To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. ALEXANDRA D. MURPHY, J.S.C.

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MARC CAMPOLONGO and JACKELYN CAMPOLONGO,
Plaintiffs,

– against –

DR & RD, INC., d/b/a BRAZEN FOX, WILLIAM P. HARDING, RUDDY DELACRUZ, JOHN DOE # 1, JOHN DOE #2, AND JOHN AND JANE DOES #3 THROUGH #10, and CARLOS MORALES,
Defendants.

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DR & RD, INC., d/b/a BRAZEN FOX, WILLIAM P. HARDING, RUDDY DELACRUZ,
Third-Party Plaintiffs,

– against –

CARLOS MORALES,
Third-Party Defendant.

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Index No. 69170/2019

Motion Seq. 5, 6, 7

DECISION & ORDER

In an action to recover damages for personal injuries, etc., (1) the defendants DR & RD, Inc. d/b/a Brazen Fox, William P. Harding, and Ruddy Delacruz move for summary judgment dismissing the complaint insofar as asserted against them, pursuant to CPLR 3212 (motion seq. 5); (2) the defendant/third-party defendant Carlos Morales moves for summary judgment dismissing the complaint and the third party complaint insofar as asserted against him, pursuant to CPLR 3212 (motion seq. 6); and (3) the plaintiffs cross-move, pursuant to CPLR 3126, to strike the answer of the defendant DR & RD, Inc. d/b/a Brazen Fox or in the alternative for an adverse inference charge (motion seq. 7):

Papers Considered

Motion Seq. 5 NYSCEF Doc. 142-169; 203; 209-216; 233-235

1. Notice of Motion/Affirmation of Lori F. Graybow, Esq./Exhibits A-W/Affidavit of Declan Rainsford/Exhibit A;
2. Affirmation of Marc S. Oxman, Esq. in Opposition/Exhibits 1-6;
3. Reply Affirmation of Lori F. Graybow, Esq.

Motion Seq. 6 NYSCEF Doc. 170-202; 217

1. Notice of Motion/Affirmation of Andrew Chan, Esq./Affidavit of Carlos Morales/Exhibits A-Z; AA-DD;
2. Affirmation of Marc S. Oxman, Esq.

Motion Seq. 7 NYSCEF Doc. 218-225; 229-232

1. Notice of Cross Motion/Affirmation of Marc S. Oxman, Esq./Exhibits 1-5;
2. Affirmation of Lori F. Graybow, Esq. in Opposition/Exhibits A-B;
3. Reply Affirmation of Marc S. Oxman, Esq.

Factual and Procedural Background

On September 14, 2019, at approximately 2:30 a.m., the plaintiff Marc Campolongo was allegedly assaulted outside a restaurant and bar owned by the defendant DR & RD, Inc. d/b/a Brazen Fox (hereinafter Brazen Fox). The defendants William P. Harding, and Ruddy Delacruz were working as bouncers for Brazen Fox at the time of the incident.

The plaintiff and his wife suing derivatively commenced this action with the filing of a summons and complaint on November 21, 2019, against Brazen Fox, Harding, and Delacruz. The complaint asserts causes of action against Brazen Fox for negligence and violations of the Dram Shop Act, codified by General Obligations Law 11-100 et seq., causes of action against Harding for negligence, assault, and battery, and a negligence cause of action against Delacruz.

The defendants commenced a third-party action against Carlos Morales, the alleged assailant. Thereafter, the plaintiff asserted a direct claim against Morales.

The Deposition Testimony

Seamus Skeffington is the restaurant manager for Brazen Fox. Skeffington was the only manager on duty at the time of the incident. Brazen Fox is a restaurant on Mamaroneck Avenue in White Plains with two dining levels and a bar. There is a back patio which can be accessed through the restaurant or from a parking lot known as the Waller Avenue parking lot which is owned by the City of White Plains.

Harding testified that he was employed as a licensed security guard for Brazen Fox. His duties included checking patron identification and ensuring that there were no fights on the premises. Harding testified that if an incident occurred on the premises, he would call 911. On the night of the plaintiff's incident, Harding arrived at Brazen Fox around 10:00 p.m. He was assigned to work the patio entrance by the parking lot. He did not recall if Brazen Fox was crowded or loud that night.

Harding testified that the plaintiff attempted to enter Brazen Fox from the back patio. Harding asked the plaintiff for identification. In response, the plaintiff replied, "I don't need to show you f****** ID" (NYSCEF Doc. 149 p. 33). Harding immediately denied the plaintiff access to Brazen Fox because he appeared intoxicated. The plaintiff attempted to walk onto the patio and Harding blocked his access. The plaintiff then walked back into the parking lot. The plaintiff returned to the patio entrance with his fist clenched. Harding testified that he tried to be polite to the plaintiff and said, "Lets just call it a night" (NYSCEF Doc. 149 p. 33). Suddenly, two men approached the plaintiff in the parking lot and punched the plaintiff causing him to fall to the ground. Harding testified that there was no physical contact between him and the plaintiff. He did not recognize anyone involved in the altercation. Harding testified that the police and emergency medical services arrived at the scene.

Rudy Delacruz testified that he had been employed as a bouncer by Brazen Fox for three years prior to the incident. Delacruz is a licensed security guard. On the night of the incident, Delacruz arrived at Brazen Fox at 11:00 p.m. He was assigned to the interior stairs. Delacruz gave a statement to the White Plains Police Department stating that the plaintiff refused to show identification to Harding and tried to push past Harding to enter Brazen Fox. Delacruz stated that the plaintiff was being verbally abusive and was highly intoxicated. According to Delacruz, the plaintiff "got in [his] face" (NYSCEF Doc. 152 p. 27), and he pushed the plaintiff off the stairs into the parking lot. While the plaintiff was in the parking lot, two unknown individuals approached the plaintiff and struck him. The plaintiff fell to the ground and hit his head. Delacruz did not assist the plaintiff because the incident did not occur on the premises of Brazen Fox. The two unknown males left in a white vehicle. Delacruz testified that he recognized the faces of the two men but did not know their names.

Skeffington testified that he was walking out the back door and observed flashing lights and saw a male being attended to by medical staff. Harding and Delacruz were standing at the back steps of the patio. At that time, Skeffington did not observe any Brazen Fox employees near the area where the incident occurred. Harding advised Skeffington that two random males hit the plaintiff and left the scene. Because the incident did not occur on the premises, there was no incident report.

Skeffington testified that Brazen Fox recommends that its employees take an Alcohol Training Awareness Program course offered by Training for Intervention Procedures (TIPS). Brazen Fox also instructs employees not to serve alcoholic beverages to customers who are visibly intoxicated. In addition, security personnel are required to have a New York State security license. According to Skeffington, Brazen Fox had approximately 32 security cameras on the premises at the time of the incident. The monitors are not continuously watched during business hours. The videos are retained for 60 days and then automatically deleted. Skeffington testified that there are two cameras that face the patio; one of the cameras faces the back door with the parking lot entrance visible.

Skeffington testified that about 30 minutes after the incident, he viewed the security camera footage. He observed the bouncers preventing the plaintiff from entering the patio and two men hitting the plaintiff and leaving the scene. The videos were retained and provided to the police. The only videos retained were those that faced the direction of the incident. All footage from the remaining security cameras was automatically deleted after 60 days. Skeffington testified that he never received a letter from counsel requesting that videos be retained.

The plaintiff testified that on the night of the incident he went to Ron Black's, a restaurant and bar next door to Brazen Fox, at approximately 10:30 p.m. He drank one beer, ate French fries, and stayed there for approximately one hour. He did not recall consuming any alcohol prior to going to Ron Blacks. After leaving Ron Blacks, the plaintiff went next door to Brazen Fox. He testified that he was on the outside patio of Brazen Fox for about one hour and drank one beer. He then went inside Brazen Fox for one hour and drank four beers. The plaintiff exited Brazen Fox through the back patio and smoked a cigarette in the parking lot. His intention was to go back inside Brazen Fox. The plaintiff did not recall going back up the stairs to the patio or anything thereafter. His next memory was waking up in the hospital.

Discussion

The proponent of a motion for summary judgment 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 from the case (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

I. The Defendants' Motion for Summary Judgment

The defendants Brazen Fox, Harding, and Delacruz move for summary judgment dismissing the complaint. The defendants argue that the incident occurred in a parking lot owned by the City of White Plains, the assault was sudden and unforeseeable, and there is no evidence that the security guards acted outside the scope of their employment. The defendants further argue that the negligence claims against Harding and Delacruz must be dismissed.

In addition to the deposition testimony, the defendants submit an affidavit of Declan Rainsford, a principal of Brazen Fox, in support of the motion. Rainsford states that on the date of the incident, there was a surveillance camera located at the rear of Brazen Fox positioned toward the back patio and the parking lot which is owned by the City of White Plains. Attached to Rainsford's affidavit is a flash drive containing video footage from the Brazen Fox security camera as well as video footage disclosed during discovery from a camera located in the City of White Plains' parking lot. Rainsford states that his review of the video shows Harding and Delacruz having a conversation with the plaintiff

and the plaintiff being denied entry into Brazen Fox. Once the plaintiff was in the parking lot, two unknown assailants punched the plaintiff.

"Under a theory of common-law negligence, a landowner may have responsibility for injuries caused by an intoxicated guest [], although liability may be imposed only for injuries that occurred on a defendant's property, or in an area under the defendant's control, where the defendant had the opportunity to supervise the intoxicated guest and was reasonably aware of the need for such control []. Without the requisite awareness [of the risk or threat] there is no duty" (*Colon v Pohl*, 121 AD3d 933, 933 [2d Dept 2014] [internal quotations and citations omitted]).

"Possessors of land have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control" (*Zhi Eric Zhang v ABC Corp.*, 194 AD3d 990, 991-992 [2d Dept 2021] *quoting Pink v Rome Youth Hockey Assn., Inc.*, 28 NY3d 994, 997-998 [2016]). "[T]he scope of the possessor's duty is defined by past experience and the likelihood of conduct on the part of third persons which is likely to endanger the safety of the visitor" (*Maheshwari v City of New York*, 2 NY3d 288, 294 [2004] [internal quotation marks omitted]).

The possessor's duty is limited to risks of harm that are reasonably foreseeable (*see Sanchez v State of New York*, 99 NY2d 247, 253). "While the owner of a public establishment has the duty to control the conduct of persons on its premises when it has the opportunity to do so and is reasonably aware of the need for such control, it has no duty to protect customers against an unforseen and unexpected assault" (*Petras v Saci, Inc.*, 18 AD3d 848, 848 [2d Dept 2005]).

Initially, while the video footage and the deposition testimony demonstrate that the actual assault took place within the parking lot owned by the City of White Plains, the site of the incident was "not so far removed from the defendants' premises as to be beyond the area that defendants might have expected their bouncers to control" (*Babikian v Nikki Midtown, LLC*, 60 AD3d 470 [1st Dept 2009]). Indeed, the incident started on the steps to the Brazen Fox patio when the plaintiff was pushed off the steps by the bouncer. The incident continued, and the assault occurred in the immediate vicinity of the patio steps.

Moreover, based upon the deposition testimony and the video footage, the defendants failed to establish that the plaintiff's injuries were the result of a sudden and unexpected assault which Brazen Fox could not have reasonably anticipated or prevented. "To establish that criminal acts were foreseeable, the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location" (*Gentile v Town & Vil. of Harrison, N.Y.*, 137 AD3d 971, 972 [2d Dept 2016]). The defendants have not submitted any evidence to establish that the conduct at issue was not reasonably predictable or that they did not have notice of any prior occurrences of the same or similar activity.

In any event, in opposition, the plaintiffs raised a triable issue of fact as to whether the incident was sudden and unforeseeable. The plaintiffs submit copies of several citations issued to Brazen Fox by the State of New York Division of Alcohol Beverage Control citing Brazen Fox for permitting the premises to become disorderly. The plaintiffs also submit an expert affidavit of William J. Birks, Jr., board certified as a security consultant through International American Society for Industrial Security. Based upon his review of the documentary and video evidence, Birks attests that the injuries sustained by the plaintiff were caused by the negligent acts of Brazen Fox. Specifically, Birks states that there was inadequate security at the time of the occurrence, the security guards were inadequately trained, and Brazen Fox did not have an adequate security plan. Birks further states that Harding and Delacruz failed to follow accepted practices to address the aftermath of the incident by failing to detain the assailants and assisting in their escape. Therefore, the defendants failed to establish entitlement to summary judgment dismissing the negligence cause of action.

The defendants also move for summary judgment dismissing the Dram Shop Act cause of action on the grounds that there is no evidence that the Brazen Fox bartenders served any of the alleged assailants while they were visibly intoxicated.

The Dram Shop Act, codified in the General Obligations law, provides:

> 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 ... 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 (Gen Oblig § 11-101).

"To establish a cause of action under the 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" (*Flynn v Bulldogs Run Corp.*, 171 AD3d 1136, 1137 [2d Dept 2019] *quoting Pinilla v City of New York*, 136 AD3d 774, 776-777 [2016]).

Here, the record is devoid of any evidence that Brazen Fox sold alcohol to the two unknown assailants or that the unknown assailants were visibly intoxicated. In support of the motion, the defendants submit affidavits from David Scott, Jean Pierre Hernandez, Lindsey Nageotte, Michael Sparno, and Sean McDonagh, who were all bartenders working for Brazen Fox on the night of the incident. The bartenders attest that they are TIPS certified. As part of the TIPS certification course, they are all trained to identify signs of intoxication including bloodshot eyes, slurred speech, poor or impaired motor coordination and body movements, lack of balance, abnormal reflexes, incoherent speech, changes in behavior, and increased volume of speech. They also received

training from Brazen Fox to identify signs of intoxication and attest that they do not serve patrons that are visibly intoxicated.

The bartenders attest that they did not consume any alcohol while working on the night of the incident and were not impaired or under the influence of any alcohol or drugs. They did not serve any alcoholic beverages to any patrons that appeared to be visibly intoxicated or exhibited signs of intoxication. They would refuse to serve any patron that appeared to be visibly intoxicated.

Thus, the defendants established entitlement to judgment as a matter of law dismissing the cause of action for violations of the Dram Shop Act. In opposition, the plaintiffs failed to raise an issue of fact.

The defendants further argue that the assault and battery claims asserted against Harding must be dismissed.

In order to recover damages for assault, a plaintiff must allege intentional physical conduct placing the plaintiff in imminent apprehension of harmful contact (*see Thaw v N. Shore Univ. Hosp.*, 129 AD3d 937, 938 [2d Dept 2015]). "To recover damages for battery, a plaintiff must prove that there was bodily contact, made with intent, and offensive in nature" (*Hines v Westchester County*, 207 AD3d 621, 622 [2d Dept 2022] *quoting Thaw v North Shore Univ. Hosp.*, 129 AD3d 937, 938-939 [2d Dept 2015]). The defendants established that there was no physical contact between Harding and the plaintiff or that Harding exhibited any conduct placing the plaintiff in imminent apprehension of harmful contact. In opposition, the plaintiffs failed to raise a triable issue of fact.

The defendants also move for summary judgment dismissing the loss of consortium claim asserted on behalf of the plaintiff Jackelyn Campolongo. The plaintiffs have not submitted any arguments or evidence in opposition.

II. The Plaintiffs' Motion to Strike the Defendants' Answer

The plaintiffs cross-move to strike the defendants' answer. The plaintiffs argue that Brazen Fox willfully and intentionally allowed videos from 32 cameras in the restaurant to be erased after a demand was issued to preserve the tapes in anticipation of litigation.

The Supreme Court has broad discretion in determining the appropriate sanction for spoliation (*see Biniachvili v Yeshivat Shaare Torah, Inc.*, 120 AD3d 605, 606 [2d Dept 2014]). The imposition of a sanction may be appropriate where a party negligently loses or intentionally destroys key evidence (*see Rokach v Taback*, 148 AD3d 1195, 1196 [2d Dept 2017]; *Neve v City of New York*, 117 AD3d 1006, 1008 [2d Dept 2014]). "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense [internal quotation marks omitted" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015] *quoting Voom*

HD Holdings LLC v Echostar Satellite L.L.C., 93 AD3d 33, 45 [1st Dept 2012]). "In the absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices" (*Sanders v 210 N. 12th St., LLC*, 171 AD3d 966, 968 [2d Dept 2019]).

Here, the plaintiffs' attorney issued correspondence to Brazen Fox, dated October 8, 2019, requesting that it preserve all video footage for a period of 24 hours prior to the incident, including videos of any alcohol consumption by the assailants. Rainsford testified that he did not receive any correspondence from the plaintiffs' attorney.

It is undisputed that Brazen Fox turned over video footage from a camera located on the balcony of the premises which was angled toward the area where the incident occurred. Rainsford states that of the 32 cameras located on Brazen Fox property, this was the only camera angle that captured the incident. Rainsford reviewed the remaining video footage with the White Plains Police Department and determined that there were no other relevant videos to preserve.

The striking of a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct. In order to impose such a sanction, the court will consider "the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness" (*Squillacioti v Independent Group Home Living Program, Inc.*, 167 AD3d 673, 675 [2d Dept 2018]). "When the moving party is still able to establish or defend a case, a less severe sanction is appropriate" (*Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717, 718 [2d Dept 2009]; *Perez v Tedesco*, 214 AD3d 1010, 1012 [2d Dept 2023]).

The Court finds that Brazen Fox had an obligation to preserve the camera footage from the time of the incident. However, the Court finds that the plaintiffs have not been deprived of the ability to establish their case. Although the plaintiffs demanded that Brazen Fox preserve all videos including videos of alcohol consumption by the assailants, there has been absolutely no evidence presented with respect to the identity of the assailants. Therefore, the extreme sanction of striking the defendants' answers is not warranted under the circumstances.

The issue of whether an adverse inference charge is warranted is best determined by the trial judge (*see S.W. v Catskill Regional Med. Ctr.*, 211 AD3d 890, 892 [2d Dept 2022]).

III. Morales' Motion for Summary Judgment

Morales moves for summary judgment dismissing the complaint and the third-party complaint arguing that there is no evidence that he assaulted the plaintiff. Morales also seeks sanctions for frivolous conduct. The plaintiffs affirmatively do not oppose Morales' motion and the defendants/third party plaintiffs have not submitted any opposition to Morales' motion. Therefore, the motion is granted without opposition. However, the Court declines to award sanctions.

CONCLUSION

The court has considered the additional contentions of the parties not specifically addressed herein and finds them to be without merit. Accordingly, it is

ORDERED that the branch of the motion of the defendants DR & RD, Inc. d/b/a Brazen Fox, William P. Harding, and Ruddy Delacruz for summary judgment dismissing the cause of action based upon violations of the Dram Shop Act is GRANTED and that cause of action is DISMISSED (motion seq. 5); and it is further

ORDERED that the branch of the motion of the defendants DR & RD, Inc. d/b/a Brazen Fox, William P. Harding, and Ruddy Delacruz for summary judgment dismissing the assault and battery causes of action against William P. Harding is GRANTED and that cause of action is DISMISSED (motion seq. 5); and it is further

ORDERED that the branch of the motion of the defendants DR & RD, Inc. d/b/a Brazen Fox, William P. Harding, and Ruddy Delacruz for summary judgment dismissing the cause of action for loss of services and consortium on behalf of the plaintiff Jackelyn Campolongo is GRANTED and that cause of action is DISMISSED (motion seq. 5); and it is further

ORDERED that the motion of the defendants DR & RD, Inc. d/b/a Brazen Fox, William P. Harding, and Ruddy Delacruz for summary judgment dismissing the complaint is otherwise DENIED (motion seq. 5); and it is further

ORDERED that the branch of the motion of the defendant/third-party defendant Carlos Morales for summary judgment dismissing the complaint and the third-party complaint is GRANTED and the complaint is DISMISSED insofar as asserted against him and the third-party complaint is DISMISSED in entirety (motion seq. 6); and it is further

ORDERED that the branch of the motion of the defendant/third-party defendant Carlos Morales for sanctions is DENIED (motion seq. 6); and it is further

ORDERED that the branch of the plaintiffs' cross motion for an adverse inference charge is DENIED with leave to renew at the time of trial (motion seq. 7); and it is further

ORDERED that the branch of the plaintiffs' cross motion to strike the defendants' answer is otherwise DENIED (motion seq. 7).

Counsel for all remaining parties are directed to appear for a **Settlement Conference** on **January 25, 2024 at 2:00 P.M.** A TEAMS link will be sent by the part clerk, Brenda Jordan-Williams, prior to the conference.

Dated: White Plains, New York
December 4, 2023

HON. ALEXANDRA D. MURPHY, J.S.C.