Jean v Wright*, 82 AD3d 1163, 919 NYS2d 377 [2d Dept 2011]).

Generally, a landlord has a duty to maintain the premises in a reasonably safe condition (*Kellman v 25 Tiemann Assoc.*, 87 NY2d 871, 638 NYS2d 937 [1995]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 929 NYS2d 620 [2d Dept 2011]). However, an out-of-possession landlord which relinquishes control over the leased premises generally will not be responsible for injuries occurring on its premises unless the landlord has a duty imposed by statute, or assumed by contract or a course of conduct (*Mendoza v Manila Bar & Restaurant Corp.*, 140 AD3d 934, 33 NYS3d 448 [2d Dept 2016]; *Madry v Heritage Holding Corp.*, 96 AD3d 1022, 1023, 947 NYS2d 588 [2d Dept 2012]).

Here, Arrasate established, *prima facie*, entitlement to judgment as a matter of law by tendering sufficient evidence demonstrating that the James Arrasate Trust was an out-of-possession landlord which owed no duty of care to plaintiff, thus eliminating any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923). Therefore, the burden shifts to plaintiff and the codefendants to proffer evidence in admissible form raising a

triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595[1980]). In opposition, plaintiff's counsel argues that Arrasate is liable based upon provisions in the lease that permit the landlord to enter and inspect the premises. However, the right of a landlord to enter the premises for inspection or make needed repairs does not impose liability on a landlord unless the dangerous condition is one of a significant structural or design defect that is contrary to a specific statutory safety provision (*see Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 516 NYS2d 451 [1987]). Absent proof that Arrasate retained control over the premises or was contractually obligated to provide security, liability cannot be imposed (*Tambriz v P.G.K. Luncheonette, Inc.*, 124 AD3d 626, 2 NYS3d 150 [2d Dept 2015]). Plaintiff's counsel states in his affirmation that he is withdrawing the fourth cause of action alleging a violation of the Americans with Disabilities Act and the fifth cause of action alleging a violation of the New York State Human Rights Law. Accordingly, the motion of defendant James Arrasate for summary judgment in his favor is granted.

Defendants Casey's Dance Hall and Saloon, Skip-Rich, Ltd., Anthony Galgano and Kevin Moynihan also move for summary judgment on the grounds that plaintiff was not assaulted by any of Casey's employees, but, rather, by a third person outside of the premises. In support of their motion, movants submit copies of the pleadings, the bill of particulars, and the transcripts of deposition testimony by plaintiff and nonparty witnesses Dennis Groth and Robert Turitto.

Plaintiff testified that when he arrived at Casey's there were at least five bouncers outside collecting money and checking identification. He testified that they were wearing short-sleeve maroon polo shirts with the Casey's logo. Plaintiff testified that he went inside and drank three to four beers and got two free shots from the bartender. He testified that there are three bars in Casey's and that the bartenders wear black clothing. Plaintiff testified that Daniel Geiger was intoxicated and that they left Casey's at 4:00 a.m., intending to go home in a cab. He testified that the cab was in the parking lot and Daniel was talking to the driver and then began throwing rocks at the fence which is located in front of Casey's. He testified that he was standing in the parking lot when he observed two bouncers chasing Daniel and punching him. Plaintiff testified that a third bouncer approached him and began punching him in the face, and that he became unconscious. He testified that when he awoke, another bouncer removed his own shirt and wrapped it around plaintiff's head before plaintiff was placed in the cab.

Robert Turitto testified that he was working as a bar back on the day of the incident, that he was wearing a maroon Casey's tee shirt, and that the bouncers wore blue shirts with the word "guard" printed on the back. He testified that on the day of the incident, Casey's had an Oktoberfest event, and that there were at least 25 employees working, 10 to 12 of whom were bouncers positioned at various places inside and outside of the establishment. Turitto testified that they closed the bar and locked the doors at 2:00 a.m., and that only employees remained inside the establishment. He testified that while he was sweeping the floors he heard a noise outside so he went outside and observed Daniel Geiger throwing rocks at the building and plaintiff lying on the ground "beaten to a pulp." He testified that he pushed Geiger to prevent him from throwing the rocks, and that he observed two white men smoking cigarettes who suddenly vanished. He testified that he saw them earlier in the evening, and that he believes they beat plaintiff. Turitto testified that there was a taxi cab parked in the parking lot, that he wrapped plaintiff's head with his bar rag and instructed the driver to take plaintiff and Daniel off of the premises.

Zachary Stevens testified that he is a licensed security guard and works at Casey's as a security manager. He testified that on the day of the incident, Robert Turitto was working as the only barback that night, and that the bartenders and barbacks wear green collared shirts that say Casey's on them. He testified that the security guards wear blue golf shirts with "Casey's" printed on front and "guard" printed on the arm. He testified that on the day of the incident, three security guards were positioned at each door, Michael Savino, Jeff Bieniewicz and Daniel McFadden. He testified that Savino was positioned at the front door and left the establishment at 1:00 a.m., and that Bieniewicz was positioned at the fire exit. Stevens testified that the bar closed at 2:00 a.m. that night, and that by 2:30 a.m. the only employees that remained at the establishment were him, Kevin Moynihan, Daniel McFadden and Robert Turitto. He testified that McFadden left at approximately 3:45 a.m. and that Turitto stayed until 6:00 a.m. cleaning the establishment. He testified that he was unaware of the subject incident until the police approached him two weeks later, and that he and Moynihan were in the basement office counting receipts when the assault allegedly occurred.

Further submitted are the transcripts of the deposition testimony of Kevin Moynihan and Anthony Galgano. Moynihan testified that he was working as a manager that evening, and that at the time of the incident he and Zachary Stevens were in the basement office reviewing receipts. Galgano testified that he has a five percent ownership in Skip Rich Ltd., and that he was not involved in the daily operations of Casey's. He testified that he held fundraisers at Casey's on St. Patrick's Day, and that he only became aware of the subject incident in 2012 when Zachary Stevens informed him of it during such a fundraiser.

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]). Here, it is evident that the conflicting depositions submitted by the movants raise genuine issues of fact, rather than eliminate them. The movants have failed to establish that none of their employees were a proximate cause of plaintiff's injuries nor have they established that such act was the result of an unforeseeable assault committed by a third party. 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 they did not breach the duty of care owed to plaintiff, defendants' motion for summary judgment in their favor is denied.

Plaintiff cross-moves for summary judgment on the issue of liability. In support of the motion, plaintiff submits copies of the pleadings, the bill of particulars, a police incident report with supporting statements of plaintiff and Daniel Geiger, the transcripts of the parties' deposition testimony, and certified records of the Westhampton Beach Police Department. Plaintiff argues that defendants are liable for his alleged injuries, because they failed to contact the police, failed to phone an ambulance and failed to provide medical attention. Plaintiff further argues that defendants are vicariously liable for the acts of their employees and that they had notice of a dangerous condition on the premises. Finally, plaintiff argues that defendants continued to serve Geiger alcohol knowing he was intoxicated, and that Geiger's intoxication caused him to become injured.

Plaintiff's argument regarding defendants' failure to phone an ambulance is not a basis for imposing liability on the defendants. First, plaintiff did not plead such a cause of action in the complaint, and, in any event, he has not adduced evidentiary facts in support of such an unpleaded cause of action (*see Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276, 413 NYS2d 309 [1978]). The record is devoid of any proof that plaintiff's injuries were caused by such alleged failure to act.

The branch of the motion seeking summary judgment on plaintiff's cause of action for violation of the Dram Shop Act is denied. General Obligations Law § 11-101, known as the Dram Shop Act, creates a cause of action against a person who illegally or improperly sells or serves intoxicating liquor in favor of one who is injured, or property damaged, caused by the acts of an intoxicated person. The statute imposes strict liability and a showing of negligence or proximate cause is not required (*Sullivan v Mulinos of Westchester, Inc.*, 114 AD3d 844, 980 NYS2d 577 [2d Dept 2014]). To establish such a cause of action, plaintiff must prove, among other things, that the sale of that alcohol bore some reasonable or practical connection to the plaintiff's injuries or damages (*Pinilla v City of New York*, 136 AD3d 774, 24 NYS3d 710 [2d Dept 2016]). Here, plaintiff argues that either an employee of Casey's or a third person committed an assault upon him. However, neither of those persons are alleged to have been served liquor by defendant. Rather, plaintiff alleges that his friend Daniel Geiger was intoxicated and unlawfully furnished with liquor. Such intoxication was not the cause of plaintiff's injuries, as Geiger was not the person who assaulted and injured plaintiff. Accordingly, plaintiff has not established the requisite connection between the furnishing of the liquor and his injuries.

With respect to the cause of action for negligent supervision, no evidence has been proffered to demonstrate the identity of plaintiff's assailant. Thus, plaintiff cannot establish that Skip-Rich Ltd. knew or should have known of the assailant's propensity to commit such assaults (*Jones v Hiro Cocktail Lounge*, 139 AD3d 608, 32 NYS3d 156 [1st Dept 2016]). Therefore, plaintiff has failed to establish his entitlement to judgment on this cause of action. Accordingly, plaintiff's cross-motion for summary judgment in his favor is denied.

Dated: March 22, 2017

HON. PAUL J. BAISLEY, JR.

J.S.C.