

Stark v Art Bar

2019 NY Slip Op 31966(U)

July 8, 2019

Supreme Court, New York County

Docket Number: 160200/2016

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 160200/2016

MATTHEW STARK,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 002 003

- v -

ART BAR, RABTRA LLC, MERCHANTS HOSPITALITY,
INC., STEVEN PULEO

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 57, 59, 60, 62, 63, 64, 65, 66, 67, 68, 69, 70, 83, 84 were read on this motion to/for PARTIAL SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 61, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82 were read on this motion to/for SUMMARY JUDGMENT

Motion Sequence Numbers 002 and 003 are consolidated for disposition. The motion (MS002) by defendants Art Bar and Rabtra, LLC for summary judgment dismissing the first and fourth causes of action is granted and denied to the extent that Art Bar seeks to dismiss the third cause of action.¹ The motion (MS003) by defendant Merchants Hospitality, Inc. (“MHI”) for summary judgment dismissing plaintiff’s claims against it is granted in part and denied in part.

Background

On March 13, 2016, plaintiff and two friends went to Art Bar, a pub located on Eighth Avenue in Manhattan. Plaintiff claims that after arriving, he and his friends began socializing

¹ As an initial matter, the Court observes that the notice of motion for MS 002 (NYSCEF Doc. No. 26) fails to request that the Court dismiss the third cause of action against Art Bar.

with a friend named Mariah and her friends. Plaintiff claims that he encountered defendant Steven Puleo, who was visibly drunk and angry. Plaintiff alleges that Puleo was kicked out of the bar twenty to thirty minutes after his initial encounter with Puleo and insists Puleo was served another alcoholic drink despite being intoxicated. Ten to fifteen minutes later, plaintiff left the bar to find a friend who was smoking a cigarette outside. Plaintiff claims that as he was walking out the door, Puleo punched him in the face and he lost consciousness.

Art Bar and Rabtra move for summary judgment dismissing the negligence (first cause of action) and negligent security (fourth cause of action) claims. These defendants argue that they cannot be held liable for negligence or negligent security because plaintiff was assaulted on a public sidewalk. Art Bar and Rabtra insist they had no duty to keep the sidewalk safe from Puleo.

MHI moves to dismiss the same causes of action (first and fourth), as well as the third cause of action which alleges a violation of New York's dram shop law. MHI claims that it did not own the or operate the bar, nor did it possess a license to sell alcohol and, therefore, could not have sold alcohol to Puleo. Art Bar makes identical arguments for why the third cause of action should be dismissed against it.

In opposition, plaintiff argues that the defendants owed a duty of care to plaintiff and that Puleo's violent behavior was foreseeable. Plaintiff emphasizes that he was hit as he was walking outside the bar and was not while on the sidewalk. With respect to MHI's motion, plaintiff points out that at the preliminary conference, defendants claimed that MHI, Rabtra and Art Bar were insured for the instant occurrence under a policy which lists MHI as the named insured.

Discussion

To be entitled to the remedy of summary judgment, the moving party “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 from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court grants the defendants’ motions to the extent that they seek to dismiss the causes of action for negligence and negligent security (first and fourth causes of action). Although plaintiff claims in opposition that he was attacked while he was walking outside, his deposition testimony reveals that he was hit while on the public sidewalk. Plaintiff testified that “I walk outside, the door, because of the winter encasing, opened to the left, I walked outside, turned to the left. At that point I only saw Steven Puleo” (NYSCEF Doc. No. 76 at 36). When

asked where Puleo was when he confronted plaintiff physically, he responded that “More than 10 feet away. He was walking, briskly, towards me. . . . “Lingering on the sidewalk, after he had left. As soon as I came out, he came directly towards me, while having words” (*id.* at 37).

There is no way to interpret this testimony to find that the attack occurred within the doorway (the outdoor encasing) leading to the bar. Plaintiff’s testimony, the testimony of his friend Garrett and even Mr. Puleo’s testimony (who claims that plaintiff charged him) all confirm the accident happened on the sidewalk. This Court is unable to find that defendants had a duty to keep the public sidewalk safe and, therefore, must sever and dismiss these causes of action. Defendants’ duty to keep a safe environment for its patrons does not extend to a public sidewalk (*Murphy v Chaos*, 26 AD3d 231, 810 NYS2d 39 [1st Dept 2006] [concluding that a nightclub was under no duty to protect plaintiff where a fight happened on a public sidewalk 15 feet from the entrance]).

The Court also observes that Puleo was removed from the bar ten to fifteen minutes before the assault. Even if defendants had a duty to ensure that Puleo left the area around the bar, that duty does not require defendants to police the sidewalk indefinitely. And although plaintiff testified that he told Puleo to stop “creeping out the girls” (NYSCEF Doc. No. 76 at 27), plaintiff did not testify that he got into a physical altercation with Puleo inside the bar. Rather, plaintiff testified that when Puleo came towards plaintiff and his group, the bartender kicked him out and admitted he was drunk (*id.* at 32-33). There was nothing in the account offered by plaintiff to suggest that Puleo would knock plaintiff out when he left the bar.

The Court denies the branch of MHI’s motion to dismiss the third cause of action. Although MHI alleges that it was not responsible for selling alcohol to Puleo, MHI did not submit sufficient documentation to show that MHI should be dismissed from this case. MHI *did*

not submit the applicable liquor license showing another entity sold alcohol at this location.

Instead, MHI cites to the deposition transcript of plaintiff, which does not mention MHI at all.

The deposition of defendants' witness (Andrew Emmet) also does not compel the Court to dismiss the third cause of action against MHI. Emmet claims that he does consulting work for Rabtra and that Rabtra "is owned by my LLC, Andrew Emmet LLC, and by my partner's LLC, which was Abraham Merchant LLC" (NYSCEF Doc. No. 55 at 14). When asked what MHI was, Emmet responded that "It's sort of an umbrella entity. It doesn't own restaurants, as far as I know; but they do payroll, office payroll, things like that" (*id.*). Emmet noted that MHI is run for his partner's convenience and that he is not paid by MHI (*id.* at 15). Emmet then explained that MHI did not have an ownership interest or pay any money to Rabtra (*id.* at 18) before admitting that he had no idea how MHI was set up (*id.* at 20).

Emmet did not have personal knowledge about what MHI actually owned or exactly how it operates with Rabtra and Art Bar. The Court cannot grant MHI summary judgment based on this vague testimony; summary judgment requires a finding as a matter of law and this testimony does nothing to clarify the relationship between Art Bar, Rabtra and MHI.

Moreover, MHI did not respond to plaintiff's argument raised in opposition that the insurance policy defendants produced in discovery identifies MHI as the named insured (NYSCEF Doc. No. 80). The preliminary conference order states that "At the time of the alleged accident, Responding Defendants [defined to include Art Bar, Rabtra and MHI] were insured by XL Insurance America, Inc." (*id.*) Emmet could not clarify this point during his deposition; he testified that "My legal partner has arranged insurance for all of our location. I don't get involved in that" (NYSCEF Doc. No. 55 at 47). This creates an issue of fact. If MHI did not operate the bar, then why did it have an insurance policy for the bar in which it was the named insured?

MHI failed to sufficiently explain the roles of the various LLCs used to own and operate the bar and, therefore, the Court cannot grant MHI summary judgment dismissing the third cause of action.

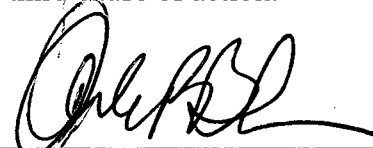
For these same reasons, the Court cannot grant summary judgment dismissing the third cause of action against Art Bar. Art Bar claims it is an assumed name for Rabtra but did not offer any documentation to show that. Art Bar only offered conclusory assertions that it is not an independent entity. And, as discussed above, defendants (including Art Bar) claimed that they were insured; Art Bar would not need insurance if it was just the name of the establishment.

Accordingly, it is hereby

ORDERED that the motion (MS002) by Art Bar and Rabtra LLC for summary judgment is granted to the extent that first and fourth causes of action are severed and dismissed and denied to the extent that Art Bar sought to dismiss the third cause of action; and it is further

ORDERED that the motion (MS003) by Merchants Hospitality, Inc. for summary judgment is granted to the extent that the first and fourth causes of action are severed dismissed against it and denied to the extent that it sought to dismiss the third cause of action.

7/8/19
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FIDUCIARY APPOINTMENT
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE