

Grossman v Bar Great Harry, LLC
2020 NY Slip Op 31514(U)
May 19, 2020
Supreme Court, Kings County
Docket Number: 521252/2018
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 521252/2018
Motion Date: 3-2-20
Mot. Cal. No.:

-----X
ROBERT N. GROSSMAN,

Plaintiff,

-against-

DECISION/ORDER

BAR GREAT HARRY, LLC,

Defendant.

-----X

The following papers numbered 1 to 3 were read on this motion:

Papers:	Numbered:
Notice of Motion/Order to Show Cause	
Affidavits/Affirmations/Exhibits/Memo of Law.....	1
Answering Affirmations/Affidavits/Exhibits/Memo of Law.....	2
Reply Affirmations/Affidavits/Exhibits/Memo of Law.....	3
Other.....	

Upon the foregoing papers, the motion is decided as follows:

In this action to recover damages for personal injuries, defendant, BAR GREAT HARRY, LLC, moves for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing plaintiff’s complaint and granting such other relief as may serve the ends of justice.

Background:

This action arises out of an incident that occurred on June 3, 2017, at approximately 2:30 a.m., at Bar Great Harry on Smith Street in Brooklyn. At that time and place, a bar back by the name of Carlos Vera, an employee of Bar Great Harry, struck the plaintiff in the face with a bottle. Plaintiff commenced this action alleging that the defendant was negligent in failing to prevent the incident; in failing to call the police and ambulance after he was attacked; in failing to exercise reasonable care in hiring, training and supervision of Mr. Vera and other employees; and of failing to exercise reasonable care in the ownership, operation, management, maintenance, supervision and control of the bar. Plaintiff also claims that it allowed the premises to become disorderly in violation of Section 106 of the Alcohol Beverage Control Law.

Defendant maintains that since it lacked knowledge that Mr. Vera had dangerous propensities, plaintiff's claims of negligent hiring and negligent retention fail as a matter of law. Defendant further claims since the incident was a sudden and unexpected event which defendant had no opportunity to prevent, plaintiff's claim that the defendant was negligent in the operation of the premises also fails as a matter of law. Finally, defendant maintains that it is not vicariously liable for Mr. Vera's acts as he was acting outside the scope of his employment as a matter of law.

In support of its motion, defendant relies primarily on the deposition testimony of the plaintiff and the defendant by Ben Wiley. Plaintiff testified that he first arrived at Bar Great Harry approximately 20 minutes before and drank two to three beers before arriving there. Upon arriving at the bar, he sat at the bar and stayed there until the time of the incident. That evening, there was one bartender (Justin Hodge) and one bar back (Mr. Vera) working the bar. The plaintiff had never seen Mr. Vera working at the bar before the night in question.

Immediately before the incident, the plaintiff claims that he was provided with a Bud Light, which he maintained was not the beer that he ordered. He testified that Mr. Vera removed the Bud Light, replaced it with a Budweiser and slammed it on the bar in front of him. The plaintiff then told Mr. Vera to "stop staring" at him. Mr. Vera then struck the plaintiff over the head with a bottle thus causing the injuries that are the subject matter of this lawsuit.

Ben Wiley, a managing member of Bar Great Harry, LLC and owner of Bar Great Harry testified at his deposition that on the evening of the incident, the bar was staffed by Justin Hodge, the bartender, and Mr. Vera. Prior to the incident, Mr. Vera had been working for Bar Great Harry for six months, perhaps longer. He testified that Mr. Vera was referred to the defendant from one of the other "high quality bars" in the area. Prior to hiring Mr. Vera, Mr. Wiley interviewed him for the bar back position. He maintained that Bar Great Harry always checked and followed up on all references for new hires. He along with John Tannen, the bar manager, made the decision to hire Mr. Vera.

Mr. Wiley testified that he received no complaints about Mr. Vera during the time he worked at Bar Great Harry before the incident. Once Mr. Vera was hired, Mr. Tannen told him that things with Mr. Vera were fine. There were no attendance problems with Mr. Vera and he was unaware of any problems that Mr. Hodge had with Mr. Vera prior to the incident. No one ever informed him that Mr. Vera had a temper, a problem with anger, or anger problems with

customers. Mr. Wiley maintained that no one at Bar Great Harry had any reservations about hiring Mr. Vera and that no one at Bar Great Harry was disappointed with him while he worked there.

In opposition to the motion, plaintiff makes a myriad of arguments, one of which is that there is sufficient evidence that the defendant either knew or should have known of Mr. Vera's dangerous propensities. In this regard, plaintiff maintains that after the incident, Mr. Hodge told him Mr. Vera had been aggressive with other bar patrons in the past. Plaintiff also contends that Mr. Vera's extensive criminal history should have put defendant on notice that Mr. Vera had dangerous propensities. Plaintiff submitted records purportedly showing that Mr. Vera was charged with strangulation and assault with a knife of his pregnant domestic partner.

Discussion:

It is axiomatic that to succeed on a motion for summary judgment, the moving party must first a “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” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]; *see also* CPLR 3212[b]). Only after the moving party makes a prima facie showing does “the burden shift to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572). “The moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Vega*, 18 N.Y.3d at 503, 942 N.Y.S.2d 13, 965 N.E.2d 240 [internal quotation marks and alterations omitted]).

“Although an employer cannot be held vicariously liable ““for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business’ ” (*Jackson v. New York Univ. Downtown Hosp.*, 69 A.D.3d 801, 801, 893 N.Y.S.2d 235, quoting *Fernandez v. Rustic Inn, Inc.*, 60 A.D.3d 893, 896, 876 N.Y.S.2d 99), the employer may still be held liable under theories of negligent hiring, retention, and supervision of the employee (*see Chichester v. Wallace*, 150 A.D.3d 1073, 55 N.Y.S.3d 378; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 161, 654 N.Y.S.2d 791). “[A] necessary

element of such causes of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury” (*Kenneth R. v. Roman Catholic Diocese Brooklyn*, 229 A.D.2d at 161, 654 N.Y.S.2d 791; *see Detone v. Bullit Courier Serv.*, 140 A.D.2d 278, 528 N.Y.S.2d 575). The employer's negligence lies in having “ ‘placed the employee in a position to cause foreseeable harm, harm which would most probably have been spared the injured party had the employer taken reasonable care in making decisions respecting the hiring and retention’ ” of the employee (*Sandra M. v. St. Luke's Roosevelt Hosp. Ctr.*, 33 A.D.3d 875, 878–879, 823 N.Y.S.2d 463, quoting *Detone v. Bullit Courier Serv.*, 140 A.D.2d at 279, 528 N.Y.S.2d 575).

Here, even if the defendant demonstrated that Mr. Vera was acting outside the scope of his employment when he struck the plaintiff with a bottle, the defendant failed to make a prima facie showing that it was not negligent with respect to the hiring, retention, and supervision of Mr. Vera. To demonstrate that it neither knew nor should have known of Mr. Vera's propensity for violence, defendant relied exclusively on the deposition testimony of Mr. Wiley. Defendant did not submit an affidavit or any other admissible proof demonstrating that John Tannen, the bar manager, neither knew nor should have known of Mr. Vera's dangerous propensities. Indeed, Mr. Tannen was partly responsible for hiring Mr. Vera and was his direct supervisor. Any testimony given by Mr. Riley concerning what Mr. Tannen told him about Mr. Vera is hearsay and inadmissible. Since defendant failed to make a prima facie showing of entitlement to summary judgment, the motion must be denied regardless of the sufficiency of the opposing papers (*Vega*, 18 N.Y.3d at 503, 942 N.Y.S.2d 13, 965 N.E.2d 240)

Accordingly, it is hereby

ORDRED that defendant's motion is **DENIED**.

This constitutes the decision and order of the Court.

Dated: May 19, 2020



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020