

<b>Simmons v Vecchiano</b>
2022 NY Slip Op 31890(U)
June 15, 2022
Supreme Court, Kings County
Docket Number: Index No. 26225/2009
Judge: Wayne P. Saitta
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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brooklyn, New York, on 15<sup>th</sup> the day of June, 2022.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

-----X  
STEPHEN SIMMONS,

Plaintiff,

Index No. 26225/2009

-against-

DECISION AND ORDER

ANTHONY VECCHIANO and RAO'S BAR & GRILL, INC.,

Defendants.

-----X

The following papers numbered on this motion:

NYSCEF Doc Numbers

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	2-3
Answering Affidavit (Affirmation) _____	22
Reply Affidavit (Affirmation) _____	20
Supplemental Affidavit (Affirmation)	
Pleadings – Exhibits _____	4-18, 23-28
Stipulations – Minutes _____	
Filed Papers _____	

This action involves a motor vehicle accident in which Defendant ANTHONY VECCHIANO's vehicle struck Plaintiff STEPHEN SIMMONS's vehicle. Plaintiff asserted a Dram Shop claim against Defendant RAO'S BAR & GRILL, INC. (RAO'S), alleging that it served Defendant VECCHIANO alcohol despite his being visibly intoxicated. RAO'S moves for an Order granting summary judgment dismissing his complaint against it on the grounds that Defendant VECCHIANO has recanted his testimony that he drank at RAO'S the night of the accident and further that Plaintiff cannot meet his burden of proof to support a claim under the Dram Shop Act.

The accident occurred on August 8, 2009, at or near the intersection of Elliot Avenue and 69<sup>th</sup> street. Following the accident, Defendant VECCHIANO was stopped by the police and subsequently arrested for a DWI with a BAC level of 0.205, significantly higher than the legal limit.

At his first deposition, Defendant VECCHIANO gave a detailed account of the events that transpired while he was a patron of RAO'S on the night of the accident. Defendant VECCHIANO stated that he was served and consumed 3 7-ounce bottles of Budweiser along with his meal while he was at a party at RAO's. Defendant VECCHIANO continues on to describe the bartender who served him as an older Caucasian man with white hair, estimated around 73 years old. Defendant VECCHIANO testified that he had previously visited the establishment before, however, on rare occasions.

When asked what he had to drink at RAO'S he testified:

Q. What was the first drink you ordered?

A. A beer.

Q. Was this a bottle of beer, was it a pitcher, or something else?

A. Bottle.

Q. Do you remember who you ordered the beer from?

A. No.

Q. Were you eating at the bar?

A. Yes.

Q. Was the person who served a male, a female?

A. Male.

Q. Can you describe him?

A. 72, 73 years old, white hair.

Q. Older?

A. Yes.

Q. He was Caucasian?

A. Yes.

Q. How long thereafter did you order another drink?

A. Half hour.

Q. What did you order?

A. Another beer.

...

Q. You know how many ounces bottles were?

A. Seven.

- ...
- Q. How many beers in total would you say you drank?  
A. Three.  
Q. Three?  
A. Mm-hmm. Yes.  
Q. Were these light beers, or something else?  
A. Something else.  
Q. What were they?  
A. Budweiser.  
Q. Budweiser?  
A. Yes.  
Q. Did you have anything to eat that evening?  
A. Yes.  
Q. What did you eat?  
A. I don't recall.  
Q. Did you eat at the restaurant?  
A. Yes.

After RAO'S was joined in the case, Defendant VECCHIANO was deposed a second time on September 15, 2014. In this second deposition, he recanted his first testimony, stating that he was not at RAO'S on the evening of the accident, nor did he order any alcoholic beverages at RAO'S. He was questioned by RAO'S attorney:

- Q. Prior to the accident, did you go to a restaurant to eat?  
A. No.  
Q. No restaurant at all?  
A. No.  
Q. Were you ever at Rao's Bar & Grill on the day or the evening before the accident?  
A. No.  
Q. Did you order any alcoholic beverages at that establishment?  
A. No.  
Q. Do you know where Rao's Bar & Grill is?  
A. Yes.  
Q. Where is it?  
A. 114<sup>th</sup> Street and Pleasant Avenue.  
Q. Have you ever been there before the date of the accident?  
A. No.  
Q. Now, you had testified that on the evening of the accident, before the accident occurred, you were at Rao's Bar & Grill; was that correct?  
...
- Q. Well, did you testify that way, that you were at Rao's Bar & Grill?  
A. I believe so,  
Q. Was that testimony correct?

A. I don't really remember. It was five years ago, two years ago.

Q. You don't remember your testimony, or you don't remember where you were?

A. I don't remember the testimony.

Q. You don't remember the testimony, okay. Well, before the accident occurred, were you at Rao's Bar & Grill?

A. No.

...

Q. So you weren't there at all that evening?

A. No.

...

Q. Do you remember where you had dinner before the accident?

A. No.

Defendant RAO'S also produced Ronald Straci, General Counsel and co-owner of the restaurant, for deposition who testified that RAO'S is not open on Saturdays and to the best of his recollection, the restaurant was not open on the day of the accident. He stated that RAO'S has only ever been open on Saturday three times in the last twenty years, and those times they were hosting Ronald McDonald Charity events and they do not host any other private parties.

Defendant ANTHONY VECCHIANO's son, Daniel Vecchiano, gave an affidavit in which he stated that he was playing trumpet in front of RAO'S as a band member in the street fair and saw his father outside of RAO's that evening. Daniel testified RAO'S was not open on the night of the accident and observed metal guards over the door. At argument, Plaintiff's attorney stated that the Giglio Society of East Harlem Annual Italian Street Fair Feast and Festival was occurring outside of RAO'S on the night of the accident.

RAO'S has not met its burden for summary judgment because Defendant ANTHONY VECCHIANO's first deposition creates questions of fact as to whether he was served while intoxicated at RAO'S. A jury could decide to believe his first deposition and disbelieve his recantation. A jury could also choose to disbelieve the testimony of Daniel Vecchiano and RAO'S other witnesses.

RAO'S second argument, that the action against them should also be dismissed even if VECCHIANO was at RAO'S that night, because Plaintiff cannot prove that VECCHIANO was served while visibly intoxicated. This argument neglects the rule that "A party does not carry its burden in moving for summary judgement by pointing out gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (*Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413 [1996], *Mennerich v. Esposito*, 4 A.D.3d 399, 400, 772 N.Y.S.2d 91, quoting *George Larkin Trucking Co. v. Lisbon Tire Mart*, 185 A.D.2d 614, 615, 585 N.Y.S.2d 894 [1992]).

WHEREFORE, it is ORDERED that Defendant RAO'S BAR & GRILL, INC.'s motion for summary judgment as against Plaintiff STEPHEN SIMMONS is denied.

This constitutes the decision and order of the Court.

ENTER,



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J.S.C.