

Denison v 300 E. 57 St., LLC
2019 NY Slip Op 33775(U)
December 24, 2019
Supreme Court, New York County
Docket Number: 152848/2016
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN

PART

IAS MOTION 33EFM

Justice

-----X

INDEX NO.

152848/2016

DENISON, ZOE

MOTION DATE

Plaintiff,

MOTION SEQ. NO.

002; 003

- v -

300 EAST 57 STREET, LLC; RUDIN MANAGEMENT CO.
INC.; 493 REST. INC. (d/b/a MERCURY BAR EAST);
PRECINCT SECURITY AND INVESTIGATIONS INC.;
WOYCHOWSKI, ROXANNE

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 114, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 151, 153, 154

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 115, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 152, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167

were read on this motion to/for

JUDGMENT - SUMMARY

Plaintiff seeks to recover damages from injuries she sustained at the hands of defendant Roxanne Woychowski and the alleged negligence of the co-defendants that arose from a night on the town in the city, state, and county of New York on April 4, 2015. The defendants remaining in this action¹, 300 East 57 Street, LLC and Rudin Management Co. Inc., and 493 Rest. Inc. d/b/a Mercury Bar East move in motion sequences 002 and 003, respectively, for summary judgment to dismiss all claims and cross-claims asserted against it. Plaintiff opposes both motions.

FACTS

At the time of the incident, plaintiff lived with her mother, Carol Denison, at 300 East 57th Street, Apartment 11B, which is owned by defendant 300 East 57

¹ This action was discontinued with prejudice as to defendant Precinct Security and Investigations Inc. ("Precinct") on September 30, 2019 (NYSCEF #168 – September 30, 2019 Stipulation of Discontinuance). Defendant Roxanne Woychowski ("Woychowski") has not answered or appeared in this matter.

Street ("300 East") and managed by Rudin Management Co. Inc. ("RMC") (collectively "Rudin defendants") (NYSCEF #92 – Zoe Denison EBT at 49).

On the day of the incident, April 4, 2015, plaintiff started her day by having lunch with her mother (*id.* at 56). After lunch, plaintiff met her friends Holly, Chris, and Sarah, and went to Tonic East, a bar located on Third Avenue and East 29th Street (*id.* at 62). While there, plaintiff consumed five drinks: a mimosa, two Stella Artois beers, and two shots of Fireball Cinnamon Whisky (*id.* at 62-63). Plaintiff remained at Tonic East for about five hours – between 4:30 p.m. and 9:30 p.m. (*id.*).

At 9:30 p.m., plaintiff and Sarah headed to another bar named Mercury Bar East on Third Avenue and East 33 Street to watch a college basketball game (*id.* at 62-63). Mercury Bar East is owned by 439 Rest. Inc. d/b/a Mercury Bar East.

Plaintiff could only recall the first fifteen minutes of her time at Mercury Bar East. Plaintiff testified that when she and Sarah arrived at Mercury Bar East, they walked to the back area of the bar where Sarah found a table and began to charge her phone (*id.* at 65). Plaintiff went to the bar to grab an available seat so she could watch the college basketball game (*id.*). Plaintiff remembered having a brief conversation about the game with an unknown man sitting next to her about. Sarah then came up to the bar, and they both ordered vodka sodas (*id.* at 65-66).

The surveillance camera footage from Mercury Bar East begins at 10:00 p.m. and shows plaintiff and Sarah at the bar (NYSCEF #110 – Mercury Bar East Security Footage). While the video footage is unclear as to plaintiff drank the vodka soda, it does show plaintiff taking a shot of liquor at 11:07 p.m. and spending a good deal of time talking to an unknown male patron sitting next to her. The video also shows that from 11:13 to 11:23 p.m., a bouncer, and later, the bar manager, Dana Thompkins, spoke with plaintiff (*id.*).

Five minutes later, plaintiff, with her coat and bag, and Sarah walked outside, followed shortly by an unknown male patron (*id.*). The three appeared to be having a conversation. At approximately 11:29 p.m., plaintiff hands her bag and coat to Sarah, who returned inside (*id.*). Plaintiff and the male patron remained outside and continued to speak (*id.*). The male patron returned inside at approximately 11:33 p.m., and plaintiff followed. Plaintiff opens the front door, steps inside, but is stopped by a bouncer. A second bouncer walks over to the bar manager, who is called over to speak with plaintiff, but this conversation is not visible on camera. Shortly thereafter, the bar manager walks away, and plaintiff steps outside.

After plaintiff stepped back outside at 11:34 p.m., she is seen on the sidewalk outside the bar, leaning against the wall, swaying back and forth, and fumbling with her watch (*id.*). After plaintiff unsuccessfully attempts to re-enter the bar, she

is seen leaving and walking away at approximately 11:37 p.m. At around 11:46 p.m., Sarah is seen emerging from the bar carrying plaintiff's possessions and looking around in vain for plaintiff.

Plaintiff then proceeded to attempt to make her way home. She was observed at the Gulluoglu Baklava Café located on Second Avenue and 52nd Street in a highly disoriented state, unsteady on her feet, crying, struggling to find her way home, and she had to write her address on a piece of paper to receive directions from one of the café employees (NYSCEF #122 – Private Investigator Gallowitz Affidavit at 2-3). Plaintiff had no recollection of these events, other than when she passed by the café some time later and “had an emotional reaction to it and realized that’s where I had been” (NYSCEF #92 at 114-115). Plaintiff’s route home is unknown after she stopped at the café.

At approximately 12:12 a.m. on April 5, 2015, plaintiff arrived home and was followed inside by defendant Woychowski (NYSCEF #96 – 300 East 57th Street Surveillance Footage). It is unknown how, when, or where plaintiff and Woychowski came upon one another. The building’s doorman, Nehat Cira, is seen standing at a desk in the lobby holding what appears to be a log book (*id.*). Cira hurriedly put the book away as soon as he noticed plaintiff enter the building (*id.*).

Cira testified that he spoke to plaintiff when she entered the lobby, asking her how she was and if she and Woychowski were together, and plaintiff responded in the affirmative (NYSCEF #93 – Cira EBT at 78-79, 94, 172, 180-181). The lobby surveillance footage confirms Cira saying something to plaintiff when she entered the building, and plaintiff is seen raising her arm after she passes Cira on the way to the elevator. Woychowski, following behind plaintiff, also raises her arm. Woychowski and Cira appear to briefly exchange words, after which Cira moves to the front door vestibule and Woychowski continues on to the elevator. At this point, plaintiff had her back to Cira and is seen pushing the elevator button. Woychowski then reaches the elevators, puts her arms around plaintiff, and they hug.

Cira testified that it appeared to him that plaintiff had consumed alcohol that evening, but that plaintiff did not sound drunk or walk in a drunken manner (*id.* at 93-94). Cira testified that he smelled alcohol on plaintiff and Woychowski (*id.* at 156). Cira also testified that he did not believe that plaintiff was in any danger or that she was in trouble (*id.* at 151).

Video from inside the elevator shows plaintiff entering with Woychowski, pushing multiple buttons in a clearly incapacitated state, swaying and struggling to stay upright. The door opens at the fifth floor; plaintiff walks out with Woychowski. Somehow, plaintiff and Woychowski ended up in Apartment 5B, an unlocked and vacant apartment. At 1:25 a.m., some 70 minutes after plaintiff’s arrival at the building, Cira received a call from the tenant in Apartment 5C informing him of a

domestic violence incident on the floor and to telephone the police (*id.* at 97). Cira called the police and then his colleague, porter Joao Alves, to respond to the reported fight on the fifth floor. Alves testified that when he arrived on the fifth floor, he saw the tenant in Apartment 5C holding plaintiff, who was wearing only a t-shirt top and underwear (NYSCEF #94 – Alves EBT at 70, 88). Alves testified that plaintiff was crying and said “she doesn’t want me anymore” (*id.* at 74).

The police arrived at the building at 1:40 a.m. and arrested Woychowski, who was subsequently charged with assault and larceny (NYSCEF #125 – Criminal Complaint). Plaintiff was taken to the hospital and, in the emergency room, her treating physician told her that he believed she had been drugged (NYSCEF #92 at 130-131). However, plaintiff’s toxicology panel came back negative for all drugs other than alcohol (NYSCEF #113 – Toxicology Report).

Plaintiff testified as follows regarding her ordeal:

“I have flashes in and out of remembering things. I was in a bakery or a restaurant of sorts, really freaked out. Looking out a window, I looked to my right and somebody short with brown hair passes. The next memory I have, I’m in an apartment that’s supposed to be mine. It has nothing in it. My mom’s gone and I can’t figure out what’s going on and then I’m sitting on the floor of what would be my room in that apartment, crying and there’s a woman or a figure in the doorway saying[:] ‘Your parents left you, they don’t love you anymore, you have to stay with me.’ The next thing I know, I’m being strangled. I can’t see anything and there’s a voice in my head saying ‘Zoe, this woman is going to kill you if you don’t do anything right now.’ Then I’m in the hallway and I just see the doorman come around the corner and that’s it” (NYSCEF # 92 at 66-67).

DISCUSSION

This decision addresses the substance of two of plaintiff’s claims: (1) negligent provision of security against defendants 300 East and RMC (the “Rudin defendants”); and (2) negligence against defendant Mercury Bar East for breaching its duty to not inject plaintiff into a dangerous situation by denying her re-entry into the bar to collect her belongings and refusing to inform plaintiff’s friend that plaintiff was denied re-entry (NYSCEF #1 – Complaint). Plaintiff also made claims for negligent training and supervision and for punitive damages against Mercury Bar East and the Rudin defendants, but she did not offer opposition to the movants’ arguments on those claims; accordingly, these claims are dismissed.

A party moving for summary judgment must make a *prima facie* showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68

NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (see *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (see *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Negligence Claim Against Mercury Bar East (MS 3)

Plaintiff alleges that Mercury Bar East was negligent by failing in its duty to not inject plaintiff into a foreseeably dangerous situation by improperly denying her re-entry into the bar to collect her belongings and inform her friend of the situation. Essentially, plaintiff's claim is that Mercury Bar East owed plaintiff a duty to not degrade her situation. Mercury Bar East's motion for summary judgment is granted; plaintiff's negligence claim against it is dismissed.

"To establish a prima facie case of negligence, plaintiff must show that defendants owed her a duty and that their breach of this duty caused her to suffer injuries" (*Evans v 141 Condominium Corp.*, 258 AD2d 293, 295 [1st Dept 1999]). Here, plaintiff cannot establish that Mercury Bar East had a duty to protect plaintiff or that allowing plaintiff to retrieve her belongings would have causally prevented her interaction with Woychowski.

Simply put, the duty as envisioned by plaintiff is not cognizable in New York. Plaintiff claims that while Mercury Bar East was entitled to deny re-entry to plaintiff, it still had a duty to not make her situation worse by separating her from her belongings and friend. Plaintiff argues that Section 314A of the Restatement (Second) of Torts provides that a possessor of land who holds it open to the public has a duty to take reasonable action to protect the invitee against unreasonable risk of physical harm and to give them first aid if the inviter knows or has reason to know that the invitee is ill or injured. Plaintiff points to *DiSalvo v Armae, Inc.*, 41 NY2d 80, 82 (1976) for the proposition that Section 314A of the Restatement (Second) of Torts has been applied in New York. However, plaintiff does not offer a binding case where § 314A was applied to a factual circumstance such as this.²

² Additionally, plaintiff asks this court to consider the cases of *Doe v O.C. Seacrets, Inc.*, 2012 WL 3257581 [D Md Aug. 7, 2012] and *Dagen v Marriott Intern., Inc.*, 2006 WL 3728344 [NDNY Dec. 18, 2006]. However, both cases have no precedential value to this court. The Maryland case, while factually similar to the circumstances here, is completely at odds with New York precedent. *Dagen* dealt with a motion to dismiss, allowing a negligence case against an innkeeper to proceed. However, *Dagen v Marriott Intl., Inc.*, 2008 WL 11504633 [NDNY Apr. 16, 2008] dealt with the same matter on summary judgment and found that defendant hotel could not be liable for plaintiff's car crash

The First Department is clear about the obligations of a public establishment to its patrons regarding assault by third-parties: “a landlord or owner of a public establishment has no duty to protect its patrons from unforeseeable and unexpected assaults nor to take any protective measures unless there was a foreseeable risk of harm from criminal activities of third persons on the premise” (*Rivera v 21st Century Rest., Inc.*, 199 AD2d 14, 15 [1st Dept 1993]; *see also Murphy v Chaos*, 26 AD3d 231 [1st Dept 2006] [nightclub owed no duty to protect assault victim during sudden, brief assault, where assault took place on public sidewalk fifteen feet from entrance of club and there was no evidence that anything occurred in club that would put club on notice of a risk of altercation]). An owner of a public establishment merely “has the duty to control the conduct of persons present on its premises when it has the opportunity to control or is reasonably aware of the necessity for such control” (*Rivera*, 199 AD2d at 15).

Here, the facts demonstrate that plaintiff’s assault was unforeseeable, unexpected, off-premises, and nothing put Mercury Bar East on notice that plaintiff was in danger of being assaulted. Plaintiff’s assault occurred in her apartment building, not at the Mercury Bar East. As such, Mercury Bar East had no ability to intervene as the conduct occurred off-premises. Additionally, Woychowski was unknown to Mercury Bar East, and there was no notice to Mercury Bar East that she would harm plaintiff.

Furthermore, while it is undisputed that plaintiff was intoxicated at Mercury Bar East, there is no evidence that plaintiff was visibly incapacitated in front of bar staff. It does not appear from the surveillance footage that bar staff ever saw plaintiff wobbling or stumbling on her feet. There was no basis for Mercury Bar East to believe that plaintiff was in danger.

Adopting plaintiff’s proposed duty would significantly enlarge the obligation of public establishment owners to their patrons. Public establishments cannot be “an insurer of the safety” for their patrons; their “duty is only to exercise reasonable care for their protection” (*Gilson v Metropolitan Opera*, 5 NY3d 574, 577 [2005]). The duty envisioned by plaintiff would effectively require bars to ensure the safety of their patrons well after they leave the premises.

In any event, even if there was a cognizable duty that required Mercury Bar East to allow plaintiff to retrieve her belongings or to inform her friend of plaintiff’s situation, the breach of this duty did not proximately cause plaintiff’s ordeal. “To carry the burden of proving a prima facie case, the plaintiff must generally show

after he was expelled from the hotel for drunkenness as the proximate cause for the crash was his drunkenness and road slickness.

that the defendant's negligence was a substantial cause of the events which produced the injury" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]). Plaintiff was not assaulted in her apartment building because she did not have access to a phone, purse, or her friend. She was assaulted because Woychowski met her, accompanied her home, passed through the lobby in full view of a doorman, and then assaulted plaintiff at a later point. Mercury Bar East's actions did not cause plaintiff to walk home. Mercury Bar East is not liable for plaintiff's injury here.

Negligence Claim Against Rudin Defendants (MS 2)

Plaintiff alleges that the Rudin defendants negligently provided security, and their negligence allowed Woychowski to assault plaintiff. "Landlords have a 'common-law duty to take minimal precautions to protect tenants from foreseeable harm,' including a third party's foreseeable criminal conduct" (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 548 [1998] [internal citations omitted]; *see also Bello v Campus Realty LLC*, 99 AD3d 638, 638 [1st Dept 2012]). "The law does not require the defendants to provide the optimal or most advanced security system available, but only reasonable security measures. To hold otherwise would cast the defendants in the role of insurers of the safety of the premises" (*Tarter v Schildkraut*, 151 AD2d 414, 415 [1st Dept 1989] [internal citations omitted]).

The Rudin defendants' motion for summary judgment is granted. The Rudin defendants had a clear policy regarding guests that entered the building at the same time as tenants; the policy was followed here. Michael Sweeney, RMC's Vice President of Security, testified that when a tenant enters the building with a guest after midnight, the doorman is required to ask the tenant if the visitor is accompanying the tenant (NYSCEF #95 – EBT of Michael Sweeney at 91).

The Rudin defendants show that doorman Nehat Cira followed the security procedures. The surveillance footage confirms that Cira interacted with plaintiff and was waved off by her. Cira testified that he asked plaintiff if Woychowski was with her, and plaintiff responded affirmatively. Plaintiff argues that relying on the surveillance footage of plaintiff's gesture is a thin reed to rely upon and that Cira's testimony regarding his interaction with plaintiff is inconsistent with the footage. However, it is clear from the footage that plaintiff, at a minimum, waved off Cira, and plaintiff does not offer any evidence that Cira failed to ask plaintiff about Woychowski. As such, there is no question of material fact here.

In any event, even if Cira failed to ask plaintiff if Woychowski was with her, the behavior of plaintiff and Woychowski that Cira observed (and the surveillance footage confirms that he was watching plaintiff and Woychowski) would not have allowed the Rudin defendants to know or have a reason to know "that there is a likelihood of conduct on the part of [Woychowski]... which is likely to endanger the safety of [plaintiff]" (*Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519 [1980]). Cira

observed plaintiff and Woychowski hugging in the lobby; there was no indication that Woychowski posed a threat to plaintiff. Woychowski's attack on plaintiff was entirely unforeseeable to the Rudin defendants. Thus, as a matter of law, the Rudin defendants fulfilled their obligation to plaintiff in providing plaintiff a minimal amount of security to protect plaintiff from a foreseeable harm.

Further, a tenant can recover damages from a landlord "only on a showing that the landlord's negligent conduct was a proximate cause of the injury" (*Burgos*, 92 NY2d at 548).

"In premises security cases ... the necessary causal link between a landlord's culpable failure to provide adequate security and a tenant's injuries resulting from a criminal attack in the building can be established only if the assailant gained access to the premises through a negligently maintained entrance. Since even a fully secured entrance would not keep out another tenant, or someone allowed into the building by another tenant, plaintiff can recover only if the assailant was an intruder"
(*Id.*, 92 NY2d at 550-51).

Here, Woychowski entered the building as an apparent guest of plaintiff. There was no basis for the Rudin defendants to view Woychowski as an intruder. As such, there is no reason to hold the Rudin defendants liable for plaintiff's assault and summary judgment in their favor is appropriate.

CONCLUSION

Mercury Bar East and the Rudin defendants are not liable to plaintiff on any of the causes of action advanced. Additionally, as there is no liability for these defendants, there is no basis for the defendants' outstanding cross-claims against each other. As such, all cross-claims in this matter are dismissed.

Accordingly, it is ORDERED that defendants 300 East 57 Street LLC and Rudin Management Corporation's motion for summary judgment (MS2) is granted and plaintiff's complaint and all cross-claims against them are dismissed; it is further

ORDERED that defendant 493 Rest. Inc.'s (d/b/a Mercury Bar East) motion for summary judgment (MS3) is granted and all claims and cross-claims against it are dismissed; it is further

ORDERED that, pursuant to the September 30, 2019, Stipulation submitted by plaintiff, this matter is discontinued with prejudice as against defendant Precinct Security and Investigations, Inc.; it is further

ORDERED that plaintiff shall move for default judgment against defendant Roxanne Woychowski or otherwise discontinue this action as to her within 30 days of this order; and it is further

ORDERED that the Clerk of the Court shall enter judgment as written.

This constitutes the Decision and Order of the Court.

<u>12/24/2019</u>			
DATE		MARGARET A. CHAN, 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