SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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THOMAS ASHER and MARIA THERESA ASHER,

Plaintiffs,

-against-

ERIK WALORDY and CHARTER PUB INC.,

Defendants.

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IAS Part 8
Index No. 614050/2018
Motion Seq. No. 001

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following submissions, in addition to any memoranda of law, were reviewed in preparing this Decision and Order:

Defendant Charter Pub's Notice of Motion, Affirmation & Exhibits.....1
Plaintiff's Affirmation in Opposition & Exhibits.....2
Defendant Charter's Reply Affirmation.....3

In this action, plaintiff Thomas Asher and his wife seeks damages for injuries Asher sustained in December 2017 when defendant Erik Walordy punched him in the head inside of the Local Ale House, a bar owned by defendant Charter Pub Inc. located in Island Park, New York. Charter now seeks summary judgment dismissing the action as against it.[1] For the reasons set forth below, the motion is granted.

FACTUAL BACKGROUND

Asher, a frequent patron of the Local Ale House—he visited 3 or 4 times per week—arrived alone at the saloon approximately at midnight and proceeded to sit at the end of the bar to talk with his friend, Bob Mauro and Mauro's wife. The bar was not crowded at the time—a total of 8-10 people, including two female bartenders. Asher spoke with Mauro for approximately half-an-hour when Walordy approached him, touched his chest and said that

[1] Walordy has not appeared in this action.

Walordy's friend wanted to meet him. Mauro told Asher that Walordy and his friends were at a Christmas party at Mauro's karate establishment and that they came to the bar afterwards. Asher did not notice anything that would indicate that Walordy was intoxicated—his speech was not slurred nor were his eyes glassy or bloodshot. Asher and Mauro laughed off Walordy's approach.

"Typical joking around" then followed (according to Asher's deposition testimony), as Walordy, Mauro and Asher conversed. Walordy then grabbed Asher's left arm putting him "in a lock," which Asher successfully exited. Everything remained cordial. Walordy then tried to get Asher's right arm in a lock, and again Asher got out of the hold. According to Asher: "It was all joking around. There was no confrontation at all." After Asher got out of the hold he "tapped" Walordy under his testicles and "basically dropped him"—Walordy went halfway to the ground. A friend of Walordy—known to Asher—then approached, and said "woe, woe, woe, that's Mr. Asher. That's Brendan's dad." Walordy then "popped up," said "I know your son," and Asher and Walordy shook hands and laughed. The bartenders said, "hey guys, knock it off." Asher testified that the entire encounter "was still cordial .... [t]here was never any heat," and there was no tension at all. Walordy then walked away and went back to his friends.

Approximately half-an-hour later, Asher was having a beer with two other friends at the bar, near the bar's exit. Asher noticed Walordy walking towards him—he thought Walordy was coming to say goodbye—when Walordy suddenly and without warning punched him in the head without provocation or a word being exchanged. Asher was rendered unconscious from the punch.

LEGAL ANALYSIS

Asher alleges that Charter was negligent because the bartenders did not remove either Asher or Walordy from the bar following their earlier horseplay. Although Asher's complaint alleges that the bar served Walordy alcohol while he was intoxicated, Asher does not seek to support this claim in his opposition papers.

It is the movant who has the burden to establish its entitlement to summary judgment as a matter of law. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623 (1997). "CPLR § 3212(b) requires the proponent of a motion for summary judgment to demonstrate the absence of genuine issues of material facts on every relevant issue raised by the pleadings, including any affirmative defenses." *Stone v. Continental Ins. Co.*, 234 A.D.2d 282, 284 (2d Dept. 1996). Where the movant fails to meet its initial burden as the movant, the motion for summary judgment should be denied. *U.S Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065 (1979). The drastic remedy of summary judgment should be granted only if there are no material issues of fact. *Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974).

To establish a cause of action under General Obligations Law §101 (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. *Dugan v. Olson*, 74 A.D.3d 1131 (2d Dept. 2010). Charter has submitted evidence—including the testimony of Asher—to satisfy its *prima facie* burden of establishing that Walordy was not intoxicated on the night in question. Asher has failed to proffer any evidence to the contrary, requiring dismissal of the Dram Shop claim. *Id.*

As described by Asher—and as reflected on the videotapes of the incident submitted by Charter—Walordy's punch was sudden and unexpected and no amount of security would have prevented the incident. As a result, the negligence claims must be dismissed. *See Katekis v. Naut, Inc.*, 60 A.D.3d 817 (2d Dept. 2009)(public establishment cannot be held liable for sudden and unexpected assaults that could not have reasonably been anticipated or

prevented); *see also Daniels v. Dairy Queen Grill & Chill*, 175 A.D.3d 463 (2d Dept. 2019); *Afanador v. Coney Bath, LLC*, 91 A.D.3d 683 (2d Dept. 2012).

Asher's argument that the bartenders should have removed either Asher or Walordy from the bar because of their earlier interaction is not supported by the evidence. Asher testified that the interaction never got hostile: "It was all joking around. There was no confrontation at all." The bartenders told the two to knock off the horseplay and they immediately did, shook hands and remained cordial. They did not speak again. According to Asher, at no time thereafter was Walordy aggressive towards him, nor was he concerned or apprehensive that Walordy was angry with him. As far as Asher was concerned, "the girls [bartenders] handled it. [I]t was over."

Asher's expert opines that the bartenders should have known that the initial interaction between Asher and Walordy "would certainly result in further altercations in the bar." But this is pure speculation, unsupported by any evidence since the initial interaction always remained cordial and never got heated—as Asher testified. *See Augustine v. City of New York*, 188 A.D.3d 969 (2d Dept. 2020)(disregarding expert affidavit that was "speculative, unsubstantiated, and conclusory"). Where an expert states his conclusion unsupported by facts or data the testimony should be given no probative force whatsoever. *Romano v. Stanley*, 90 N.Y.2d 444, 451 (1997).

Accordingly, Charter's motion is granted and the complaint is dismissed as against it.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: February 22, 2021
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.
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ENTERED
Mar 01 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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