

Cline v Harold W. Townsend Post 1757

2017 NY Slip Op 30146(U)

January 23, 2017

Supreme Court, Wayne County

Docket Number: 76532

Judge: Daniel G. Barrett

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This opinion is uncorrected and not selected for official publication.

At a Term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in the Town of Lyons, New York on the 19th day of October, 2016.

PRESENT: Honorable Daniel G. Barrett
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

BRIAN CLINE AND KAREN CLINE,

Plaintiffs

DECISION
Index No. 76532

-vs-

HAROLD W. TOWNSEND POST 1757 AND
ALLEN WALTERS, JR. A/K/A
ALLEN R. WALTERS,

Defendants

The Defendant, Harold W. Townsend Post 1757 (hereinafter referred to as Defendant) has filed a motion for Summary Judgment seeking dismissal of Plaintiffs' claims and all cross claims against them in their entirety.

BACKGROUND

The Plaintiff, Brian Cline, and Defendant, Allen Walters, Jr. a/k/a Allen R. Walters (hereinafter referred to as Co-Defendant) along with about ten other men planned to spend a weekend at Sacketts Harbor participating in an ice fishing derby scheduled for Saturday, February 9, 2013. These dozen men stayed at a residence owned by Allen Walter, Sr., father of the Co-Defendant.

This group of men arrived at the residence in Sacketts Harbor on Thursday. On Friday, February 8th, the group went to a bar in Sacketts Harbor, Defendant, about 7:00 P.M.. After 10:00 P.M. Plaintiff and Co-Defendant were involved in a physical encounter outside the Defendant Legion. Plaintiff sustained injuries and commenced this action seeking monetary compensation for the injuries sustained.

FIRST CAUSE OF ACTION

The first cause of action alleges that the Defendant was negligent in permitting an accumulation of water, snow and ice on the exterior stairs. The submissions presented in this application do not support a basis for this cause of action. Therefore, the first cause of action is dismissed against the Defendant.

SECOND CAUSE OF ACTION

The second cause of action states a claim for relief under the Dram Shop Act. General Obligations Law §11-101(1), commonly known as the Dram Shop Act, makes a party who “unlawfully” sells alcohol to another person liable for injuries caused by reason of that person’s intoxication. Under Alcohol Beverage Control Law §65(2), it is unlawful to furnish an alcoholic beverage to any “visibly intoxicated person.” In order to prevail on this cause of action, Plaintiff must show Co-Defendant was visibly intoxicated at the time he was served alcoholic beverages by the Defendant. The Court has been presented with transcripts and Affidavits of the following people who were in the Defendant’s bar. Plaintiff Brian Cline, Defendant - Allen Walter, Jr., Colleen Allen (employee of Defendant), Jeff Hogan, Tom Sombathy, Braad Dolan, Ryan Binion (on the executive board of the Defendant), Sara Brown (employee of Defendant), Mike Walters, Allen Walters, Sr., Kristy May, Mark Dolan, Steve DeBurk, Peter Bernhard and Cliff Walters.

This submissions are not in agreement as to the manner in which Co-Defendant comported himself during the course of the evening.

Plaintiff's submission indicates that the Co-Defendant had consumed ten (10) to seventeen (17) drinks of alcohol before they went to the Defendant's establishment. The drinks consisted of whiskey and coke and vodka and soda. Plaintiff states that he told Co-Defendant he was "shit faced" and needed to slow down. Plaintiff testified Co-Defendant was obnoxious, slurring his speech, and wobbly when he walked. Plaintiff opined that the Co-Defendant was visibly intoxicated when he arrived at the Defendant's bar. The Plaintiff testified he observed the Co-Defendant being served at least three times. He saw the Co-Defendant make a crude gesture to encourage oral sex and the Co-Defendant grabbed Plaintiff's posterior.

Tom Sombathy testified Co-Defendant had four (4) or five (5) drinks including a shot and one-half of 150 proof moonshine, a bloody mary, a seven and seven and a beer before noon. The Co-Defendant smoked marihuana around 6:30 P.M. before leaving for the Defendant's bar. He saw Co-Defendant consume three (3) or four (4) bottles of beer at the Defendant's bar.

Josh Hogan saw Co-Defendant smoke marihuana before arriving at the bar. He also testified Co-Defendant screamed an invitation for oral sex at the Defendant's bar on Friday night.

Co-Defendant testified he consumed three (3) to five (5) beers from 4:00 P.M. until he went to the bar that evening. He testified he had four (4) beers at the Defendant's bar.

Colleen Allen, an employee of Defendant, testified she served him four (4) beers.

Many of the other submissions present the Co-Defendant in a manner unrecognizable from the previous descriptions of his behavior on the evening in question. Their descriptions present the Co-Defendant as not being visibly intoxicated.

While the record contains evidence that the Co-Defendant was not intoxicated at the time in question, the record also contains evidence from which a trier of fact could conclude otherwise. This being the case, a motion dismissing the Dram Shop cause of action is denied (see *Rey v Barnhart*, 117 A.D. 2d 874 (3rd Dep't 1986)).

THIRD CAUSE OF ACTION

The Plaintiff alleges that the Plaintiff injured due to the failure of the Defendant's negligence and failing to provide adequate security for his safety.

The Plaintiff described an encounter between a 6'6" marine and the Co-Defendant. His version is that the Co-Defendant started a fight with the much larger marine and the Co-Defendant had to be pulled off by others. Another version presented in these papers is that there was no fight at all. The Co-Defendant was simply talking to the marine. As with the prior cause of action, a question of fact exists as to what actually occurred between the two individuals. If Plaintiff is believed that the Co-Defendant was the aggressor in starting a fight with the marine then perhaps the Defendant should have taken some action to prevent any further bad behavior by the Co-Defendant.

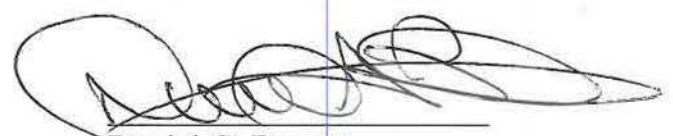
Later in the evening, around 10 P.M., Colleen Allen, employed by the Defendant to tend bar, testified that the second commander and member of the Board of Directors of the Defendant, Ryan Binion, told her that Plaintiff and Co-Defendant were arguing and they were acting like it was getting serious. She stopped serving Co-Defendant drinks and asked Plaintiff and Co-Defendant to leave the premises. Ms. Allen also testified that Mr. Binion had previously told them to leave the premises. Both Plaintiff and Co-Defendant testified they were not told to leave the premises. The Plaintiff testified he asked the Co-Defendant to go outside for a cigarette. So, a question of fact is presented whether the Defendant took action at all.

Based upon the foregoing discrepancy in testimony, the motion to dismiss the third cause of action is denied.

Based on the foregoing the first cause of action is dismissed and the second and third causes of action are not dismissed against the Defendant.

This constitutes the Decision of the Court. Counsel for Defendant to prepare an Order consistent with this Decision.

Dated: January 23, 2017
Lyons, New York



Daniel G. Barrett
Acting Supreme Court Justice