# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. ARLENE P. BLUTH** **PART** **14**

***Justice***

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ANDREW EGGERT,

Plaintiff,

- v -

AMADO TORRECILLA TORRES, TALKHOUSE INC.,THE FIVE DWARFS, INC.,SOLDIER RIDE INC.

Defendants.

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**INDEX NO.** 155360/2018

**MOTION DATE** 01/13/2023

**MOTION SEQ. NO.** 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 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

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

The motion for summary judgment by defendants Talkhouse Inc. and The Five Dwarfs, Inc. (collectively, the "Moving Defendants") is granted.

**Background**

Plaintiff claims he was at a concert in Amagansett, New York on July 28, 2017 when he was attacked by allegedly drunk patrons at an establishment owned and operated by defendants. Plaintiff brings Dram Shop Act claims against defendants for overserving the alleged assailants and claims based on allegedly insufficient security.

Plaintiff testified that the incident occurred at approximately 11 p.m. (NYSCEF Doc. No. 95 at 18 [plaintiff's deposition transcript]). He claims he arrived at the premises at 9:30 p.m. (*id.* at 19). Plaintiff acknowledged that he had not witnessed any other altercations, arguments, or fights that evening prior to his own incident (NYSCEF Doc. No. 96 at 61-62). When describing the incident, plaintiff insisted that he had not had any prior contact with the individuals

(apparently four or five) before the fight (*id*. at 67). He added that he thought these individuals "appeared intoxicated" (*id*. at 69).

Plaintiff testified that "this all happened very quickly. So it was only a few seconds. There was the initial neck grab. There was pushing. Them pushing me and as I was moving backwards and several of this group were leaning towards me, pushing me and yelling. After a few seconds was when the first punch was thrown" (*id*. at 80). He added that the bouncers were the first people over to assist him and that they arrived even before his friends (plaintiff was with three companions who were not with him at the time of the incident) (*id*. at 95).

Moving Defendants seek summary judgment on the ground that they did not violate New York's Dram Shop Act or were responsible in any way for the injuries purportedly suffered by plaintiff. They emphasize that immediately after the incident, defendants' security removed the purported assailants and that the East Hampton police responded.

Moving Defendants stress that the alleged altercation was sudden and unforeseeable, even according to plaintiff's version of events. They point out that there were no complaints or prior incidents at the premises and that defendants' employees all undergo training for responsible service of alcohol. Moving Defendants note that there was no assertion that the assailants were actually overserved or that the sale of alcohol led to the altercation.

They point to a video of the incident and contend that nothing in this video demonstrates that the assailants were visibly intoxicated. Moving Defendants maintain that plaintiff merely offers the self-serving contention that he could smell alcohol on the alleged assailants' breath. They also point out that the police report attached to the plaintiff's bill of particulars insists that *plaintiff* was intoxicated at the time of the incident.

Moving Defendants contend that the altercation was unforeseeable and rely on plaintiff's own characterization of the incident as a random act. They observe that the video footage shows that the group of assailants let several people pass by them without incident and displayed no aggression towards any other patron before the subject incident. Moving Defendants argue that they employed over a dozen security personnel on the subject evening and that at least 10 were licensed by the state of New York for such work.

In opposition, plaintiff insists there are material issues of fact relating to the Moving Defendants' negligence. He claims there are issues of fact relating to whether certain of the Moving Defendants' employees witnessed the attacks and what they knew about the alleged assailants and their purported levels of intoxication. He questions whether those witnesses can offer insight into what was done to prevent such a fight on the night of the incident and he emphasizes that the videos submitted in connection with this motion are subject to interpretation by a fact finder. Plaintiff repeatedly argues that the Moving Defendants failed to produce witnesses for depositions. He also wants various records, including time records, alcohol purchase receipts and other records to identify what was sold to patrons on the night of the incident. Plaintiff emphasizes that the Dram Shop Act does not require that he knew the alleged assailants before the attack. He observes that he suffered a fractured cheek bone as well as some broken teeth.

In reply, the Moving Defendants insist that the majority of plaintiff's motion focuses on discovery he wants. But they emphasize that such discovery is irrelevant, waived or was addressed in prior discovery orders. Moving Defendants argue that plaintiff simply failed to raise a material issue of fact in opposition. They note that plaintiff failed to identify the alleged

assailants and offers nothing more than speculation about whether the assailants were even served alcohol by the Moving Defendants.

**Discussion**

To be entitled to the remedy of summary judgment, the moving party "must 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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (id.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*, Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], affd 99 NY2d 647, 760 NYS2d 96 [2003]).

As an initial matter, the Court must address the main focus of plaintiff's motion, which focuses on the discovery he claims he now wants. The Court observes that depositions of the parties were completed in January 2020 and that plaintiff subsequently made a motion (under

MS001) for another deposition of Moving Defendants via a corporate representative under a newly enacted trial court rule. The Court denied that motion and found that when party depositions were completed, this new rule (22 NYCRR 202.20-d) did not apply (NYSCEF Doc. No. 70).

Plaintiff next made a motion to "keep the matter in active status" and to extend the time to file the note of issue. The Court had previously ordered that a note of issue be filed by April 27, 2022 and, in this decision, extended the time to file a note of issue to June 2, 2022 (NYSCEF Doc. No. 86). Critically, the Court observed that the motion did not identify any outstanding discovery (*id*.). Plaintiff then filed the note of issue.

Despite raising all manner of outstanding discovery he now wants in opposition to the instant motion, the record shows that plaintiff did not do anything to obtain the various discovery he now complains about. He did not, for instance, bring an order to show cause to compel discovery in light of the impending note of issue deadlines, either before the April 27, 2022 or the June 2, 2022 deadlines. It is, of course, plaintiff's obligation to demand relevant discovery and, if he believes that defendants or non-parties have not adequately complied, then to make the appropriate discovery motion. That did not happen here.

Instead, before filing the note of issue, plaintiff made two motions—neither of which demanded the discovery he now claims he wants. Plaintiff cannot raise a material issue of fact based on discovery he does not possess and discovery that he clearly should have demanded long ago. Plaintiff should have taken the appropriate steps to obtain discovery before filing the note of issue. In other words, this is 2018 case where only in opposition to a post note of issue summary judgment motion does plaintiff suddenly claim he wants records he should have demanded years ago.

Turning to the merits, the Dram Shop Law, General Obligations Law § 11-101(1) provides that:

> "Any 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."

A Court considering a motion for summary judgment to dismiss this claim must consider whether "[t]he record presents triable issues as to whether there was some reasonable or practical connection between the sale of alcohol to a visibly intoxicated patron and the resulting injuries" (*Carver v P.J. Carney's*, 103 AD3d 447, 448, 962 NYS2d 3 [1st Dept 2013] [internal quotations and citations omitted]).

Here the Court finds that there are no triable issues of fact to connect the sale of alcohol to a visibly intoxicated patron who caused plaintiff's injuries. The question in this case, as is often the issue in many Dram Shop Act litigations, is the nature of the accident and the circumstances of the incident. The fight at issue here was, by all accounts presented on this motion - including plaintiff's testimony and the video footage - a sudden and random altercation that escalated from nothing to a full-blown fight. The parties had no interaction preceding the fight and, in this Court's view, the videos show that the alleged assailants exhibited no outward signs of intoxication or aggressive behavior. But the Court's decision is not solely reliant upon its review of the videos.

Moving Defendants demonstrated that they employed a significant number of security personnel on the night of the incident and that these security personnel were so quick to react that they were the first people to break up the fight. Plaintiff acknowledged that security arrived

within seconds and quickly escorted the parties, including plaintiff, from the venue. Moving Defendants also attach the affidavit of their expert, William Squires (who consults on event management issues, including security and alcohol sales), who contends that the Moving Defendants "met or exceeded industry standards of care for the security and alcohol serving protocols" (NYSCEF Doc. No. 106, ¶ 10). He observed that the venue had about 14 security professionals working that evening, which would be enough staff for a crowd of 3,500 people according to industry standards (*id*. ¶¶ 16, 25), well beyond the capacity of the venue. Mr. Squires also observed that the venue required patrons to show ID and pay a $40 cover charge in order to enter the establishment (*id*. ¶ 17). He claims that after viewing the videos, he did not see anyone exhibiting signs of intoxication (*id*. 37). Plaintiff did not submit an expert along with his opposition.

The expert's affidavit along with the record before this Court compels the Court to grant the motion. Nothing about this situation raises an issue of fact about whether alcohol or overserving alcohol was a cause of the incident or that the Moving Defendants failed to provide adequate security. This is not a situation in which a disagreement escalated over many minutes that could give rise to an issue of fact about the effectiveness of defendants' security team. Nor is there any evidence that the alleged assailants acted aggressively towards others or exhibited signs of visible intoxication in order to compel the Court to deny the instant motion. Rather, the video shows that the group of purported assailants stood by calmly, let multiple people pass by (the venue was undoubtedly crowded) and seemed to be laughing right before the incident. What caused them to suddenly change their demeanor and for the altercation to begin is unclear—and plaintiff certainly does not know or provide any evidence for such an explanation.

It cannot be the case that there is an issue of fact any time there is a fight at an establishment that serves alcohol. That would expand the scope of the Dram Shop Law beyond all recognition and turn it into a strict liability scheme. A plaintiff cannot simply offer conclusory and unsubstantiated allegations that these assailants were intoxicated and seek relief under the Dram Shop Act (*Languilli v Argonaut Rest. and Diner, Inc.*, 232 AD2d 375, 375, 648 NYS2d 139 [2d Dept 1996] [finding that a conclusory and unsupported assertion that defendants served a visibly intoxicated patron was not sufficient to raise an issue of fact]). Plaintiff's conclusory claim that he smelled alcohol on the breath of one of the alleged assailants is not corroborated nor does it mean any of the assailants were intoxicated or overserved by the Moving Defendants.

More is required. For instance, plaintiff did not submit evidence such as a credit card bill for any of the alleged assailants to raise an issue about how much alcohol this group had been served. Plaintiff's opposition seems to acknowledge that he should have sought this discovery. For whatever reason, he did not make any motions about this evidence.

Nor did he submit any affidavits from someone with personal knowledge of the incident to show that this group was visibly intoxicated or acting a manner that could give rise to a Dram Shop Act claim (*c.f. Catania v 124 In-To-Go Corp.*,287 AD2d 476, 731 NYS2d 207 [2d Dept 2001] [reversing a judgment, in part, on the ground that "there was uncontradicted testimony that the unidentified assailant's behavior became increasingly aggressive as he continued to drink throughout the course of the evening"]). There is no evidence here about how much the assailants had to drink; plaintiff admitted he did not interact or observe the group before the attack.

**Summary**

Case law in this area requires that there be a connection between overserving an individual with alcohol and that person's involvement in causing a plaintiff's injuries in order to sustain a cause of action under the Dram Shop Act. Here, a sudden and unexpected fight occurred that, according to plaintiff, had no apparent cause. Plaintiff provided no evidence whatsoever to suggest the alleged assailants were intoxicated, were overserved by the Moving Defendants, or that the Moving Defendants failed to provide adequate security. Under these circumstances, the Court is unable to conclude that plaintiff raised a material issue of fact.

The Court observes that the record appears to show that only the Moving Defendants appeared in this case. The two remaining defendants, Mr. Torrecilla Torres and Soldier Ride Inc. did not appear. The docket on NYSCEF contains an affidavit of service for Solider Ride, Inc. from June 22, 2018 (NYSCEF Doc. No. 4). It also suggests that defendant Torrecilla Torres was purportedly served via nail and mail service in in in September 2018 (NYSCEF Doc. No. 10). Given that plaintiff failed to make a default motion against either defendant within a year of their defaults, the Court severs and dismisses the claims against these defendants for failure to take proceedings pursuant to CPLR 3215(c).

Accordingly, it is hereby

ORDERED that the motion by defendants Talkhouse Inc. and The Five Dwarfs, Inc. for summary judgment dismissing all claims against them is granted, the complaint is dismissed; and it is further

ORDERED that all claims against defendant Amado Torrecilla Torres and Soldier Ride, Inc. are severed and dismissed as plaintiff did not make a timely motion for a default judgment; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of defendants and against plaintiff along with costs and disbursements upon presentation of proper papers therefor.

1/24/2023
DATE

ARLENE P. BLUTH, J.S.C.

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| CHECK ONE: | X | CASE DISPOSED | | | NON-FINAL DISPOSITION | | |
| | X | GRANTED | | DENIED | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | | REFERENCE |