

**Meneve v Hyman**

2019 NY Slip Op 34298(U)

September 3, 2019

Supreme Court, Rockland County

Docket Number: Index No. 031336/2017

Judge: Sherri L. Eisenpress

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
STEVEN MENEVE and SOPHIA MENEVE,

*Plaintiffs,*

*-against-*

WILLIAM J. HYMAN, RHODES NORTH TAVERN, EAGLE  
TAVERN CORP., TYLER RHODES, DOREEN RHODES, WARREN  
L. COHEN<sup>1</sup>, JOHN DOES 1-10, and XYZ CORPORATIONS  
1-10,

*Defendants.*  
-----X

**DECISION AND ORDER**

Index No. 031336/2017

(Motions # 5-7)

*Sherri L. Eisenpress, J.*

The following papers, numbered 1 to 9, were considered in connection with (i) the "Rhodes" <sup>2</sup>Defendants' Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, for summary judgment dismissing the Complaint as against these defendants, and the cross-claims of Defendant William J. Hyman (Motion #5); (ii) Defendant William J. Hyman's ("Hyman") Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, for summary judgment dismissing all causes of action numbered "1" through "4" in Plaintiff's complaint against him (Motion #6); and (iii) Plaintiff's Notice of Cross-Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting Plaintiffs' summary judgment as against the Defendant William J. Hyman on Plaintiff's First (assault and battery) and Fourth (negligence) Causes of action set forth in Plaintiff's complaint (Motion #7):

---

<sup>1</sup>The action was discontinued as against this Defendant Cohen pursuant to a Stipulation dated May 30, 2018.

<sup>2</sup>The "Rhodes Defendants" collectively include Rhodes North Tavern, Eagle Tavern Corp., Tyler Rhodes, and Doreen Rhodes.

<b><u>PAPERS</u></b>	<b><u>NUMBERED</u></b>
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-P (MOTION #5)	1-2
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBIT 1 (MOTION #6)	3-4
NOTICE OF CROSS-MOTION/AFFIRMATION IN OPPOSITION TO MOTIONS AND IN SUPPORT OF CROSS-MOTION/EXHIBITS A-M/AFFIDAVIT OF STEVEN MENEVE/EXHIBIT A	5-7
AFFIRMATION IN OPPOSITION TO CROSS-MOTION BY DEFENDANT HYMAN AND IN FURTHER SUPPORT OF MOTION	8
AFFIRMATION IN REPLY BY RHODES DEFENDANTS	9

Upon a careful and detailed review of the foregoing papers, the Court now rules on motions numbered 5 through 7 as follows:

This action arises from an incident in which Plaintiff Steven Meneve ("Meneve") was allegedly assaulted by defendant William J. Human on March 26, 2016, outside of a restaurant owned and operated by Defendant Eagle Tavern Corp, which does business under the name Rhodes North Tavern. Plaintiffs filed a Summons and Complaint through the NYSCEF system on March 24, 2017. The Complaint alleges eight causes of action: (i) Assault and Battery against Hyman; (ii) Intentional Infliction of Emotional Distress by Hyman; (iii) Negligent Infliction of Emotional Distress by Hyman; (iv) Negligence by Hyman; (v) Negligence by the "Rhodes" Defendants; (vi) Nuisance against the "Rhodes" Defendants; (vii) Violations of §11-101 of the General Obligations Law and §65 of the Alcohol Beverage Control Law against the "Rhodes" Defendants.

Defendant Hyman filed a four sentence "Answer" pro se on or about April 28, 2017, and then later filed an Answer by counsel on June 6, 2017. On July 11, 2017, Defendants filed a pre-answer motion to dismiss the Fifth through Eighth Causes of Action, arguing that the complaint fails to state a cause of action upon which relief can be granted, as well as Defendant Hyman's cross-claims. By Order dated March 9, 2018, this Court granted the

Rhodes' Defendants' motion to dismiss to the extent that it dismissed the Sixth Cause of Action for public nuisance, part of the Seventh Cause of Action alleging a violation of Sec. 65 of the Alcohol Beverage Control Law, and all of Defendant Hyman's cross-claims against the Rhodes Defendants. Thereafter, the Rhodes Defendants filed an Answer on April 6, 2008 and discovery proceeded. A Note of Issue was filed on January 2, 2009. The Rhodes Defendants, Defendant Hyman and Plaintiffs have all filed summary judgment motions.

### **Factual Allegations**

Defendant Eagle Tavern owns and operates a restaurant/bar known as Rhodes North Tavern<sup>3</sup> located in Sloatsburg, New York. Defendant Doreen Rhodes is a fifty percent owner of Eagle Tavern Corp., as well as the bookkeeper, and Defendant Tyler Rhodes has been the manager of the restaurant since its opening. At the time of the subject occurrence, there were two employees, Kevin O'Brien and Shawn Stearns, who were stationed at the doors to the Restaurant to check the identification of incoming patrons and to act as security. There are multiple security cameras at the premises but no employee is assigned to watch the cameras. It is also undisputed that neither Tyler Rhodes or Doreen Rhodes were present at Rhodes at the time of the occurrence.

Plaintiffs testified that on the date of the occurrence, they and another couple arrived at the restaurant at approximately 9 p.m. in order to meet a third couple, one of which was celebrating his birthday. Defendant Hyman and his fiancée, Teresa DiNapoli arrived at the restaurant with another friend at approximately 11:30 p.m. Hyman and Steven Meneve had been friends for approximately 15 years but had, in the recent past, had a falling out due to a disagreement between Hyman's fiancée and Sophia Meneve, regarding their respective children. Before the incident, Meneve testified that he and Hyman had never had a disagreement, confrontation or physical altercation. However, the Plaintiffs did testify that on prior occasions

---

<sup>3</sup>The restaurant has a seating capacity of 230 seats inside as well as a deck in the back of the Restaurant which seats 30 people and has been licensed to sell alcohol since 2003.

they had seen Hyman intoxicated and involved in physical altercations. The Plaintiffs testified that after Hyman settled in, Hyman and DiNapoli were staring at them, making them uncomfortable, but that no words or gestures were exchanged.

At some point in time, Meneve testified that he walked over to Hyman and said something along the lines of "this is silly" and that they should put this behind them. Because it was loud in the restaurant, they decided to speak outside on the front porch. Hyman testified similarly and said that he was about to buy his friend a drink when Meneve approached him in a non-threatening manner and asked him to go outside to speak to him. Hyman testified that he was going to go out after he bought the drink but before that happened, Meneve came back to him and asked if he was coming. Both Meneve and Hyman agree that neither party was aggressive or threatening at this point in time.

Meneve and Hyman walked passed a bouncer situated inside of the front door and onto the front porch and began to have a conversation for about five minutes. At this point, Meneve testified that "all of a sudden" the conversation became very confrontational and that prior to this point, he "did not even think the possibility of a physical altercation was there." Meneve testified that Hyman was encroaching on his personal space and acting "very aggressively", blocking the front door while Meneve's hand remained tucked in his pocket. He then testified that Hyman suddenly punched him and he had not seen that coming. Hyman testified that it was Meneve, not him, who initiated physical contact and that Meneve pushed him. Hyman testified that in response to Meneve pushing him, he, in self-defense, attempted to grab Meneve around the neck and then punched Meneve two or three times.

The preceding conversation and the altercation were caught on surveillance video (without sound) which was provided to the Court and which the Court has reviewed. Hyman contends that the video shows Meneve "aggressively stepping towards Hyman and bumping into him and pushing Hyman backwards. Hyman claims that he started to lose his balance, after which Meneve and Hyman embrace and tussel and then Hyman strikes Meneve

in self-defense. Meneve claims that Hyman encroached on Meneve's personal space while Meneve's back was against the railing; that Meneve never punched Hyman; that Hyman punched Meneve in the face multiple times in response to a shoulder push; and that this all commenced while Meneve's hand was in his pocket.

After the physical confrontation began, the two were separated and police responded to the scene. Hyman was arrested, charged and prosecuted and testified that he plead guilty to a misdemeanor, which he says was for disorderly conduct. As is relevant to the instant motions, Plaintiffs testified that Hyman was visibly intoxicated, which is denied by Hyman. However, it appears undisputed that while at Rhodes, Hyman was not served any alcohol and Meneve testified that he did not recall seeing Hyman consume any alcohol at the restaurant that night.

#### **The Parties Contentions**

The Rhodes Defendants move to dismiss the cause of action premised upon a violation of General Obligations Law Sec. 11-101, "the Dram Shop Act," on the ground that there is no evidence that the Rhodes Defendants sold an alcoholic beverage to Hyman. Hyman testified repeatedly at his deposition that he was never served any alcohol at the restaurant on the evening in question and Plaintiff Steven Meneve himself testified repeatedly at his deposition that he did not recall seeing Hyman consume alcohol at the restaurant that night. In opposition thereto, Plaintiffs argue that there are triable issues of fact because Hyman appeared to be under the influence of alcohol upon the arrival of the police; the Plaintiffs testified that Hyman appeared to be intoxicated and the Rhodes defendants failed to preserve any video surveillance of the bar area.

The Rhodes Defendants also move to dismiss the negligence cause of action and argue that they are not liable because the incident between Plaintiff Meneve and Defendant Hyman was an unanticipated altercation. More specifically, they argue that while in the restaurant there was no aggressive behavior by either party, no argument or words spoken

which would lead an observer to believe an altercation was imminent. Once outside, they argue that regardless of which account is credited, the physical account was sudden, unexpected and without warning as Meneve himself testified that until the conversation took a sudden turn, he did not even think the possibility of a physical altercation was there and Meneve testified that the punch was "so sudden and unexpected that he didn't see it coming." Likewise, they contend that Hyman testified that the push by Meneve, which began the altercation, was without warning. They further argue that the negligent supervision claim must also fail due to the sudden and unexpected altercation.

In opposition to the motion to dismiss the negligence cause of action, Plaintiffs submit that the Rhodes Defendants have failed to meet their prima facie burden because Hyman was visibly intoxicated at all relevant times; the assault itself was purportedly witnessed by Rhodes security who could have prevented the altercation; Rhodes intervened in the assault in a negligent manner and breached its duty of care by failing to implement appropriate hiring practices and failed to train personnel or take adequate security measures. More specifically, Plaintiffs argue that Rhodes serves alcohol and it is not unforeseeable for physical altercations to occur. They argue that Rhodes was reasonably aware of the need for potential altercations based upon the installation of surveillance for the front porch; the placement of ashtrays or buckets for smoking customers and the requirement that security to "walk the perimeter" of the entire tavern including the front porch to ensure the safety of its patrons. They further claim that Rhodes should have known that Hyman was intoxicated since still appeared intoxicated to police an hour and a half after the incident. Additionally, Plaintiffs argue that Hyman was a "known trouble-maker" based upon an unidentified employee who allegedly stated to Mrs. Meneve after the accident that Hyman "does this all of the time." Lastly, they argue that Defendants negligently intervened in the assault but do not state in what manner.

Lastly, Rhodes seeks to dismiss the action against Doreen and Tyler Rhodes as well as the derivative cause of action on behalf of Sophia Meneve. With regard to the action

against Tyler and Doreen Rhodes, they argue neither was present at the time of the accident. Plaintiffs oppose the dismissal of the action against Tyler and Doreen Rhodes because they were not participants in the wrongful conduct. Rather, they argue that as officers of Eagle Tavern Corp, they were directly involved in the management and operation of Rhodes and its employees, and as such, are liable.

Defendant Hyman seeks summary judgment and dismissal of the action against him on the ground that he was acting in self-defense and his actions were justified as a matter of law. He argues that Meneve was the aggressor when he drove his shoulder into Hyman and forcibly pushed him. Hyman claims that he acted out of a fear of bodily injury to himself. In opposition to the motion, and in support of Plaintiff Meneve's cross-motion for summary judgment, Meneve argues that he has established a case of assault and battery. Any claim of self-defense must fail since one is only permitted to protect oneself with no more force than that which will reasonably effect such protection. Here, it is claimed that Meneve never punched Hyman and so the multiple punches to Steven Meneve far exceeds the amount of force necessary to defend a "push" by Meneve's "shoulder" as Hyman contends, particularly where Meneve's hand remained tucked in his pocket.

#### **Legal Discussion**

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003).

However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material

questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

### **Dram Shop Cause of Action**

General Obligation Law Section 11-101, otherwise known as the "Dram Shop Act," states as follows:

1. 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, 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.

Additionally, Alcoholic Control Law Sec. 65, states in pertinent part:

Sec. 65. Prohibited sales. No person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to...

2. Any visibly intoxicated person;

In order to sustain a finding of a violation of the Dram Shop Act the plaintiff was required to show that defendant was served alcohol while visibly intoxicated. Kelly v. Fleet Bank, 271 A.D.2d 190, 706 N.Y.S.2d 190 (2d Dept. 2000). In the instant matter, there is no evidence that the Rhodes defendants served alcohol to defendant Hyman while he was at the restaurant. Hyman denies purchasing or consuming any alcohol at the restaurant and Plaintiffs did not recall seeing him doing so. Moreover, Plaintiffs' contention that the Rhodes defendants must have served him alcohol because he was still intoxicated at the time the police arrived is nothing more than conjecture. Accordingly, Plaintiffs' Dram Shop cause of action against the Rhodes Defendants is hereby dismissed.

**Negligence Cause of Action against Rhodes Defendants**

It is alleged that the Rhodes Defendants were careless and negligent in permitting Defendant Hyman to be at the Premises on the incident date in a clear and obvious highly intoxicated condition; that they continued to serve alcohol to him; that they failed to adequately supervise the Premises and protect Plaintiffs; that they failed to have sufficient, adequate and necessary security to protect Plaintiffs; and that they failed to contact the police in a timely manner prior to and during the incident.

Defendants are correct that under the common law, there is no basis for imposing liability on persons who merely furnished alcohol, for injuries caused by an intoxicated person. D'Amico v. Christie, 71 N.Y.2d 76, 85, 524 N.Y.S.2d 1 (1987). However, landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property. Id. "In particular, they have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control." Id. Thus, applying this rationale, courts have recognized that under common law, a landowner may have responsibility for injuries caused by an intoxicated guest. Id. "That duty emanates not from the provision of alcohol but from the obligation of a landowner to keep its premises free of known dangerous conditions, which may include an intoxicated guest. Id. "There is no legal duty, however, 'to protect against an occurrence which is extraordinary in nature and, as such, would not suggest itself to a reasonably careful and prudent person as one should be guarded against.'" Lindskog v. Southland Restaurant, Inc., 160 A.D.2d 842, 843, 554 N.Y.S.2d 276 (2d Dept. 1990). Thus, a sudden and unanticipated altercation cannot serve as the basis for liability against the innkeeper. Silver v. Sheraton-Smithtown Inn, 121 A.D.2d 711, 712, 504 N.Y.S.2d 56 (2d Dept. 1986).

In the instant matter, the Court finds that although Meneve and Hyman were engaged in conversation for several minutes, the altercation between the parties resulting in physical violence was sudden and unanticipated, such that it was not a situation that could

reasonably be expected to be anticipated or prevented. See Williams v. TE Dave Enterprises Inc., 242 A.D.2d 861, 662 N.Y.S.2d 913 (4<sup>th</sup> Dept. 1997)(alleged assault against plaintiff was an unexpected altercation between patrons where it was precipitated by a brief shouting match.); Ryan v. Big Z Corporation, 210 A.D.2d 649, 210 A.D.2d 649 (3d Dept. 1994)(restaurant could not reasonably be expected to have anticipated or prevented assault where plaintiff admitted that he did not attempt to leave or seek assistance from restaurant personnel prior to the assault because he did not think anything serious was going to occur.)

Similarly, here, Meneve himself testified that until the conversation took a sudden turn, he did not even think the possibility of a physical altercation was there and Meneve testified that the punch was "so sudden and unexpected that he didn't see it coming." Likewise, Hyman testified that the push by Meneve, which began the altercation, was without warning. Nor is there any merit to Plaintiffs' contention that the Rhodes Defendants should have been on notice that the situation might escalate into violence because they were aware of Hyman's propensity to act in that manner. Plaintiffs' sole reliance upon an unidentified employee's alleged hearsay statement, made after the assault, that Hyman "does this all of the time," is insufficient to raise a triable issue of fact as to their negligent supervision claim. Additionally, there is no evidence submitted that a Rhodes employees' actions in breaking up the fight after it had commenced was the proximate cause of Plaintiff's injuries. Accordingly, Plaintiffs' action against the Rhodes Defendants is dismissed in its entirety.

#### **Motion and Cross-Motion for Assault and Battery**

"To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact." Fugazy v. Corbetta, 34 A.D.3d 728, 729, 825 N.Y.S.2d 120 (2d Dept. 2006). "The elements of a cause of action [to recover damages] for battery are bodily contact, made with intent, and offensive in nature." Id. In order to establish that bodily contact was offensive, it must be established that it is "wrongful under all the circumstances." Tillman v. Nordon, 4 A.D.3d 467, 468, 771

N.Y.S.2d 670 (2d dept. 2004).

Justification in the way of self-defense may be a defense in an action for assault and battery but only to the extent made necessary to an innocent party because of an attack, said rule being subject to the fundamental limitation that in protecting oneself no more force is permissible than will reasonably effect such protection. Decker v. Werbenec, 36 Misc.2d 220, 221, 232 N.Y.S.2d 260 (Sup Ct. Ulster County 1962) citing Van Vooren v. Cook, 273 A.D. 88, 75 N.Y.S.2d 362 (4<sup>th</sup>Dept. 1947). However, as stated in Dupre v. Maryland Management Corp., 283 A.D.2d 701, 127 N.Y.S.2d 615 (1<sup>st</sup> Dept. 1954):

That the blow or blows in retaliation resulted in more serious injury than might have been sufficient to stall the attack is not the test of use of excessive force. One must know that what he does will be excessive-an intent to inflict unnecessary injury must be established. 'Detached reflection cannot be demanded' of one facing a dangerous attack. "

It is an established rule of law that he who provokes and brings on a personal encounter with another, thereby forfeits his right of self-defense. Curtis v. Kozeluh, 50 N.Y.S.2d 883 (City Court, New York County 1944). Additionally, the defense of justification exists only where the person attacked had a fear of bodily injury from an apparent danger. Decker, 36 Misc.2d at 221.

In the instant matter, Plaintiff Meneve has established a prima facie case of assault and battery. However, in opposition thereto, the Court finds that there a triable issues of fact with respect to Defendant Hyman's self defense claim. Defendant has not waived this defense, as arguably, Plaintiff initiated the physical contact when he shoved him. It is for the jury to determine whether Hyman's response involved excessive force and thus is liable for assault and battery. As such, both the motion of Defendant Hyman and the cross-motion of Plaintiffs on the assault and battery cause of action is denied.

The Court reaches a different result, however, with regard to the Third cause of action- "Negligent Infliction of Emotional Distress by Hyman"- and the Fourth cause of action for "Negligence by Hyman." It is well-settled that no cause of action to recover damages for negligent assault exists in New York because once intentional offensive conduct has been

established, the actor is liable for assault and not negligence. Schetzen v. Robotsis, 273 A.D.2d 220, 221, 709 N.Y.S.2s 193 (2d Dept. 2000); Wertzberger v. City of New York, 254 A.D.2d 352, 600 N.Y.S.2d (2d Dept. 1998). For the same reason, any alleged actions of Hyman in causing emotional distress to Plaintiff cannot be negligent given the intentional conduct present. As such, the Third and Fourth causes of action are dismissed.

Accordingly, it is hereby

**ORDERED** that Defendants Rhodes North Tavern, Eagle Tavern Corp, Tyler Rhodes and Doreen Rhodes' Notice of Motion (Motion #5) for summary judgment dismissing Plaintiffs' Complaint as against them is GRANTED in its entirety; and it is further

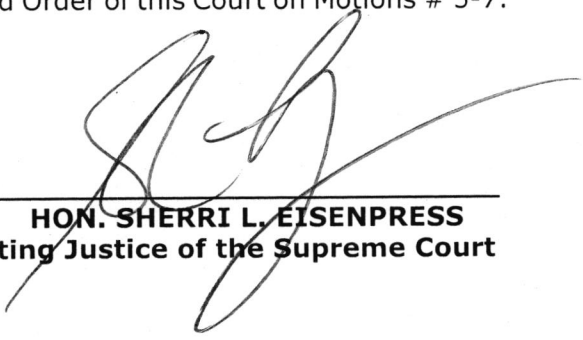
**ORDERED** that Defendant Hyman's Notice of Motion for summary judgment (Motion #6) to dismiss Plaintiff's First through Fourth causes of action is DENIED in part and GRANTED in part to the extent that the Third and Fourth Causes of Action are dismissed; and it is further

**ORDERED** that Plaintiff's Notice of Cross-Motion (Motion #7) for summary judgment on his assault and battery cause of action against Defendant Hyman is DENIED; and it is further

**ORDERED** that Plaintiffs and Defendant Hyman are to appear in the Trial Readiness Part on **WEDNESDAY, OCTOBER 2, 2019** at 9:30 a.m.

The foregoing constitutes the Decision and Order of this Court on Motions # 5-7.

Dated: New City, New York  
September 3, 2019

  
\_\_\_\_\_  
**HON. SHERRI L. EISENPRESS**  
Acting Justice of the Supreme Court

TO:

**by e-filing -**

Arturi, D'Argenio, Guaglardi & Meliti, LLP  
For Plaintiff

The Coffinas Law Firm, PLLC  
For Defendants Rhodes

Jeffrey M. Adams Esq.  
For Defendant Hyman