Ploskikh v Vcherashansky
2017 NY Slip Op 32104(U)
October 6, 2017
Supreme Court, Kings County
Docket Number: 503532/13
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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ALBERT PLOSKIKH,

Plaintiff,

-against-

ROMAN VCHERASHANSKY,

Defendant.

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ROMAN VCHERASHANSKY,

Third-Party Plaintiff,

-against-

ADBONI RESTAURANT CORP. a/k/a
THE GREEN PAVILION RESTAURANT,

Third-Party Defendant.

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DECISION/ORDER

Index No. 503532/13
Mot. Seq. No. 6
Motion Sub. 10/5/17

HON. DEBRA SILBER, J.S.C.:

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion for summary judgment dismissing the third-party complaint

Papers	Numbered
Notice of Motion, Affirmation and Exhibits.....	1-15
Memorandum of Law.....	16
Affirmation in Opposition by Third-Party Plaintiff	17
Reply Affirmation	18

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Third-party defendant Adboni Restaurant Corp. moves for summary judgment dismissing the third-party action as against it. The third-party plaintiff opposes the

motion. For the reasons set forth below, the motion is granted and the third-party complaint is dismissed.

Plaintiff in the main action has brought an action against the defendant for personal injuries sustained in a pedestrian knock-down accident which occurred on February 15, 2012. Defendant Roman Vcherashansky is alleged to have been the owner and the driver of the car which came into contact with plaintiff. The note of issue has been filed and the action is on the trial calendar.

The third-party action was commenced on or about December 2, 2014. The complaint alleges that the third-party defendant and its agents and/or employees served alcohol to the plaintiff, the pedestrian, when he was already intoxicated, thereby violating NY General Obligations Law §11-101, known as the "Dram Shop Act." The complaint alleges that as a result, the third-party defendant is liable to the third-party plaintiff for contribution and indemnification.

The instant motion is based on the movant's claim that, if one reads the depositions of the plaintiff and of the restaurant, the court will determine that the third-party defendant did not furnish alcohol to the plaintiff when he was "visibly intoxicated," therefore they did not violate the statute and are entitled to dismissal.

Standard for a Motion for Summary Judgment

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense

is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

"[T]he 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 demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *see also Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to

opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; *see also Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

Discussion

The Dram Shop Act states as follows:

> § 11-101. Compensation for injury caused by the illegal sale of intoxicating liquor
>
> Any person who shall be injured in person, property, means of support, or otherwise 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; and in any such action such person shall have a right to recover actual and exemplary damages.

In *Pinilla v City of New York*, 136 AD3d 774, 776-777 [2d Dept 2016] the Second Department states:

> To establish a cause of action under the Dram Shop Act, a plaintiff is required to prove that the defendant sold alcohol to a person who was visibly intoxicated and that the sale of that alcohol bore some reasonable or practical connection to the resulting damages (see General Obligations Law § 11-101 [1]; Alcoholic Beverage Control Law § 65 [2]; *Kaufman v Quickway, Inc.*, 14 NY3d 907, 909, 931 NE2d 516, 905 NYS2d 532 [2010]; *Dugan v Olson*, 74 AD3d 1131, 1133, 906 NYS2d 277 [2010]). Viewing the facts in the light most favorable to the plaintiff, as the nonmoving party (see *Vega v Restani Constr. Corp*, 18 NY3d 499, 965 NE2d 240, 942 NYS2d 13 [2012]; *Valentin v Parisio*, 119 AD3d 854, 989 NYS2d 621 [2014]), we conclude that, with regard to Sangria's motion for summary judgment dismissing the Dram Shop Act cause of action, the evidence submitted by the plaintiff in opposition to the prima facie establishment of Sangria's entitlement to judgment as a matter of law was sufficient to raise triable issues of fact as to whether Cadena was served alcohol while visibly intoxicated and " 'some reasonable or practical connection' existed between the sale of alcohol at [Sangria] and the resulting damages" (*Sullivan v Mulinos of Westchester, Inc.*, 73 AD3d 1018, 1019-1020, 901 NYS2d 663 [2010], quoting *McArdle v 123 Jackpot, Inc.*, 51 AD3d 743, 746, 858 NYS2d 692 [2008] ; see *Adamy v Ziriakus*, 231 AD2d 80, 88, 659 NYS2d 623 [1997], affd 92 NY2d 396, 704 NE2d 216, 681 NYS2d 463 [1998]; see e.g. *Conklin v Travers*, 129 AD3d 765, 766, 10 NYS3d 609 [2015]).

While a cause of action for contribution asserted by the driver of a vehicle as against a bar has been dismissed as unsupported by the law in the First Department, the court finds that it has been embraced as a valid cause of action in the Second Department. For example, in *Fowler v Taffe*, 152 Misc 2d 343 (N.Y. Sup. Ct. 1990), the court states:

> "In action by pedestrian for injuries sustained when he was struck by motor vehicle, owner and operator of motor vehicle could not bring third party claim for contribution against tavern that allegedly violated Dram Shop Act by selling liquor to pedestrian, thereby causing him to wander into road, since pedestrian's intoxication, if proved, could serve to either vitiate his entire claim or result in diminution of his recovery, so that there was no possibility that owner and operator of motor vehicle could be monetarily injured by tavern's alleged wrongful sale."

In the Second Department, however, the Appellate Division has stated its clear position in *O'Gara v Alacci*, 67 AD3d 54 [2nd Dept 2009].) Therein, the court states:

> accepting the facts as alleged in the third-party complaint as true, according the appellants the benefit of every favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory (see *Leon v Martinez*, 84 NY2d at 87-88), we conclude that the third-party complaint sets forth a cognizable cause of action for contribution based on an alleged violation of the Dram Shop Act. . . . Assuming the third-party defendants' employees violated the Dram Shop Act by selling alcohol to the plaintiff despite her being visibly intoxicated (see *Leon v Martinez*, 84 NY2d at 87-88), the third-party defendants would have breached a duty owed to the appellants, who are members of the public. The Dram Shop Act, intended to, among other things, protect the community from the dangers intoxicated people pose [citations omitted] . . . where the actions of the plaintiff might be attributable to her intoxication or carelessness, or both, a trier of fact could potentially, and rationally, find that the accident occurred as a result of three different breaches of duty: (1) the third-party defendants' breach of their duty under the Dram Shop Act; (2) the plaintiff's breach of her duty to exercise reasonable care for her own safety (see *Arrigo v Conway*, 36 AD2d 215, 216, 319 NYS2d 923 [1971]); and (3) the defendant/third-party plaintiff driver's breach of his duty to exercise due care to avoid colliding with the plaintiff (see Vehicle and Traffic Law § 1146; *Deitz v Huibregtse*, 25 AD3d 645, 646, 808 NYS2d 737 [2006]). Since the courts in the cases relied upon by the Supreme Court and the third-party defendants failed to recognize this possibility (see *Fowler v Taffe,* 152 Misc 2d 343, 344, 576 NYS2d 743 [1990]; *Woodbeck v Caputo & Assoc.*, 131 Misc 2d 321, 322-326, 500 NYS2d 481 [1986]), we find those cases to be unpersuasive.

The court finds that, in order to determine whether movant has made a prima facie case for summary judgment, it is necessary to read the depositions annexed to the motion, as they constitute the only evidence in admissible form in the motion papers. However, the EBT testimony of movant's bartender is merely a self-serving assertion that plaintiff was not visibly intoxicated when he was at their establishment on the night of the accident. This cannot make out a prima facie case for dismissal, both because the court is required to view the complaint in the light most favorable to the third-party plaintiff and because it is insufficient as a matter of law if that is the only admissible evidence in support of the motion. *Quiroz v 176 N. Main LLC*, 125 AD3d 628 (2d Dept 2015). That leaves the plaintiff's EBT to provide corroboration, as there is no EBT of defendant.

The plaintiff testified that he was waiting at the movant's bar for the defendant, to pick up a check that the defendant, his former employer, owed him. He lived on that block at the time. When defendant called him on his cell phone to say he had arrived, he went outside. He saw defendant double parked about four car lengths up the intersecting street. He crossed the street and stood in the crosswalk and waved to defendant. Defendant drove up to plaintiff while he was standing in the crosswalk, but apparently did not stop in time and his car came into contact with plaintiff and knocked him to the ground. When asked if he was walking at the time of the accident, he testified that he was not, but was standing still and waiting for the defendant to pull up to where he was. When asked if he was intoxicated at the time, he testified that he was not, and that he had been drinking wine at the bar and nothing else.

As all of the admissible evidence is that plaintiff was standing still in the crosswalk and was not intoxicated at the time of the accident, movant has made a *prima facie* case for summary judgment dismissing the third-party complaint.

In opposition to the motion, the third-party plaintiff provides an attorney's affirmation, a certified police report and the EBT of his client, Mr. Vcherashansky. The police report states that the officer appeared at the scene at 1:00 A.M. The statements made by the parties are as follows. Mr. Vcherashansky told him that he made a right turn and heard a "thump" but did not see anything. Plaintiff told the officer that he was standing at the corner and was knocked to the ground by defendant's car. Neither party told the officer that they knew each other, or if they did, it is not in the report. Plaintiff was taken to the hospital and complained of pain to various parts of his body. Other information in the police report is hearsay and was not considered.

At his EBT, held on December 9, 2014, Mr. Vcherashansky testified that plaintiff was a driver for the car service that he runs until he fired him about a month before the accident. He claims that plaintiff was fired because he was an alcoholic, but his *ad hominem* attacks are not supported by any evidence. In fact, Mr. Vcherashansky testified [Page 12] that he never saw plaintiff drunk, and "he was a prankster . . . for all I know it was a prank." He then said the man plaintiff shared the taxi with told him plaintiff was a drunk, but he didn't know the man's full name and testified that he did not work for defendant any longer. He then said he saw plaintiff drunk once [Page 13]. That is when he fired him. Plaintiff had fallen asleep in the car. On the day of the accident, he was going to meet plaintiff to return his deposit for the car. He waits four weeks to receive any parking tickets or moving violations before he returns the deposit to drivers. Mr. Vcherashansky testified that, as he was driving to meet plaintiff, "I heard a boom" and figured he hit something or someone so he called 911. He was driving a white Dodge Ram, a large vehicle. He did not get out of his car. He didn't see anyone. A police officer walked up to him within a minute of his call to 911 and asked him to get out of his car. He walked with the officer to the middle of the block where there was an ambulance and police cars. He did not see plaintiff and assumed he was in the ambulance [Page 42]. He then claims the people at the scene, EMTs and/or police, said things to him about plaintiff, but this is hearsay and could not be considered by the court. He did not take any photos of his vehicle or of anything else. He has since sold the vehicle.

The court finds that, viewing the evidence in the light most favorable to the third-party plaintiff, he fails to raise a triable issue of fact to overcome the motion. Mr. Vcherashansky did not see plaintiff before he hit him, according to his testimony. He had not seen him that day or for several weeks. He did not talk to him after the accident, nor

did he see him. He has no personal knowledge of any relevant information to support his claim that the third-party defendant restaurant is liable for contribution with regard to this motor vehicle accident. To be clear, both plaintiff and the restaurant's bartender claim that plaintiff was not intoxicated at the time of the accident. Defendant/third-party plaintiff claims plaintiff was so intoxicated that he contributed to causing the accident, although he does not state how he reaches this conclusion in his deposition. He also claims that the bar is responsible for plaintiff's intoxication, so the bar is responsible for its share of liability, although he testified that he did not see plaintiff before he hit him or afterwards. He thus cannot establish that the plaintiff was intoxicated, nor that his alleged intoxication contributed to causing the accident. This is insufficient. The law requires the claimant to prove that the bar "sold alcohol to a person who was visibly intoxicated and that the sale of that alcohol bore some reasonable or practical connection to the resulting damages." (*Pinilla v City of New York*, 136 AD3d 774, 776-777 [2d Dept 2016] citing General Obligations Law § 11-101 [1]; Alcoholic Beverage Control Law § 65 [2]; *Kaufman v Quickway, Inc.*, 14 NY3d 907, 909, 931 NE2d 516, 905 NYS2d 532 [2010]; *Dugan v Olson*, 74 AD3d 1131, 1133, 906 NYS2d 277 [2010]). Defendant Vcherashansky has not done so.

The foregoing shall constitute the decision and order of the court.

Dated: Brooklyn, New York
October 6, 2017

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court