

Gines v Scott
2023 NY Slip Op 35171(U)
July 24, 2023
Supreme Court, Queens County
Docket Number: Index No. 711411/2019
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
FRANCISCO GINES,

Plaintiff,

-against-

WALTER L. SCOTT, OTG MANAGEMENT
JFK, LLC, OTG MANAGEMENT NY LLC,
A/K/A OTG MANAGEMENT, LLC and
OTG MANAGEMENT, INC.,Defendants.
-----X

Index No.: 711411/19

Motion Date: 1/3/23

Mot. Seq.: 5



The following papers were read on this motion by plaintiff Francisco Gines for “summary judgment in favor of the plaintiff on the issue of liability” and, the cross-motion by defendants OTG Management JFK, LLC, OTG Management NY LLC, a/k/a OTG Management, LLC and OTG Management, Inc (OTG defendants) for summary judgment.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits	EF 114-134
Answering Affidavits to Mot.-Exhibits.....	EF 137-139
Notice of Cross-Motion-Affidavits-Exhibits.....	EF 140-157
Answering Affidavits to Cross-Mot.-Exhibits.....	EF 159-166
Replying Affidavit to Mot.-Exhibits.....	EF 164-166
Answering Affidavits to Cross-Mot.-Exhibits	EF 167-170
Replying Affidavits to Cross-Mot.....	EF 171-172

Upon the foregoing papers, it is ordered that the motion by plaintiff for summary judgment is granted only as to defendant Walter L. Scott, and is denied as to defendants OTG Management JFK, LLC, OTG Management NY LLC, a/k/a OTG Management, LLC and OTG Management, Inc (OTG defendants). The cross-motion by the OTG defendants is denied in its entirety.

This action arises out of an incident, that occurred on July 6, 2018, at approximately 9:50 p.m., on the jet bridge leading from a JetBlue aircraft to Gate 27, at

John F. Kennedy International Airport (JFK). Plaintiff, a supervisor of airport operations for JetBlue, alleges that he was “physically assaulted, beaten and battered” by defendant Walter L. Scott (Scott). Plaintiff further alleges that the OTG defendants, who operated the restaurants bars and concessions at JFK, served alcohol to a visibly intoxicated Scott, in violation of New York State General Obligation Law Section 11-101 (Dram Shop Act).

In the complaint, the plaintiff alleges that Scott, after becoming visibly intoxicated, “willfully recklessly, and with gross negligence physically injured” him. He also asserts common law negligence claims against the OTG defendants and a statutory claim against the OTG defendants for allegedly serving alcohol to a visibly intoxicated Scott in violation of New York State General Obligations Law Section 11-101 and Alcohol & Beverage Law Section 65. However, in the motion papers, the plaintiff only addresses his claim against Scott and his dram shop claim against the OTG defendants.

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). The party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*Rodriguez v Parkchester South Condominium, Inc.*, 178 AD2d 231 [1st Dept. 1991]). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A party seeking summary judgment may not merely point to gaps in the opponent's proof to obtain relief. Rather, the movant must adduce affirmative evidence of its entitlement to summary judgment (*Torres v Industrial Container*, 305 AD2d 136, 760 [1st Dept. 2003]).

CPLR 3212 (b) states, “[a] motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit.”

On a motion for summary judgment, facts must be viewed "in the light most favorable to the non-moving party" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, [2011]). Summary judgment is a drastic remedy, to be granted only where the moving party has "tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, [1986]) and then only if, upon the moving party's meeting of this burden, the non-moving party fails "to establish the existence of material issues of fact which require a trial of the action" (*Id.*). The moving party's "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Id.*). However, once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Alvarez v Prospect Hospital, supra*).

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST SCOTT

Plaintiff alleges that Scott, "willfully, recklessly, and with gross negligence, physically injured the plaintiff, Francisco Gines". In the affirmation in support, counsel alleges that the plaintiff was "assaulted [and] battered by the [d]efendant, which caused severe, significant personal injuries." Thus, the plaintiff is alleging a claim of assault and battery against Scott.

Plaintiff testified that on the night of the incident, after the flight to Fort Lauderdale which had been delayed for several hours, had "closed" and, the door to the aircraft was locked, he and a co-worker, Anthony Caliendo, were told to go back on board the aircraft and assess a situation involving an intoxicated passenger. Upon entering the aircraft, he spoke to a crew member who told him that the passenger (Scott) was intoxicated and that the captain and crew did not want him on the flight. He told the crew member he would assess the situation.

Plaintiff testified that he was wearing a suit and tie with a lanyard and an ID. As he approached Scott, he observed that Scott's speech was slurred, his face was red and and his breath smelled of alcohol. Plaintiff identified himself, as a supervisor, and asked

Scott to see his boarding pass. Scott was with his wife and two sons. Scott stood up to get the pass from the overhead compartment and gave it to him. At this point, Scott's wife said something to Scott, who told her to be quiet. Plaintiff testified that because of the smell of alcohol, he asked Scott if he had been drinking, but Scott did not respond. After Scott gave him the boarding pass, he told Scott and his wife to remove their items and that Scott had to deplane. Scott was upset, but initially complied.

Plaintiff further testified that as he and Scott stepped off the plane onto the jetway, Scott appeared to stagger. As they were walking up the jetway, according to the plaintiff, Scott began cursing and saying, in effect, "Why am I coming off this plane?", to which Gines replied, in sum and substance, that they could not discuss it on the plane, but that they could discuss it "at the podium". During this walk, Scott was allegedly saying: "Why the f***k are we getting off this plane?"; Who the f*** are you?."

Plaintiff further testified that "upon getting to top of the jet bridge," Scott began to curse and scream. He claims he unsuccessfully tried to get Scott to calm down, and suggested they discuss the situation at the podium. Scott allegedly "kept yelling and screaming." At this point, Jennifer Scott said to her husband "Come on, let's just go. Let's go up to the podium and just discuss what we're going to do next." Plaintiff testified that, after he turned around and began walking toward the podium, Scott "punched me in the back of my head." Plaintiff then turned around and Scott hit him in the face and then put him in a headlock.

At this point, Caliendo arrived and separated the two men. According to the plaintiff, Scott then "proceeded to punch Anthony in the face." Scott then hit the plaintiff two more times. By now, the Port Authority Police and corporate security had arrived.

Anthony Caliendo testified that he was requested to respond to Gate 27, due to an altercation that had occurred on the aircraft. When he arrived at the aircraft, he observed Gines escorting Scott off of the plane. It appeared that Scott was intoxicated at the time, since he was bumping into the airline seats as he was walking down the aisle, being escorted off the plane. Caliendo further testified that when he, Gines and Scott arrived at a round area on the jet bridge, he heard screaming, at which point he looked back and observed Scott, kneeling on Gines and head locking him, while he (Gines) was on the ground.

Defendant Scott testified that he was scheduled to fly to Fort Lauderdale from JFK on the day of the incident. The flight was originally scheduled to leave at approximately 4:50 p.m. He estimated that he arrived at JFK, between approximately 2:00 p.m. and 2:30 p.m. The flight had been delayed a few times prior to the incident. He and his family were in the gate area for “a couple of hours”, at which point he went to a kiosk bar. He ordered alcohol from the kiosk bar and testified that he ordered other alcoholic beverages at another bar within the terminal. He did not recall how many drinks he ordered at the kiosk bar, but it was at least more than one beer. When asked, if it was more than five drinks, he responded: “It could’ve been. I was there for a couple of hours”.

When asked if he was intoxicated prior to getting on the airplane, he testified that he was “[p]robably legally I wouldn't be able to drive a car but I wasn't driving a car.” Scott estimated that, from approximately 5:30 p.m. until approximately 9:30 p.m., when the plane was about to depart, he consumed approximately six beers. He had his last beer, a Corona, at a bar called “The Loft,” 20 to 25 minutes before boarding the plane, 40 to 45 minutes before the incident.

After boarding the plane, there was an argument between himself and a female passenger behind him, after he accidentally reclined his seat backward “into her space” and, she became angry and complained to flight personnel. A man approached him and repeatedly said: “You have to get off the plane.” He got his bags and walked down the portable walkway toward the terminal.” His family was behind him. He and the man from the plane were shoulder to shoulder. When they got to the end of the walkway, he said: “I'm not taking another f*****g step anywhere till I know what's going on.”

At this point the man moved toward him and Scott testified that he moved back and hit his own head against a “mobile corridor.” At this point the record becomes unclear, but it appears that Scott testified that the man’s palm went toward his (Scott’s) chest. “As his arm was coming towards me and I hit the thing I came back and I hit him.”

He further testified:

Q. Okay. When you say you hit him, does that mean you punched him with your right hand?

A. I -- probably -- yeah, yes.

Q. Are you a righty or a lefty?

A. I'm a righty.

Q. And where did you punch him?

A. I am not sure. Either in his chest or chin area. As I said, I was going down at the same time. Like, there was --it wasn't just a stand face to face hit. It was -- there was things going on.

Q. So getting back to that day. The gentleman reaching out with his hand, you go back, you hit your head, you then punch him. What occurs next?

A. We both go down to the ground and then I -- we were still going back and forth with each other and then another gentleman comes over and kicked me in the side.

Q. When you were down on the ground with the gentleman what was going on?

A. We were fighting.

Q. And I apologize if you said this. How did you get down to the ground, did he pull you down, did you fall down?

A. I think we just fell down.

Q. Did you fall down immediately after you landed your punch or at some other time?

A. No. It was -- I think that was in that -- like, I came back and then I went towards him and then that's when I hit him and we both went down.

Q. So immediately after landing your punch you both went down to the ground, correct?

A. Yes.

Q. So, you said while you're down on the ground you're fighting. What does that mean?

A. We were grabbing each other and punching each other.

Q. How many punches did you throw while you were on the ground?

A. I don't know.

The Court file reflects that, on July 27, 2018, defendant Scott appeared in Supreme Court, Queens County, before Judge Jeffrey Gerushuny in AP 1. At that time, by counsel, Mr. Scott acknowledged having an alcohol problem and that he would be going into

treatment. A conditional plea arrangement was agreed to whereby Scott would plead guilty to two counts of assault in the third degree, a class A misdemeanor, and disorderly conduct, a violation. If he stayed out of trouble and completed a 12 week alcohol treatment program, the assault charge would be expunged from his record.

According to the transcript, the following transpired at the hearing:

THE COURT: Do you admit on July 6, 2018 at 10:05 p.m., Terminal 5, JFK Kennedy Airport, County of Queens, State of New York with intent to cause physical injury to another person, did you cause such injury to that person in that you punched the complainant Anthony Caliendo (phonetic) Francis Gines (phonetic) multiple times in the face and body. Specifically, to Anthony Caliendo, causing lacerations to his forehead, left forearm, substantial pain, annoyance and alarm. And with respect to Francisco Gines, you caused bruising and swelling to the right eye, left eye, upper lip causing substantial pain, annoyance and alarm. Is that true?

THE DEFENDANT: Yes.

To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact. (*Bastein v. Sotto*, 299 AD3d 432, 433 [2d Dept. 2002]. To recover damages for battery, a plaintiff must prove that there was bodily contact, that the contact was offensive, and that the defendant intended to make the contact without the plaintiff's consent (*Id*; see *Holtz v Wildenstein & Co.*, 261 AD2d 336 [1st Dept. 1999]; *Roe v Barad*, 230 AD2d 839 [2d Dept. 1996])

Here, through the submission of his own examination before trial (EBT) testimony, the EBT testimony of Anthony Caliendo, the EBT testimony of Scott and the minutes of Scott's plea allocution, plaintiff Francisco Gines has established a *prima facie* entitlement to judgment as a matter of law as to the claim of assault and battery against defendant Walter L. Scott.

In opposition, Scott fails to come forward with admissible evidence to raise a

triable issue of fact. The fact that Scott's guilty plea to assault in the third degree was expunged from his criminal record, because he complied with the terms of the plea agreement, is not dispositive as Scott has admitted to the elements of assault and battery in his EBT testimony and plea allocution.

Thus, plaintiff's motion for summary judgment on his claim for assault and battery against Scott is granted.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST THE OTG DEFENDANTS ON THE DRAM SHOP CLAIM

For a plaintiff to succeed on a summary judgment motion on a claim brought pursuant to the Dram Shop Act, the plaintiff must demonstrate that defendant provided alcohol to a person who was visibly intoxicated and that the service of alcohol had at least some reasonable connection to the resulting damages (*Lorenzo v Great Performances/Artists as Waitresses, Inc.*, 211 AD3d 640 [1st Dept. 2022]; *see also Catania v 124 In-To-Go, Corp.*, 287 AD2d 476 [2d Dept 2001], lv dismissed 97 NY2d 699 [2002]).

Plaintiff proffers absolutely no evidence as to whether Scott was visibly intoxicated when he purchased his last beer, approximately 40 to 45 minutes before the incident. Since the plaintiff has not met his burden of proof on the issue, his motion for summary judgment against the OTG defendants on his Dram Shop Act claim is denied.

THE CROSS MOTION FOR SUMMARY JUDGMENT BY THE OTG DEFENDANTS

The OTG defendants cross move for summary judgment dismissing plaintiff's Dram Shop Act claim, his common law negligence claims, and Scott's cross-claims.

In regards to the Dram Shop claim, significantly, the OTG defendants do not submit the affidavits of any bartenders or servers at the kiosks at JFK, denying that Scott was visibly intoxicated when he purchased his last beer before boarding the flight. Where a defendant moves for summary judgment on a Dram Shop Act claim, the defendant must first negate the possibility that alcohol was unlawfully served to a visibly intoxicated person

(see *McGovern v. 4299 Katonah Inc.*, 5 AD3d 239 [1st Dept. 2004]; *Costa v. 1648 Second Ave. Restaurant*, 221 AD2d 299 [1st Dept. 1999]; *MacDougall v Kelsch*, 161 AD2d 886 [3d Dept. 1990]. For a defendant to establish its *prima facie* entitlement to judgment as a matter of law dismissing a cause of action under the Dram Shop Act, it is required to establish either that it did not serve alcohol to the person while he or she was visibly intoxicated or that its sale of alcohol to him or her had no reasonable or practical connection to the resulting damages (see *Flynn v Bulldogs Run Corp.*, 171 AD3d 1136 [2d Dept. 2019]; *Trigoso v Correa*, 150 AD3d 1041 [2d Dept. 2017]).

The only evidence offered by the OTG defendants is the affidavit of Dr. John Brick, an expert in forensic psychopharmacology, who opines that Scott could not have displayed signs of visible intoxication while at the kiosk bar. However, even assuming, *arguendo*, that the opinion of the expert establishes a *prima facie* entitlement to summary judgment, it is contradicted by the testimony of the plaintiff that: he smelled alcohol on Scott's breath approximately 45 minutes after he consumed his last beer; Scott's face was red and his speech was slurred; Scott was belligerent and staggering; the testimony of Anthony Caliendo that Scott was bumping into the airline seats as he was being escorted off the plane; and, finally, Scott's own admissions that he was intoxicated enough that he could not legally operate a car, and that he was belligerent: "I'm not taking another f*****g step anywhere till I know what's going on."

Viewing the evidence in a light most favorable to the plaintiff, this is sufficient to raise a triable issue of fact as to whether Scott was served alcohol by the OTG defendants while he was visibly intoxicated (see *Carver v P.J. Carney's*, 103 AD3d 447 [1st Dept.]; *McGovern v 4299 Katonah Inc.*, 5 AD3d 239 [1st Dept. 2004]). Thus, the cross-motion for summary judgment dismissing plaintiff's dram shop claim is denied.

The branch of the motion by the OTG defendants to dismiss plaintiff's common law claims is also denied as the OTG defendants have not submitted any affidavits or deposition testimony from any employees or anyone with knowledge of the operations of the kiosks to demonstrate their entitlement to summary judgment. This part of the motion is supported only by an attorney affirmation, which has no evidentiary value. Since the OTG defendants have failed to meet their initial burden, it is not necessary to review the sufficiency of the opposing papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Thus, the cross-motion for summary judgment to dismiss plaintiff's common law claims against the OTG defendants is denied.

Finally, the branch of the cross-motion to dismiss Scott's cross-claims is also denied. It is well settled that an intoxicated person who might be answerable in damages for injuring a member of the public can seek contribution from the seller of the alcohol based upon an alleged violation of the Dram Shop Act because the intoxicated person and the seller are "subject to liability for damages for the same personal injury" (*O'Gara v Alacci*, 67 AD3d 54, 58 [2d Dept. 2009]; CPLR 1401; *see also Smith v Guli*, 106 AD2d 120, 122 [4th Dept. 1985]; *Herrick v Second Cuthouse*, 100 AD2d 952 [2d Dept. 1984], *affd* 64 NY2d 692 [1984].

Accordingly, it is

ORDERED that plaintiff's summary judgment motion is granted in part and denied in part; in that: it is

ORDERED that the summary judgment is granted solely as to plaintiff's claim against Walter L. Scott; and it is further

ORDERED that summary judgment is denied as to plaintiff's claims against defendants OTG Management JFK, LLC, OTG Management NY LLC, a/k/a OTG Management, LLC and OTG Management, Inc. (the OTG defendants); and it is further,

ORDERED that the cross-motion for summary judgment by the OTG defendants is denied; and it is further

ORDERED that the branch of the cross-motion to dismiss Scott's cross-claims is also denied; and it is further

ORDERED that any arguments or requests for relief not addressed herein have been considered by the Court and are denied.

Dated: July 24, 2023



A handwritten signature in black ink, appearing to read "T. Dufficy".

TIMOTHY J. DUFFICY, J.S.C.