SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

TIMOTHY R. RASMUSSEN,

Plaintiff(s),

- against -

ARTHUR VILLATORE, ROBERT WALKER and

Defendant(s).

TRIAL/IAS PART 5

INDEX NO. 6081/10

MOTION SEQUENCE NO. 3

MOTION SUBMISSION DATE: December 1, 2011

The following papers read on this motion:

Notice of Motion	X
Affirmation in Opposition	X
Reply Affirmation	X

Upon the foregoing papers, the motion by the defendants Robert Walker and Rose Walker for an Order pursuant to CPLR §3212 which grants summary judgment to the moving defendants on the issue of liability, is determined as hereinafter provided:

This personal injury action arises out of an incident that occurred on August 15, 2009 at approximately 10:30 p.m. in the rear yard of the premises located at 2460 Mermaid Avenue, Wantagh, NY. The plaintiff who was 19 at the time of the alleged incident contends that at that time he was invited to a block party and gathering by the Walker defendants' son Pat. Subsequent to arrival, the plaintiff contends that there was alcohol present and available in the Walker defendants' back yard and that while in the back yard the plaintiff had lighter fluid sprayed on his shirt on his back by the defendant Arthur Villatore. The plaintiff described the defendant Arthur Villatore as "intoxicated". The back yard had a fire pit in it which had a fire in it which caused the plaintiff's shirt to ignite resulting in physical injuries.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):**

> "It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact

(*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie 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 material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York, supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

The plaintiff at the plaintiff's January 20, 2011 deposition set forth:

"Q. Other than telling you there would be some drinking, did Pat say anything else relating to alcohol when he invited you to the party?
A. No.
Q. When he indicated there would be some drinking, you understood that to mean alcohol would be at the party?
A. Yeah.
Q. Did Pat indicate to you at any point when he invite you to the party who would be providing the alcohol?
A. Yea. His parents.
Q. What did he say?
A. He said his parents, like, bought the beer.
Q. Did he indicate to you that you would be permitted to drink that beer?
A. Yes.
Q. What did he say?
A. He said that, like, everyone's allowed to drink.
Q. Did he indicate to you when you were discussing the party what type of beer had been purchased?
A. No.
Q. Did he indicate to you whether anything other than beer had been purchased for that party?
A. No.
Q. Did he ask you to bring anything to the party?
A. No.

. . .

Q. There were other people that you didn't know?
A. Yeah.
Q. Was Arthur Villatore present?
A. Yes.
Q. Who is Arthur Villatore?
A. He was a friend of mine.
Q. How did Arthur come to be at that party?
Mr. Stock: If you know.
Q. If you know.
A. I don't know.
Q. Did Pat invite him?
A. I don't know.

Q. To your knowledge, was Pat friends with Arthur Villatore?
A. Yeah.
Q. How old is Arthur Villatore at the time of this accident?
A. I don't remember.
Q. Under 21?
A. Yeah.
Q. What time did Arthur arrive?
A. I think around seven.
Q. When he arrived, he went right to the Walker home.
A. Yeah.
Q. Do you know what he had been doing earlier that day?
A. No.
Q. Do you know if he had been hanging out at one of the other neighbor's houses during the day?
A. I don't know.
Q. When he arrived at 7 p.m., how would you describe his condition?
A. Like - - (indicating). Like, it's all right.
Q. When he arrived at 7 p.m., did he appear intoxicated to you?
A. A little bit.
Q. Did he indicate to you that he had been drinking?
A. Yeah.
Q. Did he tell you where he had been drinking?
A. No.
Q. Did he tell you what he had been drinking?
A. No.
Q. What was it about him that made him seen intoxicated to you when he arrived?
A. He slurred his words a little bit.
Q. Did he arrive with anyone else?
A. No.
Q. Was he carrying and alcohol with him when he arrived?
A. I don't remember.
Q. To your knowledge, had Arthur consumed any type of narcotic medication or - - sorry, narcotic drugs or marijuana prior to his arrival at the party?
A. I don't know.
Q. Other than slurring his words, did he do anything else that made him seem intoxicated to you?
A. No.
Q. Was he capable of walking?
A. Yeah.
Q. Was he stumbling at all?
A. Little bit. Every once in a while.
MR. STOCK: This is when he arrived at the party?
THE WITNESS: Yeah.
Q. Was he acting silly at all when he arrived?
A. Little bit.
Q. What type of things was he doing?
A. He just kept joking around a lot.
Q. Did the Walkers, Robert and Rose Walker, know that Arthur was present?
A. Yes.

Q. Did you see them interact at all?
A. Yeah.
Q. What did you observe?
A. Um, like, he just said hi to them and that's it.
Q. Did Rose and Robert Walker consume any alcohol, to your knowledge?
A. I think so.
Q. Did you see them doing that?
A. No.
Q. Did Rose and Robert Walker interact with Arthur when he first arrived, or was that something that occurred later on?
A. When he first arrived.
Q. Did you see them interact at any other point that evening?
A. No."

see deposition transcript of Timothy R. Rasmussen at pgs 24-25; 42-46

In examining the issue of the providing of alcohol to underage individuals, the Court in **Rust v Reyer**, 91 NY2d 355, 670 NYS2d 822 stated:

> "Underage drinking is a significant societal problem that has generated widespread concern (*see, e.g., French, Kaput and Wildman, Special Project: Social Host Liability for the Negligent Acts of Intoxicated Guests, 70 Cornell L Rev 1058 [1985]; Comment, Killer Party; Proposing Civil Liability for Social Hosts who Serve Alcohol to Minors, 30 J Marshall L Rev 245, 257-258 [1996] ["Killer Party"].* All 50 States have et minimum drinking ages, a measure which has to some extent prevented minors from themselves purchasing alcohol at bars and liquor stores. Those same laws, however, have proven far less effective in stopping minors from obtaining alcohol in a social setting, where it is provided to them by individuals who have little, if any, financial disincentive for doing so (*see, e.g., Killer Party, op. cit., at 260).*
>
> States have responded to this circumvention of their minimum age laws in a variety of ways. Some have by statute imposed civil liability, criminal liability or both on gratuitous providers of alcohol. In other States, courts have recognized a common-law duty of the provider (*see generally, Annotation Social Host's Liability For Injuries Incurred By Third Parties As A Result Of Intoxicated Guest's Negligence, 62 ALR4th 16).* New York had taken the former approach: in addition to making it a crime to furnish alcoholic beverages to a minor in most cases (*Penal Law §260.20[2]),* in 1983 the Legislature enacted General Obligations Law §11-100, which provides:
>
> "Any person who shall be injured in person, property, means of support or otherwise, by reason of the intoxication or impairment of ability of any person under the age of twenty-one years, whether resulting in his death or not, shall have a right of action to recover actual damages against any person who knowingly causes such intoxication or impairment of ability 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" (*General Obligations Law §11-100[1] [emphasis supplied]).*

Conceding that Reyer herself never actually served alcohol to any party guest, plaintiff nonetheless contends that Reyer's actions constituted "furnishing" under the statute. Neither the relevant statutes (including related enactments General Obligations Law §11-101 and Alcoholic Beverage Control Law §65) nor our prior cases define the term "furnishing", which is ordinarily understood to mean "to provide in any way:, to "supply" or "to give" (*see. e.g., Black's Law Dictionary 675 [6th ed 1990]; Webster's Deluxe Unabridged Dictionary 743 [2d ed 1983]; accord, Ball v Allstate Ins. Co., 81 NY2d 22, 25).*

Here, Reyer allegedly gave permission for the alcohol at the party she was planning, provided storage for the kegs of beer both before and after the party, negotiated a share of the proceeds from cup sales for herself and at least attempted to arrange for her friends to drink the beer without charge. Her request for a portion of the proceeds from cup sales underscores here complete complicity in the fraternity's plans to furnish beer. As stated in plaintiff's affidavit, Reyer "chose to participate in a scheme to furnish alcohol to underage individuals in return for a payment of money." Moreover, without Reyer's advance permission, the beer could not have been served as it ultimately was. Indeed, many of the 150 minors present may well not have come to the party in the first instance had they not known that alcohol would be available.

We conclude that if proven at trial, these facts cold bring Reyer's acts within the meaning of "furnishing" as used in the statute. Reyer's role could well be viewed as part of a deliberate plan to provide, supply or give alcohol to an underage person.

In reaching this conclusion we are mindful that a statute in derogation of the common law must be strictly construed (*see Sherman v Robinson, 80 NY2d 483, 487; D'Amico v Christie, 71 NY2d 76, 83).* We are mindful as well that our prime directive, in matters of statutory interpretation, is to give effect to the intention of the Legislature (*see, Feres v City of New Rochelle, 68 NY2d 446, 451; People v Ryan, 274 NY 149, 152).* To interpret "furnishing" as Reyer suggests - in effect limiting it to those who has the alcohol to the minor- gives the term an overly narrow reach that undermines the clear legislative goal.

The purpose of General Obligations Law §11-100 is to employ civil penalties as a deterrent against underage drinking (*Sheehy v Big Flats Community Day, 73 NY2d 629, 636).* As the bill's cosponsor noted, "[t]his legislation seeks to protect minors from those persons uncaring enough to provide intoxicating beverages to minors in an indiscriminate manner and by so doing, to endanger the life and safety of the minor as well as of the general public" (*Letter of Assemblymember John F. Duane, Bill Jacket, L 1983, ch 641*). In the words of Senator William T. Smith, also a cosponsor of the statute:

"Over the years, numerous court cases have dealt extensively with the question of common law liability on the part of those who knowingly furnish alcoholic beverages to under-age persons at graduation parties, church

> socials, wedding receptions, office parties, and college campuses. Under-age persons consuming excess alcohol at those social events unquestionably have the same propensity to do harm to the traveling public as those who have been served alcohol pursuant to a sale" (*1983 NY Legis Ann, at 281).*
>
> The facts alleged demonstrate that Reyer was more than an unknowing bystander or an innocent dupe whose premises were used by other minors seeking to drink (*cf., Dodge v Victory Mkts., 199 AD2d 917; Reickert v Misciagna, 183 AD2d 151).* Similarly, she was more than a passive participant who merely knew of the underage drinking and did nothing else to encourage it (*cf., Lane v Barker, 241 AD2d 739; MacGilvray v Denino, 149 AD2d 571; see also, Pelinsky v Rockensies, 209 AD2d 392).* Reyer played an indispensible role in the scheme to make the alcohol available to the underage party guests.
>
> Reading the statute to foreclose responsibility in these circumstances would allow unintended circumvention of the legislation and negate its deterrent purpose (*see, 1983 NY Legis Ann, at 281-282 [*the "time has come for every individual to accept responsibility for an activity which most people partake in, consumption of alcoholic beverages - the responsibility as a consumer, and as a furnisher, as well"]; *see also, Killer Party, op. cit., at 249-250).*"
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> **Rust v Reyer, supra at 358-361**

Notwithstanding the Walker defendants' denial of the presence of alcohol on their premises, the plaintiff has established an issue of fact as to whether alcohol was provided to the individuals at the gathering in issue; whether the Walker defendants knew of the condition of the defendant Arthur Villatore and what role if any alcohol played in the injuries received by the plaintiff. As such, the application by the Walker defendants for an Order pursuant to CPLR §3212 which grants summary judgment to the moving defendants on the issue of liability, is **denied**.

SO ORDERED.

DATED: 2/9/2012

.....Roy S. Mahon.....
J.S.C.

ENTERED
FEB 15 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE