Ali v Miller's Ale House, Inc.

2018 NY Slip Op 34435(U)

August 3, 2018

Supreme Court, Suffolk County

Docket Number: Index No. 15-610868

Judge: David T. Reilly

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SHORT FORM ORDER

INDEX No. 15-610868
CAL. No. 17-02099OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice Supreme Court

MOTION DATE 2-7-18
ADJ. DATE 4-4-18
Mot. Seq. # 001 - MG; CASEDISP

CHRISTOPHER ALI,

Plaintiff,

- against -

MILLER'S ALE HOUSE, INC.,

Defendant.

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Upon the following papers numbered 1 to 14 read on this motion for summary judgment : Notice of Motion and supporting papers 1 - 12 ; Answering Affidavits and supporting papers 13 - 14 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Miller's Ale House, Inc., for summary judgment dismissing the complaint against it, pursuant to Civil Practice Law and Rules (CPLR) 3212, is granted.

This action was commenced by plaintiff Christopher Ali to recover damages for injuries he allegedly sustained on November 15, 2014, when he was punched and kicked by unidentified individuals at a premises owned by defendant Miller's Ale House, Inc. (MAH), located at 1800 The Arches Circle, Deer Park, New York. By his bill of particulars, plaintiff claims MAH was negligent in failing to prevent the alleged battery, and that it violated General Obligations Law § 11-101 ("the Dram Shop Act") and Alcoholic Beverage Control Law §§ 65 and 106 (6).

MAH, now moves for summary judgment in its favor, arguing that the alleged altercation was "spontaneous, unforeseeable and could not have been reasonably anticipated or prevented." It further argues that, with regard to plaintiff's Dram Shop claim, "there is no common-law negligence claim for the sale of alcohol," "there is no private right of action under Alcoholic Beverage Control Act § 65," and that there is

no evidence "that anyone was intoxicated or that alcohol was sold to a visibly intoxicated person or that any such intoxication caused the assault." In support of its motion, MAH submits copies of the pleadings, transcripts of the parties' deposition testimony, a transcript of non-party Coulton Fischer's deposition testimony, and a digital versatile disc containing security camera footage.

Christopher Ali testified that on the night in question, he drove to the bar/restaurant known as Miller's Ale House with the intention of meeting his friend, Timothy Miller, for a drink. He indicated that MAH had two bars at its premises, one indoors and one outdoors. Plaintiff stated that he met up with Mr. Miller in the outdoor bar area. Plaintiff testified that he ordered one mixed drink from the outdoor bar, then walked with Mr. Miller into the indoor bar area, where they sat down with their drinks. He described the atmosphere inside MAH as "nice, [not] overly crowded," and that many people were eating. The volume level in the restaurant was "loud," but not rowdy. He testified that at approximately 12:15 a.m., a man in a baseball cap walked over and asked him "what [he] was looking at." Plaintiff stated he told the man that they were now "looking at each other." He indicated the interaction lasted only a "[c]ouple of seconds" before the unidentified individual "smiled and walked away" with his "black male" companion. Plaintiff stated that he eventually ordered a second alcoholic beverage and consumed it. Plaintiff further stated that he did not inform any MAH employees of his interaction with the unidentified man.

Plaintiff testified that 30 to 45 minutes after his initial interaction with the unidentified man, he "felt somebody staring at [him]," turned around, and saw the man staring at him. Plaintiff stated that the unidentified man asked him "if [he] wanted to pay with pain," meaning that "he wanted to hurt [him]." Plaintiff indicated that the man then "got in [his] face" and prevented him from moving, but that he did not call for help. He testified that he stood face-to-face with the unidentified man and his male companion for "less than a minute." However, when asked if the security footage of the incident refreshed his recollection that the interaction was actually 2 ½ minutes long, plaintiff agreed. Upon questioning, plaintiff denied smelling alcohol on the man's breath, and denied observing any physical indicia that the individual was intoxicated. Plaintiff stated that he then "asked [the unidentified man] to get out of [his] face," and "pushed him out the way [sic]." Plaintiff testified that, in response, the unidentified man punched him in the face, rendering him unconscious. Upon questioning, plaintiff acknowledged that the security camera footage fairly and accurately depicted the subject incident.

Non-party Coulton Fischer testified he had been employed by MAH as a licensed security guard for a period of approximately five years, and he was present at the time of the subject incident. He stated that on the night in question, approximately 20 people, in groups of five, came to the bar, that most of these individuals were underage, and that the oldest person in the group was 21 years old. He explained that all underage patrons have "crosses" drawn on their hands by the person checking their identification, so that they could not "go into the back patio [where alcohol is sold]." Mr. Fischer indicated that the group was "loud" and "rowdy," and that he instructed another security guard to "keep an eye on them." Mr. Fischer testified that approximately three minutes after the aforementioned group's entrance to MAH, he stepped out of the restaurant's front door momentarily. He stated that while outside, a hostess "came running out"

and informed him that a fight had broken out at the bar. Mr. Fischer indicated that he witnessed "four kids" striking one individual, one of which was about to strike the individual with a bar stool. He testified that after he was able to "get the four kids off the one," another individual "sliced" him from behind. Upon questioning as to whether there had been other fights at MAH during his tenure working there, Mr. Fischer responded "Of course . . . It's a bar, everybody drinks, everybody gets beer muscles, everybody wants to fight." Asked to describe the manner in which fights often occurred, he explained that "[w]hen they fight in the bar, one person will fight, then other people just jump in."

Mr. Fischer further testified that he is familiar with gangs and believes that the group of individuals who entered MAH on the night in question were affiliated with one. Specifically, he stated he believed they were members of a "blood gang" due to their display of "[f]ive point star[s]" and the "letter B," but does not describe in what manner such symbols were exhibited. When asked if the group of individuals in the restaurant appeared intoxicated, Mr. Fischer stated that they smelled "like weed."

Non-party Ryan-Kate Sehy, appearing on behalf of MAH, testified she has been employed by MAH as a bartender since 2011. She stated she was working at MAH on the night of the subject incident, and that five or six security personnel were on duty. She indicated that "it was a very quiet night" with "no yelling, no screaming, nothing." Asked whether she had witnessed other fights at MAH, she testified she had seen approximately five others, but that none were as serious as that involving plaintiff. Specifically, she stated that the instant altercation was the most intense she had witnessed in her 13 years of bartending. However, Ms. Sehy indicated that, despite working in the bar area where the altercation took place, she observed no sign that such altercation would occur, and no large groups of individuals. She also testified she did not believe gang affiliations played any role that night.

A party moving for summary judgment "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" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

The "owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults" (***Solomon v Natl. Amusements, Inc.***, 128 AD3d 947, 948, 9 NYS3d 398 [2d Dept 2015], quoting ***Giambruno v Crazy Donkey Bar & Grill***, 65 AD3d 1190, 1192, 885 NYS2d 724 [2d

Dept 2009]). A property owner is only obligated to take reasonable precautionary measures to minimize the risk of criminal acts and make the premises safe for visitors when the owner is aware, or should be aware, that there is a likelihood of conduct on the part of third parties that would endanger visitors (***Gentile v Town & Vil. of Harrison, N.Y.***, 137 AD3d 971, 971, 27 NYS3d 207 [2d Dept 2016]; *see* ***Hegarty v Tracy***, 125 AD3d 804, 4 NYS3d 254 [2d Dept 2015]). To establish that criminal acts were foreseeable, "the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location, and [w]ithout evidentiary proof of notice of prior criminal activity, the owner's duty reasonably to protect those using the premises from such activity never arises" (***Gentile v Town & Vil. of Harrison, N.Y.***, *supra* at 972).

General Obligations Law § 11-101 (1) provides:

> 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.

Alcoholic Beverage Control Law § 65 mandates "[n]o person shall sell, deliver or give away ... any alcoholic beverages to ... [a]ny person, actually or apparently, under the age of twenty-one years ... [a]ny visibly intoxicated person [or]... [a]ny habitual drunkard known to be such to the person authorized to dispense any alcoholic beverages," while Alcoholic Beverage Control Law § 106 (6) states "[n]o person licensed to sell alcoholic beverages shall ... suffer or permit such premises to become disorderly."

MAH has established a prima facie case of entitlement to summary judgment (*see* ***Valente v Dave & Buster's of New York, Inc.***, 158 AD3d 731, 68 NYS3d 744 [2d Dept 2018]; ***Afanador v Coney Bath, LLC***, 91 AD3d 683, 936 NYS2d 312 [2d Dept 2012]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Through the plaintiff's deposition testimony, it demonstrated that the altercation was not presaged by any obvious actions of the involved individuals, and that it had no knowledge of any prior incidents between those individuals. The fact that plaintiff believed any interaction he had with the unidentified assailant was "done and over with" after the assailant's initial comment, coupled with a less-than-three-minute escalation of tensions 30 to 45 minutes later, supports MAH's argument that it had no warning of an impending fight (*see* ***Pink v Rome Youth Hockey Assn., Inc.***, 28 NY3d 994, 41 NYS3d 204 [2016]; ***Scharff v L.A. Fitness Intl., LLC***, 139 AD3d 929, 30 NYS3d 574 [2d Dept 2016]); ***Wirth v Wayside Pub, Inc.***, 142 AD3d 1346, 38 NYS3d 302 [4th Dept 2016]). The video evidence, as authenticated by plaintiff, further reflects that defendant's employees immediately responded to the

scene of the altercation and successfully brought it to a conclusion within one minute and 15 seconds (*contrast* ***Solomon v Natl. Amusements, Inc.***, *supra*).

Defendant also established a prima facie case with regard to plaintiff's Dram Shop cause of action. Plaintiff testified that he did not smell alcohol on the assailant's breath, nor did he believe that such individual was intoxicated. In addition, the record lacks any evidence that defendant served alcohol to the assailants. The burden, thus, shifted to plaintiff to raise a triable issue (*see generally* ***Vega v Restani Constr. Corp.***, *supra*).

In opposition to defendant's motion, plaintiff argues that the altercation resulting in his alleged injuries was not "spontaneous and unforeseeable," because Mr. Fischer allowed a large group of individuals he believed to be "rowdy" gang members to enter MAH, and that his "verbal altercations" with the unidentified, hat-wearing individual should have been recognized by MAH as a prelude to a fight. In addition, plaintiff argues that MAH employees should have observed a group of individuals surrounding plaintiff and "coordinating" a physical assault. In support of those arguments, plaintiff submits only his counsel's affirmation. Plaintiff having adduced no evidence in opposition to defendant's motion, he fails to raise a triable issue.

Accordingly, the motion by defendant for summary judgment dismissing the complaint against it is granted.

Dated: August 3, 2018

J.S.C.
HON. DAVID T. REILLY

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION