

**Reis v LTGO, Inc.**

2019 NY Slip Op 31239(U)

April 30, 2019

Supreme Court, Suffolk County

Docket Number: 14-21982

Judge: Denise F. Molia

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INDEX No. 14-21982  
CAL. No. 18-00381OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 39 - SUFFOLK COUNTY

**PRESENT:**

Hon. DENISE F. MOLIA  
Acting Justice of the Supreme Court

MOTION DATE 6-22-18  
ADJ. DATE 12-7-18  
Mot. Seq. # 004 - MotD

-----X

JAMES REIS,

Plaintiff,

- against -

LTGO, INC., MFBD, INC, and BRANDON  
GARCIA,

Defendants.

-----X

LATRONICA LAW FIRM, P.C.  
Attorney for Plaintiff  
64 Davidson Avenue, # 107  
Levittown, New York 11756

GOLDBERG SEGALLA, LLP  
Attorney for Defendant LTGO, Inc.  
200 Garden City Plaza, Suite 520  
Garden City, New York 11530

N. RICHARD WOOL, ESQ.  
Attorney for Defendant Garcia  
475 S. Oyster Bay Road  
Plainview, New York 11803

Upon the following papers numbered 1 to 33 read on this motion for summary judgment; Notice of Motion and supporting papers 1 - 15; Answering Affidavits and supporting papers 16 - 17; 18 - 29; Replying Affidavits and supporting papers 30 - 31; 32 - 33; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by defendant LTGO, Inc., for summary judgment dismissing the complaint against it is granted to the extent provided herein, and is otherwise denied.

This action was commenced by plaintiff James Reis to recover damages for injuries he allegedly sustained on January 10, 2014, as a result of a physical altercation between himself and defendant Brandon Garcia at the Nutty Irishman, a bar located in Farmingdale, New York. Defendant LTGO, Inc., is alleged to have owned and operated the Nutty Irishman. Plaintiff asserts claims pursuant to General Obligations Law § 11-101 ("the Dram Shop Act") and common-law negligence. By a stipulation of discontinuance dated January 29, 2015 plaintiff's claims against defendant MFBD, Inc., were dismissed without prejudice.

LTGO, Inc. (LTGO) now moves for summary judgment in its favor, arguing that it did not serve alcohol to visibly-intoxicated patrons, that the altercation was unforeseeable, and that plaintiff was a voluntary participant therein. In support of its motion, LTGO submits copies of the pleadings, transcripts of

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the parties' deposition testimony, transcripts of nonparties Courtney McCall, Rudy Sulmonte, and Michael Agunzo's deposition testimony, and a compact disk containing security camera footage.

Plaintiff testified that at 10:30 p.m. on the night in question, he visited The Nutty Irishman for the first time, accompanied by his girlfriend at the time, Courtney McCall, and multiple male friends. He indicated that after drinking "a beer or two," he encountered Brandon Garcia. Plaintiff stated that Mr. Garcia was an acquaintance of his, as well as Ms. McCall's ex-boyfriend. Plaintiff testified that Mr. Garcia approached his friend Logan and stated something akin to "You better watch your boy." Plaintiff indicated that he overheard that admonition and surmised that Mr. Garcia's comment was related to his displeasure that he was dating Mr. Garcia's ex-girlfriend. Plaintiff stated that he and Mr. Garcia got "loud," then a member of The Nutty Irishman's security team intervened to end the verbal exchange "10 to 15 seconds" later. Asked to describe the manner in which the security person ended the confrontation, plaintiff indicated that the "big bouncer" simply pointed in opposite directions, instructing him to walk one way, and Mr. Garcia to walk the other. Plaintiff denied either he or Mr. Garcia were instructed to leave the establishment.

Plaintiff further testified that following his initial interaction with Mr. Garcia, he walked toward the rear of The Nutty Irishman, exiting its indoor portion and entering its outdoor bar area. He stated that he smoked a cigarette, then decided to leave The Nutty Irishman. However, rather than leave through an exit door from the exterior bar, plaintiff indicated that he and Ms. McCall decided to re-enter the interior portion of The Nutty Irishman and exit through its front door. Plaintiff testified that while walking through The Nutty Irishman's interior, he was punched in the face and rendered unconscious. Plaintiff testified that prior to being punched by Mr. Garcia, he observed him drinking a "shot" and saw him with a beer in his hand.

Brandon Garcia testified that he arrived at The Nutty Irishman at approximately 11:00 p.m. on the night in question, accompanied by Rudy Sulmonte and other friends of his. He stated that he and plaintiff were friends before the incident in question, and had gone out to dance clubs together. He indicated that he has been dating Courtney McCall since 2007, but that they had a brief separation in 2014, during which time plaintiff began dating her. Mr. Garcia testified that prior to his arrival at The Nutty Irishman, he consumed three or four Bud Light beers over the course of one hour and forty-five minutes. He indicated that those beers gave him a "[s]light buzz." He stated that between the time of his arrival at the bar, and the time of the altercation in question, he consumed an additional three to four Budweiser beers.

Mr. Garcia testified that at approximately 11:30 p.m., plaintiff and Ms. McCall approached him. He stated that plaintiff began verbally demeaning him, attempted to punch him in the face, but did not make contact. Mr. Garcia indicated that one of The Nutty Irishman's security personnel immediately grabbed plaintiff and walked him to the rear of the establishment. He testified that he believed plaintiff had been ejected from the bar, but saw him on the dance floor five minutes later. Mr. Garcia stated that while traversing the path from the front room of the bar toward the back, he "felt a shove and [plaintiff] was face-to-face to [him] and [Mr. Garcia] took a swing." Upon questioning, Mr. Garcia explained that it was plaintiff who had shoved the front of his left shoulder. He indicated that his punch landed on plaintiff's left cheek, at which time a security person "choked" him from behind and dragged him out of the bar.

John Court testified that he was the general manager of The Nutty Irishman in Farmingdale, New York, a bar owned by LTGO, at the time of plaintiff's incident. He indicated that The Nutty Irishman employed 10 to 12 security personnel in total, but that only six were present on the night in question. Mr. Court stated that each of those employees received both formal and on-the-job training in security, culminating in them obtaining a New York State security license. He indicated that The Nutty Irishman's bartenders were trained by its personnel in identifying intoxicated patrons, and instructed that they should not serve additional alcoholic beverages to anyone visibly intoxicated. He further indicated that The Nutty Irishman had a policy of prohibiting intoxicated individuals from entering the establishment. Mr. Court testified that neither plaintiff nor Mr. Garcia appeared to be intoxicated on the night in question. Mr. Court also stated that The Nutty Irishman had a written procedure for instances when fights broke out in the bar, explaining that the parties would first be separated and then their injuries, if any, would be assessed. Upon discovery that neither party was injured, "we would ask both parties to leave through separate exits," verifying those exits by radio communication. Mr. Court testified that an identical procedure would be followed if two patrons had engaged in a verbal altercation. Asked to describe the manner of verbal exchange that would require the participants therein to be asked to leave, he explained that some indicators would be "[e]levated voices, behavior that would indicate to us that there's a potential for an imminent threat to either [a] patron, property, or staff," or "[a]ny attempt to make physical contact with another person."

Questioned regarding the events leading up to the subject incident, he stated he learned that plaintiff and Mr. Garcia had gotten into a verbal altercation, but that by the time he arrived at the scene 20 seconds later, plaintiff was no longer present. Mr. Court indicated that he spoke to Mr. Garcia, who volunteered to leave the premises. He testified that he then received a radio communication informing him that the other participant in the verbal altercation, plaintiff, was "outside on the back patio." Mr. Court stated that based upon Mr. Garcia's calm demeanor, he decided to take no further action as to him, but sought out plaintiff in order to "make sure both parties were in agreement" as to what occurred. He indicated that he ordered security personnel to keep Mr. Garcia "under observation" until plaintiff could be located.

Mr. Court testified that while he was not in the immediate vicinity when the later physical altercation occurred, he viewed closed-circuit video of the incident. In that video, he saw Mr. Garcia, "12 to 14 feet" from the nearest security person, walk toward the rear of The Nutty Irishman while plaintiff walked toward the front. He stated that he further observed, in the video, Mr. Garcia punch plaintiff in the face. Mr. Court indicated that after the physical altercation occurred, he escorted Mr. Garcia out of The Nutty Irishman without additional incident.

Christopher McDermott testified that he was working at The Nutty Irishman on the night in question. He indicated that he received a radio communication that two men were arguing, and that John Court responded thereto. He stated that Mr. Court subsequently informed staff, via radio, that the two men were leaving, but that one of them was walking toward the back patio. Mr. McDermott testified that he does not know if those men volunteered to leave or if they were ordered to do so, but that no action was taken by The Nutty Irishman to ensure they exited. Mr. McDermott further testified that between one and 30 minutes later, he learned plaintiff and Mr. Garcia had engaged in a physical altercation, and responded to the scene as the two men were being separated by security.

Michael Agunzo testified that he accompanied plaintiff to The Nutty Irishman on the night in question, and that within approximately 30 minutes of their arrival, he saw plaintiff and Mr. Garcia arguing. According to Mr. Agunzo, the initial altercation between plaintiff and Mr. Garcia involved “a little pushing, shoving, [and] maybe some loose punches thrown,” but “no one hit each other.” He indicated that “bouncers broke it up,” but that Mr. Garcia approached him a minute-and-a-half later and yelled, “You need to check your boy and you . . . he needs to watch himself. He’s going to get hurt.” Mr. Agunzo testified that Mr. Garcia’s statement caused him to approach one of The Nutty Irishman’s security personnel and tell them that they “need to kick [Mr. Garcia] out, or they need to do something, [because] something bad was going to happen.” He indicated that the security person replied, “We know.” Mr. Agunzo stated that 30 seconds later, he observed two other security personnel run past him, and he followed them. He testified that he soon arrived at plaintiff’s location, saw plaintiff on the floor, and saw Mr. Garcia on top of him, punching him while security attempted to pull him away.

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 National 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]). However, property owners “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” (*Covelli v Silver Fist, Ltd.*, 167 AD3d 980, 980, 91 NYS3d 181 [2d Dept 2018]). 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.*, 137 AD3d 971, 972, 27 NYS3d 207 [2d Dept 2016]).

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 (*Adamy v Ziriakus*, 92 NY2d 396, 400, 681 NYS2d 463 [1998]). Specifically, 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.

When moving for summary judgment dismissing the cause of action alleging a violation of the Dram Shop Act, a defendant has the burden of demonstrating, prima facie, either that it did not sell alcohol to a visibly intoxicated patron, or that its sale of alcohol to such patron when he or she was visibly intoxicated did not bear a reasonable or practical connection to the plaintiff's injuries (*see Giordano v Zepp*, 163 AD3d 781, 79 NYS3d 659 [2d Dept 2018]).

LTGO failed to establish a prima facie case of entitlement to summary judgment on the issue of common-law negligence (*see generally Alvarez v Prospect Hosp.*, *supra*). While it argued that Mr. Garcia's attack on plaintiff was unforeseeable, the deposition testimony demonstrates that LTGO was aware of an earlier incident between plaintiff and Mr. Garcia (*see Tansey v Coscia*, 159 AD3d 850, 73 NYS3d 213 [2d Dept 2018]; *Cole v JW's Pub*, 133 AD3d 815, 19 NYS3d 434 [2d Dept 2015]; *Mitchell v Long Acre Hotel*, 147 AD3d 567, 46 NYS3d 785 [1st Dept 2017]; *Walfall v Bartini's Pierre, Inc.*, 128 AD3d 685, 9 NYS3d 108 [2d Dept 2015]; *Boyea v Aubin*, 65 AD3d 736, 883 NYS2d 808 [3d Dept 2009]; *cf. Pink v Rome Youth Hockey Assn., Inc.*, 28 NY3d 994, 41 NYS3d 204 [2016]). LTGO's reliance on *Candelaria v Lake & Morningside Props., Inc.*, 71 AD3d 941, 896 NYS2d 893 (2d Dept 2010), is misplaced, as the incident therein took place outside of the defendant's premises, and beyond its area of control (*see also Oddo v Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc.*, 28 NY3d 731, 49 NYS3d 358 [2017]; *Covelli v Silver Fist, Ltd.*, *supra*). Here, the incident is alleged to have occurred inside LTGO's building, where its employees could exercise control over Mr. Garcia. Further, as to LTGO's argument that plaintiff was a voluntary participant in the incident during which he was allegedly injured, the closed-circuit video footage belies that contention. Therein, plaintiff is shown walking through the crowded bar, seemingly unaware of the impending punch by Mr. Garcia. There is no visual evidence that plaintiff intended to enter Mr. Garcia's vicinity prior to the punch, as he appeared to be walking at an average pace with Ms. McCall in tow, while Mr. Garcia is shown moving rapidly toward plaintiff and striking him. Thus, triable questions remain as to whether LTGO should have foreseen additional, escalating animosity between plaintiff and Mr. Garcia, and whether it was negligent in permitting the men to remain at the premises following their initial altercation.

As to plaintiff's General Obligations Law § 11-101 claim, however, LTGO established a case of entitlement to summary judgment by demonstrating, prima facie, that it did not serve alcohol to any visibly intoxicated patrons on the date in question. Each of the deposed witnesses whose testimony was submitted by LTGO in support of its motion denied that Mr. Garcia was visibly intoxicated at the time of the incident (*see Trigoso v Correa*, 150 AD3d 1041, 55 NYS3d 130 [2d Dept 2017]; *Dugan v Olson*, 74 AD3d 1131, 906 NYS2d 277 [2d Dept 2010]). The burden, thus, shifted to plaintiff to raise a triable issue (*see generally Vega v Restani Constr. Corp.*, *supra*).

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In opposition, plaintiff argues that Mr. Garcia's testimony that he was feeling a "buzz" and that, within a period of 30 minutes, a bartender served him 3 to 4 beers, supports his contention that a LTGO bartender served Mr. Garcia while he was visibly intoxicated. Mr. Garcia also opposes LTGO's motion to dismiss the Dram Shop claim against it, supplying his own affidavit in which he states that "while being served [by LTGO], [he] probably was intoxicated." He further stated that he had consumed 6 to 8 beers, "which may have been a factor in the incident on the dance floor." Neither opponent of LTGO's motion raises a triable issue as to this claim (*see generally Ricaurte v Inwood Beer Garden & Bistro Inc.*, 165 AD3d 586, 85 NYS3d 438 [1st Dept 2018]). First, plaintiff alters Mr. Garcia's deposition testimony by omitting the modifying word "slight" from his self-assessment that he had a "slight buzz" at the time he arrived at The Nutty Irishman. Then, Mr. Garcia uses equivocal language in describing his mental state at the time he was served alcohol at The Nutty Irishman. Even if assumed true, Mr. Garcia's assertion that he "probably was intoxicated" is insufficient to raise a triable issue of whether he was "visibly intoxicated" at the time he was served such alcohol (*see Giordano v Zepp, supra*). Mr. Garcia submitted no affidavit from a witness, or other evidence, to establish that he exhibited traditional indicia of intoxication at the time he was served.

Accordingly, the motion by defendant LTGO, Inc., for summary judgment dismissing the complaint against it is granted to the extent provided herein, and is otherwise denied.

Dated: 4-30-19

*John D. ...*  
A.J.S.C.

         FINAL DISPOSITION      X   NON-FINAL DISPOSITION