

Drive N.J. Ins. Co. v RT Hospitality Group, LLC

2022 NY Slip Op 34978(U)

June 8, 2022

Supreme Court, Queens County

Docket Number: Index No. 717279/21

Judge: Janice A. Taylor

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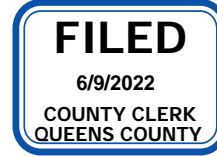
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

-----x
DRIVE NEW JERSEY INSURANCE COMPANY
AND DRIVE NEW JERSEY INSURANCE
COMPANY AS SUBROGEE OF IRON BOUND
FITNESS, LLC,,



Plaintiff(s),

Index No.: 717279 /21

Motion Date:3/8/22

- against -

Motion Cal. No.:7

Motion Seq. No.: 1

RT HOSPITALITY GROUP, LLC D/B/A ATLANTIS
GENTLEMEN'S CLUB,

Defendant(s).

-----x
The following papers numbered 1 - 9 read on this motion by
defendant pursuant to CPLR 3211(a) (1) and (7) to dismiss the
complaint, or alternatively, granting summary judgment.

PAPERS
NUMBERED

Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Service.....	5 - 6
Reply Affirmation-Exhibits-Service.....	7 - 9

Upon the foregoing papers, it is **ORDERED** that the above-
referenced motion is decided as follows:

This is a subrogation action brought by plaintiff to recover
medical payment and property damage payments it made as a result
of an October 29, 2019 automobile accident. The complaint
alleges that on the date of the accident non-party Ashley M.
Perez was the driver of a motor vehicle and that non-parties
Lorelain Abreau-Mateo and Hazem A. Aly were passengers in the
vehicle. The vehicle driven by non=party Perez as involved in a
single car accident when it came into contact with a concrete
barrier. Non-party Perez was found to have an elevated blood
alcohol level after the accident. The complaint alleges that the
defendant provided alcohol to non-party Perez even though she was
visibly intoxicated. The plaintiff alleges that it insured the

vehicle involved in the subject accident. The plaintiff brought this action alleging common-law negligence and under General Obligations Law § 11-101 the "Dram shop Act."

On a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7) a court must accept as true the allegations of the complaint and give the plaintiff every favorable inference to determine if the allegations fit within a cognizable legal theory (see *Leon v Martinez*, 84 NY2d 83 [1994]; *Baker v Town of Wallkill*, 84 AD3d 1134 [2011]; *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 [2004]). A motion to dismiss merely addresses the adequacy of the pleading and does not reach the substantive merits of plaintiff's cause of action (see *Kaplan v New York City Dept. of Health & Mental Hygiene*, 142 AD3d 1050 [2d Dept 2016]; *Lieberman v Green*, 139 AD3d 815 [2d Dept 2016]). Whether the pleading will later survive a summary judgment motion, or plaintiff will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss (see *Tooma v Grossbarth*, 121 AD3d 1093 [2d Dept 2014]). To withstand dismissal, the requisite elements of the cause of action must be discernable from the pleadings, and the complaint must give notice of the transactions and occurrences to be proved" (CPLR 3013; see *Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901 [2d Dept 2014]).

The first cause of action is under the Dram Shop Act. Under the Dram Shop Act a party who unlawfully sells alcohol to a visibly intoxicated person is liable for injuries caused by that person's intoxication (*Catania v 124 In-To-Go, Corp.*, 287 AD2d 476 [2d Dept 2001]). The elements necessary to prove a cause of action under the statute are (1) an unlawful sale; (2) of liquor; (3) to an intoxicated person; (4) which causes an injury (see *Romano v Stanley*, 90 NY2d 444 [1997]). There must be some reasonable connection between the sale of alcohol and the resulting injuries (*McNeill v Rugby Joe's*, 298 AD2d 369 [2d Dept 2002]).

The issue before the court is whether a subrogee can bring an action under the Dram Shop Act. The defendant argues that an insurer can not bring subrogation action alleging a cause of action the Dram Shop act. This argument is without merit. The fact that the Dram Shop Act does not specifically list that a subrogation can be brought under it does not mean that an insurer cannot bring such an action as a subrogee. A subrogee steps into the shoes of the subrogor (see *Humbach v Goldstein*, 229 AD2d 64 [2d Dept 1997]). It is, thus, allowed to bring an action as if it were the subrogor. In fact, courts have found that there can a subrogation recovery under the Dram Shop Act (see *Dymond v Dunn*, 148 AD2d 56 [3d Dept 1989]), Therefore, dismissal of this cause of action is unwarranted.

To the extent that the plaintiff seeks to recover for reimbursement of the first-party benefits paid on behalf of non-party Aly, however, that request can only be brought by lien in the action brought by non-party Aly. Therefore, the plaintiff cannot recover these payments in this action.

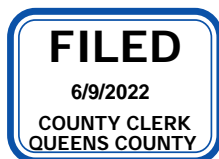
Finally, the plaintiff does not oppose the branches of the motion to dismiss the action brought under common law negligence or to dismiss recovery of attorney's fees, and for the recovery of the for the reimbursement for \$27,755.76 for Perez' medical payments therefore those branches are granted without opposition.

Accordingly, the branches of the defendant's motion to dismiss the first cause of action is **DENIED**, except to the extent that it seeks to recover for reimbursement of the first-party benefits paid on behalf of non-party Aly. Further,

SO ORDERED that the branches of the defendant's motion to dismiss the second cause of action for rescission and for recovery of attorney's fees and for reimbursement for \$27,755.76 for Perez' medical payments are **GRANTED** and those causes of action are dismissed.

The foregoing shall constitute the decision and order of this court.

Dated: June 8, 2022





JANICE A. TAYLOR, J.S.C.

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