

Toal v DJB Tap Inc.

2024 NY Slip Op 34874(U)

July 16, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 617776/2021

Judge: Joseph C. Pastorella

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SHORT FORM ORDER

INDEX No. 617776/2021
CAL. No. 202301461OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 003 MG
Mot. Seq. # 004 MD
Mot. Seq. # 005 MD

-----X
STEVEN TOAL,

Plaintiff,

GRUENBERG KELLY DELLA
Attorney for Plaintiff
700 Koehler Avenue
Ronkonkoma, New York 11779

- against -

SMITH MAZURE, P.C.
Attorney for Defendant DJB Tap Inc.
39 Broadway, 29th Floor
New York, New York 10006-3053

DJB TAP INC. d/b/a THE TAP ROOM and PR
SECURITY CONSULTING INC.,

Defendants.
-----X

LINDSAY P. HENRY ATTORNEY AT LAW
P.C.
Attorney for Defendant PR Security Consulting,
Inc.
57 West Main Street, Suite 200
Babylon, New York 11702

Upon the following e-filed papers read on these motions for summary judgment, partial summary judgment, and sanctions: Notice of Motion and supporting papers by defendant DJB Tap Inc., dated November 27, 2023; Notice of Motion and supporting papers by plaintiff, dated January 26, 2024; Notice of Motion and supporting papers by plaintiff, dated March 1, 2024; Answering Affidavits and supporting papers by plaintiff, dated March 1, 2024; Answering Affidavits and supporting papers by defendant DJB Tap Inc., dated March 4, 2024; Replying Affidavits and supporting papers by plaintiff, dated March 12, 2024; Replying Affidavits and supporting papers by plaintiff, dated March 12, 2024; it is

ORDERED that the motion by defendant DJB Tap Inc., for summary judgment dismissing the complaint and cross claims against it is granted; and it is further

ORDERED that the motion by plaintiff for partial summary judgment against defendant DJB Tap Inc., on the issue of liability, is denied; and it is further

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ORDERED that the cross motion by plaintiff for an order, inter alia, imposing sanctions on defendant DJB Tap Inc., and its counsel, is denied.

This action was commenced by plaintiff Steven Toal to recover damages for personal injuries allegedly sustained on June 11, 2021, when, while a patron of The Tap Room, located at 114 West Main Street, Patchogue, New York, he became involved in an altercation with another patron. It is undisputed that nonparty 114 Main LLC owns the subject premises, that defendant DJB Tap Inc., d/b/a The Tap Room (DJB), owned and operated the bar/restaurant at the subject premises, and that defendant PR Security Consulting Inc. (PR) was hired by DJB to provide security services thereat. By his bill of particulars, plaintiff asserts claims sounding in negligent hiring, negligent training, negligent supervision, and inadequate security. DJB asserts cross claims against PR for contribution, indemnification, and failure to procure insurance. PR asserts cross claims against DJB for contribution and indemnification.

DJB now moves for summary judgment in its favor, arguing “the entire incident happened quickly and that no security intervention was possible, or would have made any difference.” In support of its motion, DJB submits, among other things, transcripts of the parties’ deposition testimony, an hour-long video recording of the alleged incident, photographs of the incident location, a copy of an independent medical examination conducted by Dr. Elliot B. Duboys, a copy of a security contract between DJB and PR, copies of TIPS training certificates, and affidavits of Ray Cruz and Daniel Kennedy.

Plaintiff also moves for partial summary judgment in his favor, arguing that “there can be no dispute that the defendant Tap Room failed to follow the recommendations of its security company, failed to comply with industry standards requiring that at least two security guards be posted on any floor with a bar serving alcohol, failed to properly locate the security guard by the DJ booth, and utterly failed in its duty to provide reasonable security for the benefit of its patrons, and the plaintiff in particular, which resulted in a catastrophic failure to intervene in a prolonged and easily preventable altercation.” In support of his motion, plaintiff submits, among other things, transcripts of the parties’ deposition testimony, the video recording of the alleged incident, a copy of a security contract between DJB and PR, and an affidavit of nonparty David White.

In a second motion, plaintiff’s counsel seeks sanctions against DJB and its counsel, alleging various instances of frivolity, suborning perjury, and spoliation. In support of that motion, plaintiff submits, among other things, transcripts of the parties’ deposition testimony, the video recording of the alleged incident, a copy of a security contract between DJB and PR, an affidavit of nonparty David White, and a copy of a preservation letter.

Plaintiff testified that on the date in question, he and his girlfriend, Lauren Dioguardi, arrived in Patchogue at approximately 9:30 p.m., then ate dinner at a restaurant across the street from The Tap Room. He indicated that he consumed one margarita with dinner, then, at approximately 11:30 p.m., he and Lauren left the restaurant and walked to The Tap Room. Plaintiff stated that The Tap Room is a two-story bar/restaurant, which he has visited on more than 10 prior occasions. Upon entry into The Tap Room, plaintiff observed that its downstairs level was crowded, and decided that he and Lauren would

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get their drinks the upstairs bar. He testified that The Tap Room's second-floor area "was crowded as well," but that they were able to buy drinks at the bar, then find seats at a table. Plaintiff stated that approximately 10 minutes later, when he and his girlfriend had finished, or nearly finished, their first alcoholic beverages, they returned to the bar to obtain a second drink. After doing so, they decided to abandon their seats at the table and remain at the bar. Plaintiff explained that there was only a single unoccupied seat at the bar, which Lauren occupied, while he remained standing. He testified that a number of nearby patrons "were a little belligerent," so he walked over to a different portion of the bar, attempting to find two open seats away from them. Plaintiff stated that after he walked away from Lauren, he turned back and saw Lauren "being . . . bothered by that guy," whom he later identified as Anthony Esposito. He indicated that he walked back to Lauren's location and asked the "[v]ery" intoxicated Mr. Esposito, whose speech was slurred and excessively loud, what his problem was. Thereafter, they exchanged words, culminating in Mr. Esposito seeking to shake plaintiff's hand. Following plaintiff's refusal to shake Mr. Esposito's hand, Mr. Esposito became aggravated. Plaintiff explained that in order to shield Lauren from additional harassment by Mr. Esposito, he placed his body between them at the bar. He indicated that Mr. Esposito became more aggressive as time passed, eventually "getting in [his] face," and pushing him twice.

Plaintiff testified that he then began fighting with Mr. Esposito, punching him at least once in the face, but does not believe Mr. Esposito landed any punches himself. He stated that the fight lasted for approximately 20 or 30 seconds before being broken up, and that when he rose to his feet he "felt liquid on [his] back." Plaintiff described thinking that a drink had been poured on him during the altercation, but then saw blood seeping from an approximately three-inch "gash" "towards the back of [his] head and [his] neck." Asked if he had been struck by any objects or weapons, other than fists, during the altercation, he replied that he does not know, but also stated that "there was glass in [his] neck." Asked the color of the glass that was eventually removed from his neck by medical professionals, he stated that it was "clear." Plaintiff testified that during the altercation, a man behind him attempted to break up the fight by placing him in a headlock, and that they "all fell together" to the floor. He stated that his head, arms, and legs all struck the floor during the fall. Asked if he knows how he sustained the laceration to his neck, plaintiff replied, "I do not."

Questioned regarding Mr. Esposito's alcohol consumption prior to their altercation, plaintiff indicated that he "did not watch or count how many drinks he had," but that he "had drinks in front of him." Plaintiff also stated that he did not lodge any complaints about Mr. Esposito's behavior prior to the incident. Asked if anyone overheard his conversation with Mr. Esposito, he replied that he "would assume whoever was next to us." Plaintiff recalled that one of the bartenders on duty at the subject bar was named Michelle, which he knew from having worked with her several years earlier at a TGI Friday's restaurant in Farmingville. He stated that he believes two security guards were present in The Tap Room on the subject evening, one at the door, and one that he encountered after the altercation ended. Asked why he did not request help from security or the bartender prior to the fight starting, given his testimony that he believed The Tap Room had a duty to supervise and ensure his safety, he replied, "I didn't expect to get into an altercation with the guy."

Michelle Moser testified that she has been employed as a bartender at The Tap Room since 2019, and that she was working its upstairs bar on the night in question. She stated that in addition to her

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duties involving serving food and drinks to customers, she also has a responsibility to ensure that The Tap Room's customers "are not overserved" alcohol. As to her training, she indicated that she was required by The Tap Room to take various online and in-person courses, including "eTIPS." Ms. Moser recalled that on the subject evening, three of the four cash registers at the upstairs bar were being used, and that her cash drawer was located at the opposite end of the bar from plaintiff was standing. Ms. Moser testified that bartender Joe Klarich's cash drawer was located closest to plaintiff. Nevertheless, she recalled serving Mr. Esposito only a single "Old Fashioned" mixed drink that evening, as evidenced by a credit card receipt she was able to locate, but acknowledged that he may have obtained additional beverages elsewhere. Nevertheless, Ms. Moser stated that Mr. Esposito did not appear intoxicated at the time she served him his drink.

Regarding the moments leading up to the subject incident, Ms. Moser testified that she observed, from approximately 25 feet away, Mr. Esposito and plaintiff having a "conversation," but not arguing, for "[l]ess than five minutes," and possibly less than two minutes, before the fight occurred. Asked if she brought such information to anyone's attention, she stated that she did not, because the two men were not yelling or screaming, the disagreement "didn't look like it was going to go anywhere," and the fight "happened very quickly." She further noted that the "situation happened so quickly that [she does not] think anybody really realized it was a situation until it was already over." Ms. Moser stated that there are "always two," and possibly three, security guards on the second floor, and that if she needed their assistance, she would use a flashlight to get their attention. However, she denied knowledge of the number of security personnel present on the first floor, because she "wasn't down there." Ms. Moser indicated that she has an independent recollection that, on the night in question, security guards were usually positioned at the top of the stairs leading to the first floor, as well as "by the DJ booth." Shown portions of the surveillance camera footage from the subject evening, she was able to identify a security guard standing "in the corner" at "the top of the stairs." Then, when shown that portion of the video depicting the violence between Mr. Esposito and plaintiff, Ms. Moser conceded that no security guard rushed from the area of the DJ booth to render aid in the approximately 45 seconds from when plaintiff is first pushed and when the altercation concludes.

James Bonanno testified that he and David Johnson are co-owners of nonparty 114 Main LLC, which owns the subject premises, as well as DJB, which operates five Tap Room locations throughout Nassau and Suffolk counties. He indicated, in relevant part, that the Patchogue location of The Tap Room has two floors of roughly the same square footage, and that the maximum capacity of its upper floor is 75 people. Mr. Bonanno stated that DJB regulates the number of patrons in the establishment through the use of a counting device employed by the security guard stationed at its front door. He explained that DJB retained the services of an outside security company, which he calls "PSA," and that on Friday nights in the summer months, PSA supplied The Tap Room with "from two to three" security guards. Mr. Bonanno testified that PSA would usually send two security guards, but that DJB could request a third, since it was he who determined how many security guards would be necessary, based upon "previous years' sales and what [they] think [they] would do business-wise." As to those security guards' positioning within The Tap Room, he indicated that, beginning at 9:00 p.m., there was "[d]efinitely one at the front door and then . . . one or two roaming." He further noted that while he "wouldn't necessarily say they had a certain spot," DJB would "try to keep one on the second floor to have some visibility." Asked how The Tap Room's bartenders would communicate with security

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personnel, Mr. Bonanno stated, "It is a small establishment [and] there is a guard normally 20 feet away, so they can verbally communicate."

Regarding inquiries into the training DJB provides for its staff, Mr. Bonanno testified that both its management and bartenders must be TIPS certified, and that DJB developed its own in-house training program called a Learning Management System (LMS). He indicated that staff is trained to offer patrons food or water if they appear intoxicated, but if the patron is hostile, they are told to summon a manager. Mr. Bonanno stated that his staff is also permitted to contact security if they feel a verbal altercation is escalating into a physical one. He stated that PSA's guards are trained exclusively by PSA, and not DJB. Asked if he has, in his "many years of experience in this industry," "witnessed physical altercations in the restaurants and bars," Mr. Bonanno testified that he has, "but not many." Questioned as to why DJB only retained video footage for the few minutes prior to the altercation, and not the "hour or two before the incident," he stated that "[t]his is not a normal occurrence," and that DJB's "IT guy" merely "exported what he believed was the incident."

Phil Fogarty testified that he is currently the owner of PR, which he says does business as "PSA." Shown a portion of the video recording from the incident date, and asked how many security guards would be appropriate for the size of the crowd shown, he replied, "Two to three." Mr. Fogarty indicated that in such scenario, the security guards would generally be positioned with one "at the top of the stairs," and one either at "the rear of the bar where you can't see[,] or to the front of the bar." Watching more of the surveillance footage, specifically the moment the fighting began, Mr. Fogarty observed a man run down the stairs and, shortly thereafter, one of PR's security guards run up the stairs and rush to the scene. He then testified that he observed a second PR security guard arrive from downstairs. Based upon his observations of the video recording, Mr. Fogarty stated that DJB "only asked for two guards," and opined that "[i]f the second floor bar was open, they automatically should have had five guards." Nevertheless, when asked to describe how frequently, in his experience, bar fights occur in Suffolk County, he stated, "not that often."

In an affidavit submitted in support of DJB's motion, Raymond Cruz states that he was the general manager of The Tap Room on the incident date, and recalls it "with great specificity." He indicates that shortly before the altercation, he "was upstairs exercising [his] role as General Manager and overseer of the activities in the upstairs bar . . . [while also] picking up and sweeping the floor of something which had dropped to the ground." Mr. Cruz recalls that a man named Brian Mitchell was working as a security guard on the second floor "for most of the evening," but that shortly before the subject incident, an unrelated situation occurred, involving a drunk guest "down on the stairs," requiring the attention of both of The Tap Room's security guards. He avers that The Tap Room's "maximum capacity" for its upstairs section was 70 people, and 80 people for its downstairs portion, meaning it "would only need one guard on each floor." Mr. Cruz explains that "occasionally guards move around given circumstances which so require," but, as "one of the individuals who is in charge of overseeing and supervising security," he "would have brought up another security worker to the second floor" if he "felt that there was inadequate security that night."

Daniel Kennedy, Ph.D., submits an affidavit wherein he states that he is "an expert in the field of forensic criminology" and is "fully versed in the professional standards and industry recommendations

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for bar security.” Based upon his “extensive review of the materials,” he opines that The Tap Room had “an entirely appropriate level of security.” Specifically, Mr. Kennedy states that the “whole incident occurred in not more than 42 seconds,” and that bar employees “helped break up the fight, including the DJ.” He further states that there “is no causation with respect to where the security guards were placed,” as “[w]ithin 25 seconds or so of the struggle breaking out, multiple individuals were actively engaged in separating the disputants.” Mr. Kennedy further notes that a “server was working at the end of the bar near the mutual combatants 15 seconds before the fight initiated and detected nothing.” He states that “[t]here is no standard of care which requires” that The Tap Room “have two security persons upstairs and standing near the location of the shoving match.” In conclusion, Mr. Kennedy opines that “the conduct of the Tap Room in regard to this matter was not negligent,” and that “its personnel responded immediately and responsibly once they had notice of the disturbance.”

The “owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults” (*Solomon v National Amusements, Inc.*, 128 AD3d 947, 948, quoting *Giambruno v Crazy Donkey Bar & Grill*, 65 AD3d 1190, 1192). “[A] landowner is not an insurer of a visitor’s safety, and has no duty to protect visitors against unforeseeable and unexpected assaults” (*Covelli v Silver Fist, Ltd.*, 167 AD3d 980, 981; see *Scharff v L.A. Fitness Intl., LLC*, 139 AD3d 929). However, property owners do “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” (*Covelli v Silver Fist, Ltd.*, 167 AD3d 980, 981). 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, and [w]ithout evidentiary proof of notice of prior criminal activity, the owner’s duty reasonably to protect those using the premises from such activity never arises” (*Gentile v Town & Vil. of Harrison, New York*, 137 AD3d 971, 972).

Here, DJB established a prima facie case of entitlement to summary judgment in its favor (see *York v Paddy’s Loft Corp.*, 208 AD3d 617; *Martinelli v Dublin Deck, Inc.*, 198 AD3d 635; *Ali v Miller’s Ale House, Inc.*, 189 AD3d 966; see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320). It demonstrated that in addition to its regular staff, it had a least 2 security guards present on the night in question, that its employees were properly trained, and that the video footage of the subject altercation demonstrates it “was a sudden and unforeseeable event that could not have been anticipated or prevented by the provision of greater security measures” (*Muzafarov v Casallas-Gonzalez*, 164 AD3d 680, 681; see *Velez v Pac. Park 38 Sixth Ave., LLC*, 183 AD3d 590; *Valente v Dave & Buster’s of New York, Inc.*, 158 AD3d 731; *McLaughlan v BR Guest, Inc.*, 149 AD3d 519; *Hegarty v Tracy*, 125 AD3d 804). DJB further established that its employees received no prior complaints of arguments or altercations involving plaintiff or Mr. Esposito (see *Oblatore v 67 W. Main St., LLC*, 169 AD3d 705; compare *Whittingham v McDonald’s Corp.*, 174 AD3d 672 [restaurant had experienced 15 prior violent incidents]).

In opposition, plaintiff argues that DJB deviated from industry standards, failed to train its employees properly, was slow to intervene in the altercation in question, and was generally negligent in failing to prevent plaintiff’s alleged injuries. In support of his own motion, and in opposition to DJB’s motion, plaintiff submits, among other things, an affidavit of nonparty David White. In such affidavit,

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Mr. White states that he has “over twenty-five years’ experience in the security field” and “built [his] reputation as one of Long Island’s most requested security guards.” However, he submits no curriculum vitae, or resume, setting forth his training, accreditation, education, or publications. Even assuming, arguendo, that Mr. White is an expert in the security field, his affidavit is insufficient to raise a triable issue of fact. Mr. White declares that DJB’s “decision to provide only two security guards for the entire two-story establishment, against the advice of its long term security company, was clearly negligent.” He then states, without reference to any supporting authority, that “the industry standard for a bar such as the TAP ROOM, in light of its size, layout, sight lines, the number of customers, and the number of bartenders serving drinks is to have a minimum of two security guards per floor.” Mr. White subsequently indicates, again without referring to authority, that “15-25 seconds is industry standard to observe and respond to a potential issue and step in to de-escalate.” These opinions are too speculative and conclusory to raise a triable issue (*see generally Lowe v Japal*, 170 AD3d 701). He cites to no regulation or industry standard dictating the appropriate number of security personnel in the instant circumstances, or the “correct” positioning of security personnel.

Furthermore, the video recording establishes that the physical altercation between plaintiff and Mr. Esposito happened too quickly for even the most diligent of security guards to prevent (*see Velez v Pacific Park 38 Sixth Ave., LLC*, 183 AD3d 590; *compare Solomon v National Amusements, Inc.*, 128 AD3d 947 [physical assault lasted for 15 to 20 minutes prior to security intervention]). A review of the subject surveillance footage also reveals that, save for a single individual, none of the uninvolved patrons in plaintiff’s vicinity, standing perhaps three feet away from him, exhibit any awareness of a simmering conflict between plaintiff and Mr. Esposito prior to Mr. Esposito first pushing plaintiff. Thus, there is no support for plaintiff’s contention that DJB had sufficient notice of an impending incident such that it could have intervened prior to its commencement. Tellingly, plaintiff testified that he, himself, did not believe a physical altercation with Mr. Esposito was imminent. The mere fact that PR often recommended DJB hire additional security personnel for its premises does not establish that DJB deviated from what constitutes the industry standard of care for security services in a bar/restaurant. Mr. Fogarty admitted that his recommendations for security staffing were based upon standards he formulated himself and, thus, his testimony offers no authoritative insight into industry-wide practices and guidelines.

Accordingly, the motion by DJB for summary judgment dismissing the complaint and cross claims against it is granted. Plaintiff’s motion for partial summary judgment on the issue of DJB’s liability is denied. Plaintiff’s motion seeking an order imposing sanctions against DJB and its counsel for spoliation and other alleged malfeasance is also denied.

Dated: July 16, 2024


 HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION