

<b>Sneider v AB Green Gansevoort, LLC</b>
2018 NY Slip Op 31310(U)
June 20, 2018
Supreme Court, New York County
Docket Number: 155101/14
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

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MARCO SNEIDER

Plaintiff

Index No. 155101/14

v

DECISION AND ORDER

AB GREEN GANSEVOORT, LLC, ABG STANDARD  
OPERATION, LLC, and DIPEN NAYAK

MOT SEQ 004

Defendant.

-----X

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for personal injuries arising from an assault at a Manhattan bar owned and operated by the defendants AB Green Gansevoort, LLC, and ABG Standard Operation, LLC (together the ABG defendants), the ABG defendants move pursuant to CPLR 3212 for summary judgment dismissing the complaint against them. The plaintiff opposes the motion; co-defendant Dipen Nayak does not. The motion is granted in part.

II. BACKGROUND

The plaintiff alleges that, at approximately 1:30 a.m. on February 23, 2013, he was sitting at a table at the Biergarten at The Standard Hotel when he was unexpectedly struck in the face by defendant Dipen Nayak, another patron of the bar. The plaintiff

suffered facial fractures, lacerations, and other injuries. Nayak was arrested, charged with assault and harassment, and subsequently pleaded guilty to the violation of disorderly conduct.

By an order dated January 7, 2015, this court denied Nayak's motion pursuant to CPLR 3211(a)(7) to dismiss the complaint as against him. By an order dated November 19, 2015, this court granted the plaintiff's motion for partial summary judgment as against defendant Nayak on the issue of liability, and dismissed Nayak's counterclaims, leaving damages to be determined at trial.

In his complaint, the plaintiff asserts two causes of action against the ABG defendants - (1) that they were negligent in failing to provide adequate security for patrons at the bar despite having knowledge of prior assaults by its patrons upon others (first cause of action), and (2) that they were negligent in furnishing alcohol to Nayak despite the fact that Nayak was visibly intoxicated, in violation of General Obligations Law § 11-101(1) (second cause of action).

In support of their motion for summary judgment, the ABG defendants submit the deposition transcripts of the plaintiff, Nayak, Michael Caruso, the director of guest relations at The Standard Hotel, and Jason Edwards, a guest relations officer at The Standard Hotel, along with an attorney's affirmation. The plaintiff testified that he and some friends were at another

nearby bar drinking beer prior to going to the Biergarten to do the same. There, he and one friend sat down at a table with some girls and, after about 20 minutes, he was struck by Nayak. The plaintiff testified that he did not observe Nayak prior to the attack but was told by friends that Nayak poured beer on him before striking him. The plaintiff could not tell if Nayak was intoxicated, and could not recall what he looked like. The next thing he recalled after being struck was being walked outside to an ambulance. He spent two days in the hospital.

Nayak, at his own deposition taken in January 2017, testified that he recalled very little about the events leading up to the attack, only that he was at the Biergarten for two hours before the occurrence, that he had consumed beer during that time, and that the number of beers consumed "could have been more than two but less than seven." He testified that he had gone to the bar to order drinks a few times that night but could not recall if he was slurring his words when he spoke to the bartender or whether he was able to stand without swaying. In response to a question as to whether the Biergarten served him alcohol while he was intoxicated, he replied, "I guess to some extent." Nayak recalled that there was a doorman outside but could not recall if there was a line to get into the bar or if he was asked to show identification. According to Nayak, he heard the plaintiff make lewd comments to Nayak's date and other

companions at the table, and curse at Nayak. Nayak further testified that he did not seek out or speak with security personnel to complain about the plaintiff's behavior.

As Nayak explained it, just as he was retrieving his jacket and those of his companions, the plaintiff exchanged words with him, and raised and swung his arms "as if he were saying something." Nayak testified that he felt threatened, and simply "reacted" by striking the plaintiff in the face as the plaintiff arose from his seat.

Neither Edwards nor Caruso observed the attack upon the plaintiff. Caruso testified that the Biergarten had a capacity of 683 people and that, on the night of the incident, there were probably less than 150 patrons in the establishment. He testified that on that night the Biergarten employed two or three security personnel who were all trained to respond to intoxicated customers. He estimated that on a Saturday night in February 2013, there would be a total of 15-25 security personnel on duty in The Standard Hotel.

Edwards, who was working the night of February 23, 2013, testified that he could recall two or three altercations at the bar before that date, but had no independent recollection of the instant incident. Edwards denied ever personally observing a bartender serving an intoxicated patron.

In opposition to the motion, the plaintiff submits three

incident reports prepared by the ABG defendants which indicate the presence of an intoxicated patron at the bar on three occasions in the two years prior to the incident - July 2010, October 2010, and November 2012. The October 2010 report concerns an incident where the intoxicated person assaulted another patron. The plaintiff also submits the transcript of Nayak's criminal plea allocution, dated March 4, 2014, in which he admits under oath that he struck the plaintiff with intent to cause injury and admits that he had no justification for doing so. The plaintiff also submits a subsequent affidavit of Nayak dated August 15, 2015, submitted to this court on a prior motion, in which he denies being intoxicated at the time of the incident, attempts to disavow his plea and claims to have been acting in self-defense and in defense of his friends when he struck the plaintiff.

In that regard, this court's order of November 19, 2015, notes that "the facts contained in Nayak's affidavit submitted on this motion contradict his own plea allocution" and "[w]hile [Nayak] now contends that he struck the plaintiff on behalf of some female friends, no such assertion has been previously made. In any event, Nayak's affirmative waiver of any justification defense at the time of his plea waives the defense as to himself and others. See Penal Law § 35.15."

### III. DISCUSSION

#### A. Summary Judgment Standard

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) (citations omitted). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), as well as 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. See Vega v Restani Constr. Corp., 18 NY3d 499 (2012). Thus, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." Garcia v J.C. Duggan, Inc., 180 AD2d 579, 580 (1<sup>st</sup> Dept. 1992). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See Vega v Restani Constr. Corp., supra. A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See id. Stated otherwise, "[t]he drastic remedy of summary judgment, which deprives a party of his [or her] day in court,

should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable.'" De Paris v Women's Natl. Republican Club, Inc., 148 AD3d 401, 403-404 (1<sup>st</sup> Dept. 2017); see Bronx- Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480 (1<sup>st</sup> Dept. 1990). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law by merely pointing to gaps in the plaintiff's case. Rather, it must affirmatively demonstrate the merit of its defense. See Koulermos v A.O. Smith Water Prods., 137 AD3d 575 (1<sup>st</sup> Dept. 2016); Katz v United Synagogue of Conservative Judaism, 135 AD3d 458 (1st Dept. 2016).

#### B. Provision of Inadequate Security

The ABG defendants demonstrated their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging inadequate security since the instant incident was an unexpected and unforeseeable attack.

Generally, "restaurant owners [a]re required to exercise reasonable care for the protection of patrons on their premises." Davis v City of New York, 183 AD2d 683, 683 (1<sup>st</sup> Dept. 1992). The owner of a restaurant or other public accommodation may be held liable for its failure to provide adequate security where it had prior notice of similar occurrences or had "reason to know that

there is a likelihood that third parties may endanger the safety of those lawfully on the premises." Wayburn v Madison Land Ltd. Partnership, 282 AD2d 301, 303 (1<sup>st</sup> Dept. 2001); see Shaw v Riverbay Corp., 286 AD2d 638 (1<sup>st</sup> Dept. 2001); Cruz v Madison Detective Bureau, Inc., 137 AD2d 86 (1<sup>st</sup> Dept. 1988); see also Davis v City of New York, supra. However,

"[w]ith respect to the adequacy of security, while the owner of a public establishment has the duty to control the conduct of persons on its premises when it has the opportunity to do so and is reasonably aware of the need for such control, *it has no duty to protect customers against an unforeseen [sic] and unexpected assault (see D'Amico v Christie*, 71 NY2d 76; Millan v AMF Bowling Ctrs., Inc., 38 AD3d 860; Petras v Saci, Inc., 18 AD3d 848)." (emphasis added)

Katekis v Naut, Inc., 60 AD3d 817, 818 (2<sup>nd</sup> Dept. 2009); see Maheshwari v City of New York, 2 NY3d 288; Salichs v City of New York, 127 AD3d 406 (1<sup>st</sup> Dept. 2015); Afanador v Coney Bath, LLC, 91 AD3d 683 (2<sup>nd</sup> Dept. 2012); Scalice v Kullen, 274 AD2d 426 (2<sup>nd</sup> Dept. 2000).

In regard to this cause of action, the ABG defendants rely upon the testimony of the plaintiff in which he described the attack as unprovoked and unexpected. They also rely in part on co-defendant Nayak's deposition testimony, in which he asserted that his conduct in striking the plaintiff was an impulsive reaction to the plaintiff's sudden gestures and arm swinging. Although there is evidence that the plaintiff may have had some interaction with the defendant prior to the attack, these

allegations are insufficient to provide notice to the AGB defendants "of any escalating situation between the plaintiff and h[is] assailant such that the [ABG defendants'] employee should have reasonably anticipated or prevented the attack." Scalice v Kullen, supra, at 427. Indeed, Nayak elected not to inform security personnel, and there is no proof of any conduct on the part of the plaintiff that should have alerted security personnel to a potential problem.

Thus, the ABG defendants established, prima facie, that the attack "was not a foreseeable result of any security breach," and that, by assigning two or three security personnel in their establishment, they took "reasonable measures to deal with issues of ... disorderliness short of unprovoked criminal acts." Maheshwari v City of New York, supra, at 294; see generally Djurkovic v Three Goodfellows, Inc., 1 AD3d 210 (1<sup>st</sup> Dept. 2003).

The plaintiff's submissions in opposition are insufficient to warrant denial of that portion of the defendants' motion. The incident reports he submitted do not support his position since they reflect only three incidents of an intoxicated patron over a two year period and only one where the patron assaulted another. Nor are the reports in admissible form, as required on a summary judgment motion. Indeed, none of the reports are signed or even indicate who prepared them. Thus, they do not overcome the ABG defendants' showing that Nayak's attack upon the plaintiff was

unforeseen and unprovoked, such that no amount of additional security would have prevented it. See Salichs v City of New York, supra. Moreover, in his own deposition testimony, the plaintiff asserts that the attack was unforeseeable and unprovoked, and he also relies on Nayak's plea allocution, in which Nayak gave sworn testimony that his action was not prompted by any conduct of the plaintiff, which is consistent with Nayak's deposition testimony that he acted on impulse. Finally, the plaintiff's bare allegation that there should have been more than three security personnel in the bar is not supported by any expert or any legal authority which would allow the court to so conclude.

C. Dram Shop Act

"General Obligations Law § 11-101 (1), known as the Dram Shop Act, makes a party who 'unlawfully' sells alcohol to another person liable for injuries caused by reason of that person's intoxication. Under Alcoholic Beverage Control Law § 65 (2), it is unlawful to furnish an alcoholic beverage to any 'visibly intoxicated person.'" Adamy v Ziriakus, 92 NY2d 396, 400 (1998). Proof of visible intoxication can be proven by circumstantial evidence, such as expert testimony or eyewitness testimony. See Romano v Stanley, 90 NY2d 444 (1997); Kelly v Fleet Bank, 271 AD2d 654 (2<sup>nd</sup> Dept. 2000).

"In order to shift th[e] burden to the plaintiff to produce

evidence in admissible form sufficient to create an issue of fact on a Dram Shop cause of action, a defendant moving for summary judgment must first negate the possibility that alcohol was unlawfully served to a visibly intoxicated person." Costa v 1648 Second Ave. Restaurant, 221 AD2d 299, 301 (1<sup>st</sup> Dept. 1995); see Darwish v City of New York, 287 AD2d 407 (1<sup>st</sup> Dept. 2001). The ABG defendants "failed to eliminate that triable issue of fact" (Costa v 1648 Second Ave. Restaurant, supra, at 301), since their submissions do not establish, prima facie, that Nayak was not visibly intoxicated when they furnished him with alcohol. In fact, Nayak's own testimony, in which he stated that he may have consumed as many as six beers prior to striking the plaintiff, and that he was already intoxicated "to some extent" when being served alcohol, suggests otherwise, notwithstanding an affidavit he submitted on a prior motion in which he averred that he was not intoxicated. The deposition testimony of Caruso and Edwards provided no support in this regard since neither had any specific independent recollection of the evening or of Nayak.

To the extent that the ABG defendants rely on the "failure of plaintiff's deposition testimony and bill of particulars to demonstrate a prima facie case" (Darwish v City of New York, supra, at 407), this reliance is insufficient since it misapprehends the burden of proof on this motion. See id. Notably, the ABG defendants did not submit an affidavit or sworn

testimony from a bartender or from anyone who witnessed any transaction between a bartender and Nayak. Nor did they submit any video from inside the bar to show that Nayak was not intoxicated when served or at any other time. While a video of the assault itself was submitted on a prior motion, neither party submitted it on this motion. The ABG defendants thus "did not submit any evidence that [Nayak] was not visibly intoxicated when the bartender served him" Duran v Poggio, 244 AD2d 162, 162 (1<sup>st</sup> Dept. 1997). Hence, summary judgment dismissing the Dram Shop Act cause of action must be denied, regardless of the sufficiency of the opposition papers.

#### IV. CONCLUSION

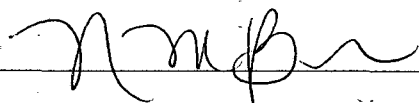
Accordingly, it is

ORDERED that the motion of the defendants AB Green Gansevoort, LLC, and ABG Standard Operation, LLC, for summary judgment dismissing the complaint as against them is granted to the extent that the first cause of action, which seeks to recover for negligence in the provision of security at The Standard Hotel Biergarten, is dismissed, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

Dated: June 20, 2018

ENTER:



J.S.C.

**HON. NANCY M. BANNON**