

**Annaloro v 406 Broome St. Rest Inc.**

2019 NY Slip Op 31959(U)

July 8, 2019

Supreme Court, New York County

Docket Number: 156996/13

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

ALEXANDRA ANNALORO

INDEX NO. 156996/13

- v -

MOT. DATE

406 BROOME ST. REST INC. et al.

MOT. SEQ. NO. 005 and 006

The following papers were read on this motion to/for
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

In this personal injury action, plaintiff seeks to recover for injuries she sustained while she was a passenger in a car driven by an intoxicated, underage person. In motion sequence 005, defendants Sentinels Security and Investigations Inc. ("Sentinels") and Andy Castillo (together with Sentinels collectively "Sentinels Defendants") move for summary judgment dismissing defendant 406 Broome St. Rest Inc. d/b/a Brinkley's Broome Street's ("Brinkley's") cross-claims against them. That motion has been submitted without opposition despite notice and an opportunity to respond.

In motion sequence 006, Brinkley's moves for summary judgment dismissing plaintiff's complaint. Plaintiff cross-moves for partial summary judgment on the issue of liability. The motions are hereby consolidated for the court's consideration and disposition in this single decision/order.

Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (Zuckerman, supra). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v. Ceppos, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (Sillman v. Twentieth Century Fox Film, 3 NY2d 395 [1957]).

Dated: 7/8/19

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST
[ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

The following facts are based upon plaintiff's deposition testimony. On the evening of October 26, 2012, plaintiff and her friend Jamie Pagan consumed alcoholic beverages at a bar/restaurant owned and operated by Brinkley's. Plaintiff and Pagan were both underage (each 20 years old). In the early hours of the following morning, Pagan was driving the vehicle that plaintiff sustained her injuries in.

Earlier that night, Plaintiff testified that Pagan picked her up from her house in Staten Island "[s]ometime after 7:00[pm]" along with another friend named Jennifer. Pagan then drove to the Staten Island ferry, where Pagan parked her car. The three women took the ferry to Manhattan and went somewhere to eat. Plaintiff could not recall where they went. Plaintiff did admit that she and Jennifer had alcohol at dinner, but Pagan did not.

After dinner, the three women went to Brinkley's to see plaintiff's boyfriend and his friends, who were then all over the age of 21 (late-twenties). Plaintiff's boyfriend had gone to college with the bartender; they were in the same fraternity and had lived in a house together for a year.

Plaintiff could not recall what time she arrived at Brinkley's, nor how she got there. Plaintiff testified that there was a bouncer at the entrance but she did not remember if she was asked for identification when she entered Brinkley's. Plaintiff wasn't sure if Pagan was asked for identification, either, but she did testify that Pagan and the bouncer spoke. She was not able to hear their conversation.

Once inside the bar, no one asked plaintiff for identification. Plaintiff ordered at least one beer that night. She testified that she might have had another beer and a shot. Pagan also drank at Brinkley's, and plaintiff recalled that Pagan ordered drinks from the bar. However, plaintiff did not know how much Pagan had to drink. Plaintiff did not know who Pagan ordered her drinks from, but plaintiff "saw [Pagan] with drinks", and Pagan was with plaintiff next to the bartender when plaintiff ordered a Corona.

Plaintiff testified that the bartender, who was named Nicholas Luiz (sometimes "Nick"), "was trying to give us drinks and I just kept passing them on to Jenn and [Pagan]." Plaintiff further explained:

Q. You testified that that Nick was pushing drinks towards you; how many times did he do that?

A. Only a few, it was when we first interacted, when he tried to get my phone number.

...

Q. What was he pushing towards you?

A. Shots and then I don't know if he paid for a beer or whatever, but there were beers in front of us.

Q. And "us" means who?

A. Jamie was next to me at this point and my boyfriend was and his friends were kind of behind us.

...

Q. How many times did you pass a drink on to Jamie?

A. I'm not sure.

Q. More than once?

A. There was like a shot and then drinks, I don't know really what was going on.

Q. Do you know if you passed one or more than one drink on to Jamie from Nick?

- A. I'm not sure.
- Q. One of them was a shot?
- A. Yes.
- Q. Do you remember what it was a shot of?
- A. No.
- Q. When Nick was pushing drinks, did you tell him that you didn't want them?
- A. No, I was just taking them.
- Q. Did you give them to anyone else besides Jamie and Jenn?
- A. Not personally, no.
- Q. Did anyone else pass them on to other people, if you know?
- A. I don't know.
- Q. Over how long a period of time was Nick pushing drinks your way?
- A. I don't know, he was friends with all the people we were with, so like I said, I don't know if he was just giving them to us, like I said, I don't know.

Plaintiff left Brinkley's by cab and went to the ferry. Plaintiff left with her boyfriend, Pagan and Jennifer. Plaintiff estimated that they left Brinkley's sometime between 2 and 3am, because they missed the 3am ferry back to Staten Island. Instead of waiting for the next ferry at 4am, they all took a cab to the ferry terminal in Staten Island.

Plaintiff did not remember getting back to Staten Island or getting into Pagan's car. At approximately 5am, plaintiff was asleep in the back seat of Pagan's car when Pagan fell asleep and crashed into a guardrail on the West Shore Expressway on Staten Island. Pagan was thereafter arrested for drunk driving with a blood alcohol level of 0.13 at the scene of the accident. The next thing plaintiff remembered after getting the cab to Staten Island was waking up in an ambulance.

Brinkley's produced Luiz for a deposition. Luiz testified that he could not recall anything specifically about the night that plaintiff was at Brinkley's, nor did he know whether plaintiff, Pagan or plaintiff's boyfriend were at the bar that night. Luiz also stated that he did not know the relationship between plaintiff and her boyfriend and stated that he and plaintiff's boyfriend were not friends. In fact, Luiz testified that he was not aware of a time when plaintiff's boyfriend went to Brinkley's while Luiz was working.

Generally, Luiz testified that his typical shift was from 6pm to 2am on weekdays and 4am on weekends. Luiz was trained to not serve alcohol to people who were already intoxicated. Luiz claimed that during the five years he worked at Brinkley's, he had refused to serve patrons that were intoxicated over ten times.

Luiz further testified that Brinkley's had a policy to only allow people 21 years of age or older into the bar after 10pm, but did not have a system to denote patrons that entered the bar prior to 10:00 p.m. or who were under 21. Further, Luiz never observed patrons with their hands marked or wearing bracelets signifying that they were over 21. Luiz also stated that he was not trained to identify a fake identification. However, Luiz claimed that he would check the identifications of anyone that didn't look over 21.

Luiz claimed that his practice was to check the identification of anyone that looked younger than 35, but he was not told to do this by Brinkley's. He also stated that if a woman came in with one of his friends he would assume that she was "around the same age" as him and would not ask her for identification before serving her alcohol.

Sentinels, a company owned by Castillo, provided security at Brinkley's beginning at 10pm on October 26, 2012.

### Parties' arguments

Brinkley's argues that "the evidence shows that the bartender was reasonable in concluding that [Pagan] was of legal drinking age." This evidence purportedly includes Pagan's presence after 10pm, the absence of any history of underage patrons getting past the bouncers and the fact that Pagan passed the evening with individuals whom the Luiz specifically knew to be of legal age.

Meanwhile, plaintiff contends that Brinkley's motion should be denied because Luiz could not remember any details about plaintiff or her friend on the night in question. Plaintiff further contends she is entitled to partial summary judgment on liability based on her testimony that they were never asked how old they were or to verify their ages by any staff.

In support of her cross-motion, plaintiff has submitted a sworn affidavit, wherein she states in part as follows:

2. I was deposed for two days by the defendants, both days of my testimony were interrupted by multiple seizures that I now permanently suffer as a result of this car crash.
3. The following information was not asked of me during my two days of testimony so I offer this affidavit to further clarify the record.
4. On the evening of October 26, 2012, I observed the non-party "Jamie Pagan" ordering, being served, paying for, and consuming alcoholic beverages at the now defunct defendant "Brinkley's Broome St. Bar" by it's bartender Nick Luiz. During the hours that I was at Brinkley's Broome Street Bar, myself and Jamie Pagan, both under the age of 21 were never asked to verify our age, asked for identification or asked how old we were.

### **Discussion**

At the outset, the Sentinels Defendants' motion is granted without opposition. They have established that they were not contractually obligated to verify that everyone entering Brinkley's was 21 years old or older and thus cannot be liable to Brinkley's for common law or contractual indemnification or failure to procure insurance. Accordingly, Brinkley's cross-claims against the Sentinels Defendants are severed and dismissed.

Plaintiff has asserted claims against Brinkley's for negligence and violations of GOL § 11-100 and 11-101, also known as the Dram Shop Act.

GOL § 11-100 provides in pertinent part as follows:

Any person who shall be injured in person, property, means of support or otherwise, by reason of the intoxication or impairment of ability of any person under the age of twenty-one years, whether resulting in his death or not, shall have a right of action to recover actual damages against any person who knowingly causes such intoxication or impairment of ability by unlawfully furnishing to or un-

lawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of twenty-one years.

GOL § 11-101, provides as follows:

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.

The Dram Shop Act must be read in conjunction with ABC Law § 65 to determine whether there was an unlawful sale of alcohol (*Moyer v. Lo Jim Café*, 19 AD2d 523 [1st Dept 1963] aff'd 14 NY2d 792 [1964]). Pursuant to ABC Law § 65(1), it is unlawful to furnish an alcoholic beverage to any "person, actually or apparently, under the age of twenty-one years". ABC Law § 65 also the sale of "any alcoholic beverages to... any intoxicated person..."

The court will first consider the motion-in-chief. Plaintiff has not raised any substantive arguments in opposition to Brinkley's motion for summary judgment as to the common law negligence or GOL § 11-101 claims. GOL § 11-100 created a cause of action where one did not exist under common law or the Dram Shop Act (*Powers v. Niagara Mohawk Power Corp.*, 129 AD2d 37 [3d Dept 1987]). A common law negligence claim does not lie against an establishment which provided alcohol where there is an insufficient nexus between the sale and the situs of the accident (see *D'Amico v. Christie*, 71 NY2d 76 [1987]; see also *Butler v. New York City Transit Authority*, 3 AD3d 301 [1st Dept 2004]; *Reuter v. Flobo Enterprises, Ltd.*, 120 AD2d 722 [1986]; *Delamater v. Kimmerle*, 104 AD2d 242 [3d Dept 1984]). There is certainly insufficient proof that Pagan was visibly intoxicated and thereafter served alcohol by Brinkley's. Accordingly, both claims are severed and dismissed.

Brinkley's, however, has failed to demonstrate *prima facie* entitlement to judgment as a matter of law with respect to plaintiff's GOL § 11-100 claim. Brinkley's relies upon Luiz' testimony to show that it was reasonable to sell alcohol to Pagan on October 26, 2012. Yet, Luiz could not even recall whether he worked there that night or any other detail regarding plaintiff and her friends. Even if Brinkley's had met their burden, triable issues of fact preclude summary judgment. Plaintiff and Luiz' testimony paint very different pictures of what happened at Brinkley's on October 26, 2012. For example, Luiz testified that he wasn't even friends with plaintiff's boyfriend. Meanwhile, plaintiff claims that Luiz was pushing drinks at his old college friends/former roommate. This discrepancy and others raise issues of credibility which the court cannot resolve on this motion.

Defense counsel argues that it was reasonable for Luiz to assume that plaintiff and Pagan were the same age as Pagan's boyfriend and his friends. While this argument does not establish that Brinkley's is entitled to judgment as a matter of law, it does raise a triable issue of fact sufficient to defeat plaintiff's cross-motion. Brinkley's also relies on its general policies and practices. This reliance is misplaced since plaintiff and Pagan could have arrived before 10pm and therefore were indisputably not carded when they entered. On this record, Brinkley's did not have a sufficient policy in place to distinguish between underage and 21 and over patrons who were at the premises before 10pm and remained thereafter.

Even if plaintiff and Pagan entered after 10pm, plaintiff claims that they were not carded. To the extent that plaintiff's prior testimony contradicts this latter claim made in her affidavit, plaintiff has provided a reasonable explanation for any conflicts in testimony, to wit, seizures. It remains for a factfinder to weigh plaintiff's credibility. Otherwise, a jury could conclude on this record that Brinkley's had reasonable cause to believe that Pagan was underage yet provided alcoholic beverages to her nonetheless.

Plaintiff is also not entitled to summary judgment. Indeed, plaintiff could not remember many details on the night in question and the record otherwise remains insufficiently developed. Plaintiff does not know when she arrived at Brinkley's, and therefore cannot rely on the undisputed fact that Brinkley's did not card patrons before 10pm.

It remains for a jury to decide whether Brinkley's had reasonable cause to believe that Pagan was underage. There is no testimony from Pagan on this record, nor any explanation for the failure to subpoena her. There is no testimony from plaintiff's boyfriend or plaintiff's other friend, Jennifer to substantiate plaintiff's claims. Plaintiff testified that she observed Pagan speak to the bouncer before they entered the bar but does not know what was said. Plaintiff also testified that she did not know who Pagan ordered drinks from. In her affidavit, plaintiff clarifies that Luiz served Pagan. On this record, a jury could discredit plaintiff's testimony and find that Pagan received her drinks from plaintiff or other patrons, rather than Brinkley's bartenders and/or servers. Therefore, there is a further issue of fact as to whether Brinkley's furnished or assisted Pagan in procuring alcohol.

### CONCLUSION

In accordance herewith, it is hereby

**ORDERED** that the Sentinels Defendants' motion for summary judgment (seq 5) is granted without opposition and Brinkley's cross-claims against them are severed and dismissed; and it is further

**ORDERED** that Brinkley's motion is only granted to the extent that plaintiff's common law negligence and GOL § 11-101 claims are severed and dismissed; and it is further

**ORDERED** that Brinkley's motion is otherwise denied; and it is further

**ORDERED** that plaintiff's cross-motion is denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated:

7/8/19  
New York, New York

So Ordered:

  
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Hon. Lynn R. Kotler, J.S.C.