

**Vallecillo v Racks Café Billiards Inc.**

2012 NY Slip Op 31987(U)

July 20, 2012

Sup Ct, Queens County

Docket Number: 28661/08

Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10  
Justice

-----X

Daniel Vallecillo and Jasmin Vallecillo,  
  
Plaintiffs,  
  
- against -

Index  
Number: 28661/08  
  
Motion  
Date: 7/3/12

Racks Café Billiards Inc., individually  
and doing business as racks Café Billiards,  
Charles Matthews, City of New York, NYC  
Department of Corrections and John/Jane  
Does 1-5,

Defendants.

Motion  
Cal. Number: 16  
  
Motion Seq. No.: 3

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The following papers numbered 1 to 9 read on this motion by defendant, Racks Café Billiards Inc., for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibit.....	5-7
Reply.....	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Racks for summary judgment dismissing the complaint and all cross-claims against it against it or, in the alternative, for summary judgment dismissing plaintiff's fourth cause of action against Racks for punitive damages, is granted solely to the extent that plaintiff's first and fourth causes of action are dismissed. In all other respects, the motion is denied.

Plaintiff, a New York City Department of Corrections Officer, allegedly sustained injuries as a result of being assaulted by defendant Matthews, a fellow Corrections Officer, at plaintiff's bar at 1926 Steinway Street in Queens County on November 30, 2007.

The complaint alleges three causes of action against Racks. Plaintiff's first cause of action alleges negligence by Racks in the "care, supervision and control" of its patrons and in the

failure to provide adequate security, and negligence in the hiring, training and supervision of its employees who served alcohol to Matthews while he was in a visibly intoxicated condition.

Plaintiff's second cause of action alleges liability against Racks based upon a violation of General Obligations Law §11-101 (the Dram Shop Act) in that Racks served alcohol to Matthews despite his being in a visibly intoxicated condition.

Plaintiff's fourth cause of action seeks an award of punitive damages against Racks.

With respect to plaintiff's first cause of action alleging negligence, the deposition testimony of plaintiff, Matthews, Peter Triantafillou, President of Racks, and the non-party witnesses, establish that the alleged assault upon plaintiff by Matthews could not have been anticipated by Racks' employees. There is no evidence that Matthews, prior to the alleged assault, was displaying any visible behavior which should have alerted Racks' employees that Matthews presented a danger to anyone. Although plaintiff testified that at the time he bumped into Matthews the latter was visibly drunk and slurred his speech, there was no altercation or confrontation between them prior to the attack. Plaintiff merely testified that he had accidentally bumped into Matthews and Matthews made a single comment to him that was unintelligible because of his slurred speech. Thereafter, he merely noticed Matthews occasionally looking in his direction, but there was no exchange between them of a verbal or any other nature and Matthews did not make any faces at plaintiff. Plaintiff testified that approximately 45 minutes after the bumping incident, as he was walking through the bar, another individual pushed him, whereupon he pushed back and quickly headed to the door to exit Racks. When he was approximately 10 feet from the entrance he turned about and Matthews punched him in the face. This testimony by plaintiff himself showing that the assault was a sudden unanticipated incident, coupled with the undisputed evidence that the bar was noisy and crowded with Department of Corrections officers, raises no issue of fact as to any negligence on the part of Racks in failing to control Matthews' behavior or failing to have adequate security to protect plaintiff.

As to the allegation that Racks was negligent in the hiring, training and supervision of its employees because they served Matthews alcohol when he was visibly intoxicated, no common law cause of action for negligence exists for serving an intoxicated person alcohol who thereafter causes injury by reason of his or her intoxication (see Sherman v Robinson, 80 NY 2d 483 [1992]).

The opposition papers fail to raise any issue of fact as to Racks' negligence. Therefore, Racks is entitled to summary judgment dismissing plaintiff's first cause of action.

Likewise, Racks is also entitled to summary judgment dismissing plaintiff's fourth cause of action seeking punitive damages, there appearing no opposition to this branch of the motion. In the first instance, it is settled law that no separate cause of action for punitive damages may be maintained (see Brualdi v Iberia, 79 AD 3d 959 [2<sup>nd</sup> Dept 2010]). Moreover, even had plaintiff sought punitive damages as part of his remaining cause of action alleging violation of the Dram Shop Act, Racks would still be entitled to dismissal of said claim as a matter of law, since there is no allegation or showing of any reckless or willful conduct on the part of Racks so as to support a claim for punitive damages (see Brown v Maple 3, LLC, 88 AD 3d 224 [2<sup>nd</sup> Dept 2011]).

However, the submissions on this motion raise an issue of fact as to whether Matthews was served alcohol by Racks while visibly intoxicated so as to support a cause of action pursuant to the Dram Shop Act.

The Dram Shop Act (GOL §11-101) provides that "[a]ny person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages." What constitutes an unlawful sale of liquor under the Dram Shop Act is set forth in Alcohol Beverage Control Law §65 entitled "Prohibited Sales", which states, in relevant portion, "No person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to... 2. Any visibly intoxicated person" (see Moyer v Lo Jim Café, 19 AD 2d 523 [1<sup>st</sup> Dept 1963], affd 14 NY 2d 792 [1964]).

In order to establish a prima facie cause of action under the Dram Shop Act, plaintiff must proffer evidence that the person to whom alcohol was sold "acted or appeared to be visibly intoxicated at the time of the sale" (DeMarco v Oak Beach Inn Corp., 241 AD 2d 538, 538 [2<sup>nd</sup> Dept 1997]). Moreover, proof of visible intoxication may be shown by circumstantial evidence, including eyewitness testimony (see Kelly v Fleet Bank, 271 AD 2d 654 [2<sup>nd</sup> Dept 2000]).

Here, in support of its motion, Racks submits the deposition

testimony of two non-party witnesses, Mark Daniels and Hasan Muhammad, who testified that Mathhews did not appear to be visibly intoxicated. Also submitted is the deposition transcript of Matthews in which he testified that he only had one Coors Light beer and no other drinks.

However, plaintiff testified in his deposition that when he bumped into Matthews, the latter said something but "[i]t was slurred, I couldn't understand it", adding that "it was visible that he was wasted, he was drunk." When asked, "Aside from the slurring, did you notice anything else about him that might have given you a reason to believe he might have been intoxicated at that time?", plaintiff replied, "His body was pretty much waving, his body was waving front to back. He wasn't steady in his stance, you know, he was pretty much stumbling." Plaintiff also testified that in his subsequent observations of Matthews, the bartender served him another drink.

Therefore, plaintiff's testimony that Matthews appeared visibly intoxicated when he was served by the bartender at Racks raises a triable issue of fact as to whether Matthews was served alcohol at Racks while in a visibly intoxicated condition (see Roy v Volonino, 262 AD 2d 546 [2<sup>nd</sup> Dept 1999]). The citation by Racks' counsel to Sen v Scudieri (165 AD 2d 346 [1<sup>st</sup> Dept 1991]) in support of his argument that the mere observation that the person served slurred his words is a mere inference that is insufficient to establish visible intoxication is inapposite to the facts of this case. The Appellate Division, First Department, in Sen, stated, in relevant part, "We have held that the slurring of one's speech, in and of itself, when that person is at the same time coherent, is insufficient to conclude that person is intoxicated" (165 AD 2d at 531-532). In our case, plaintiff testified not only that Matthews' speech was slurred but unintelligible. Moreover, plaintiff described Matthews as waving back and forth, unsteady and stumbling.

The affidavits of Keri Korus and George Malatanos, employed as bartenders at Racks on the night of the subject assault, averring that they are familiar with the visible signs of intoxication and that they did not serve any visibly intoxicated person that night and did not witness any others doing so does not constitute probative or competent evidence that Matthews was not served alcohol while in a visibly intoxicated condition. Korus and Malatanos concede in their affidavits that that have no first hand knowledge of the incident that evening and did not observe Matthews. That they did not serve anyone whom they observed in a visibly intoxicated condition does not establish that Mathhews was not in fact visibly intoxicated or that he was not served by any

other bartender. They do not aver that they were the only bartenders in the establishment on the night of the incident.

Counsel's additional argument that plaintiff has failed to demonstrate that Racks violated the Dram Shop Act because plaintiff did not know what the drink was that he claims he observed was served to Matthews by the bartender, therefore, failed to show that the bartender served him alcohol, is without merit. That Matthews was in a crowded bar where substantial quantities of alcohol were concededly served to its patrons and that Matthews himself testified that he was drinking beer at the time he was bumped, and that Matthews was thereafter observed having another drink from the same type of cup he was first observed drinking out of, at least raises a triable issue as to whether the second drink he was seen imbibing was alcoholic. The Court notes that there was no testimony by Matthews or anyone else as to what his second drink was. Indeed, Matthews denies that he had any drink at all after his Coors beer, which he said was a 12-oz bottle. This is in contradiction to plaintiff's testimony that he saw a bartender serve Matthews a drink in the same type of cup he originally saw Matthews drinking from at the time of the earlier bumping event.

Therefore, the submissions on this motion raise a triable issue of fact as to whether Matthews was served an alcoholic beverage by a Racks bartender while visibly intoxicated, thus precluding the granting of summary judgment dismissing plaintiff's Dram Shop cause of action.

Accordingly, that branch of Racks' motion for summary judgment dismissing plaintiff's second cause of action alleging violation of the Dram Shop Act is denied.

Dated: July 20, 2012

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KEVIN J. KERRIGAN, J.S.C.