

Ward v BDN Assoc., Inc.
2019 NY Slip Op 34579(U)
June 13, 2019
Supreme Court, Westchester County
Docket Number: Index No. 51255/2018
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
PENELOPE L. WARD, as Administrator of the Estate of
ISAAC WARD, deceased,

Plaintiff,

Amended Decision & Order

Index No. 51255/2018

Seq # 2

-against-

BDN ASSOCIATES, INC., d/b/a THE CELTIC CORNER,
DENNIS O'BRIEN, BRIAN J. DOYLE, DR. & RD. INC. d/b/a
BRAZEN FOX, RORY DOLAN, DECLAN RAINSFORD,
BUTTERFIELD 8 WP LLC d/b/a BROTHER JIMMY'S BBQ,
CHRISTOPHER COCOZZIELLO, JOHN GAZZOLA and
HARRY KYREAKEDES,

Defendants.

-----X
The following papers were read on the motion filed by the defendants, BDN Associates, Inc. d/b/a The Celtic Corner ("Celtic Corner"), Dennis O'Brien ("O'Brien"), and Brian J. Doyle ("Doyle"):

Notice of Motion/Affirmation/Exhibits A-G	1-9
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Factual and Procedural Background

The plaintiff commenced this action on January 29, 2018, by filing a summons and complaint to recover money damages for conscious pain and suffering alleged to have been sustained and the wrongful death of the plaintiff's decedent, Isaac Ward (the "decedent"), on January 2, 2017 at approximately 3:00 a.m., on Mamaroneck Avenue, at

or near the intersection of Rutherford Avenue in White Plains, New York, when the vehicle owned and operated by the defendant, Harry Kyreakedes ("Kyreakedes"), in which the decedent was a passenger, collided with a tree.

The plaintiff alleges that the other named defendants, including Celtic Corner, O'Brien and Doyle, violated the Alcoholic Beverage Control Law §§ 65[2] and 65[3] by serving alcohol to Kyreakedes, an intoxicated or visibly impaired person prior to the vehicular accident. (New York's Dram Shop Act)

The defendants, Celtic Corner, O'Brien and Doyle, now file the instant motion to dismiss pursuant to CPLR 3211(a)(7) or in the alternative a motion for summary judgment pursuant to CPLR 3212, dismissing the plaintiff's complaint and all cross-claims against the moving defendants. The attorney argues that the defendants did not serve alcohol to a visibly intoxicated person, the defendants did not serve alcohol to a habitual drunkard, the defendants were acting in their official capacity, and that all cross-claims must be dismissed.

In opposition, the plaintiff argues that affidavits offered by the defendants do not meet the requirement of demonstrating that the defendants are entitled to judgment as a matter of law, since they offer nothing more than speculation, conclusions and unsubstantiated assertions. The plaintiff further argues that even if the Court finds that the defendants have met their burden, the motion is premature, since the defendants are in exclusive control of material information necessary for the plaintiff to raise a genuine issue of material fact. The plaintiff asserts that discovery is incomplete or key information is unavailable or in the sole possession of parties other than the one opposing the motion. The plaintiff argues that at the time of the motion, no examinations before trial have been

held and until they have been held, the plaintiff cannot ascertain whether a genuine issue of material fact exists as to whether Celtic Corner bears any negligence.

In reply, the defendants argue that no party opposed the dismissal of the cross-claims and that the plaintiff does not oppose the portion of the motion seeking dismissal of the claims against O'Brien and Doyle in their personal/individual capacities nor that aspect of the motion pertaining to the Alcoholic Beverage Control Law § 65[3] prohibiting the serving of alcohol to a habitual drunkard and therefore, those aspects of the motion should be dismissed. The defendants also argue in reply that the motion relies on admissible evidence and in opposition, the plaintiff has not submitted any actual evidence to dispute the defendants' motion, but instead submitted Kyreakedes' allocution transcript, which does implicate the defendants. The defendants also argue that it is not enough for a party opposing a summary judgment motion to insinuate that there might be some question of fact in the case and contend that the motion is premature without some evidentiary basis to suggest that discovery may lead to relevant evidence.

Discussion

CPLR 3211(a)(7) provides, in relevant part that:

"[a] party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that:

(7) the pleading fails to state a cause of action..."

(N.Y. Civ. Prac. L. & R. 3211[a] [7]).

Under CPLR 3211(a)(7), initially "[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law...." (see *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]). On a motion to dismiss for failure to state a cause

of action, the court must view the challenged pleading in the light most favorable to the non-moving party, and determine whether the facts as alleged fit within any cognizable legal theory (see *Brevtman v Olinville Realty, LLC*, 54 AD3d 703 [2d Dept 2008]; see also *EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, [2005]; *Leon v Martinez*, 84 NY2d 83 [1994]).

The issue here is not whether the plaintiff can succeed with the claims, but whether the causes of action as pled, are cognizable at law. The Court finds that the plaintiff has sufficiently stated the causes of action in the complaint and they are pled with sufficient particularity. While the plaintiff may not ultimately succeed in its action against the defendants and may have its causes of action dismissed on a motion for summary judgment, in a motion to dismiss, the standard is not whether the complaint states a cause of action, but whether the plaintiff has a cause of action (see *Morales v Copy Right, Inc.*, 28 AD3d 440 [2d Dept 2006]). Therefore, that part of the motion seeking dismissal of the action pursuant to CPLR 3211(a)(7), is denied.

The defendants also seek summary judgment dismissal of the complaint pursuant to CPLR 3212. A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). If a sufficient prima facie showing is made, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR 3212[b]); see also, *Vermette v Kenworth Truck Company*, 68 NY2d 714, 717 [1986]). The parties' competing contentions are viewed

in the light most favorable to the party opposing the motion. (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

“General Obligations Law § 11-101(a), popularly known as the Dram Shop Act, makes a party who “unlawfully” sells alcohol to another person liable for injuries caused by reason of that person’s intoxication” (*Romano v Stanley*, 90 NY2d 444, 447 [1997]). “Under Alcoholic Beverage Control Law § 65[2], it is unlawful to furnish an alcoholic beverage to any “visibly intoxicated person.” (*Id.*). The plaintiff’s Dram Shop Act cause of action against the defendants rests on the premise that they “unlawfully” sold alcoholic beverages to Kyreakedes, a visibly intoxicated person and a habitual drunk, in violation of the Alcoholic Beverage Control Law (*Id.* @ 449).

“To establish a cause of action under New York’s Dram Shop Act, a plaintiff is required to prove that the defendant sold alcohol to a person who was visibly intoxicated and that the sale of that alcohol bore some reasonable or practical connection to the resulting damages” (see *Dugan v Olson*, 74 AD3d 1131, 1132 [2d Dept 2010]). Consequently, to establish its entitlement to judgment as a matter of law with regard to those claims, the defendants are required to establish either that they did not serve alcohol to the decedent while he was visibly intoxicated or that their sale of alcohol to him had no reasonable or practical connection to the accident (*Id.* @ 1133). “Proof of visible intoxication can be shown by circumstantial evidence, including expert and eyewitness testimony” (*Kelly v Fleet Bank*, 271 AD2d 654, 655 [2d Dept 2000]).

Here, the defendants submitted the affidavits of Jennifer Keane (“Keane”), the bartender at the Celtic Corner on the night of the accident and O’Brien, an owner and 50

percent shareholder of the Celtic Corner. Keane avers to knowing Kyreakedes for twenty years and states that she does not know him to frequently get drunk or as a habitual drunkard and that he was not visibly intoxicated on the night of the accident. She states that when Kyreakedes entered the Celtic Corner, he walked straight without stumbling or staggering, his speech was not slurred and his eyes were not blood shot. Keane avers that she served Kyreakedes two beers that night, with the second beer being at approximately 11:30 p.m., some three hours before the accident.

O'Brien also avers that Kyreakedes was not stumbling nor did he seem visibly intoxicated when he entered the Celtic Corner, Kyreakedes shook his hand firmly and he did not smell of alcohol. Both Keane and O'Brien assert that Kyreakedes left the Celtic Corner at approximately 12:04 a.m., when the bar closed for the night and that he was not served another drink at the Celtic Corner that night.

The defendants also relied on a video recording made on the night of January 1, 2017, which both Keane and O'Brien averred to be an exact duplicate of the original and certified to be a true and accurate record of the events that occurred on the night of the accident. Keane and O'Brien also averred that the video was made as the events occurred and was kept in the regular and ordinary course of the Celtic Corner's business.

Based on the affidavits and the video submitted, the Court finds that the defendants have established that the defendants did not sell alcohol to a person who was visibly intoxicated or a habitual drunkard and also that there was no reasonable or practical connection between the sale of alcohol and the accident. In opposition, the plaintiff failed to create any triable issue to rebut the defendants' prima facie showing. Further, the need to conduct discovery does not warrant denial of the motion. "The mere hope or speculation

that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Turner v Butler*, 139 AD3d 715 [2d Dept 2016]). Therefore, the plaintiff did not establish the existence of any material issue of fact to rebut the defendants' prima facie showing of entitlement to summary judgment.

The causes of action against O'Brien and Doyle individually, as co-owners of the Celtic Corner, are also dismissed as there is no basis upon which to pierce the corporate veil (*Mistrulli v McFinnigan, Inc.*, 39 AD3d 606, 607 [2d Dept 2007]). The plaintiff must establish that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Id. quoting Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). In this case, the evidence fails to raise a triable issue of fact as to the presence of either of those two elements with regard to O'Brien and Doyle.

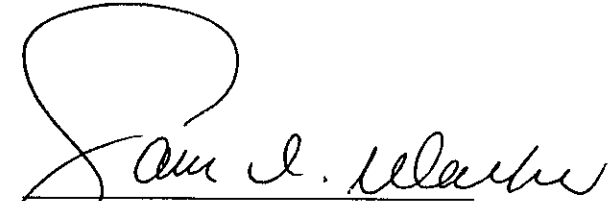
Accordingly, it is

ORDERED that the motion for summary judgment to dismiss the complaint and all cross-claims, is granted; and it is

ORDERED that the complaint and all cross-claims are dismissed as against BDN Associates, Inc. d/b/a The Celtic Corner, Dennis O'Brien and Brian J. Doyle.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
June 13, 2019



HON. SAM D. WALKER, J.S.C.