Ricaurte v Inwood Beer Garden & Bistro Inc.
2018 NY Slip Op 31171(U)
June 8, 2018
Supreme Court, New York County
Docket Number: 153561/2016
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 47

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FERNANDO RICAURTE,

Plaintiff,

- against -

INWOOD BEER GARDEN & BISTRO INC.,

Defendant.

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DECISION AND ORDER

Index No. 153561/2016

PAUL A. GOETZ, J.:

Plaintiff brings this action sounding in negligence and for a violation of the Dram Shop Act to recover damages for personal injuries sustained on December 18, 2015 when he was assaulted at the Inwood Bar & Grill by another patron, nonparty Felix Lopez (Lopez). Defendant Inwood Beer Garden & Bistro, Inc., operating as the Inwood Bar & Grill (Restaurant), moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the application.

Background

At his deposition, plaintiff testified that he had visited the Restaurant twice before the incident. Plaintiff explained that the main level consists of a large bar counter, tables, a stage and a patio, and there is a separate room downstairs. On the date of the incident, plaintiff arrived at the Restaurant around 4:30 p.m. for a holiday party organized by his employer. The party took place in the downstairs room. After one to one and one-half hours, plaintiff and a few of his co-workers, including Jose Grullon, left the party for the bar counter upstairs. Radhames Tejada (Tejada) and Ramon Mata (Mata) joined them at the counter an hour or so later.

At some point that evening, plaintiff went to the bathroom, which was located on the main floor next to a small vestibule. There was a woman standing in the vestibule, and plaintiff

went to stand one to two feet behind her. The door to the bathroom was closed. They waited for two or three minutes before the woman began knocking "violently" on the door with her purse (plaintiff tr at 48). Lopez and another woman emerged from the bathroom almost immediately thereafter. Lopez came out "very very violently, very clearly intoxicated and he sees me and grabs me by the collar and pushes me against the wall . . . cursing at me . . . [and] just roughing me up, pushing his knuckles right into my neck, telling me you don't know who I am" (plaintiff tr at 52). Plaintiff did not strike Lopez, but he did try to push him away. The entire encounter lasted between 10 to 15 seconds before defendant's employees and Tejada came to separate them. Plaintiff then returned to his friends at the counter. He had been talking to his friends for a "good long while," possibly 15 to 20 minutes, when Lopez struck him on the head (*id.* at 61, 65). Lopez fled the Restaurant but was later arrested. He pled guilty to an unknown offense at a subsequent criminal trial.

Plaintiff testified that he saw Lopez for the first time when Lopez emerged from the bathroom. Lopez did not look visibly intoxicated, and plaintiff did not know how long Lopez had been at the Restaurant. He did not know if Lopez had anything alcoholic to drink or if he had been served alcohol. Plaintiff, though, testified that Lopez's breath smelled of alcohol, that his eyes were "a little red, droopy," and that he was very loud and agitated (plaintiff tr at 53).

Mata testified that he and a friend arrived at the Restaurant between 8 p.m. and 9:30 p.m. Mata had been at the Restaurant for 10 minutes before he noticed Lopez seated at the right side of the counter. He did not know if Lopez was intoxicated at that time. Mata testified that Lopez was not staggering or acting violently nor did he look upset. Mata maintained that he saw Lopez being served at least twice with what he believed was alcohol.

Mata stated that he had been at the counter for roughly 40 minutes when he heard a loud commotion from an alcove next to the bathroom. The commotion lasted between one to one and

one-half minutes. Mata testified he did not know that Lopez was involved and did not recall seeing plaintiff at that time. He testified that he was not aware of plaintiff's involvement in the first altercation in the alcove (*id.* at 45).

Three to five minutes passed before he saw Lopez, who looked "very, very, very angry," emerge from the alcove to grab his coat from a chair (Mata tr at 34, 36). Rather than walk straight to the exit, Lopez "made a right towards me . . . [and] questions the guy behind me, which was Fernando I later found out" (*id.* at 34). Lopez did not slur his words, and Mata did not know if Lopez was drunk (*id.* at 49). Before plaintiff could respond, Lopez punched him and ran off. Less than a minute passed from the time Lopez exited the alcove to the time he struck plaintiff (*id.* at 40). Mata could not recall seeing anyone walking with Lopez prior to the second incident.

Bar owner Maria Figueroa (Maria) testified that she was having dinner at the Restaurant when the first incident occurred. She heard a commotion near the bathroom and "saw people like trying to hold one person and the other person" (Maria tr at 17). Ricardo Cardona (Cardona), her manager, told her that Lopez and a woman were inside the bathroom and that plaintiff was waiting outside. When Lopez came out, there was a physical confrontation where one person tried to push another. She was told that Lopez was asked to leave and her husband, Hugo Figueroa (Hugo), escorted him from the Restaurant. Lopez, though, "managed to turn to the right and punch" plaintiff in the back of the head (Maria tr at 18, 43). Maria testified that she was standing next to the hostess stand and did not witness the second incident. Although the bar hired an outside company to provide security, the security guards did not begin work until 9:30 p.m., about one hour after the first incident. Maria testified that she purchased the Restaurant in July 2015, and from that time up to December 18, there had been no prior physical altercations at the Restaurant.

In an affidavit in support of the motion, Hugo averred that he went to the alcove near the bathroom when an employee alerted him to a fight. Hugo stepped between two men who were yelling at each other. Once he arrived, plaintiff immediately calmed down and left the alcove, but Lopez continued shouting. Hugo stated that he told Lopez to calm down or else leave the premises. Lopez agreed to leave and entered the bathroom to wash his hands. When Lopez emerged from the bathroom, he appeared calm. Hugo then began to escort Lopez out of the Restaurant, walking on Lopez's left. When they reached the bar counter, Lopez grabbed his jacket from a chair. Hugo stated that Lopez then lunged two to three feet to his right and struck plaintiff on the back of the head. Hugo stated that Lopez did not appear intoxicated. Lopez was not stammering, his speech was not slurred, and his eyes were not bloodshot. Hugo stated that there had been no prior physical altercations at the Restaurant and that he had never seen Lopez at the Restaurant before.

Defendant also tenders an affidavit from John A. Cocklin, MBA (Cocklin), an expert in Dram Shop, Alcohol Establishment Security and Police Practices. Based upon his review of the deposition transcripts and of the surveillance video taken the night of December 18, Cocklin opined, within the bounds of reasonable professional certainty, that defendant acted with reasonable care. First, Hugo de-escalated the first situation by stepping between plaintiff and Lopez, and while speaking to Lopez, Hugo "backed [plaintiff] out of the alcove and away from Lopez" (Cocklin aff, ¶ 9). After a short conversation, Hugo directed plaintiff out of the alcove area. Second, Hugo promptly ejected the more aggressive patron, Lopez, from the premises. The surveillance video showed Lopez walking to the only exit from the Restaurant, with Hugo following directly behind, when Lopez suddenly pivoted to his right to strike plaintiff. Time-lapse on the surveillance video showed that six seconds passed from the time Lopez retrieved his belongings to the time he pivoted towards plaintiff. Less than two seconds later, Lopez struck

plaintiff, who was standing among other patrons at the counter. Both incidents took place within the span of four minutes and 53 seconds.

Discussion

It is well settled that the movant on 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 issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [emphasis in original]).

A. The First Cause of Action for Negligence

Defendant argues that summary judgment is appropriate because the first altercation was unexpected. As to the second altercation, defendant submits that its actions were reasonable.

Plaintiff argues that defendant failed to show that the second attack was not foreseeable and that it took reasonable measures to protect plaintiff.

The elements for a cause of action for negligence are "(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], *rearg denied* 28 NY3d 956 [2016] [internal quotation marks and citation omitted]). "Restaurant owners [are] required to exercise reasonable care for the protection of patrons on their premises" (*Davis v City New York*, 183 AD2d 683, 683 [1st Dept 1992] [citation omitted]), which includes taking "minimal security precautions to protect those on their premises from the foreseeable criminal acts of third parties" (*Matz v Nettles*, 137 AD3d 667, 667 [1st Dept 2016] [citations omitted]). However, "a possessor of land, whether he be a landowner or a leaseholder, is not an insurer of the visitor's safety" (*Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519 [1980]). The scope of the duty turns on foreseeability, taking into account "past experience and the 'likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor'" (*Pink v Rome Youth Hockey Assn., Inc.*, 28 NY3d 994, 998 [2016], quoting *Maheshwari v City of New York*, 2 NY3d 288, 294 [2004]). A restaurant or bar owner is not liable for "an unexpected altercation between patrons which results in injury [because it] is not a situation which could reasonably be expected to be anticipated or prevented" *Silver v Sheraton-Smithtown Inn*, 121 AD2d 711, 712 [2d Dept 1986]); *Lewis v Jemanda N.Y. Corp.*, 277 AD2d 134, 134 [1st Dept 2000]).

Based on plaintiff's own testimony, the first incident was sudden and unexpected and was not the type that defendant could have "reasonably anticipated or prevented" (*Afanador v Coney Bath, LLC*, 91 AD3d 683, 683-684 [2d Dept 2012]; *Lewis*, 277 AD2d at 134]). There was no evidence showing that Lopez was acting in an unruly manner before the first altercation. Similarly, there was no evidence of a prior interaction between plaintiff and Lopez that would have alerted defendant to a possible altercation (*see Cutrone v Monarch Holding Corp.*, 299 AD2d 388, 389 [2d Dept 2002]).

Nevertheless, a restaurant owner has the duty to control the conduct of third parties on their premises "when they have the opportunity to control such persons and are reasonably aware of the need for such control" (*D'Amico v Christie*, 71 NY2d 76, 85 [1987], citing *DeRyss v New York Cent. R.R. Co.*, 275 NY 85, 91 [1937]). Defendant has demonstrated that the second incident, although it involved the same parties, was likewise unforeseeable and unanticipated and that defendant exercised reasonable care to protect plaintiff. Hugo had already intervened in the first incident and asked Lopez to leave the Restaurant, to which Lopez voluntary agreed. The second incident occurred while Hugo was escorting Lopez off the premises, and the two incidents occurred within minutes of each other.

Plaintiff does not dispute that the first incident was sudden and unexpected. As to the second, he failed to raise a triable issue of fact. A defendant need only provide "reasonable security measures not optimal nor the most advanced security system available" (*Leyva v Riverbay Corp.*, 206 AD2d 150, 155 [1st Dept 1994], citing *Tarter v Schildkraut*, 151 AD2d 414, 415 (1st Dept 1989), *lv denied* 74 NY2d 616 [1989]), and here, defendant acted promptly to remove Lopez from the premises. Plaintiff failed to identify what additional safety measures could have been taken to avoid the second incident (*see Djurkovic v Three Goodfellows*, 1 AD3d 210, 211 [1st Dept 2003], *lv denied* 2 NY3d 701 [2004]). Moreover, plaintiff did not refute defendant's evidence that there were no prior incidents at the Restaurant (*see Davis*, 183 AD2d at 683). Accordingly, summary judgment is granted on plaintiff's first cause of action.

B. Second Cause of Action Under the Dram Shop Act

Defendant contends that summary judgment should be granted because plaintiff cannot establish Lopez was visibly intoxicated when he was served.

Plaintiff argues that Mata witnessed defendant serving Lopez two alcoholic drinks and that plaintiff observed that Lopez was visibly intoxicated.

General Obligations Law § 11-101 (1) states, in relevant part, that "[a]ny person who shall be injured . . . by any intoxicated person, or by reason of the intoxication of any person . . . 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 . . . ." Liability under the statute is predicated upon the commercial sale of alcohol to a visibly intoxicated person (*see Adamy v Ziriakus*, 92 NY2d 396, 400 [1998]; *D'Amico*, 71 NY2d at 84). While "[p]roof of mere consumption of alcohol is not enough to defeat a [defense] motion for summary judgment in a Dram Shop action" (*Costa v 1648 Second Ave. Rest.*, 221 AD2d 299, 300 [1st Dept 1995], quoting *Pizzaro v City of New York*, 188 AD2d 591, 594 (2d Dept 1992], *lv denied* 82 NY2d 656 [1993]), it is incumbent upon defendant on moving for summary judgment to tender admissible evidence that it did not sell alcohol to a visibly intoxicated person (*see Darwish v City of New York*, 287 AD2d 407, 407 [1st Dept 2001]; *Costa*, 221 AD2d at 301, citing *MacDougall v Kelsch*, 161 AD2d 886, 887-888 [3d Dept 1990]).

Circumstantial evidence is permissible to demonstrate a bar patron's visible intoxication (*see Adamy*, 92 NY2d at 401), such as testimony from eyewitnesses (*see Dugan v Olson*, 74 AD3d 1131, 1133 [2d Dept 2010]). Here, defendant relies solely upon Mata's testimony to show that Lopez was not visibly intoxicated. Mata observed Lopez being served "[a]t least twice" by the bartender with what he assumed were alcoholic beverages. Mata did not know if Lopez was drunk because "I don't know his limit" (Mata tr at 26). Lopez was not staggering or acting violently and his speech was not slurred. He did not notice if Lopez's eyes were bloodshot.

The court, though, must view the evidence in the light most favorable to plaintiff (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2006]). Although plaintiff did not personally observe whether Lopez had been served alcohol, he testified that Lopez was visibly intoxicated during their first encounter. Lopez's breath smelled of alcohol and his eyes were "a

little red, droopy" (plaintiff tr at 53). He was also very loud and agitated. Mata also testified that the bartenders served Lopez with at least two alcoholic beverages. Absent from the moving papers are affidavits or testimony from Cardona or the bartenders working the night of the incident to describe Lopez's condition at the time he was served (*see Cohen v Bread & Butter Entertainment LLC*, 73 AD3d 600, 601 [1st Dept 2010]; *McGovern v 4299 Katonah*, 5 AD3d 239, 240 [1st Dept 2004]; *Duran v Poggio*, 244 AD2d 162, 162 [1st Dept 1997]). Because defendant failed to meet its prima facie burden, this branch of the motion is denied.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted as to plaintiff's first cause of action for negligence and is otherwise denied.

Dated: New York, New York
June 8, 2018

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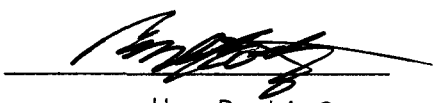

Hon. Paul A. Goetz, JSC