

Denenberg v 268 W. 47th Rest., Inc.
2022 NY Slip Op 31123(U)
April 6, 2022
Supreme Court, New York County
Docket Number: Index No. 151918/2020
Judge: Lisa S. Headley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LISA S. HEADLEY PART 22M

Justice

-----X

MARIYA DENENBERG,

Plaintiff,

- v -

268 WEST 47TH REST., INC., INDIVIDUALLY AND D/B/A
COPACABANA, 760 8TH AVE. REST., INC., INDIVIDUALLY
and D/B/A COPACABANA, ANSLEM TROTMAN, VICTOR
RODRIGUEZ NIEVES, JOHN DOE SAID NAME BEING
FICTITIOUS AND UNKNOWN,

Defendant.

-----X

268 WEST 47TH REST., INC., INDIVIDUALLY AND D/B/A
COPACABANA, 760 8TH AVE. REST., INC., INDIVIDUALLY
AND D/B/A COPACABANA

Plaintiff,

-against-

RUN THE CITY LLC, COLSON DEMPSTER D/B/A PRETTY
RUN THE CITY

Defendant.

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INDEX NO. 151918/2020

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595239/2021

The following e-filed documents, listed by NYSCEF document number (Motion 001) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 118, 119, 120, 121, 122, 123, 124, 125, 126

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 127, 128, 129

were read on this motion to/for JUDGMENT - SUMMARY.

In motion sequence 001, plaintiff, Mariya Denenberg, moves this Court seeking an Order, pursuant to *CPLR §3212(e)*, to grant summary judgment on the issue of liability against defendants/third-party plaintiffs, 268 West 47th Rest., Inc., individually and d/b/a Copacabana and 760 8th Ave. Rest., Inc., individually and d/b/a Copacabana (hereinafter "Copacabana"). Plaintiff alleges that she sustained serious injuries as a result of a motor vehicle accident involving the

vehicle operated by defendant, Anslem Trotman (hereinafter “Trotman”), who was served alcohol while visibly intoxicated by defendants Copacabana, in violation of *New York State General Obligations Law §11-101* (“*GOL §11-101*”) and *Alcohol Beverage Control Law §65(2)* (“*ABC §65(2)*”). Defendants Copacabana oppose the motion.

In motion sequence 002, defendants Copacabana also move this Court for an Order granting summary judgment and dismissing plaintiff’s complaint, along with any and all cross-claims, arguing that there is no evidence defendants Copacabana violated *GOL §11-101* or *ABC §65(2)*.

It is undisputed that Plaintiff was struck by a motor vehicle operated by defendant Anslem Trotman, Jr., on June 30, 2019, at approximately 7:30 a.m., suffering serious injuries. Defendant Trotman was arrested at the scene and charged with misdemeanors violations of *Vehicle and Traffic Law §1192(3)2*(*Driving While Intoxicated* [“*DWI*”]), *Vehicle and Traffic Law §1192(1)3*(*Driving While Ability impaired* [“*DWAI*”]), *Vehicle and Traffic Law §1194(1)(b)4*(*refusing to take a breath test*), and indicted on a class E felony. Defendant Troutman plead guilty to a D felony assault.

The issue presented is whether defendants Copacabana served alcohol to defendant Trotman, while he was visibly intoxicated in violation of *ABC §65(2)* and *GOL §11-101* otherwise known as the Dram Shop Act. Based on the following reasons, plaintiff’s motion is denied, and defendants Copacabana’s motion to dismiss the complaint against Copacabana is granted.

Plaintiff argues that the record demonstrates that defendants Copacabana unlawfully served alcoholic beverages to defendant Trotman, while he was a visibly intoxicated patron of its nightclub, thereby violating *ABC §65(2)* and the *Dram Shop Act*. Plaintiff further argues that, as a result of defendants Copacabana’s actions, defendant Trotman subsequently operated a motor vehicle, while intoxicated and collided into plaintiff, a pedestrian, thereby subjecting defendants Copacabana to liability pursuant to *GOL §11-101*. In addition, plaintiff argues that the evidence presented amply demonstrates a reasonable connection between defendants Copacabana’s unlawful sale and her resulting injury from the motor vehicle accident, and therefore, plaintiff argues that she has established *prima facie* entitlement to judgment as a matter of law.

In support of plaintiff’s motion for summary judgment, plaintiff submits the sworn deposition testimony of defendant Trotman, non-party witnesses, Ania Trotman and Shyna Trotman, and arresting police officer Victor Nicassio.

Defendant Trotman testified at his deposition that he became intoxicated while celebrating his birthday at an event held at the Copacabana venue on June 29, 2019. Several days before the night of the incident, defendant Trotman purchased a \$300.00 birthday party package, using his debit card, online through Eventbrite from party promoter Colson Dempster d/b/a Pretty Run the City (hereinafter “Pretty Run the City”). The \$300.00 purchase included a VIP area and 2 bottles of alcohol for a total of 6 people.

Within 10 minutes of his arrival at the venue on June 29, 2019, 2 bottles of alcohol and mixers were placed on the table in his VIP section. When asked whether alcohol was poured by

any staff of defendants Copacabana, defendant Trotman testified at his deposition, “No, I’m not sure to tell you the truth,” “there were no bottle girl uniforms.” Defendant Trotman testified that after a while, he felt himself getting “tipsy.” The relevant testimony of non-party witness, Ania Trotman, is that “someone in black brought a bottle to the table and she saw no one pay for it.” Further, the relevant testimony of non-party witness Shyna Trotman is “that she saw a lady with a bottle but don’t know who she was” and that, “she did not observe defendant Trotman go to the bar to purchase anything.”

In further support of her motion, plaintiff submits the expert affidavit of forensic toxicologist, Elizabeth Spratt. Plaintiff argues that based on Ms. Spratt’s expert opinions, including her background, training, and experience as a forensic toxicologist, as well as her review of the relevant pleadings, sworn testimony, and evidence, Ms. Spratt calculated, within a reasonable degree of certainty, that defendant Trotman’s alcohol level at the club on June 30, 2019, between the hours of 1:00 a.m. and 3:00 a.m., would have been within a range of approximately 0.185%-0.215%, well above the legal limit.

In opposition, defendants Copacabana argue, *inter alia*, that defendant Trotman’s testimony confirms that the birthday package was purchased through the party promoter, Pretty Run the City on Eventbrite online, and not through defendants Copacabana’s website. Defendants Copacabana argue that the non-party witness, Ania Trotman’s deposition testimony did not offer any evidence that defendant Trotman was served alcohol by any staff of Copacabana after he became intoxicated. Defendants Copacabana argue that the testimony of Shyna Trotman also demonstrates that none of Copacabana’s staff poured defendant Trotman any drinks, and that defendant Trotman did not purchase any alcohol on the night of the incident. Furthermore, defendants Copacabana argue that the record is devoid of any evidence that the defendants Copacabana served defendant Trotman with alcohol while he was visibly intoxicated, as required to prove by statute, and therefore, defendants Copacabana cannot be held liable to plaintiff under the *Dram Shop Act*.

As it pertains to motion sequence 002, in support of their motion for summary judgment, defendants Copacabana submit the testimony of defendant Trotman and non-party witnesses Ania and Shyna Trotman summarized above, as well as the affidavit of Edwin Hernandez, Head of Security at Copacabana, Colson Dempster, the party promoter manager of third-party defendants, Pretty Run The City, and the affidavit of Richard Stripp, PhD, a New York State Certified Clinical and Forensic Toxicologist. Defendants Copacabana argue that even if it is determined that they sold alcohol to defendant Trotman, the two bottles of alcohol were placed in his VIP section within 10 minutes of his arrival at the premises, and there is no evidence that defendant Trotman was visibly intoxicated when he accepted the bottles in his designated VIP section. In addition, defendants Copacabana argue that defendant Trotman poured his own drinks from the bottles provided with the VIP package, and there is no evidence that he made any additional purchases of alcohol directly from defendants Copacabana throughout the evening. Therefore, defendants Copacabana argue that they cannot be held liable to plaintiff under the *Dram Shop Act*.

According to the affidavit of Edwin Hernandez, tickets for the Copacabana venue were sold through Eventbrite by promoters who rent the 760 Rooftop. The promoter’s Eventbrite account is independent from that of Copacabana. Mr. Hernandez stated that a West Indian Event

is held on Saturday nights, and such promoters rent the Copacabana bartenders and security, as well as have their own staff. The party promoters have control over the VIP section and the bottles provided to the customers, who purchased VIP tickets with bottle service through Eventbrite. The VIP package for six people included one 750 ml bottle of alcohol and one bottle of Champagne with unlimited mixers, and access to a private section.

Mr. Hernandez stated, in his affidavit, that if a person is intoxicated when passing security, and going up or down the stairs to and from the rooftop area, security would refuse entry back into the venue. Therefore, anyone visibly intoxicated at Copacabana, would be cut off from alcohol service and safely escorted out of the premises with their party in compliance with Copacabana's procedures. Mr. Hernandez further stated that he was present at Copacabana on June 29, 2019 until closing on June 30, 2019. Mr. Hernandez stated that if defendant Trotman was in the VIP section and left the VIP section, he would have had to navigate four flights of stairs, pass five security officers, all of whom are trained to identify if someone is intoxicated.

According to the affidavit of third-party defendant, party promoter, Colson Dempster, the events at Copacabana were open to the public by either buying tickets in advance and online through Eventbrite, or by paying a cash entrance fee at the door. Mr. Dempster explained that once inside the establishment, patrons were not confined to any specific floor or rooftop area. The arrangement between defendants Copacabana and third-party defendant Pretty Run the City was that the party promoter would advertise parties and events for a percentage of the entrance fees.

Third-party defendant, Colson Dempster, further stated that bar sales and bottle service were provided by the venue, along with security, wait staff and "bottle girls". Mr. Dempster denied ever selling alcohol to or from Copacabana, the nightclub or any patrons, as third-party defendant Pretty Run the City does not have a liquor license. Mr. Dempster indicated any alcohol served at the event was purchased by patrons directly from defendants Copacabana by bartenders, "bottle girls," and/or Copacabana-employed "wait staff," and all proceeds from the sale of alcohol, including "VIP packages" and "bottle service" sales, were collected and kept by defendants Copacabana. The court finds these statements to be self-serving as no evidence was submitted concerning the agreement between third-party defendant and Pretty Run the City and defendants Copacabana in support of this affidavit.

Finally, defendants Copacabana submit the affidavit of Richard Stripp, Ph.D., a New York State Certified Clinical and Forensic Toxicologist, who reviewed numerous documents in connection with this matter. Based on the evidence, Dr. Stripp concluded, to a reasonable degree of toxicological certainty, that on Friday, June 28, 2019 nothing in the record indicates that defendant Trotman entered the establishment while visibly intoxicated. Dr. Stripp further states that the deposition testimony and affidavit of Mr. Hernandez indicate that if defendant Trotman was visibly intoxicated at the time he arrived at the nightclub; he would not have been allowed to enter the establishment pursuant to the Copacabana's policies. Additionally, all the alcohol consumed at the event was self-served, and provided by the party promoter's bottle service girls when Mr. Trotman was sober, and not visibly intoxicated.

DISCUSSION

“[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *see also, Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once the movant has made a *prima facie* showing, the burden shifts to the opposing party to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” *Casper v. Cushman & Wakefield*, 74 A.D.3d 669, 669 (1st Dep’t 2010), *lv dismissed* 16 N.Y.3d 766 (2011) [internal quotation marks and citation omitted]). If an issue of fact exists, summary judgment should be denied. *Stone v. Goodson*, 8 N.Y.2d 8, 12 (1960).

The *Dram Shop Act* must be read in conjunction with the *Alcoholic Beverage Control Law* § 65 to determine whether there was an unlawful sale of alcohol. *Moyer v. Lo Jim Café*, 19 A.D.2d 523, 240 N.Y.S.2d 277 (1st Dep’t 1963). The *Alcoholic Beverage Control Law* §65 states in pertinent part:

No person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverage to (2) any visibly intoxicated person. *Alcoholic Beverage Control Law* § 65(2).

The New York's *Dram Shop Act* affords “[a]ny person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication 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.” *General Obligations Law* § 11-101.

Here, the court finds that plaintiff has not met her *prima facie* burden of establishing summary judgment as a matter of law. The plaintiff argues that defendant Trotman was or became intoxicated while at the Copacabana venue, however, the issue before this court is not whether defendant was or became intoxicated while at the Copacabana venue, but whether defendant Trotman was served alcohol by defendant's Copacabana while he was visibly intoxicated in violation of the *Dram Shop Act*. Based on the evidence presented, including the deposition testimony of defendant Trotman, non-party witnesses, Ania Trotman and Shyna Trotman, the plaintiff has failed to establish that defendant's Copacabana served alcohol to defendant Trotman while he was visibly intoxicated.

Furthermore, the affidavit of plaintiff's forensic toxicologist has no probative value because it does not shed any light on whether defendant Trotman was sold or served alcohol while visibly intoxicated. Altogether, the plaintiff has failed to demonstrate by the testimony and evidence submitted, that defendant Trotman was sold or served alcohol by defendant's Copacabana while he was visibly intoxicated.

As it pertains to defendant Copacabana’s motion to dismiss, the *Dram Shop Act* is clear that, “no person shall sell, deliver or give away or cause or permit to be sold, delivered or given away an alcoholic beverage to any visibly intoxicated person.” See, *General Obligations Law § 11-101(1)*. The testimony demonstrates that no one could confirm who put additional bottles of alcohol on the table in defendant Trotman’s VIP section, however, it is undisputed that no one identified any Copacabana staff member serving or selling any alcohol to defendant Trotman at any point during the night. As such, the defendants Copacabana’s motion to dismiss is granted as there is no issue of fact that defendants did not serve alcohol to a visibly drunk defendant Trotman.

Based on the foregoing, it is hereby,

ORDERED that plaintiff’s motion for summary judgment as against defendants/third-party plaintiffs 268 West 47th Rest., Inc., individually and d/b/a Copacabana and 760 8th Ave. Rest., Inc., individually and d/b/a Copacabana is DENIED; and it is further

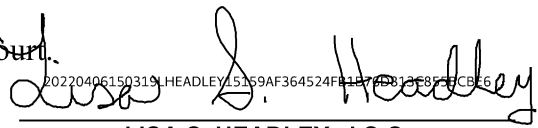
ORDERED that defendants/third-party plaintiffs 268 West 47th Rest., Inc., individually and d/b/a Copacabana and 760 8th Ave. Rest., Inc., individually and d/b/a Copacabana’s motion for summary judgment and dismissing plaintiff’s complaint along with any and all cross-claims, is GRANTED; and it is further

ORDERED that defendants/third-party plaintiffs 268 West 47th Rest., Inc., individually and d/b/a Copacabana and 760 8th Ave. Rest., Inc., individually and d/b/a Copacabana are hereby discontinued from this action, and the caption shall be amended accordingly; and it is further

ORDERED that any request relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, the movant-plaintiff shall serve a copy of this decision/order upon the defendants with notice of entry.

This constitutes the Decision and Order of the Court.


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LISA S. HEADLEY, J.S.C.

4/6/2022
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
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APPLICATION:

CHECK IF APPROPRIATE: