Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES **PART 17**
Justice

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SALVATORE DZIEKAN,
Plaintiff

Index No.: 21295/09
Motion Date: 5/16/12
Motion Cal. No.: 15
Motion Seq. No.: 2

-against-

PALACE CAFÉ, INCORPORATED, ANNE R. RYAN, MARY BONUSO, GERALDINE CURTIN, ANNE R. RYAN FAMILY TRUST, "PATRON 1," "PARTON 2", "PARTON 3", "PARTON 4", "PATRON 5", "PARTON 6", said names being fictitious, the Intent of Plaintiff Being to Designate,
Defendants.

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The following papers numbered 1 to 10 read on this motion by defendants **PALACE CAFÉ, INCORPORATED, ANNE R. RYAN, MARY BONUSO, GERALDINE CURTIN, ANNE R. RYAN FAMILY TRUST** ("defendants") for an order pursuant to CPLR 2221granting re-argument of the order dated March 14, 2012, which denied defendants motion for summary judgment and upon re-argument, vacate the March 14 Order and decide the summary in defendants favor.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Affirmation in Opposition.....	5
Reply Affirmation.....	6
Notice of Motion	7
Appendix.....	8
Notice of Cross-Motion.....	9
Affirmation in Reply.....	10

Upon the foregoing papers it is ordered that this motion by defendants for an order pursuant to CPLR 2221granting re-argument of the order dated March 14, 2012, which denied defendants motion for summary judgment and upon re-argument, vacate the March 14 Order and decide the summary judgment in defendants favor, is granted, for the following reasons:

The purpose of a motion for re-argument is to afford a party an opportunity to

demonstrate that the court overlooked or misapprehended the law or facts pertinent to the original motion. *See* CPLR 2221[d][2]; *see also* Delgrosso v 1325 Limited Partnership, 306 AD2d 241 [2d Dept 2003]; Foley v Roche, 68 AD2d 558, 567 [1st Dept 1979] Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided or to present arguments different from those originally presented. (*See* Gellert & Rodner v Gem Community Management, Inc., 20 AD3d 388 [2d Dept 2005]; *see also* McGill v Goldman, 261 AD2d 593 [2d Dept 1999]; Foley v Roche, supra.)

In this case, defendants have demonstrated that the court overlooked relevant facts. In the March 14, 2012 Order, Justice Schulman denied the motion by defendants for an order pursuant to CPLR § 3212 for summary judgment dismissing the complaint against them, and also denied the cross-motion by plaintiff for an order pursuant to CPLR §3212 granting summary judgment on the issue of liability. This was based upon the motions being untimely since the note of issue was filed on March 4, 2011, and the motion for summary judgment was not served until January 4, 2012, ten months later. The cross-motion was served on or about February 8, 2012, eleven months after the filing of the note of issue. The Court also found that defendants and plaintiffs had failed to seek leave of the court to file this late motion, or to offer any good cause for the delay beyond the time prescribed by statute. However, the parties had sought from this Court, an extension of defendants' time to file their summary judgment motion and plaintiff's time to move to strike defendants' deposition of plaintiff from this Court, based upon the existence of outstanding discovery. In a so-ordered stipulation dated, December 9, 2011, this Court extended defendants and plaintiff's time to file their respective motions until January 19, 2012. As such, the filing of the defendants' summary judgment motion on January 4, 2012 was timely. The filing of the cross-motion was not timely since no extension was ever sought by plaintiff for an extension of time. Accordingly, the motion by defendants for re-argument of the March 14 Order is granted, and upon re-argument, the Court finds that the summary judgment was timely, and it shall now be addressed.

Upon review of the original summary judgment motion papers, it is ordered that the motion by defendants for an order granting summary judgment in their favor and dismissing the complaint against them is granted, for the following reasons:

The action herein stems from plaintiff's claims that he was injured on February 1, 2009, at about 12:00 a.m., when he was assaulted inside the premises located at 206 Nassau Avenue, Brooklyn, N.Y., known as the Palace Café, and outside the premises. Plaintiff claims that he was inside the premises with his brother and a female friend. The premises is a bar and on that night the only person working was the bartender. Plaintiff and his party partook in alcoholic beverages and at some point a person sitting at the bar mistakenly drank a shot of alcohol that was meant for plaintiff's group. Thereafter, the bartender asked plaintiff's brother to leave the bar due to alleged nasty comments made by him to a female patron. Plaintiff, his friend, and

brother were leaving the bar and were being escorted by the bartender when two patrons, one being he shot drinker, left their seats at the bar and rushed toward plaintiff and his brother. These patrons threw the two on the sidewalk directly outside the premises and proceeded to give both a bad beating. Police Officers arrived, the melee ended, and plaintiff was issued a summons for disorderly conduct. When an ambulance arrived, plaintiff was treated by the ambulance personnel. After the officers and ambulance left, patrons from the bar approached plaintiff and his brother, outside of the bar, and proceeded to assault them again.

Plaintiff commenced the instant action seeking to recover for injuries sustained in the two attacks. The first cause of action states that defendants "breached their duty to properly maintain, operate, manage and control the premises. The second cause of action states that defendants "breached their duty to supervise intoxicated patrons at the Premises", which caused injuries to plaintiff. The third cause of action claims that defendants breached their duty to provide security at the Premises. The fourth cause of action, claims these defendants violated the General Obligations Law Section 11-101 (The Dram Shop Act).

Defendants now move for summary judgment claiming they did not breach any duty to the plaintiff and he has no cause of action predicated upon a violation of the Dram Shop Act and plaintiff will be unable to establish that the moving defendants were in any way negligent in the happening of this incident. Defendants' have submitted the deposition testimony of plaintiff, his brother, their female companion, and the bartender who was working on February 1, 2009. This testimony mostly confirms the facts set forth above. Of particular note is that prior to the incident, there was little to no interaction between the plaintiff's party and others in the bar and there was no indication that any bar patron was visibly intoxicated. Moreover, there is no indication that there had been previous assaults or other acts of violence at the bar.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See*, Barr v. County of Albany, 50 NY2d 247 (1980); Miceli v. Purex, 84 AD2d 562 (2d Dept. 1981); Bronson v. March, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in Daliendo v Johnson, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

The Court finds that defendants have established their right to judgment as a matter of law. The evidence they have submitted shows there is no basis to hold them liable for the injuries plaintiff suffered. Thus, the burden shifts to plaintiff to raise an issue of fact. Initially, the court notes that plaintiff has not submitted any opposition to the motion. Plaintiff has

submitted a cross-motion that seeks summary judgment in its favor, and an order denying defendants' motion. However, this cross-motion was denied as untimely in the March 14, 2012. Moreover, the cross-motion does not separately set forth a basis to deny the motion, rather, it only sets forth reasons to grant the motion. In any event, were this Court to analyze the cross-motion and treat it as opposition, the Court would find that plaintiff has failed to establish its burden of proof.

Plaintiff has not submitted any evidence other than his attorney's affirmation. An attorney's affirmation has no probative weight and cannot raise a triable issue of fact. Bates v Yasin, 13 AD3d 474 (2d Dept. 2004.) Furthermore, the first and second causes of action claim defendants violated their duty to protect plaintiff from being attacked by patrons who posed a danger due to alcohol consumption and to supervise these intoxicated individuals. There is no evidence to suggest any of the patrons were intoxicated or posed a danger to plaintiff. In fact, the evidence suggests it was plaintiff's brother having insulted a female patron, and not alcohol, that caused the attack upon plaintiff. Consequently, as a matter of law, there are no issues of fact regarding the first two causes of action. Moreover, a property owner must act in a reasonable manner to prevent harm to those on its premises, and an owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such conduct, and is reasonably aware of the need for such control. Giambruno v Crazy Donkey Bar & Grill, 65 A.D.3d 1190 (2d Dep't 2009.) As such, since plaintiff was harmed outside of the premises, defendants had no obligation to prevent the harm he suffered. *Id.* Furthermore, the deposition testimony revealed that these alleged assaults were sudden and unexpected events that defendants could not have reasonably anticipated or prevented. Thus, defendants cannot be subject to common-law liability for injuries sustained by the plaintiff while they were inside or outside defendants' premises. Kiely v Benini, 89 A.D.3d 807 (N.Y. App. Div. 2d Dep't 2011)

Regarding the third cause of action, plaintiff claims that defendants had a duty to provide security at the premises. However, there is no evidence to suggest that there was recurring criminal or violent activity at the premises. Nor was there any indication that defendants had reason to believe such activity had occurred in the past, or would occur in the future. As such, there was no duty to have security on the premises and the third cause of action must be dismissed. Furthermore, there is no evidence to suggest that even if there was security inside the premises, the injuries suffered by plaintiff as a result of the beating he sustained outside of the premises would not have taken place.

Regarding the fourth cause of action, plaintiff claims that the Dram Shop Act was violated by defendants. Under the Dram Shop Act, a cause of action was created that was unknown at common law. Catania v. 124 In-To-Go, Corp., 287 A.D.2d 476 (2d Dept 2001.) The Act allowed recovery against a bar owner for injuries caused as a result of a patron's intoxication. Under the statute, a party who unlawfully sells alcohol to a visibly-intoxicated

person is liable for injuries caused by reason of that person's intoxication. General Obligations Law § 11-101. In order to show that the damages suffered by the plaintiff in a Dram Shop action arose "by reason of the intoxication" of a patron to whom alcohol was illegally sold, there must be "some reasonable or practical connection" between the sale of alcohol and the resulting injuries. Adamy v Ziriakus, 231 AD2d 80, (4th Dept 1997), affd 92 NY2d 396, 400. However, proximate cause, as must be established in a conventional negligence case, is not required. Catania v. 124 In-To-Go, *supra.* See also, McNeill v Rugby Joe's, Inc. , 298 AD2d 369 (2d Dept 2002.)

Here, as set forth above, defendants have established their prima facie entitlement to judgment as a matter of law. Alvarez v Prospect Hosp., 68 NY2d 320 [1986].) Plaintiff's evidence failed to establish that any patron at the bar, let alone his assailants were visibly intoxicated.. That alcohol has been consumed by a person, does not in of itself constitute intoxication Senn v. Scudieri, 165 A.D.2d 346 (1st Dept 1991.) Furthermore, there is no testimony that any patron appeared to be intoxicated and was served alcohol or that there is a reasonable connection between the alcohol served to any patron and the injuries sustained by the plaintiff. Accordingly, the fourth cause of action must be dismissed.

Based on the above the motion for summary judgment in defendants' favor dismissing the complaint is granted.

Dated: May 17, 2012

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ORIN R. KITZES, J.S.C.