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SHORT FORM ORDER

COPY

INDEX No. 15-1728
CAL. No. 18-01417OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 12-13-18
ADJ. DATE 2-28-19
Mot. Seq. # 001 - MotD

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PATRICK WENZ,

Plaintiff,

- against -

HARBOR CRAB COMPANY RESTAURANT & MARINA, BMS RIVERSIDE, INC., BRIAN WARD, FRANCIS PAUL MILLS, MARK E. MILLER, BRIAN K. KEARNS, SCOTT CAMPBELL, ANTHONY SPENCER, MACKENZIE MILLER, "JOHN DOES 1 THROUGH 5" and "JANE DOES 1 THROUGH 5", Representing the Fictitious Names of Individuals, Whose Full Names Are Unknown to Plaintiff, Who Were Employees or Persons Selling Alcoholic Beverages at HARBOR CRAB RESTAURANT & MARINA Located at 116 Division Street, Patchogue, New York,

Defendants.

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Attorney for Plaintiff:
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Upon the following papers numbered 1 to 19 read on this motion for summary judgment : Notice of Motion and supporting papers 1- 10 ; Answering Affidavits and supporting papers 11- 17;18-19 ; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants BMS Riverside, Inc., Harbor Crab Company Restaurant & Marina, Francis Paul Mills, Mark E. Miller, Brian K. Kearns, Scott Campbell, Anthony Spencer,

Mackenzie Miller, John Does one through five, and Jane Does one through five, for summary judgment dismissing the complaint against them is granted to the extent set forth, and is otherwise denied.

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained as a result of an assault that occurred at the premises known as Harbor Crab Company Restaurant & Marina (hereinafter Harbor Crab), located at 116 Division Street, Patchogue, New York, on August 14, 2014. The verified complaint, as amplified by the bill of particulars, alleges that plaintiff was assaulted by Brian Ward, who was intoxicated, and that defendants BMS Riverside Inc., and Harbor Crab, as owners and operators of the subject premises, were negligent in failing to maintain the premises in a reasonably safe manner and in serving the assailant alcohol knowing he was intoxicated and under the age of 21 in violation of General Obligations Law §§ 11-100 and 11-101 and of Suffolk County Code § 294-8. The complaint also names defendants Mark Miller, Francis Paul Mills, Scott Campbell, and Brian Kearns and apparently seeks to hold them liable on the sole basis that they are owners and shareholders of BMS Riverside Inc. (hereinafter BMS). Plaintiff alleges further that defendants Anthony Spencer, Mackenzie Miller, John Does numbered one through five, and Jane Does numbered one through five are employees of Harbor Crab, and that they were working on the night of the incident and serving alcoholic beverages. Defendant Brian Ward is alleged to have been an employee of Harbor Crab, but there is no allegation that he was working on the night of the incident.

BMS and Harbor Crab now move for summary judgment dismissing the cause of action for common law negligence on the grounds that they did not breach their duty of care owed to plaintiff, as the assault was unforeseeable. BMS and Harbor Crab also move for summary judgment dismissing the cause of action against it under General Obligations Law § 11- 101 on the ground that the service of alcohol was not a proximate cause of plaintiff's injuries. Defendants Mark Miller, Francis Paul Mills, Scott Campbell, and Brian Kearns seek summary judgment dismissing the complaint against them on the grounds that they were not present at the subject premises on the night of the incident, that they did not serve Brian Ward alcohol, and that as shareholders of BMS they are shielded by the corporate form from liability for the alleged negligence. In support of their motion, movants submit copies of the pleadings, the verified bill of particulars, the transcripts of deposition testimony by the parties, and an affidavit of Mark Miller.

Mark Miller testified that he, Brian Kearns, and Frank Mills were the owners of BMS in 2014, and that BMS purchased Harbor Crab, a corporation in 2001. He testified that Harbor Crab operates as a seafood restaurant and bar, and that it is open for business seven days per week. He testified that Harbor Crab has between 20 and 30 employees including 15 bartenders, a general manager, a beverage manager, and a chef, and that it hires a security company that provides licensed security guards when requested. He testified that there are three entrances to the restaurant that are utilized during the day, and that one entrance is used during evening hours. Miller testified that the premises are mostly used for the restaurant service, and the waiters and waitresses check the patrons' identification, unless large crowds are anticipated, at which time he hires one or two security guards to stand at the entrance door. He testified that on the evening of the incident he hired a security guard who stood at the front entrance and checked identification.

Miller testified that he has known Brian Ward for his entire life, and that he was employed at Harbor Crab as a bar back/porter, and that bar backs do not serve alcohol. He testified that his two daughters work

at the restaurant as bartenders and also serve food and hostess, and that his daughter Delaney has dated Brian Ward. Miller testified that he works at the subject premises between three and four days per week, alternating with the two other owners, and that he was not at the subject premises on the night of the incident. He testified that he never had any problems or issues with Brian Ward, and that on the rare occasions he observed him as a customer, he did not observe him drink alcohol.

Miller testified that he learned of the incident the following day when Anthony Spencer, the beverage manager, called him, and that he went to the restaurant and spoke with him as well as other employees who were working on the night of the incident. He testified that the employees told him that Delaney and Patrick Wenz, whom he never met, were talking in a restricted area so that they could hear each other, and that Ward observed them and a verbal argument ensued. He testified that the employees told him that Wenz pushed Ward, "he hit him, Wenz left, Ward left, and that they both left so quick that it was a spontaneous occurrence." He testified that Delaney told him that she and Wenz were speaking in the pub room in front of a speaker and that they could not hear each other so they stepped into the hallway, and that Wenz spontaneously came bursting in, yelled at Wenz who shoved Ward, and that Ward turned around and punched him.

Miller testified that he spoke with Ward a week after the incident, and that Ward told him that he had been dining at the restaurant, and he observed Wenz and Delaney conversing, so he yelled at him, and that Wenz pushed him. He testified that Ward told him that he punched Wenz, and that he "just lost it." Miller was shown an incident report that was prepared by the employees, and he testified that it consisted of six statements prepared by each employee and himself. He testified that his statement states that "Anthony Spencer inspected the area immediately." Miller testified further that incident reports are regularly completed by Harbor Crab's employees following an incident, that the police arrived at the scene and prepared their own reports, and that he and the police viewed video footage from security cameras. He testified that none of the employees told him that Ward consumed alcohol, and that he asked his daughter Mackenzie if she served Ward alcohol or if she had observed him consuming alcohol and she responded in the negative.

Plaintiff testified that on the night of the incident he went to Harbor Crab with his friends, and that he had conversed and flirted with Delaney. He testified that she took him into a private storage room where they kissed, and that he was sitting on boxes of beer and Delaney was standing up between his legs, when Ward suddenly came in the room, ran towards him and began punching him in the face multiple times. He testified that he was seated during the assault, and that he does not know where Delaney was while it was happening, but that she brought him a wet towel afterwards. He testified that no words were spoken between him and Ward, and that when the assault was over Ward immediately ran out the door.

Plaintiff testified that he did not shove, push or strike back, and that the assault happened quickly, without warning. He testified that he exited the premises through a back door and went outside where his friends were, and that they observed Ward running away so he chased him, but Ward jumped into the back seat of a vehicle driven by someone else. He testified that he went to the emergency room at Brookhaven

Memorial Hospital, and that the following morning he went to the police station in the fifth precinct and filed a written statement regarding the subject incident.

Plaintiff testified that he met Ward at his friends house approximately one and a half months prior to the incident, and that they spoke about lacrosse for a few minutes. He testified that on the night of the incident, at approximately 11:30 p.m., he passed Ward in the hallway of the restaurant holding a beer, and that they said hello to each other and high-fived each other. He testified that he never had any issues with Ward, that after the incident he contacted Ward to determine the reason for the assault, and that Ward told him Delaney was his girlfriend. Plaintiff testified that he met Delaney on various occasions prior to the incident, and that they flirted and exchanged telephone numbers.

Brian Ward testified that he has known Delaney since first grade, that they had been dating on and off for three years preceding the incident, and that on the night of the incident they were dating, and he considered her his girlfriend. He testified that he worked as a bar back at Harbor Crab in the summer months during the years 2011 through 2013, and that on the night of the incident he went to Harbor Crab with his friends to celebrate a friend's twenty-first birthday. He testified that he and his friends arrived at 8:00 p.m., and that they ordered appetizers and beers from the bar located at the back of the restaurant before going to the front bar where he drank between three and five whiskey-ginger drinks, as well as two shots of whiskey or tequila, and he referred to himself as "drunk."

Ward testified that he does not recall which bartender served him and his friends the alcoholic drinks, or who paid for them, and he does not remember being asked for identification. He testified that Mackenzie and Anthony Spencer were working on the night of the incident, and that Delaney was at the subject premises as a customer. He testified that he was 20 years of age at the time of the incident, and that he was served alcohol from Harbor Crab on several occasions prior to the date of the incident.

Ward testified that he has known Wenz since the third grade, as they went to the same school, and that he did not have any issues with him nor did the two men ever get into a fight. He testified that prior to the incident he had been searching the premises for Delaney to say goodnight, and that he looked everywhere for her, including the beer storage room. He testified that the door to the storage room was closed, and that he opened it and observed Delaney and plaintiff kissing. He testified that he yelled at them and walked up to them to leave with Delaney, and that as he walked away, Wenz pushed him so he turned around and pushed him back before walking away. Ward testified that while he was walking away, Wenz punched him in the back of the head and a fight ensued. Ward was asked if he would have pushed or punched Wenz if he was not "drunk" and he replied in the affirmative.

It is well settled that 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 eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to

the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

General Obligations Law § 11-101, known as the Dram Shop Act, creates a cause of action against a person who illegally or improperly sells or serves intoxicating liquor in favor of one who is injured, or property damaged, caused by the acts of an intoxicated person. The statute imposes strict liability and a showing of negligence or proximate cause is not required (***Sullivan v Mulinos of Westchester, Inc.***, 114 AD3d 844, 980 NYS2d 577 [2d Dept 2014]). To establish such cause of action, plaintiff must prove that defendant served alcohol to a person who was visibly intoxicated, and that such sale of the alcohol bore some reasonable or practical connection to the plaintiff's injuries or damages (***Giordano v Zepp***, 163 AD3d 781, 79 NYS3d 659 [2d Dept 2018]; ***Pinilla v City of New York***, 136 AD3d 774, 24 NYS3d 710 [2d Dept 2016]). The statute applies only to sales of alcohol for profit, *i.e.*, commercial sales (***D'Amico v Christie***, 71 NY2d 76, 524 NYS2d 1 [1987]; ***Ferber v Olde Erie Brew Pub & Grill, LLC***,161 AD3d 1142, 78 NYS3d 209 [2d Dept 2018]).

Therefore, to establish a prima facie entitlement to summary judgment dismissing the cause of action under the Dram Shop Act, defendants must establish that they did not sell alcohol to Ward while he was visibly intoxicated or that their sale of alcohol to Ward had no reasonable or practical connection to the plaintiff's alleged injuries (*see* ***Flynn v Bulldogs Run Corp.***,171 AD3d 1136, 100 NYS3d 35 [2d Dept 2019]; ***Trigoso v Correa*** 150 AD3d 104155 NYS3d 130 [2d Dept 2017]; ***Lauinger v Surf's Out at Kismet, LLC***, 134 AD3d 681, 20 NYS3d 595 [2d Dept 2015]; ***Dugan v Olson***, 74 AD3d 1131,906 NYS2d 277 [2d Dept 2010]).

Additionally, defendants are alleged to have violated Section 11-100 of the General Obligations Law, which creates a cause of action in favor of one who is injured, or property damaged, caused by the acts of an intoxicated or impaired person under twenty-one years of age against any person who furnishes or unlawfully assists in procuring alcoholic beverages to such person under the age of twenty-one. Unlike General Obligations Law §11-101, liability may be imposed even if the provider of the alcohol did not sell it to the minor. In order to impose liability under §11-100, a defendant must have actual knowledge or reasonable cause to believe that alcohol is being provided to a person under the age of 21, the defendant must have actively assisted in procuring the alcohol for the minors, and defendant must have knowingly caused such intoxication or impairment of ability (***Sherman v Robinson***, 80 NY2d 483, 591 NYS2d 974 [1992]; ***Holiday v Poffenbarger***, 110 AD3d 841, 973 NYS2d 276 [2d Dept 2013]).

Here, BMS and Harbor Crab have not submitted any affidavits by their employees who were working on the night of the incident to establish prima facie that they did not sell, serve, or assist in procuring the alcohol for Ward, that they did not know or have reason to believe Ward was under the age of 21, and that

they did not knowingly cause such intoxication or impairment of ability (*compare* ***Ferber v Olde Erie Brew Pub & Grill, LLC***,161 AD3d 1142, 78 NYS3d 209). Similarly, no proof is submitted to establish Ward was "visibly intoxicated." While Ward testified as to the amount of alcohol he consumed and referred to himself as "drunk," no proof by an eyewitness, such as other patrons or employees of Harbor Crab, is submitted to establish that he exhibited signs of intoxication at the time he was served alcohol (*see* ***Romano v Stanley***, 90 NY2d 444, 661 NYS2d 589 [1997]; ***Brown v Mackiewicz***, 120 AD3d 1172, 992 NYS2d 314 [2d Dept 2014]; ***Burkhard v Sunset Cruises, Inc.***, 191 AD2d 669, 595 NYS2d 555 [2d Dept 1993]).

However, defendants did establish prima facie that no reasonable or practical connection existed between the alleged illegal sale of alcohol and the incident through the testimony of Ward, who was asked whether he would have reacted in the same manner if he had not been consuming alcohol, and he testified that he would have, as Delaney was his girlfriend. Therefore, defendants established their prima facie entitlement to summary judgment dismissing the cause of action under General Obligations Law § 11-101 (*see* ***Kaufman v Quickway, Inc.***, 14 NY 3d 907, 905 NYS2d 532 [2010]), despite the lack of proof that Ward was not visibly intoxicated, and shifted the burden to the opposing parties to submit proof in admissible form sufficient to raise a triable issue of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

In opposition, plaintiff submits an affirmation by his attorney which fails to raise a triable issue of fact demonstrating that a practical connection existed between the alleged illegal sale of alcohol and plaintiff's injuries (*see* ***Kiely v Benini***, 89 AD3d 807, 932 NYS2d 181 [2d Dept 2011]). Defendant Brian Ward opposes the motion with an affirmation of counsel which also fails to raise a triable issue of fact. Counsel relies on (***Catania v 124 In-To-Go, Corp.***, 287 AD2d 476, 731 NYS3d 207 [2d Dept 2001]) to support his argument that there is a reasonable or practical connection between the sale of alcohol and plaintiff's injuries. However ***Catania*** is distinguishable, as the evidence in that case demonstrated that the assailant "became increasingly aggressive as he continued to drink throughout the course of the evening, and that the attack on the plaintiff was sudden and unprovoked" (***Catania v 124 In-To-Go, Corp.***, 287 AD2d 476, 478, 731 NYS2d 207). No such evidence was proffered here. Nor is counsel's statement that "intoxication can be proved simply by the testimony of the person intoxicated" supported by the case he cites, ***Keily v Benini***, 2010 NY Slip Op 31448 [Sup Ct, Queens County 2010]) nor its affirmance (***Kiely vBenini***, 89 AD3d 807, 932 NYS2d 181 [2d Dept 2011]). In ***Benini***, the lower court cited several factors used to determine one's intoxication, including the slurring of words, observation by a witness which describes the person's conduct and speech, among other things, noting that not one of these things, in and of itself, constitutes intoxication. Accordingly, the branch of the motion for summary judgment dismissing the cause of action alleging a violation of GOL § 11-101 is granted.

With respect to the cause of action under General Obligations Law § 11-100, defendants failed to establish a prima facie entitlement to summary judgment, as no proof has been submitted to demonstrate that none of Harbor Crab's employees served, furnished or assisted in procuring the alcohol for Ward, and that they did not know or have reason to believe Ward was under the age of 21. Nor have defendants established prima facie that Ward was not intoxicated or that his ability was not impaired at the time of the incident. (*see*

General Obligations Law §11-100 [1]). Therefore, the branch of the motion for summary judgment dismissing the cause of action alleging a violation of General Obligations Law § 11-100 is denied.

Regarding the cause of action asserting common law negligence, to prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Owners and occupants of stores, office buildings, and other places onto which members of the general public are invited have a nondelegable duty to provide the public with reasonably safe premises to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Etminan v Esposito***, 126 AD3d 854, 6 NYS3d 103 [2d Dept 2015]; ***Blatt v L'Pogee, Inc.***, 112 AD3d 869, 978 NYS2d 291 [2d Dept 2013]; ***Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.***, 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]).

The duty of care owed by proprietors of establishments is to use reasonable care under the circumstances, and the proprietor may be held liable for injuries caused by the conduct of third persons when the establishment has the opportunity to control such conduct and is aware of the need to do so (***Oblatore v 67 W. Main St., LLC***, 169 AD3d 705, 91 NYS3d 714 [2d Dept 2019]; ***Hegarty v Tracy*** 125 AD3d 804, 4 NYS3d 254 [2d Dept 2015]; ***Kranenberg v TKRS Pub, Inc.***, 99 AD3d 767, 952 NYS2d 215 [2d Dept 2012]). However, a property owner is not the insurer of a visitor's safety, and it has no duty to protect visitors against unforeseeable and unexpected assaults (***Daniels v Dairy Queen Grill & Chill***, ___ AD3d ___, 101 NYS3d 841 [2d Dept 2019]; ***Scharff v L.A. Fitness Intl., LLC***, 139 AD3d 929, 30 NYS3d 574 [2d Dept 2016]; ***Afanador v Coney Bath, LLC***, 91 AD3d 683, 936 NYS 2d 312 [2d Dept 2012]; ***Giambruno v Crazy Donkey Bar & Grill***, 65 AD3d 1190, 885 NYS2d 724 [2d Dept 2009]). If an owner is aware that there is a likelihood of conduct on the part of third parties that would endanger visitors, the owner is obligated to take reasonable precautionary measures to minimize the risk of criminal acts (***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Gentile v Town & Vil. of Harrison, N.Y.***, 137 AD3d 971, 27 NYS3d 207 [2d Dept 2016]). "The criminal conduct at issue must be shown to be reasonably predictable based on prior occurrences of the same or similar criminal activity at a location sufficiently proximate to the subject location" (***Bryan v Crobar***, 65 AD3d 997, 999, 885 NYS2d 122 [2d Dept 2009]). The burden is on the proprietor to demonstrate that the conduct that caused the plaintiff's injuries could not have been anticipated and prevented (*see* ***Cole v JW's Pub***, 133 AD3d 815, 19 NYS3d 434 [2d Dept 2015]).

Here, defendants established a prima facie entitlement to summary judgment on plaintiff's cause of action alleging common law negligence for failing to maintain the premises in a safe manner by demonstrating that they had no opportunity to control Ward's conduct at the time he allegedly assaulted plaintiff, and that they were not aware of the need for such control (***Heyman v Harooni***, 132 AD3d 950 18 NYS3d 699 [2d Dept 2015]). The deposition testimony of the parties establishes that the incident was unforeseeable and happened quickly in an inconspicuous area of the premises (*see* ***Colon v Pohl***, 121 AD3d 933, 995 NYS2d 139 [2d Dept 2014]; ***Giambruno v Crazy Donkey Bar & Grill***, 65 AD3d 1190, 885 NYS2d 724). Additionally, the record is devoid of any evidence regarding any prior similar incidents or that

there were problems or issues with Ward to establish defendants' awareness of a need to take precautions (***Salgado v Paccio***, 150 AD3d 1293, 52 NYS3d 875 [2d Dept 2017]). In opposition, neither plaintiff nor defendant Ward submit any proof to raise a triable issue of fact as to whether defendants were aware of a need to control Ward's conduct and had an opportunity to do so. Therefore, the branch of the motion to dismiss the cause of action against BMS and Harbor Crab sounding in negligence is granted.

With respect to the application for summary judgment dismissing the complaint against defendants Mark Miller, Francis Paul Mills, Scott Campbell, and Brian Kearns, it is undisputed such defendants are owners and shareholders of BMS. It is well settled that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability (*see* ***Walkovszky v Carlton***, 18 NY2d 414, 417, 276 NYS2d 585 [1966]; ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009] *affd* 16 NY3d 775, 919 NYS2d 496 [2011]).

While an exception to this principle exists, the doctrine of piercing the corporate veil, it is inapplicable here, as such doctrine exists to prevent fraud, illegality or to achieve equity (*see* ***Morris v State Dept. of Taxation & Fin.***, 82 NY2d 135, 603 NYS2d 807 [1993]; ***Bonacasa Realty Co., LLC v Salvatore***, 109 AD3d 946, 972 NYS2d 84 [2d Dept 2013]; ***Sigal v Brokaw***, 71 AD3d 865, 895 NYS2d 862 [2d Dept 2010]; ***Treeline Mineola, LLC v Berg***, 21 AD3d 1028, 1029 [2d Dept 2005]). No allegations of any kind have been made which would implicate personal liability upon the individual owners and shareholders of BMS, and no opposition to defendants' prima facie case is submitted by any of the opposing parties to raise a triable issue of fact. Therefore, the branch of the motion for summary judgment dismissing the complaint against defendants Mark Miller, Francis Paul Mills, Scott Campbell, and Brian Kearns is granted.

As for the imposition of vicarious liability upon BMS and Harbor Crab for the conduct of defendants Anthony Spencer, Mackenzie Miller, John Does numbered one through five, and Jane Does numbered one through five, as employees of Harbor Crab, business corporations are vicariously liable, under the doctrine of respondeat superior, for the torts of their employees committed within the scope of the corporate business (***Poplawski v Gross***, 81 AD3d 801, 917 NYS2d 247 [2d Dept 2011]; ***Connell v Hayden,*** 83 AD2d 30, 59, 443 NYS2d 383 [2d Dept 1981]). Whether an act of the employee falls within the scope of the employer's business depends upon whether the act furthers the employers interest or business (***Holmes v Gary Goldberg & Co., Inc.***, 40 AD3d 1033, 838 NYS2d 105 [2d Dept 2007]). An employer is not vicariously liable where the employee's tortious conduct could not have been reasonably expected by the employer (***Gui Ying Shi v McDonald's Corp.***, 110 AD3d 678, 972 NYS3d 307 [2d Dept 2013]).

Here, Harbor Crab failed to submit competent proof that defendants Anthony Spencer, Mackenzie Miller, John Does numbered one through five, and Jane Does numbered one through five employees did not serve alcohol to Ward knowing he was under twenty one years of age. No affidavits have been submitted by any of these defendants, and Mark Miller's testimony at his deposition, that "they told him they did not serve Ward alcohol" is inadmissible hearsay. With respect to vicarious liability for the conduct of Ward, however, it is undisputed that Ward was not working at Harbor Crab on the night of the incident, and in any event, his alleged conduct does not fall within the scope of employment, as it was personal in nature,

unrelated to his job, and unforeseeable (*see* ***Montalvo v Episcopal Health Services, Inc.***,172 AD3d 1357, 102 NYS3d 74 [2d Dept 2019]; ***Rodriguez v Judge***, 132 AD3d 966, 18 NYS3d 692 [2d Dept 2015]). Thus, BMS and Harbor Crab established their prima facie entitlement to summary judgment with respect to the cause of action asserting vicarious liability for the conduct of Brian Ward, and, there being no opposition to raise a triable issue of fact, the branch of the motion dismissing the cause of action imposing vicarious liability against BMS and Harbor Crab for the conduct of Brian Ward is granted.

However, BMS and Harbor Crab failed to establish their prima facie entitlement to summary judgment dismissing the vicarious liability claim regarding employees Anthony Spencer, Mackenzie Miller, John Does numbered one through five, and Jane Does numbered one through five. Accordingly, the branch of the motion for summary judgment dismissing the cause of action against BMS and Harbor Crab asserting vicarious liability for the conduct of such employees is denied.

Finally, plaintiff's allegation that defendants violated Suffolk County Code § 294-8 is of no consequence to BMS and Harbor Crab, as the local law applies to owners, renters, and persons in control of private residences. Furthermore, it does not create a private cause of action.

Dated: September 9, 2019
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION