

Adika v SD Hospitality Corp.

2019 NY Slip Op 31730(U)

June 18, 2019

Supreme Court, New York County

Docket Number: 151149/2016

Judge: Kathryn E. Freed

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X INDEX NO. 151149/2016

YONA ADIKA,

Plaintiff,

MOTION SEQ. NO. 001

- v -

SD HOSPITALITY CORP. D/B/A THE PONY BAR,

DECISION AND ORDER

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for SUMMARY JUDGMENT

In this negligence/Dram Shop action, defendant SD Hospitality Corp. d/b/a The Pony Bar moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff Yona Adika opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On the night of August 21, 2014, plaintiff arrived at The Pony Bar (“the bar”), located at 637 10th Avenue in Manhattan, after 11 pm. Doc. 1 at par 3; Doc. 22, Pltf. Dep. at 72-73. When he arrived, there were approximately 30 people in the bar, including two bartenders, a barback (a bartender’s assistant), and an individual working security. Doc. 22, Pltf. Dep. at 74-80. During the next 90 minutes, plaintiff drank two beers. Doc. 22, Pltf. Dep. at 83-84. At approximately 1 a.m., he was assaulted by an unknown individual (“the assailant”). Doc. 22, Pltf. Dep. at 83.

While at the bar, plaintiff observed a group of five individuals, including the assailant, sitting around a table. Doc. 22, Pltf. Dep. at 89-91. The group was loud and used obscenities. Doc. 22, Pltf. Dep. at 103-105. Although there were 10 empty glasses and three glasses filled with beer on the assailant's table, he did not know how many of the empty glasses had contained beverages consumed by the assailant. Doc. 22, Pltf. Dep. at 93-94, 99-101. Plaintiff only saw the assailant drink two beers but did not know whether he had consumed any other drinks that night. Doc. 22, Pltf. Dep. at 101-102. At one point prior to the assault, the assailant went to the bar to buy drinks and consumed one of the drinks he bought. Doc. 22, Pltf. Dep. at 110. However, plaintiff was not sure how long before the assault this occurred. Doc. 22, Pltf. Dep. at 110.

Although plaintiff claimed that he did not approach the assailant's table prior to the assault (Doc. 22, Pltf. Dep. at 206-207), surveillance video reflects that he did so about 10 minutes before, at about 1 a.m., and immediately before the assault at about 1:10 p.m. At about midnight, plaintiff approached an individual whom he believed was the manager of the bar and told him that the people at the assailant's table were making him feel unsafe. Doc. 22, Pltf. Dep. at 77, 80, 89. Plaintiff also claims that, a few minutes before the assault, he went outside to tell the manager of the bar that the group at the assailant's table was making him feel unsafe. Doc. 22, Pltf. Dep. at 113-116.

Plaintiff testified that, prior to the incident, he was standing outside the bar and, when he walked back in, the assailant approached him, said something to him, and, less than five seconds later, grabbed and hit him. Doc. 22, Pltf. Dep. at 113-115, 118-119. Before the incident, he did not believe that an assault was imminent. Doc. 22, Pltf. Dep. at 122.

Huitzel, who cleaned the assailant's table, saw the assailant drink at least two 14-ounce beers. Doc. 24, Huitzel Dep. at 39-43. He maintained that the assailant appeared "normal" and not

intoxicated. Doc. 24, Huitzel Dep. at 43-45. Dan McLaughlin was co-owner of SD Hospitality Corp., the company which owned the bar, and was also manager of the bar. Doc. 23, McLaughlin Dep. at 7-9.

The bartenders were responsible for dealing with unruly patrons. Doc. 23, McLaughlin Dep. at 15. Every bartender attended a lengthy seminar teaching them how to identify patrons who were intoxicated. Doc. 23, McLaughlin Dep. at 89. Only on a rare occasion would the bartenders eject someone from the premises. Doc. 24, Huitzel Dep. at 15-16.

As the night went on and the people at the assailant's table continued to consume alcohol, they got louder and began slurring their speech and using obscenities. Doc. 24, Huitzel Dep. at 104-108. Plaintiff opined that the group was getting more and more drunk, "sloppy", "aggressive" and "obnoxious" because the bar "kept serving them." Doc. 22, Pltf. Dep. at 105-106. Plaintiff also maintained that the body language of the people at the assailant's table was threatening, insofar as one of the people was "leaning forward and just showing his shoulders" and "posturing and puffing his chest out." Doc. 22, Pltf. Dep. at 105-106.

Just before the incident, plaintiff was standing outside of the bar with a beer when Huitzel told him to go back inside. Doc. 23, McLaughlin Dep. at 69; Doc. 24, Huitzel Dep. at 37. There were approximately 7 people in the bar. Doc. 24, Huitzel Dep. at 27. Plaintiff approached the assailant's table and began speaking to the people there. Doc. 24, Huitzel Dep. at 76-77. The plaintiff and the assailant spoke for about two to three minutes before their conversation grew louder and the assailant grabbed and struck plaintiff. Doc. 24, Huitzel Dep. at 59. The remaining bartender and Huitzel pulled the plaintiff and the assailant apart. Doc. 24, Huitzel Dep. at 59-63. Huitzel then escorted the assailant outside of the bar. Doc. 24, Huitzel Dep. at 63-64.¹

¹ Videotape footage reveals that, seconds after the altercation began, Liman and Huitel escorted plaintiff out the door. Doc. 22, Pltf. Dep. at 211-212; Doc. 23, McLaughlin Dep. at 60-61, 72-73; Doc. 24, Huitzel Dep. at 92-93.

Prior to the date of the alleged incident, there had been no altercations or assaults at the bar. Doc. 22, Pltf. Dep. at 64, 67-68; Doc. 23, McLaughlin Dep. at 60, 87; Doc. 24, Huitzel Dep. at 84-85.

McLaughlin testified that security video shows that plaintiff never spoke to him before the assault and that he did not even enter the bar until just after the assault occurred. Doc. 23, McLaughlin Dep. at 18, 24. As was his custom, McLaughlin worked at several different bars on a given night, including the night of the incident. Doc. 23, McLaughlin Dep., at 17-18. When McLaughlin returned to the bar from another establishment approximately one minute after the incident, the bartender, the assailant, and Huitzel advised him that plaintiff had approached the assailant's table and started an argument by saying something to a female at the table. Doc. 23, McLaughlin Dep. at 25-26, 29-30, 32, 41-43, 45-46, 58-59. McLaughlin recalled that the assailant did not appear drunk after the incident occurred. Doc. 23, McLaughlin Dep. at 54-55. The individuals at the assailant's table were not carrying drinks and did not appear to be intoxicated. Doc. 23, McLaughlin Dep. at 54-55, 60.

McLaughlin admitted that the bar did not maintain any logs regarding who worked at the premises on a given night. Doc. 23, McLaughlin Dep. at 23. Although the bar maintained a book of complaints and incident reports, which would be completed by bartenders, and such a report was completed after the alleged incident (Doc. 24, Huitzel Dep. at 82-83), neither the book nor any incident report has been produced. He testified, however, that the bar was equipped with a video surveillance system consisting of at least two cameras outside the bar and at least four inside the bar. Doc. 23, McLaughlin Dep. at 12-14, 85-86. He preserved footage from the date of the incident which ran from 1 a.m. until about 1:25 a.m. Doc. 23, McLaughlin Dep., at 82-83.

After the incident, the individuals involved in the altercation were removed from the bar and plaintiff attempted to photograph the assailant. Doc. 22, Pltf. Dep. at 123-128. As the plaintiff and the assailant stood outside the bar, the assailant struck him again, attempting to knock his phone from his hands. Doc. 22, Pltf. Dep. at 124.

This action was commenced by the filing of a summons and complaint on February 11, 2016. Doc. 1. In the complaint, plaintiff alleged negligence as well as a Dram Shop violation. Doc. 1. Defendant joined issue by service of its answer on or about March 14, 2016. Doc. 19.

In his bill of particulars dated July 7, 2016, plaintiff alleged, inter alia, that:

Defendant was negligent in its provision of security inside the [bar] and in causing and/or allowing a visibly intoxicated assailant to consume additional alcohol. Defendant was negligent in its control and supervision of the nightclub and or the patrons thereat and in failing to take adequate steps to protect plaintiff.

Doc. 20 at par. 5.

Plaintiff filed a note of issue on August 10, 2018. Doc. 14.

Defendant now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Docs. 15-26. In support of the motion, defendant submits, inter alia, an attorney affirmation, a memorandum of law, the pleadings and bill of particulars, the deposition testimony of plaintiff, Huitzel, and McLaughlin, an affidavit by McLaughlin, and video footage taken by a security camera.

In support of the motion, defendant argues that, because it did not serve the assailant while he was visibly intoxicated, it is entitled to summary judgment dismissing the Dram Shop claim. Defendant further asserts that it is entitled to dismissal of the negligence claim since it did not fail to provide adequate security at the bar. In his affidavit in support, McLaughlin avers that he was

not aware of any prior visit to the bar by the assailant and was not aware that that individual had any propensity for violence. Ex. H, at par. 4.

In opposition to the motion, plaintiff argues that defendant has failed to establish his prima facie entitlement to dismissal of the Dram Shop claim. Alternatively, plaintiff argues that, if defendant did meet its burden, then it raised a triable issue of fact regarding whether defendant served alcohol to the assailant while he was visibly intoxicated. Plaintiff further asserts that, given the boisterous, aggressive, and threatening behavior of those at the assailant's table, defendant knew or should have known that those individuals posed a threat and thus failed to provide adequate security.

In reply, defendant argues that it was not negligent since it could not have foreseen the the assailant's sudden attack of plaintiff. It further asserts that plaintiff's Dram Shop claim must be dismissed since there is no proof that the assailant was intoxicated at the time he was sold alcohol by the bar and there is no indication as to when the assailant's purchase of alcohol was made, how many drinks he ordered, who served him, or how he was behaving at the time he was served. Defendant further asserts that, although plaintiff claims that he told the manager of the bar that he felt threatened prior to the incident, no such conversation appears on the video footage from the night of the incident and McLaughlin testified that he did not arrive at the bar until after the assault.

LEGAL CONCLUSIONS:

Summary Judgment Standard

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The movant must produce sufficient evidence to eliminate any issues

of material fact. *Id.* If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. *See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006). Only if, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, will summary judgment be denied. *See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012); *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiff's Dram Shop Claim

The Dram Shop Act (General Obligations Law §11-101) provides, in relevant part, as follows:

1. 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.

On this motion, defendant has the initial burden of negating the possibility that it served alcohol to a visibly intoxicated person. *Cohen v. Bread & Butter Entertainment LLC*, 73 AD3d 600 (1st Dept. 2010); *Darwish v. City of New York*, 287 AD2d 407 (1st Dept. 2001). Only if this showing is made does the burden shift to plaintiff to adduce evidence that defendant served alcohol to the assailant despite visible signs of intoxication. *Cohen*, 73AD3d at 601; *McGovern v. Katonah*, 5 A.D.3d 239 (1st Dept. 2004).

This Court finds that defendant has failed to negate the possibility that alcohol was unlawfully served to an intoxicated person. Although Huitzel and McLaughlin opined that the assailant did not appear intoxicated, Huitzel saw the assailant drink two 14-ounce beers and testified that the people at the assailant's table were loud, slurring, their words, and using obscenities. Plaintiff also testified that the people at the assailant's table were sloppy, obnoxious, aggressive, and using threatening body language. At some point prior to the assault, plaintiff saw the assailant buy drinks at the bar and consume one of them. However, plaintiff was not certain how long before the assault the assailant bought the drinks, and defendant has not proven that the assailant was not intoxicated when the sale was made. Since the assailant and his companions were loud, obnoxious, aggressive, and threatening, triable issues of fact exist regarding whether there was "some reasonable or practical connection" between the sale of alcohol to a visibly intoxicated customer, i.e., the assailant, and the alleged injuries. *Carver v P.J. Carney's*, 103 AD3d 447, 448 (1st Dept 2013) (citation omitted).

Plaintiff's Negligence Claim

This Court further concludes that the facts "also suffice to raise issues of fact as to whether defendant's employees should have been aware that a potentially dangerous situation existed, and breached their duty to exercise adequate supervision and control over [the assailant's] behavior, precluding summary judgment dismissing plaintiff's negligence claim." *McGovern v 4299 Katonah Inc.*, 5 AD3d 239, 240 (1st Dept 2004) (citation omitted). Specifically, plaintiff testified that, prior too the assault, he told an individual whom he believed was the manager of the bar that he felt threatened, thereby putting the bar on notice of a potentially dangerous situation. Although McLaughlin, the owner and manager of the bar, testified that he did not arrive at the

scene until after the incident, and that the video footage taken on the evening in question never shows him speaking with plaintiff, it is possible that plaintiff had this discussion with Huitzel or another individual whom he believed was the manager. Indeed, Huitzel does not deny that such a conversation occurred.

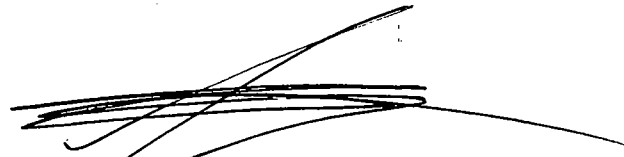
Therefore, in light of the foregoing, it is hereby:

ORDERED that defendant's motion is denied in all respects; and it is further

ORDERED that this constitutes the decision and order of the court.

6/18/2019

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE