Stitt v Dubliner
2017 NY Slip Op 31785(U)
August 15, 2017
Supreme Court, Suffolk County
Docket Number: 13-9695
Judge: Peter H. Mayer

SHORT FORM ORDER

INDEX No. 13-9695
CAL. No. 16-01332OT

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

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 10-21-16 (002)
MOTION DATE 12-16-16 (003)
ADJ. DATE 1-27-17
Mot. Seq. # 002 - MotD
003 - XMD

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BRANDIN A. STITT,

Plaintiff,

- against -

THE DUBLINER and SEAN GREEN,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendant The Dubliner, dated September 27, 2016, and supporting papers; (2) Affirmation in Opposition by the plaintiff, dated November 18, 2016, and supporting papers; (3) Affirmation in Opposition by the defendant Sean Green, dated January 13, 2017; (4) Reply Affirmation by the defendant The Dubliner, dated December 13, 2016; (5) Reply Affirmation by the defendant The Dubliner, dated January 24, 2017; (6) Notice of Cross Motion by the plaintiff, dated November 18, 2016, supporting papers; (7) Affirmation in Opposition by the defendant The Dubliner, dated December 8, 2016, and supporting papers; (8) Reply Affirmation by the plaintiff, dated January 26, 2017; (~~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 that the motion by the defendant The Dubliner for summary judgment dismissing the complaint and all cross claims against it is granted to the extent that the plaintiff's first cause of action for negligence is dismissed, and is otherwise denied; and it is further

ORDERED that the cross motion by the plaintiff for an order striking the answer of the defendant The Dubliner or, in the alternative, granting an adverse inference charge against said defendant at trial, on the grounds of spoliation of evidence, and for an order granting summary judgment in his favor against the defendant The Dubliner on his fifth cause of action pursuant to the Dram Shop Act, is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff on April 5, 2012 when he was assaulted by the defendant Sean Green (Green) outside the bar operated by the defendant The Dubliner (The Dubliner). In his complaint, the plaintiff sets forth five causes of action. In his first cause of action the plaintiff alleges that The Dubliner was negligent in failing to, among other things, "prevent the aforesaid physical striking from occurring," and in his fifth cause of action he alleges that The Dubliner is liable for his injuries under the Dram Shop Act (General Obligations Law § 11-101). The plaintiff also asserts three causes of action against Green sounding in negligence, assault, and for punitive damages.

It is undisputed that The Dubliner, located on Stone Street in the Wall Street area of Manhattan, New York, shares common owners with a number of establishments on said street, including another bar named Beckett's. During a certain period each year, and during certain hours of the day, the establishments fronting on Stone Street are permitted to place tables and chairs in the street to accommodate customers who wish to eat and drink outdoors.

The Dubliner now moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that it had no notice of any problem involving the plaintiff and Green, that the incident between the two occurred suddenly and spontaneously, and that it has no liability pursuant to the Dram Shop Act. In support of its motion, The Dubliner submits, among other things, the pleadings, the plaintiff's bill of particulars, and the transcripts of the deposition testimony of the plaintiff, Green, and three of its employees.

The proponent of a summary judgment motion 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]; ***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 trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

At his examination before trial, plaintiff testified that he and several coworkers, including Green, arrived at The Dubliner at approximately 3:00 p.m. or 4:00 p.m. on April 4, 2012, that they sat outside and were served food and drinks, and that they moved inside to the bar at The Dubliner at approximately 10:00 p.m. He stated that he had been to The Dubliner a dozen or more times prior to this visit, that the bar at The Dubliner was "65 feet or more" long, and that he knew Megan, one of the bartenders there. He indicated that he had never had any problems at the bar, or voiced any complaints to anyone at The Dubliner prior to the date of this incident. The plaintiff further testified that, from their arrival at The Dubliner until the time of this incident at approximately 12:30 am on April 5, 2012, Green was the only member of his group drinking Bud Light beer, and that Green consumed approximately 12 Bud Lights during that time. He indicated that he had a disagreement with Green as he was leaving the bar, that Green wanted to discuss a personal issue and stay at the plaintiff's apartment that night, and that he told Green that he did not want to talk with him and that he could not stay at his apartment. He stated that this conversation took place inside of The Dubliner "at the corner of the bar," and that the conversation lasted approximately five minutes.

The plaintiff further testified that, during their conversation inside of The Dubliner, Green "did come up a little aggressive and loud," that neither of them pushed the other or threw something, and that he did not recall who was the bartender on duty at the time. He stated that he believes some of The Dubliner's "security people" were present during this conversation, that he did not know where they were at the time, and that the bartender did not say anything to him or Green during their conversation. He indicated that "we didn't really want to air our dirty laundry in front of the other coworkers, so he followed me outside." He declared that he left The Dubliner by himself, that Green followed him outside, and that he sat on a table "up against the brick wall of the bar" and started having a discussion with Green. The plaintiff further testified that the discussion lasted a "minute or two," that he was talking in a "regular voice" while Green was talking in an "elevated voice," that Green did not understand his desire to end his friendship with Green, and that Green grabbed him "around the biceps, shaking me." He indicated that he did not remember anything after that encounter. He stated that he believes that Green was intoxicated when his group entered The Dubliner and when this incident occurred, that the only change in Green's behavior to support that belief was that Green became "a little aggressive," and that he did not make any complaints about Green's behavior to anyone employed at The Dubliner between the the time he entered the bar and this incident.

At his deposition, Green testified that he was a coworker and good friend of the plaintiff before this incident, that he arrived at Stone Street at approximately 6:00 p.m. or 7:00 p.m. to see his coworkers sitting at a table, and that he had five or six Bud Lights while joining them there. He stated that he did not join the group when they did "shots" of liquor, that he did not remember if anyone else in the group was drinking Bud Light beer, and that he believes that Kevin Botti (Botti) paid the bill for them all before they left the outside table. He indicated that, at approximately 10:30 p.m. or 11:00 p.m., he, along with the plaintiff, Botti, and another coworker, "walked down to The Dubliner," that he did not feel that he was intoxicated at the time, and that the group entered the Stone Street entrance of The Dubliner and went to "the end of the bar nearest the door." Green further testified that he had "maybe two" beers while he was in The Dubliner, and that he was only served by a bartender. He stated that, at one point, the plaintiff separated from the group to talk to a woman, that he approached the plaintiff, who was sitting "toward the middle of the bar" and appeared "down in the dumps" after the conversation with the

woman, and that the plaintiff reacted angrily. He indicated they left The Dubliner by way of the Stone Street exit, that he did not feel intoxicated at the time, and that he stopped on the street when the plaintiff called his name. Green further testified that the plaintiff was intoxicated and cursing at him, that the plaintiff grabbed him and threw a punch that missed, and that he then hit the plaintiff who fell to the ground. He indicated that he walked back into The Dubliner to get help, that the police arrived and spoke with him, and that they then allowed him to leave the scene. He acknowledged that he was arrested approximately two and one-half weeks later, that he pled guilty to receive a lesser sentence, and that he told his employer that there had been no altercation with the plaintiff, who had just fallen and injured himself. Green further testified that no one had told him that evening that he was slurring his words, that he appeared disheveled, that he was stumbling, or that he should not drink any more beers.

Noel McDermott (McDermott) testified[1] that he is one of the principal officers of the corporation that owns and operates The Dubliner, that the bar employed, among other things, a full-time manager, Heather Dillman (Dillman), and a doorman, Gus Gonzalez (Gonzalez), at the time of this incident, and that one of the bartenders employed at the time was named Megan Forrest. He indicated that he was not present at the bar on the evening of this incident, that there had not been any physical altercations at The Dubliner before this incident, and that he believes that there was one bartender on duty at the time in question. He stated that the vast majority of The Dubliner's clientele are Wall Street executives and brokers, that The Dubliner employs a doorman because incidents can happen, and that he never discussed with the doorman what to do in the event an altercation occurs. McDermott further testified that The Dubliner does not monitor the amount of alcohol served to a table, that bartenders are instructed to "cut off" a table if it appears that a group was becoming intoxicated, and that others could also make that determination.

At her deposition, Dillman testified that she was employed as the manager of The Dubliner on the date of this incident, and that she had finished her work shift at 9:00 p.m. that evening. She stated that the monitoring of the service of alcohol to patrons of the bar is left to the discretion of the servers and bartenders on duty, and that the staff is instructed to stop serving an individual who appears "clearly intoxicated." She indicated that the doorman, Gonzalez, works at Beckett's and The Dubliner simultaneously, that his duties include checking identification, and that he has no responsibility to break up an altercation between patrons. Dillman further testified that, prior to Superstorm Sandy on October 29, 2012 and prior to the date of this incident, Beckett's had outdoor seating in front of The Dubliner, that Megan Forrest (Megan) was the bartender on duty late that evening, and that Megan is no longer employed by The Dubliner. She stated that she spoke with Megan and Gonzalez after she learned of this incident, that Megan told her that she did not witness the incident because she was inside the bar at the time, and that Gonzalez told her that he did not witness the incident but "came at the end of it." She indicated that the area in front of The Dubliner on Stone Street is used by patrons of the bar even after the tables are taken away at night.

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[1] For reasons that will become obvious, the undersigned summarizes only those portions of McDermott's testimony, and that of another employee of The Dubliner, Heather Dillman, that bear on the determination of The Dubliner's motion for summary judgment. Testimony relevant to the plaintiff's cross motion will be addressed in consideration of the issues raised therein.

Gonzalez testified that he was employed by Beckett's as a doorman/host in April 2012, that he also checks on The Dubliner, and that he is not a "bouncer" or security for the bars. He stated that he had never had to break up a fight at Beckett's or The Dubliner prior to this incident, and that if someone needed to be escorted out of either establishment "[w]e usually call the First Precinct." He indicated that if he saw "someone who was approaching the bar that was stumbling or walking sideways, I would let the bartender know they had too much to drink," and that the decision to cut someone off would be based on staff observations and an assessment that the person was visibly intoxicated or belligerent. Gonzalez further testified that he did not witness this altercation, that he had seen the two patrons involved in this incident as he was entering The Dubliner after leaving Beckett's, and that the two were talking outside in front of The Dubliner at the time. He stated that, when he left The Dubliner approximately five to ten minute later, he observed one of the two men unconscious on the ground, that the other was passing him to go into the bar, and that he followed the gentleman back inside to ask him what had happened. He indicated that the gentleman told him that his friend had slipped and fallen, that the person tried to leave the bar but he stopped the person from leaving, and that the person did not appear to be intoxicated when Gonzalez spoke with him.

The Dubliner has established its prima facie entitlement to summary judgment dismissing the plaintiffs first cause of action for negligence. As the bar's owner and operator, The Dubliner clearly had a duty to act in a reasonable manner to control the conduct of third persons on its premises so as to prevent harm to its patrons (***D'Amico v Christie***, 71 NY2d 76, 524 NYS2d 1 [1987]; ***Raney v Seldon Stokoe & Sons***, 42 AD3d 617, 839 NYS2d 577 [3d Dept 2007]). "Liability for an intoxicated guest may be imposed on a landowner only for injuries that occurred on the landowner's property, or in an area under the landowner's control, where the landowner had the opportunity to supervise the intoxicated guest. That duty emanates not from the provision of alcohol but from the obligation of a landowner to keep its premises free of known dangerous conditions, which may include intoxicated guests" (***D'Amico v Christy,*** 71 NY2d at 85, 524 NYS2d at 5). For the purposes of deciding this motion only, it is determined that this incident happened in an area controlled by The Dubliner.

However, a defendant's duty arises only when it has the opportunity to control such persons and is reasonably aware of the need for such control (*see* ***Millan v AMF Bowling Centers, Inc.***, 38 AD3d 860, 833 NYS2d 173 [2d Dept 2007]). That is, a defendant has no duty to protect patrons against unforeseeable and unexpected assaults (*see* ***Tavarez v Sidetracks, LLC***, 128 AD3d 806, 9 NYS3d 368 [2d Dept 2015]; ***Ash v Fern***, 295 AD2d 869, 744 NYS2d 559 [3d Dept 2002]), or where the incident giving rise to the harm happened unexpectedly and in such a short space of time that they could not have reasonably anticipated or prevented it (*see* ***Giambruno v Crazy Donkey Bar & Grill***, 65 AD3d 1190, 885 NYS2d 724 [2d Dept 2009]; ***Curcio v East Coast Hoops, Inc.***, 24 AD3d 997, 805 NYS2d 489 [3d Dept 2005]). A defendant can be deemed on notice of an impending assault where its employees observe an escalating problem on the premises sufficient to give it such notice and the defendant fails to take reasonable actions to prevent it (*see* ***Ash v Fern***, *supra*; ***Stafford v 6 Crannel St.***, 304 AD2d 997, 759 NYS2d 231 [3d Dept 2003]; ***Heavlin v Gush***, 197 AD2d 773, 602 NYS2d 721 [3d Dept 1993]).

Here, the parties' testimony demonstrates that the plaintiff was injured as the result of a sudden and unexpected assault which The Dubliner could not have reasonably anticipated or prevented. Thus, The Dubliner has established their prima facie entitlement to summary judgment dismissing the

plaintiff's first cause of action on the ground that it cannot be held liable in negligence for the plaintiff's injuries (*see* ***Afanador v Coney Bath, LLC***, 91 AD3d 683, 936 NYS2d 312 [2d Dept 2012]; ***Katekis v Naut, Inc.***, 60 AD3d 817, 875 NYS2d 212 [2d Dept 2009]).

The Court now turns to that branch of The Dubliner's motion which seeks to dismiss the plaintiff's fifth cause of action alleging a violation of the Dram Shop Act. The Dram Shop Act creates a cause of action against one who unlawfully sells alcoholic beverages to an intoxicated person, on behalf of a person who has sustained loss or injuries by reason of that person's intoxication (*see* ***D'Amico v Christie***, 71 NY2d at 83, 524 NYS2d at 5; ***Adamy v Ziriakus***, 92 NY2d 396, 681 NYS2d 463 [1998]). Said Act must be read in conjunction with Alcoholic Beverage Control Law § 65 (***Matalavage v Sadler***, 77 AD2d 39, 432 NYS2d 103 [2d Dept 1980]), which provides that a person who is injured by an intoxicated person, or by reason of such intoxication, has a cause of action against dispensers of alcoholic beverages who continue to sell such beverages to a visibly intoxicated customer (***Reuter v Flobo Enters.***, 120 AD2d 722, 723, 503 NYS2d 67 [2d Dept 1986]). Proof of visible intoxication may be established by circumstantial evidence, including expert and eyewitness testimony (*see* ***Poppke v Portugese Am. Club of Mineola***, 85 AD3d 751, 924 NYS2d 834 [2d Dept 2011]; ***Kish v Farley***, 24 AD3d 1198, 807 NYS2d 235 [4th Dept 2005]). A defendant who seeks dismissal of Dram Shop claim against it, as here, must negate the possibility that it served alcohol to a visibly intoxicated person (*see* ***Hurtado v Williams***, 112 AD3d 1047, 976 NYS2d 326 [3d Dept 2013]; ***Poppke v Portugese Am. Club of Mineola***, *supra*; ***McGovern v 4299 Katonah,*** 5 AD3d 239, 773 NYS2d 285 [1st Dept 2004]). Thus, it is only after this initial burden has been met by the defendant that the burden shifts to the plaintiff to produce evidence in admissible form sufficient to create an issue of fact (***Costa v 1648 Second Ave Rest.***, 221 AD2d 299, 634 NYS2d 108 [1st Dept 1995]; ***Fishman v Beach***, 214 AD2d 920, 625 NYS2d 730 [3d Dept 1995]).

Here, The Dubliner has failed to establish its entitlement to summary judgment on the plaintiff's fifth cause of action. There are issues of fact regarding the amount of alcohol consumed by Green that evening, whether Green was visibly intoxicated when he was first served alcohol at The Dubliner, when and under what circumstances Green was served alcohol at The Dubliner, and whether Green was visibly intoxicated at the time of his last purchase of alcohol that evening. Green's testimony that he did not feel that he was intoxicated cannot serve to make out The Dubliner's burden on summary judgment, and The Dubliner failed to supply any testimony from the bartenders who were working on the evening of this incident (*see* ***Cohen v Bread & Butter Entertainment LLC***, 73 AD3d 600, 905 NYS2d 4 [1st Dept 2010]).

In addition, Gonzalez's testimony that Green did not "appear intoxicated" is conclusory and insufficient to negate the possibility that The Dubliner served alcohol to a visibly intoxicated person (C*f.* ***Terbush v Buchman***, 147 AD2d 826, 537 NYS2d 916 [3d Dept 1989] [witness statements regarding manner of speech, tone of voice and motor coordination sufficient to satisfy defendant's burden on summary judgment]). Thus, the burden never shifted to the plaintiff to submit evidence that The Dubliner served alcohol to Green despite visible signs of his intoxication (*see* ***Conklin v Travers***, 129 AD3d 765, 10 NYS3d 609 [2d Dept 2015]; ***McGovern v Katonah***, 5 AD3d 239, 773 NYS2d 285 [1st Dept 2004]). The failure of The Dubliner to make a prima facie showing of entitlement to summary judgment on the plaintiff's fifth cause of action requires a denial of the subject branch of the motion

regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hospital***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Matinez v 123-16 Liberty Avenue. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]).

In opposition to the motion, the plaintiff submits the affirmation of his attorney, the affidavits of Botti and another of the plaintiff's coworkers, and a copy of the bill for the food and drinks issued by Beckett's allegedly paid by Botti. The latter three exhibits are relevant only to that branch of The Dubliner's motion which seeks to dismiss the plaintiffs fifth cause of action, and they do not need to be addressed based on the determinations herein. In his affirmation, counsel for the plaintiff contends that "there were several opportunities for ... The Dubliner to exercise reasonable care in the protection of the Plaintiff," and that the subject "verbal disagreement ... continued to escalate, over several minutes, in more than one location, near more than one of the defendant's employees." The testimony of the plaintiff and Green do not support counsel's contentions, and the plaintiff fails to submit an affidavit of someone with personal knowledge of the fact to raise a issues of fact requiring a trial of this action.

In opposition to the motion, Green submits the affirmation of his attorney who contends, among other things, that The Dubliner has failed to meet its burden regarding the dismissal of the plaintiff's cause of action pursuant to the Dram Shop Act, and that there is an issue of fact whether The Dubliner was on notice that a fight "was about to ensue." Green fails to submit an affidavit of someone with personal knowledge of the facts to raise a issues of fact requiring a trial of this action. Accordingly, The Dubliner's motion for summary judgment is granted to the extent that the plaintiff's first cause of action for negligence is dismissed, and is otherwise denied.

The plaintiff now cross-moves for an order striking The Dubliner's answer or, in the alternative, granting an adverse inference charge at trial, on the grounds of spoliation of evidence, and for summary judgment in his favor on the ground that The Dubliner violated the Dram Shop Act. In support of his cross motion, the plaintiff submits, among other things, the pleadings, the transcripts of the deposition testimony summarized above, and the exhibits submitted in his opposition to The Dubliner's motion. It is determined that the deposition testimony summarized above does not need to be considered in determining the plaintiff's cross motion to the extent that testimony bears on the issues involving the plaintiff's first cause of action. However, the exhibits previously submitted in the plaintiff's opposition to The Dubliner motion, consisting of two nonparty affidavits and a copy of the Beckett's bill for food and drink are relevant to the issues involving the Dram Shop Act, and are resubmitted herein.

In his affidavit, nonparty Logan Hoffman swears that he visited The Dubliner with the plaintiff, Green, Botti, and three other coworkers on April 4, 2012, that the group sat and drank at tables in front of The Dubliner during the afternoon and early evening, and that Green was the only person drinking Bud Light in front of The Dubliner. He states that he left the group "at some point during the evening," that Green "had four or five drinks and the entire group did two rounds of liquor shots" while he was at The Dubliner, and that the plaintiff, Green, and Botti remained at The Dubliner when he left.

In his affidavit, nonparty Botti swears that he visited The Dubliner with the plaintiff, Green, Hoffman, and three other coworkers on April 4, 2012, that the group sat and drank at tables in front of The Dubliner during the afternoon and early evening, and that Green was the only person drinking Bud

Light in front of The Dubliner. He states the entire group had at least one shot of liquor while sitting outside The Dubliner, that the group decided to go inside The Dubliner at some point in the evening, and that he "closed and paid a tab in the amount of $424.61." He indicates that only he, the plaintiff, Green and another coworker then went into The Dubliner, that the four "continued consuming alcohol for several more hours," and that Green "became visibly intoxicated inside The Dubliner and continued to consume alcoholic beverages up until the time of the incident." Botti further swears that The Dubliner continued to serve Green alcohol while he was visibly intoxicated, that he observed Green and the plaintiff leave the bar immediately before the incident, and that he did not observe the incident because he was inside The Dubliner at the time.

The copy of the bill or "tab" dated April 4, 2012 indicates that it was issued by Beckett's at 5:15 p.m. that evening, that the number of guests served was eight, and that five Jameson shots were served to the group. Although said bill is not attached as an exhibit to Botti's affidavit, and Botti does not directly address its authenticity, the bill indicates that the total amount due is the amount Botti swears that he paid on the evening in question, and The Dubliner does not object to its admissibility. Thus, for the purposes of deciding the instant cross motion only, it is determined that the bill can be considered herein.

The plaintiff has failed to establish his prima facie entitlement to summary judgment on his cause of action pursuant to the Dram Shop Act. It is well settled that evidence of mere consumption of alcohol is insufficient on a motion for summary judgment in a Dram Shop action (*see* ***Pizzaro v City of New York***, 188 AD2d 591, 591 NYS2d 485 [2d Dept 1992]; ***Smith v Guli***, 117 AD2d 1017, 499 NYS2d 561 [4th Dept 1986]). Indeed, a factual determination of intoxication cannot be made solely on the basis of how much alcohol a person has consumed "since the effect of alcohol may differ greatly from person to person" (***Senn v Scudieri***, 165 AD2d 346, 350, 567 NYS2d 665, 668 [1st Dept 1991]; *see also* ***Romano v Stanley***, 90 NY2d 444, 661 NYS2d 589 [1997]; ***Csizmadia v Town Of Webb***, 289 AD2d 854, 735 NYS2d 222 [3d Dept 2001]).

In addition, Botti's statement that Green was visibly intoxicated is conclusory and suffers from the same disability as the statement made by Gonzalez that Green did not appear intoxicated (***Terbush v Buchman***, *supra*). There are issues of fact whether Green appeared visibly intoxicated during the evening in question, and whether The Dubliner served him alcohol thereafter. 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 (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; ***Roth v Barreto***, *supra*; ***Rennie v Barbarosa Transport, Ltd.***, 151 AD2d 379, 543 NYS2d 429 [1st Dept 1989]). Accordingly, that branch of the plaintiff's cross motion which seeks summary judgment on his favor on his cause of action pursuant to the Dram Shop Act is denied.

The Court now turns to that branch of the plaintiff's cross motion which seeks sanctions based on the alleged spoliation of evidence by The Dubliner. In those portions of his testimony relevant to this issue, McDermott declares that The Dubliner had surveillance cameras with views inside and outside the building, that video was recorded and stored in the bar's offices, and that system records over the existing videos automatically depending on the amount of memory or storage available. He stated that he did not know if the video recording of this incident (the video) was recorded over, that he believes

that the police requested the video, and that he or Dillman would be responsible for managing the surveillance system. McDermott further testified that The Dubliner does not have any protocols in effect regarding the preservation of a recording should it learn about an incident at the bar, that he never viewed the video, and that he did not tell Dillman to preserve the video.

Dillman's testimony regarding this issue is that she viewed the video the day after this incident when she learned of its occurrence,[2] that the police requested a copy of the video "about a week later, over a week later," and that she tried to provide the video but it had been taped over.

The determination of spoliation sanctions lies within the broad discretion of the court (***Lentz v Nic's Gymnasium, Inc.***, 90 AD3d 618, 933 NYS2d 875 [2 Dept 2011]; ***Gotto v Eusebe-Carter***, 69 AD3d 566, 892 NYS2d 191 [2d Dept 2010]). A court may "impose a sanction even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided the party was on notice that the evidence might be needed for future litigation" (***Samaroo v Bogopa Serv. Corp.***, 106 AD3d 713, 964 NYS2d 255 [2d Dept 2013]; ***Iannucci v Rose***, 8 AD3d 437, 778 NYS2d 525 [2d Dept 2004]). Generally, striking a pleading as a sanction for spoliation is appropriate only where the missing evidence deprives the moving party of the ability to establish his or her claim or defense (*see* ***Holland v W.M. Realty Mgt.***, 64 AD3d 627, 629, 883 NYS2d 555 [2d Dept 2009]; ***Ingoglia v Barnes & Noble Coll. Booksellers***, 48 AD3d 636, 637, 852 NYS2d 337 [2d Dept 2008]). Here, the plaintiff has not established that the missing evidence would deprive him of the ability to establish his claims.

In his affirmation is support of the cross motion, counsel for the plaintiff does not indicate that the plaintiff is unable to establish his claims without the subject video, and in what manner the plaintiff is prejudiced by his inability to view the video. Where the evidence lost is not central to the case or its destruction is not prejudicial, a lesser sanction, or even no sanction at all, may be appropriate (*see* ***Denoyelles v Gallagger***, 40 AD3d 1027, 834 NYS2d 868 [2d Dept 2007]; ***E.W. Howell Co.,Inc. v S.A.F. La Sala Corp.***, 36 AD3d 653, 828 NYS2d 212 [2d Dept 2007]; ***De Los Santos v Polanco***, 21 AD3d 397, 799 NYS2d 776 [2d Dept 2005]; ***Iannucci v Rose***, 8 AD3d 437, 778 NYS2d 525 [2d Dept 2004]).

Under the particular circumstances, the Court finds the instant motion is premature. There are questions of fact whether The Dubliner was on "notice of a credible probability" that the video itself would become the focus of any litigation commenced as a result of the incident (*see* ***Suazo v Linden Plaza Assoc.***, 102 AD3d 570, 958 NYS2d 389 [1st Dept 2013]; ***Voom HD Holdings LLC v EchoStar Satellite L.L.C.***, 93 AD3d 33, 939 NYS2d 321 [1st Dept 2012]). A ruling as to the admissibility of Dillman's testimony and the wisdom of delivering an adverse inference charge to the jury at trial should be made at the time of trial, when a determination as to the relevance of such evidence and such charge may be made in context (*see* ***Grant v Richard***, 222 AD2d 1014, 636 NYS2d 676 [4th Dept 1995]; ***Speed v Avis Rent-A-Car***, 172 AD2d 267, 568 NYS2d 90 [1st Dept 1991]). Accordingly, the branch of the

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[2] The admissibility of Dillman's testimony regarding her viewing of the video, and the weight to be given it, if any, should await the determination of the issues raised by the plaintiff's cross motion, as discussed herein. Regardless, her testimony in this regard is not dispositive of the issues before the Court.

cross motion which seeks sanctions based on the alleged spoliation of evidence by The Dubliner is denied, without prejudice to renewal at the time of trial.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: August 15, 2017

PETER H. MAYER, J.S.C.