

Kehoe v Aiello

2024 NY Slip Op 34824(U)

September 4, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 609250/2021

Judge: Christopher Modelewski

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SHORT FORM ORDER

INDEX No. 609250/2021
CAL. No. 202301686OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

HON. CHRISTOPHER MODELEWSKI
Justice of the Supreme Court

MOTION DATE 03/18/2024 (001)
MOTION DATE 03/28/2024 (002)
ADJ. DATE 05/13/2024
Mot. Seq. # 001-MG
Mot. Seq. # 002-MD

-----X
BRENDAN KEHOE,

Plaintiff,

- against -

JON J. AIELLO, JOY MARIE AIELLO,
MATTHEW YABLON and KOREY WEEKS,

Defendants.
-----X

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion and supporting papers by defendants Jon J. Aiello and Joy Marie Aiello, filed February 14, 2024; Notice of Motion and supporting papers by defendant Korey Weeks, filed February 29, 2024; Answering Affidavits and supporting papers by defendants Jon. J. Aiello and Joy Marie Aiello, filed March 5, 2024; Answering Affidavits and supporting papers by defendant Korey Weeks, filed March 11, 2024; Replying Affidavits and supporting papers by defendant Jon J. Aiello and Joy Marie Aiello, filed March 15, 2024; Answering Affidavits and supporting papers by plaintiff Brendan Kehoe, filed May 3, 2024; Answering Affidavits and supporting papers by defendant Matthew Yablon, filed May 6, 2024; Replying Affidavits and supporting papers by defendant Jon J. Aiello and Joy Marie Aiello, filed May 9, 2024; it is

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ORDERED that these motions are consolidated for purposes of a determination herein; and it is further

ORDERED that the motion by defendants Jon J. Aiello and Joy Marie Aiello for summary judgment dismissing the complaint and all cross-claims against them is granted; and it is further

ORDERED that the motion by defendant Korey Weeks for summary judgment dismissing the complaint and all cross-claims against him is denied, as academic.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on July 4, 2020, when he was allegedly assaulted by defendants Matthew Yablon and Korey Weeks while at a Fourth of July party located at the premises owned by defendants Jon J. Aiello and Joy Marie Aiello (“the Aiello defendants”), located at 39 Glenview Avenue in Northport, New York. Plaintiff asserts causes of action for negligence and reckless disregard for his safety against the Aiello defendants. Plaintiff also asserts causes of action for assault and battery and intentional infliction of emotional distress against defendants Matthew Yablon (“Yablon”) and Korey Weeks (“Weeks”).

The Aiello defendants now move for summary judgment dismissing the complaint and all cross-claims against them, arguing, among other things, that they are not responsible for the tortious acts of third parties, and that they were unaware of the need to control plaintiff’s assailant. They further argue that plaintiff’s claims pursuant to General Obligations Law § 11-100, Penal Code § 260.20 (2), and Suffolk County Code § 294-8 must be dismissed. In support of their motion, the Aiello defendants submit, among other things, the pleadings, the parties’ deposition transcripts, and the deposition transcript of nonparty witness Ryan Weinstein. In opposition, plaintiff argues that there are numerous questions of fact, including whether it was foreseeable that someone would become intoxicated and cause injury to a third party, whether the Aiello defendants had the opportunity to control Yablon and nonparty Brian Minouge’s actions, whether they were negligent in the manner in which they supervised the party, and whether they acted with reckless disregard for plaintiff’s safety. Plaintiff also argues that there are issues of fact as to whether the Aiello defendants violated General Obligations Law § 11-100. Plaintiff notes that he has not pled a separate cause of action premised upon New York State Penal Code § 260.20 (2) or Suffolk County Code § 294-8. In support of his opposition, plaintiff relies on the exhibits submitted by the Aiello defendants, as well as the deposition transcripts of nonparty witnesses Rosina (Rosie) Aiello and Gianna Aiello, photographs, and the affidavit of nonparty witness Michael Trumbull.

To establish prima facie entitlement to judgment as a matter of law, a movant must come forward with evidentiary proof, in admissible form, demonstrating the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 48 NYS2d 316 [1985]). If such a showing is made, the burden shifts to the party opposing the motion for summary judgment, who must proffer evidence in admissible form sufficient to establish the existence of any material issue of fact which requires a trial (*Alvarez v*

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Prospect Hosp., 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

It is well-settled that a landowner has a duty to maintain his or her property in a reasonably safe condition (*Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]). Landowners “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” (*D’Amico v Christie*, 71 NY2d 76, 85, 524 NYS2d 1, 5 [1987]; see *Colon v Pohl*, 121 AD3d 933, 995 NYS2d 139 [2d Dept 2014]; *Crowningshield v Proctor*, 31 AD3d 1001, 820 NYS2d 330 [2d Dept 2006]). While a landowner may have responsibility for injuries caused by an intoxicated guest, “liability may be imposed only for injuries that occurred on defendant’s property . . . where defendant had the opportunity to supervise the intoxicated guest” (*D’Amico v Christie*, 71 NY2d at 85, 524 NYS2d at 5; see *Heyman v Harooni*, 132 AD3d 950, 18 NYS3d 699 [2d Dept 2015]). A landowner’s duty emanates “not from the provision of alcohol but from the obligation of a landowner to keep its premises free of known dangerous conditions, which may include intoxicated guests” (*D’Amico v Christie*, 71 NY2d at 85, 524 NYS2d at 5). To trigger the reckless disregard exception set forth in CPLR 1602 (7), “a plaintiff must prove, by a preponderance of the evidence, the intentional commission ‘of an act of an unreasonable character in disregard of a known or obvious risk so great as to make it highly probably that harm would follow, and done with conscious indifference to the outcome’” (*Towers v Hoag*, 40 AD3d 244, 245, 833 NYS2d 388, 389 [1st Dept 2007]; see *Szczerbiak v Pilat*, 90 NY2d 553, 664 NYS2d 252 [1997]).

General Obligations Law § 11-100 states that any person who is injured “by reason of the intoxication . . . of any person under the age of twenty-one years . . . shall have a right of action to recover damages against any person who knowingly causes such intoxication . . . by unlawfully furnishing to or unlawfully assisting in procuring alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of twenty-one years” (see *Rust v Reyer*, 91 NY2d 355, 670 NYS2d 822 [1998]). Notably, the law requires a showing that the very minor to whom the intoxicant was sold or furnished became intoxicated and in his or her intoxicated state injured a third party (see *Sherman v Robinson*, 80 NY2d 483, 591 NYS2d 974 [1992]; *Dodge v Victory Markets Inc.*, 199 AD2d 917, 606 NYS2d 345 [3d Dept 1993]).

The Aiello defendants established their prima facie entitlement to judgment as a matter of law dismissing the claim of common-law negligence (see *Virella v 245 N. St. Hous. Dev. Fund Corp.*, 188 AD3d 1618, 136 NYS3d 598 [4th Dept 2020]; *Nelson v Neng*, 297 AD2d 313, 746 NYS2d 177 [2d Dept 2002]; *Guercia v Carter*, 274 AD2d 553, 712 NYS2d 143 [2d Dept 2000]). Plaintiff testified that he was at the party at the Aiello defendants’ residence on July 4, 2020, that he consumed alcohol before the party, and that he brought alcohol with him to the Aiello’s residence. Plaintiff testified that he was at the party for “about an hour” and that it was peaceful during that time. He further testified that the majority of the people at the party were around 18 to 20 years old. Plaintiff testified that he was in the backyard when he heard yelling, that a few minutes later he went to the driveway, and that he remembered getting hit four times. He testified that he did not see the person who struck him.

Joy Aiello testified that she was not aware that plaintiff and Yablon were at the party until after the incident. She testified that just before the incident, she was on the deck with Jon Aiello, Weeks, and

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her youngest daughter, Barbara, and that Barbara notified her father that she thought a fight was occurring. She stated that “Korey and [Jon Aiello] ran down to the scene” while she turned off the barbeque. She testified that when she arrived at the driveway she saw her husband “pushing a kid trying to get him out,” and that she believed that person was Yablon. She further testified that no one appeared to be intoxicated at the party. Jon Aiello testified that he was barbequing on the deck during the party, when his daughter notified him there was a fight occurring in the driveway, and that he did not hear any raised voices before that time. He testified that he quickly went down to the driveway, and that he assumed there had been a “scuffle” but he did not witness it. He further testified that he was not aware Yablon was at the party until he walked down to the driveway. He testified that the incident occurred “[n]ot long” after Yablon arrived, and that “[Yablon] walked onto the property and the altercation started pretty quick.” He further testified that he learned after the fact that Yablon struck plaintiff.

Matthew Yablon testified that he did not consume any alcohol on July 4, 2020, and that he “didn’t drink at all for months leading up to [that date].” He testified that when he arrived at the Aiello’s residence, he walked down the driveway, and as soon as he got to the backyard, he saw his friend, Andrew Tripp. He testified that once he saw Mr. Tripp, he “said hi to him and then [Andrew Tripp] started walking to the driveway and [he] went to go follow him.” Yablon testified that about three minutes passed from the time he arrived to the time when he saw Mr. Tripp, that he was in the backyard for “[t]wo minutes,” and that the incident occurred as he was leaving and walking back up the driveway. He testified that Jon Aiello arrived on the driveway after the fight had “fizzled out.” He also testified that approximately “30 seconds, 45 seconds” passed from when a group of partygoers began cursing at him to when the fight became physical.

Weeks testified that he saw Yablon drinking earlier in the day on July 4, 2020, but, when asked whether he was acting in a manner that led him to believe he was intoxicated, he answered, “No, not sure.” Weeks testified that Yablon “is a fighter” and “is very aggressive,” and that he did not inform the Aiello defendants of such behavior prior to July 4, 2020. Nonparty Ryan Weinstein testified that Yablon was not drinking on July 4, 2020, and that he relied on Yablon to be his designated driver on July 4, 2020, because he knew that he was not consuming alcohol. He testified that once he arrived at the Aiello defendants’ residence with Yablon, he walked into the backyard, and that, “[o]nce I reached the backyard, I heard elevated volume behind me, and then as I turned, I saw what I believe to be Matt surrounded by a sea of kids.”

Through the deposition testimony submitted, the Aiello defendants established a prima facie case that they had neither the opportunity nor the ability to control the conduct of plaintiff’s assailant, nor the awareness of the need to do so, as the alleged incident occurred suddenly and unexpectedly shortly after Yablon arrived, and that they were not aware Yablon was at their home (*see D’Amico v Christie*, 71 NY2d 76, 524 NYS2d 1; *Salgado v Paccio*, 150 AD3d 1293, 52 NYS3d 85 [2d Dept 2017]; *Daly v Finley*, 101 AD3d 931, 957 NYS2d 224 [2d Dept 2012]; *Afanador v Coney Bath, LLC*, 91 AD3d 683, 936 NYS2d 312 [2d Dept 2012]; *Nelson v Neng*, 297 AD2d 313, 746 NYS2d 177). Additionally, both Ryan Weinstein and Yablon testified that Yablon had not consumed any alcohol on the date of the incident, and, while Weeks testified that he saw Yablon consume alcohol at a different location earlier in the day, he also indicated Yablon did not appear to be intoxicated (*see Nelson v Neng*, 297 AD2d 313, 746 NYS2d 177). Defendants also have established their entitlement to judgment as a

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matter of law dismissing the reckless disregard cause of action, as there is no evidence that the Aiello defendants' actions arose to the level of "conscious or intentional doing of an act of unreasonable character in disregard of a known or obvious risk . . . done with conscious indifference to the outcome" (*Szczerbiak v Pilat*, 90 NY2d 553, 557, 664 NYS2d 252, 255). Additionally, the Aiello defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action pursuant to General Obligations Law § 11-100, by demonstrating that they did not furnish alcohol to a minor under the age of 21 who then caused injury to a third party (*see Holiday v Poffenbarger*, 110 AD3d 841, 973 NYS2d 276 [2d Dept 2013]; *Cannon v Giordano*, 93 AD3d 1329, 941 NYS2d 420 [4th Dept 2012]).

Plaintiff failed to raise a triable issue of fact in opposition (*see Colon v Pohl*, 121 AD3d 933, 995 NYS2d 139 [2d Dept 2014]; *Nelson v Neng*, 297 AD2d 313, 746 NYS2d 177). Plaintiff submits Rosie Aiello's and Gianna Aiello's deposition testimony, both of whom testified that Yablon struck plaintiff. Rosie Aiello also testified that when Yablon arrived at the party, he "looked very upset" and told her he was going to hurt someone. She testified that she told Yablon that he had to leave and could not be at the house, and that he complied and began following her out down the driveway. She testified that Yablon then saw nonparty Brian Minouge "urinating in [their] bushes," at which point Yablon confronted Minouge, telling him that he was being disrespectful. She testified that Yablon and Minouge began to curse at one another and "started to get in each other's faces" while she tried to separate them; that, after arguing back and forth, "Matt Yablon crossed over the gate again and he started to throw punches"; and that "Brendan Kehoe got struck in the face by Matt Yablon's hand." She characterized the incident as having happened very quickly.

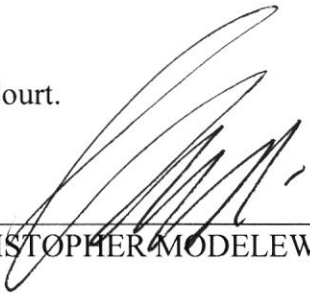
While there was testimony from multiple witnesses that underage individuals were drinking at the party, plaintiff failed to adduce any evidence in admissible form that Yablon was intoxicated (*see Nelson v Neng*, 297 AD2d 313, 746 NYS2d 177; *Aminov v East 50th Street Restaurant Corp.*, 232 AD2d 592, 649 NYS2d 452 [2d Dept 1996]). Moreover, as Yablon was over the age of 21 at the time of the alleged incident, General Obligations Law § 11-100 is not applicable (*see Holiday v Poffenbarger*, 110 AD3d 841, 973 NYS2d 276). Plaintiff contends that the fight was instigated by nonparty Minouge, who was 19 years old at the time of the incident, and that Minouge was at the party for at least one hour before the incident occurred. However, there is no evidence that Minouge was the individual who struck plaintiff, and plaintiff submitted Rosie Aiello's and Gianna Aiello's deposition testimony, wherein each stated that Yablon struck plaintiff. Moreover, multiple parties, including Rosie Aiello, testified that the incident happened very shortly after Yablon arrived at the Aiello's residence; thus, the Aiello defendants did not have the opportunity to supervise him, nor did plaintiff establish that the Aiello defendants were aware of the need for such control (*see D'Amico v Christie*, 71 NY2d 76, 85, 524 NYS2d 1; *Crowningshield v Proctor*, 31 AD3d 1001, 820 NYS2d 330). Accordingly, the Aiello defendants' motion for summary judgment dismissing the complaint and cross-claims asserted against them is granted.

Korey Weeks also moves for summary judgment dismissing the complaint and cross-claims against him. However, on June 14, 2024, a stipulation discontinuing all claims and cross-claims against Weeks, dated May 11, 2024, and signed by counsel for all parties, was filed with the court. Accordingly, Weeks's motion is denied as moot.

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The foregoing constitutes the decision and Order of the Court.

Dated: September 4, 2024



HON. CHRISTOPHER MODELEWSKI, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION