

**Meneve v Hyman**

2018 NY Slip Op 34107(U)

March 9, 2018

Supreme Court, Rockland County

Docket Number: Index No. 031336/2017

Judge: Sherri L. Eisenpress

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
STEVEN MENEVE and SOPHIA MENEVE,

*Plaintiffs,*

*-against-*

WILLIAM J. HYMAN, RHODES NORTH TAVERN, EAGLE  
TAVERN CORP., TYLER RHODES, DOREEN RHODES, WARREN  
L. COHEN, JOHN DOES 1-10, and XYZ CORPORATIONS  
1-10,

*Defendants.*

-----X  
Sherri L. Eisenpress, J.

**DECISION AND ORDER**

Index No. 031336/2017

(Motion # 1)

The following papers, numbered 1 to 5, were considered in connection with the "Rhodes" <sup>1</sup>Defendants' Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3211, dismissing the Complaint, and cross-claims of Defendant William J. Hyman, on the grounds that Plaintiffs have failed to state a claim upon which relief may be granted:

**PAPERS**

**NUMBERED**

NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS "A"- "E"/ MEMORANDUM OF LAW IN SUPPORT	1-3
AFFIRMATION IN OPPOSITION BY PLAINTIFF/EXHIBIT "A"/MEMORANDUM OF LAW IN OPPOSITION	4
AFFIRMATION IN REPLY	5

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

Plaintiffs filed a Summons and Complaint through the NYSCEF system on March 24, 2017. The Complaint alleges eight causes of action: (i) Assault and Battery against Hyman; (ii) Intentional Infliction of Emotional Distress by Hyman; (iii) Negligent Infliction of Emotional

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<sup>1</sup>Plaintiffs collectively refer to the "Rhodes Defendants" as including Rhodes North Tavern, Eagle Tavern Corp., Tyler Rhodes, Doreen Rhodes and Warren L. Cohen and it is these Defendants who move to dismiss.

Distress by Hyman; (iv) Negligence by Hyman; (v) Negligence by the "Rhodes" Defendants; (vi) Nuisance against the "Rhodes" Defendants; (vii) Violations of §11-101 of the General Obligations Law and §65 of the Alcohol Beverage Control Law against the "Rhodes" Defendants; and (viii) Loss of Consortium.

In sum and substance, Plaintiffs allege that on or about March 26, 2016, they attended a birthday party at Rhodes Tavern. They further allege that Defendant Hyman arrived at the premises in an obvious and apparent highly intoxicated condition but was nonetheless served intoxicating beverages by agents and/or employees of Rhodes Tavern. It is also alleged that the Rhodes Defendants were on actual and/or constructive notice of Defendant Hyman's confrontational behavior, as he customarily appears at the premises in a highly intoxicated condition. During the course of Plaintiffs' dinner at Rhodes, they claim that Defendant Hyman began to stare at them and made them feel uncomfortable. Around 11:30 p.m., Defendant Hyman followed Mr. Meneve outside onto the patio/porch of the premises, verbally assaulted him and threatened, attacked and punched him in the face, resulting in multiple facial fractures and personal injuries. After the alleged assault, Plaintiffs claim that a Rhodes' employee advised the Plaintiffs that Defendant Hyman is "a troublemaker and causes problems whenever he comes onto the Premises." Plaintiffs allege that the Rhodes Defendants were aware of Defendant Hyman's highly intoxicated condition, continued to serve him alcohol, were aware of his confrontational behavior on prior occasions and failed to adequately supervise and/or control his behavior and provide adequate security measures at the premises.

Defendant Hyman filed a four sentence "Answer" pro se on or about April 28, 2017, and then later filed an Answer by counsel on June 6, 2017. The second Answer asserts various affirmative defenses including improper service, self-defense, negligence of Plaintiff, unclean hands, failure to state a cause of action upon which relief can be granted, failure to mitigate damages, Statute of Limitations, defense of others, consent, assumption of risk, mistake of law or fact, and necessity. He also interposed cross-claims against the Rhodes

Defendants including contribution, negligence of others, indemnification, request for allocation, negligent training and supervision and failure to intervene.

On July 11, 2017, Defendants filed the instant pre-answer motion to dismiss the Fifth through Eighth Causes of Action, arguing that the complaint fails to state a cause of action upon which relief can be granted, as well as Defendant Hyman's cross-claims. On a motion to dismiss for failure to state a cause of action [§ 3211(a)(7)], the Court initially must accept the facts alleged in the complaint as true and then determine whether those facts fit within any cognizable legal theory, irrespective of whether the plaintiff will likely prevail on the merits. Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 318, 631 N.Y.S.2d 565 (1995); Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972 (1994); People v. New York City Transit Authority, 59 N.Y.2d 343, 348, 465 N.Y.S.2d 502 (1983); Morone v. Morone, 50 N.Y.2d 481, 429 N.Y.S.2d 592 (1980); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-275, 401 N.Y.S.2d 182 (1977); Cavanaugh v. Doherty, 243 A.D.2d 92, 98, 675 N.Y.S.2d 143 (3d Dept. 1989); Klondike Gold, Inc. v. Richmond Associates, 103 A.D.2d 821, 478 N.Y.S.2d 55 (2d Dept. 1984). The complaint must be given a liberal construction and will be deemed to allege whatever cause of action can be implied by fair and reasonable reading of same. Shields v. School of Law of Hofstra University, 77 A.D.2d 867, 431 N.Y.S.2d 60 (2d Dept. 1980); Penato v. George, 52 A.D.2d 939, 383 N.Y.S.2d 900 (2d Dept. 1976).

#### **Fifth Cause of Action**

The Fifth Cause of Action is one for negligence against the Rhodes Defendants. It is alleged that Defendants were careless and negligent in permitting Defendant Hyman to be at the Premises on the Incident date in a clear and obvious highly intoxicated condition; that they continued to serve alcohol to him; that they failed to adequately supervise the Premises and protect Plaintiffs; that they failed to have sufficient, adequate and necessary security to protect Plaintiffs; and that they failed to contact the police in a timely manner prior to and during the incident.

Defendants allege that this cause of action must be dismissed because the common law of this state has never recognized a cause of action for Dram Shop liability. They further argue that the negligent supervision claims must fail, as a matter of law, because the assault was an unexpected altercation between patrons. In opposition, Plaintiffs argue that they have sufficiently plead negligence in that Defendants failed to keep the premises in a reasonably safe condition such that their invitees are not unnecessarily exposed to danger.

Defendants are correct that under the common law, there is no basis for imposing liability on persons who merely furnished alcohol, for injuries caused by an intoxicated person. D'Amico v. Christie, 71 N.Y.2d 76, 85, 524 N.Y.S.2d 1 (1987). However, landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property. Id. "In particular, they have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control." Id. Thus, applying this rationale, courts have recognized that under common law, a landowner may have responsibility for injuries caused by an intoxicated guest. Id. "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 an intoxicated guest. Id. For this reason, Plaintiffs have sufficiently plead a negligence cause of action arising out of Defendants' alleged failure to protect them from the actions of co-defendant Hyman. Likewise, Plaintiffs have sufficiently plead a negligence cause of action with respect to negligent supervision and control. At this point in time, prior to any discovery, the Court cannot say that the Rhodes Defendants were not liable for negligent supervision based upon their claim that the assault was an unexpected altercation between patrons. For these reasons, Defendants' application to dismiss the Fifth Cause of Action is denied.

#### **Sixth Cause of Action**

The Sixth Cause of Action alleges nuisance. Plaintiffs allege that the Rhodes Defendants maintained a "nuisance and a public nuisance" by operating the Premises without

adequate, necessary and/or reasonable supervision and security. Defendants move to dismiss the public nuisance claim on the ground that there is no allegation of interference with public property- an essential element of such a cause of action. They also argue that any claim of private nuisance must also be dismissed because private nuisance is interference with the use and enjoyment by a plaintiff of plaintiff's property. Plaintiffs argue that they have alleged a private nuisance cause of action in that one may be liable for private nuisance where the wrongful invasion of the use and enjoyment of another's land is intentional and unreasonable.

To constitute a public nuisance, the offending party's actions must damage or infringe upon the exercise of rights common to all people, such as interfering with the public's right to use a public place. Haire v. Bonelli, 57 A.D.3d 1354, 1358, 870 N.Y.S.2d 591 (3d Dept. 2008). Clearly, any claim of a public nuisance must be dismissed since Rhodes Tavern, though open to the public, is private property. Liability for a private nuisance arises from conduct which invades another's interest in the private use and enjoyment of land, and the invasion is either intentional, negligent or related to abnormally dangerous activities. Id. In the instant matter, Plaintiffs do not allege that Defendants intentionally invaded his enjoyment in the use of the restaurant nor that any abnormally dangerous activities were involved. "Where nuisance arises solely from negligence, there is generally a single wrong which may be characterized as either a nuisance or negligence." Id. Since the Court may properly submit a single count of negligence to the jury because negligent conduct becomes an element of the nuisance cause of action, and a plaintiff can only recover once for the harm suffered regardless of how the cause of action is denominated, the Court may dismiss the private nuisance cause of action where the negligence cause of action remains. Id. For these reasons, the Court grants dismissal of the Sixth Cause of Action in its entirety.

#### **Seventh Cause of Action**

The Seventh Cause of Action alleges violations of §11-101 of the General Obligations Law (otherwise known as the "Dram Shop Rule") and § 65 of the Alcohol Beverage

Control Law ("ABCL"). Defendants move to dismiss the Dram Shop claims as to the individual movants Tyler Rhodes, Doreen Rhodes and Warren Cohen, as they claim they are not the owners of the subject restaurant and there is no allegation in the complaint that they personally served alcoholic beverages to Defendant Hyman. In support of this contention, they annex two single page documents in the nature of a Rockland County Department of Health permit which lists Eagle Tavern Corp. as the "operator of Rhodes North Tavern" and a New York State Department of Taxation and Finance, Certificate of Authority, which authorizes Eagle Tavern Corp to collect sales and use taxes. With respect to the alleged violations of §65 of the Alcohol Beverage Control Law, Defendants argue that it does not create a private right of action.

Plaintiffs oppose the motion and argue that Defendants have not shown that the "establishment's" owner and operator Eagle Tavern Corp., is not owned or operated by the individual defendants. They argue that the documents submitted fail to establish lack of ownership as a matter of law. With respect to the § 65 of the ABCL, Plaintiffs contend that it does create a private right of action.

A motion to dismiss founded upon documentary evidence [§ 3211(a)(1)] will only be granted if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. Sunset Café, Inc. v. Mett's Surf & Sports Corp., 103 A.D.3d 707, 959 N.Y.S.2d 700 (2d Dept. 2013); Jones v. Rochdale Village, Inc., 96 A.D.3d 1014, 948 N.Y.S.2d 80 (2d Dept. 2012); Fontanetta v. Doe, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010). In the instant matter, the two documents submitted do not conclusively show that the individual named defendants are not "owners" in any legal sense. As such, the Court denies the application to dismiss the Seventh Cause of Action with respect to the Dram Shop claims against the individually named Defendants. However, the claims premised upon § 65 of the ABCL must be dismissed because that section creates no independent statutory cause of action. Moter v. Lo Jim Café, 19 A.D.2d 523, 240 N.Y.S.2d 277 (1<sup>st</sup> Dept. 1963); Lee v. Holloway, 146 Misc.2d 455, 461, 550 N.Y.S.2d 977 (Sup Ct. Wayne County 1989).

**Eighth Cause of Action**

Plaintiffs Eighth Cause of Action is one for loss of consortium on behalf of Sophia Meneve as a result of the injuries suffered by her husband Steven Meneve. Moving Defendants argue that since this action is wholly derivative of the causes of action asserted on behalf of plaintiff Steven Meneve, it to must too be dismissed. Since this Court did not dismiss all the causes of action against moving Defendants, there is no basis upon which to dismiss the loss of consortium claim.

**Counter Claims**

Defendants move to dismiss the cross claims asserted by Defendant Hyman and set forth a *prima facie* showing for dismissal. Defendant Hyman fails to oppose the application in any manner. As such, the Court grants moving Defendants' application in its entirety.

Accordingly, it is hereby

**ORDERED** that Defendants' Notice of Motion to dismiss Plaintiffs' Complaint is granted in part, and denied in part, and only to the extent set forth in this decision; and it is further

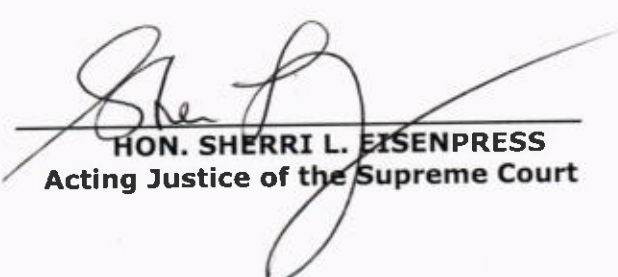
**ORDERED** that Defendants' Notice of Motion to dismiss Defendant Hyman's cross-claims is granted as unopposed; and it is further

**ORDERED** that moving Defendants shall file an Answer on or before April 6, 2018; and it is further

**ORDERED** that all parties are ordered to appear for a Preliminary Conference on **THURSDAY, MAY 17, 2018** at 9:45 a.m.

The foregoing constitutes the Decision and Order of this Court on Motion # 1.

Dated: New City, New York  
March 9, 2018

  
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**HON. SHERRI L. EISENPRESS**  
Acting Justice of the Supreme Court

TO:

**by e-filing -**

Arturi, D'Argenio, Guaglardi & Meliti, LLP  
For Plaintiff

The Coffinas Law Firm, PLLC  
For Defendants Rhodes

Kaufman, Semeraro and Leibman, LLP  
For Defendant Hyman