

McGrogan v DS Cass Inc.
2024 NY Slip Op 35462(U)
August 8, 2024
Supreme Court, Westchester County
Docket Number: Index No. 63072/2022
Judge: William J. Giacomo
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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. WILLIAM J. GIACOMO, J.S.C.**

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JOSEPH McGROGAN and MARY McGROGAN,

Index No. 63072/2022

Plaintiffs,

Motion Seq. 001 & 002

– against –

DS CASS INC.,

DECISION & ORDER

Defendant.
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In an action to recover damages for personal injuries, in motion sequence 001, plaintiff Joseph McGrogan moves, pursuant to CPLR 3212 for partial summary judgment on the issue of liability. Plaintiff also seeks to dismiss the defendant's affirmative defenses of comparative fault and assumption risk and requests to set the matter down for trial on the issue of damages only. In motion sequence 002, defendant DS Cass Inc. cross-moves, pursuant to CPLR 3212 for an order granting summary judgment dismissing plaintiff's complaint. Motion sequence numbers 001 and 002 are hereby consolidated for disposition.

Papers Considered

NYSCEF DOC NO. 16-21; 28-49

1. Notice of Motion/ Affirmation in Support by J.P. Delaney, Esq./Exhibits A-C/ Statement of Material Facts
2. Notice of Cross Motion/Affirmation in Opposition and in Support by Robert W. Gifford, Esq./Exhibits A-M/ Counter Statement of Material Facts/Memorandum of Law
3. Affirmation in Opposition and in Reply by J.P. Delaney, Esq./ Exhibits A-B/ Counter Statement of Material Facts
4. Memorandum of Law in Reply

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced this action on or about August 3, 2022 by filing a summons and complaint for personal injuries sustained on February 8, 2021 inside the restaurant/bar known as Durty Nelly's, located in Yonkers, New York. Durty Nelly's is operated by defendant DS Cass, Inc. and is owned by non-parties Sean Cassidy and Dermot Cassidy, who are cousins. The

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complaint, grounded in negligence, alleges that plaintiff was caused to be struck and knocked down by an employee (Sean Cassidy), and sustained severe injuries as a result which have necessitated multiple procedures, including an anterior cervical discectomy fusion.¹ Defendant's answer contains 27 affirmative defenses. The 25th affirmative defense states that plaintiff's claims are banned by plaintiff's assumption of risk, contributory negligence and fault, and his improper use and misuse of the premises.

Relevant Testimony

Plaintiff testified that he had been working as a bartender on and off at Durty Nelly's from 2004 until 2021. Plaintiff testified that he, Dermot Cassidy and Sean Cassidy had been "best of friends." Plaintiff's wife had been working as the bartender on the night of the incident. Plaintiff stated that he had been sitting with Dermot, and they "were having an argument about money [tips that plaintiff did not think were being split correctly]." He continued that the "argument got a little bit heated. We both stood up. We were yelling at each other, and [Sean Cassidy] came running over and grabbed me by the two arms and we went flying into the jukebox." The whole thing happened very quickly, as Sean came over approximately ten seconds after plaintiff and Dermot Cassidy stood up. Plaintiff testified that his glasses fell to the ground and he got "slammed" into the jukebox and then left the bar thirty seconds later. The jukebox was about six to seven feet from where plaintiff had been standing. After Sean Cassidy came and grabbed plaintiff, Sean Cassidy did not say anything because he "was working. [He] was picking up glasses, he was doing his thing." Plaintiff continued that "this whole thing happened in zero time. It wasn't when [Sean Cassidy] came running over and grabbed me, I know for a fact he didn't want to hurt me." Plaintiff believed that it was Sean Cassidy's intention to separate plaintiff and Dermot Cassidy from one another. Plaintiff testified that he suffered injuries as a result of the incident and had initially been bruised on his back and left arm and had pain across his chest.

Sean Cassidy testified that on the night of the incident he "saw two people who I loved and cared about get in an argument. And I tried to step in between it." He referred to plaintiff as an "older brother," and explained that Dermot Cassidy is his cousin and business partner. Sean Cassidy continued that "I just tried to de-escalate a situation that I saw might escalate further." He testified that he "walked over, and I got in between them. And I tried to separate it and stop it.

¹ Plaintiff's wife, Mary McGrogan, filed a stipulation of discontinuance on October 18, 2023.

That's all." He claims that he "pushed both of them away, and [plaintiff] definitely went against the wall, not against the jukebox." Sean Cassidy testified that everything happened very quickly and that he never meant for plaintiff to get injured.

Motions for Summary Judgment

In support of plaintiff's motion for summary judgment, he argues that defendant was negligent and that defendant's negligence was the sole proximate cause of his injuries. Plaintiff is requesting for partial summary judgment on the issue of liability and for the court to find that he was free from comparative fault. He summarizes that Sean Cassidy, defendant's employee, negligently pushed plaintiff into a wall/jukebox, in an attempt to de-escalate an oral argument between plaintiff and another co-owner. Plaintiff asserts that Sean Cassidy was in the course of his employment when this happened and that defendant would be vicariously liable for its employees actions. In addition, defendant was allegedly solely responsible for plaintiff's accident. Plaintiff argues that, as a result of Sean Cassidy's actions, he sustained serious injuries, and ultimately required back surgery.

In opposition to plaintiff's motion and in support of its cross motion, defendant argues that plaintiff's initiation and voluntary participation in the fight bars recovery for claimed injuries allegedly resulting from the event. Defendant also states that it is charged with ensuring a safe environment at the premises. It alleges that it did not breach any duty of care owed to plaintiff, as Sean Cassidy did not act unreasonably in performing its duty to keep plaintiff and Dermot Cassidy safe by preventing the altercation from further escalating. According to defendant, even if a duty was breached, an issue of fact remains as to whether the alleged negligence proximately caused plaintiff's injuries. Defendant submits a report from his proposed expert witness, who opined, among other things, that the need for back surgery resulted from the natural progression of pre-existing degenerative changes.

In opposition, plaintiff argues that the incident involved an oral dispute only, and not a physical fight, as alleged by defendant. Plaintiff asserts that he never threatened anyone. As a result, plaintiff was purportedly free from culpable conduct. In addition, defendant allegedly violated his duty to protect plaintiff when he pushed him into the wall without his consent. Further, plaintiff's injuries were allegedly caused by defendant's actions. In support of this contention, plaintiff submits medical reports from plaintiff's surgeon and pain management doctor who both

affirm that plaintiff's injuries, subsequent surgery and other treatment were causally related to the injuries sustained during the incident.

DISCUSSION

Summary Judgment

A party seeking summary judgment has the burden of tendering evidentiary proof in admissible form to demonstrate the absence of material issues of fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). In determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *Boulos v Lerner-Harrington*, 124 AD3d 709, 709 (2d Dept 2015). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 (1986).

"Once this showing has been made, however, 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." *Alvarez v Prospect Hosp.*, 68 NY2d at 324; see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment. *Zuckerman v New York*, 49 NY2d at 562. "The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist." *Kolivas v Kirchoff*, 14 AD3d 493, 493 (2d Dept 2005).

To sustain a cause of action for negligence, "a plaintiff must establish the existence of a legal duty, a breach of that duty, proximate causation, and damages." *Luina v Katharine Gibbs School N. Y., Inc.*, 737 AD3d 555, 555 (2d Dept 2007). It is well settled that "[n]egligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination." *Davis v Commack Hotel, LLC*, 174 AD3d 501, 502 (2d Dept 2019) (internal quotation marks omitted).

"Landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property. In particular, they 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 (1987) (internal citation

omitted). Under the doctrine of respondeat superior, an employer may be held vicariously liable for a tort committed by an employee acting within the scope of his or her employment. *See e.g. Browne v Lyft, Inc.*, 219 AD3d 445, 446 (2d Dept 2023) (internal quotation marks omitted) (“Pursuant to this doctrine, the employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment”); *see also Giambruno v Crazy Donkey Bar and Grill*, 65 AD3d 1190, 1193 (2d Dept 2009) (“The evidence presented at trial provides a valid line of reasoning to support the jury’s conclusion that the bouncers were acting within the scope of their employment when they used excessive physical force to remove Delgado and Hacker from the premises, and to thus hold the defendant liable under the doctrine of respondeat superior”).

Applying the standards as set forth above, defendant, as the owner of a public establishment, had a duty to protect the patrons on its property. Further, Sean Cassidy was acting within the scope of his employment when he separated and pushed plaintiff away from Dermot Cassidy as a way to de-escalate an argument. Both parties testified that they were all friends for many years, that the argument became heated with yelling, Sean Cassidy pushed plaintiff and Dermot Cassidy away from one another as a way to deescalate the argument, and that the whole incident happened very quickly. The Court has considered the testimony and the record and finds that at this time, summary judgment in favor of either party is denied, as questions of fact remain as to whether Sean Cassidy’s conduct was reasonable under the circumstances. *See e.g. Boyea v Aubin*, 65 AD3d 736, 737 (3d Dept 2009)(Court found triable issues of fact remained as to the reasonableness of the conduct of a general manager of a restaurant during a “melee that erupted between” the general manager and a disgruntled customer that lead to the plaintiff/patron sustaining injuries).

Plaintiff moved for partial summary judgment on the issue of liability, with the outstanding issue of the amount of damages to be determined at trial. Defendant moved for summary judgment dismissing the complaint, arguing plaintiff cannot establish a causal relationship between the incident and his injuries. Viewing the evidence in a light most favorable to plaintiff, plaintiff has overwhelmingly established that he suffered injuries as a result of the incident. However, as the primary issue of breach of duty is unresolved, the issue of damages is also reserved for trial.

Plaintiff also moves to dismiss the affirmative defenses of comparative fault and assumption of risk. Defendant argues that plaintiff voluntarily exposed himself to the dangers of

a physical fight and defendant was prompted to intervene. Here, it is undisputed that there was no physical altercation. Nonetheless, plaintiff testified that, although there was never any physical altercation, he and Dermot were yelling and stood up from their seats in a heated argument. Accordingly, the Court declines to dismiss any of the affirmative defenses, because, as noted above, there are outstanding questions of fact as to the circumstances surrounding Sean Cassidy's actions. It is well settled that "whether a plaintiff is comparatively negligent is almost invariably a question of fact and is for the jury to determine in all but the clearest cases." *Shea v New York City Tr. Auth.*, 289 AD2d 558, 559 (2d Dept 2001); *see also Arbegast v Bd. of Educ. of S. New Berlin Cent. School*, 65 NY2d 161, 168 (1985) ("Thus, what the statute requires comparison of is not negligence but conduct which, for whatever reason, the law deems blameworthy, in order to fix the relationship of each party's conduct to the injury sustained and the damages to be paid by the one and received by the other as recompense for that injury").

Accordingly, based on the circumstances, as questions of fact remain, both plaintiff and defendant's motions seeking summary judgment, are denied.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this court notwithstanding the specific absence of reference thereto.

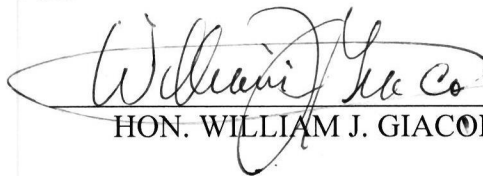
Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment in its favor (motion sequence 001) is denied; and it is further

ORDERED that defendant's cross motion for summary judgment dismissing the complaint (motion sequence 002) is denied.

The parties are directed to appear for a settlement conference on September 30, 2024 at 11:30 virtually. Links will be sent by the Court.

Dated: White Plains, New York
August 8, 2024


HON. WILLIAM J. GIACOMO, J.S.C.