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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

ALAN KUDISCH and DIANE MARGOLIES-LITMAN, AS ADMINISTRATORS OF THE ESTATE OF ZACHARY A. KUDISCH, DECEASED, and ALLAN KUDISH individually and DIANE MARGOLIES-LITMAN individually	TRIAL/IAS, PART 41 NASSAU COUNTY INDEX NO.: 020489-09 XXX
Plaintiffs,	MOTION SUBMISSION DATE: 1-5-12
-against-	
GRUMPY JACK'S INC.,	MOTION SEQUENCE NO. 001 & 002
Defendants.	

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Cross Notice of Motion to Amend the Complaint and Affirmation	X
Affirmation in Opposition	X
Affirmation in Reply	X
Affidavit in Opposition to Motion by Diane Margolies-Litman	X
Reply Affirmation	X

Motion by defendant Grumpy Jack's Inc. for an order pursuant to CPLR 3211(a)(7) dismissing plaintiffs' complaint for failure to state a cause of action; and for an order pursuant to CPLR 3212 dismissing the complaint due to plaintiffs failure to identify meaningful pecuniary loss is granted. Cross-motion by plaintiffs for an order pursuant to CPLR 3025(b) granting them leave to amend the

complaint to include causes of action for gross negligence and punitive damages is denied as moot.

Plaintiffs commenced this action, individually and as administrators of the estate of their son, who died as a result of a one-car accident on October 30, 2008 when he struck a guardrail and several trees located on the property of 122 North Country Road, Mount Sinai, New York. Plaintiffs allege that decedent, then 20 years old, was furnished alcohol unlawfully by defendant, became intoxicated and lost control of the vehicle he was driving. A toxicology report was issued which revealed that Zachary had a significant amount of alcohol as well as marijuana in his system at the time of death.

The complaint alleges as a first cause of action a violation of the Dram Shop Act (see General Obligations Law §§ 11-100, 11-101) and Alcoholic Beverage Control Law § 65. The second and third causes of action sound in property damage and common-law negligence. The fourth and fifth causes of action seek damages for loss of present and future support as well as medical expenses and funeral expenses incurred on behalf of the infant decedent. The sixth and seventh causes of action sound in wrongful death.

Defendant now moves to dismiss the complaint pursuant to CPLR 3211(a)(1)(7) and CPLR 3212.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must determine whether from the four corners of the pleading "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Salvatore v Kumar,* 45 AD3d 560 [2nd Dept 2007], *lv to app den.* 10 NY3d 703 [2008], quoting *Morad v Morad*, 27 AD3d 626, 627 [2nd Dept 2006]). Further, the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiffs accorded the benefit of every possible favorable inference (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 [2001]; *Leon v Martinez,* 84 NY2d 83, 87-99 [1994]; *Kats v East 13th Street Tifereth, Place, LLC*, 73 AD3d 706, 707 [2nd Dept. 2010]). Notably, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Ginsburg Development Companies, LLC v Carbone*, 85 AD3d 1110 [2nd Dept 2011]; *Farber v Breslin*, 47 AD3d 873 [2nd Dept 2008]).

As noted above, the plaintiffs are alleging theories of liability predicated upon the provisions embodied in General Obligations Law §§ 11-100 and 11-101. "The Dram Shop Act, codified in General Obligations Law §11-101, was promulgated by the legislature to create a private right of action which could be

instituted against sellers of alcoholic beverages for injuries occasioned by the sale thereof (*Sherman v Robinson*, 80 NY2d 483 [1992])." *Basdavanos v El-Waraky*, 30 Misc 3d 1226 (N.Y. Sup. 20011)." The statute states the following:

> Any 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.

General Obligations Law §11-100 creates liability upon the gratuitous providers of liquor to minors, irrespective of whether or not the providing of such liquor was accompanied by an actual sale (*Sherman v Robinson, supra),* and provides as follows:

> 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.

In order to establish a cause of action under General Obligations Law §11-101(1), "a plaintiff is required to prove that the defendant sold alcohol to a person

who was visibly intoxicated and that the sale of that alcohol bore some reasonable or practical connection to the resulting damages." *Dugan v Olson*, 74 AD3d 1131 [2nd Dept. 2011]; *Poppke v Portuguese American Club of Mineola*, 85 AD3d 751 [2nd Dept 2011]; *see Sullivan v Mulinos of Westchester, Inc.*, 73 AD3d 1018 [2nd Dept 2010]; *McArdle v 123 Jackpot, Inc.*, 51 AD3d 743 [2nd Dept 2008]. "Proof of visible intoxication can be established by circumstantial evidence, including expert and eyewitness testimony." *Poppke v Portuguese American Club of Mineola*, *supra; see Kish v Farley*, 24 AD3d 1198, 1200 [4th Dept 2005]. Here, plaintiff has not established that defendant sold alcohol to a visibly intoxicated person.

General Obligations Law §11-100 provides for a right of civil recovery against a person who knowingly provides alcohol to a minor, but only for people injured by the actions of the intoxicated minor (*see Rudden v Bernstein*, 61 AD3d 136 [2nd Dept 2004]; *Sheehy v Big Flats Community Day*, 73 NY2d 629, 635 [1989]). It does not provide a right of recovery for injuries suffered by intoxicated minors as a result of their own intoxication (*Sheehy v Big Flats Community Day, supra; McArdle v 123 Jackpot, Inc., supra; Searley v Wegmans Food Mkts., Inc.*, 24 AD3d 1202 [4th Dept 2005].

Further, an intoxicated person or his or her estate cannot maintain a cause of action under the Dram Shop Act for injuries sustained as a result of that person's voluntary intoxication. *Oursler v Brennan*, 67 Ad3d 36 [4th Dept 2009]; *Livelli v Teakettle Steak House, Inc.*, 212 Ad2d 513 [2nd Dept 1995]. *lv to appeal granted*, 68 AD3d 1824, *appeal withdrawn* 15 NY3d 848 [2010].

In support of its motion, defendant asserts that decedent was involved in a one-car motor vehicle accident as a result of his own intoxication, ultimately resulting in his death at 121 North Country Road, Mt, Sinai, New York, approximately 1.8 miles from the defendant's premises located at 28 Oakland Avenue, Port Jefferson, New York.

Initially, we note that plaintiffs concede that New York's Dram Shop Act does not create a cause of action for an intoxicated person or his estate when the injuries are a result of the person's own intoxication. See Plaintiff's Affirmation in Opposition, ¶ 3. In that regard, since the intoxicated person's injuries resulted in death, the decedent's estate is not now vested with additional rights that the decedent would not have had, had he survived. In other words, any damages recoverable by a decedent's estate under the Dram Shop Act are the same as the

injured party could have recovered if death had not ensued. *Scheu v High-Forest Corp.*, 129 AD2d 366 [3rd Dept 1987]; *see Delamater v Kimmerie*, 104 AD2d 242 [3rd Dept 1984]; *Matalavage v Sadler*, 77 AD2d 39 [2nd Dept 1980].

While an intoxicated infant has no cause of action predicated on a violation of the Dram Shop Act, "the infant's parents may sue individually under the Dram Shop Act as parties suffering a loss which resulted form the injury of the intoxicated person" (*Gigliotti v Byrne Dairy, Inc.*, 249 AD2d 973 [4th Dept 1998], quoting *Reuter v Flobo Enters.*, 120 AD2d 722 [2nd Dept 1986]; *see* General Obligations Law §11-101[4]). The statute allows an infant's parents to sue as persons injured in "means of support" (General Obligations Law §11-100[1]). The party seeking to recover for an injury in means of support, however, has the burden to show that the decedent had a legal duty or had undertaken an obligation to support his parent (*see, Scheu v High-fiorest Corp., supra*). Here, it is undisputed that decedent was 20 years old at the time of the accident and there is insufficient evidence that he supported plaintiffs or that they anticipated his support in the future (*see McArdle* v *123 Jackpot, Inc.*; *Marsico v Southland Corp.*, 148 AD2d 503, 504-505 [2nd Dept 1989], cf., *Raynor v C.G.C. Grocery*

Corp., 159 AD2d 463 [2nd Dept 1990]). The cause of action seeking to recover funeral expenses similarly is without merit (see *Marsico v Southland Corp.*, *supra).*

It is well settled that leave to amend should be freely granted (*see* CPLR 3025[b]); *Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166, 179 [1989]) in the absence of prejudice or surprise resulting from the delay. *Schwartz v Sayah*, 83 AD3d 926 [2nd Dept 2011]. "[T]he determination whether to grant such leave is within the Court's discretion and the exercise of that discretion will not be lightly disturbed." *Alrose Oceanside, LLC v Meuller*, 81 AD3d 574 [2nd Dept 2011], quoting *Comsewogue Union Free School Dist. v Allied-Trent Roofing Sys., Inc.*, 15 AD3d 523, 524 [2nd Dept 2005].

Inasmuch as plaintiffs have not stated a cause of action as administrators of decedent's estate or individually as parents as a matter of law, the cross-motion for leave to amend the complaint has been rendered academic.

In view of the foregoing, the motion is granted and the cross-motion is denied.

Dated: March 12, 2012

STEVEN M. JAEGER, A.J.S.C.