

Brabant v Beatty

2017 NY Slip Op 31055(U)

April 24, 2017

Supreme Court, Suffolk County

Docket Number: 11-12627

Judge: W. Gerard Asher

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INDEX No. 11-12627

CAL. No. 16-01293OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 10-14-16 (003)
MOTION DATE 12-5-16 (004)
ADJ. DATE 1-31-17
Mot. Seq. # 003 - MG
004- MD

-----X

TIMOTHY BRABANT,

Plaintiff,

- against -

DONALD BEATTY and DUBLIN DECK, INC.,
BRAD RAGUSO and "JOHN DOE 1-10" True
names being fictitious and unknown,

Defendant.

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Upon the following papers numbered 1 to 71 read on these motions for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1-18; 23-56; Notice of Cross Motion and supporting papers ____; Answering
Affidavits and supporting papers 19-21; 57- 65; 66- 67; Replying Affidavits and supporting papers 22; 68-71; Other ____; (~~and~~
~~after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion of defendant Dublin Deck, Inc. and the motion of defendant Brad
Raguso are consolidated for purposes of this determination; and it is further

ORDERED the motion of defendant Dublin Deck, Inc. for summary judgment dismissing the complaint against it is granted, all cross claims against it are dismissed, and this action is severed as against it; and it is further

ORDERED the motion of defendant Brad Raguso for summary judgment dismissing the complaint against him is denied.

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained as a result of an assault that occurred at the premises known as The Dublin Deck located at 325 River Avenue, Patchogue, New York on May 21, 2010. The complaint, as amplified by the bill of particulars, alleges that plaintiff was assaulted by defendant Donald Beatty, who was intoxicated, and that defendant Dublin Deck, Inc. was negligent, among other things, in serving alcohol to those under the influence and in hiring and supervising its employees.

Defendant Dublin Deck now moves for summary judgment dismissing the complaint on the grounds that it did not breach its duty of care owed to plaintiff and was not a proximate cause of his injuries. In support of the motion, defendant submits copies of the pleadings, the bill of particulars, the transcripts of the parties' deposition testimony, and an incident report.

At his deposition taken on March 11, 2013, plaintiff testified that on the evening of the subject incident, he and his girlfriend Jaimee Romeo arrived at the Dublin Deck at approximately 6:30 p.m. He testified that they drank beer and listened to a live band for the first 45 minutes before sitting at a table for a couple of hours and then proceeding to the upper level where the dance floor is located. Plaintiff testified that while he was walking to the bathroom he bumped into defendant Donald Beatty, who he described as stocky, approximately 5 feet nine inches tall, wearing a yellow and green shirt and a baseball cap. Plaintiff testified that they both turned around and were facing each other when words were exchanged. He testified that Beatty asked him if he wanted to go outside and fight, and he told him that he did not want to fight all of his eight friends. Plaintiff testified that a tall man who was standing with Beatty told plaintiff that Beatty "was not in the mood." According to plaintiff, he testified that Beatty came towards him with his arms swinging and hit him in the mouth, causing his tooth to break. He testified that after he was hit, he fell to the ground, and as he was falling, he grabbed Beatty's shirt and Beatty fell on top of him. Plaintiff testified that while he was on the ground, several of Beatty's friends kicked him in the head repeatedly. He testified that bouncers came to help him within a minute and half and brought him to the bathroom, cleaned his face, and gave him an ice pack. Plaintiff testified that the police arrived, and that he called his brother who drove him to the hospital. When asked why he did not press charges against defendant Beatty, he testified that the police told him it would be his word against defendant's word and that they would both be arrested.

Defendant Beatty testified that on the date of the incident, he arrived at the Dublin Deck at 9:00 p.m., and that he drank one beer before the incident happened. He testified that he and his friends were standing in a circle, and that plaintiff walked in between them aggressively pushing through the crowd and shoving into him. He testified that he told plaintiff "you could have said excuse me," or there's an easier way to go through crowds, and that plaintiff asked him if he wanted to "take this outside." Beatty testified that his friend Pat told plaintiff to go away, and that defendant Brad Raguso hit plaintiff in the mouth. He testified

that plaintiff and Brad fell to the ground, that plaintiff was on top of Brad, and that he pulled plaintiff off of Brad. Beatty testified that plaintiff started throwing punches at him and ripped his shirt, and within seconds security guards arrived and grabbed him and pulled him away from plaintiff.

Mark Miller, one of the owners of Dublin Deck, testified that he was working on the evening of the incident. He testified that he has a verbal agreement with Professional Security Association to provide security guards to work in the subject establishment. He testified that on the evening of the incident, 13 security guards were working inside the premises and 6 security guards were working outside. He testified that at approximately 10:00 p.m., he observed two groups of patrons being escorted outside by security personnel, and that one group was comprised of plaintiff and his girlfriend. Mr. Miller testified that he observed plaintiff with a bloody mouth and cuts on his knuckles, and that plaintiff did not appear intoxicated, but he believed plaintiff may have been high on drugs. He testified that plaintiff was agitated, belligerent and unruly, and that he was bragging to his girlfriend about throwing punches back. Miller testified that he stayed with plaintiff until the police arrived, and that plaintiff told police that he was spontaneously struck. He testified that he prepared an incident report that evening.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*Russo v Frankels Garden City Realty Co.*, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; *Ellers v Horwitz Family Ltd. Partnership*, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). Owners and occupants of stores, office buildings, and other places onto which members of the general public are invited have a nondelegable duty to provide the public with reasonably safe premises (*Blatt v L'Pogee, Inc.*, 112 AD3d 869, 978 NYS2d 291 [2d Dept 2013]; *Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.*, 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]). This duty requires a landowner to act in a reasonable manner to prevent harm to those on his or her property, which includes the duty to control the conduct of third persons on their premises when the owners have the opportunity to control such persons and are reasonably aware of the need for such control (*see D'Amico v Christie*, 71 NY2d 76, 524 NYS2d 1 [1987]; *Victor C. v Lazo*, 30 AD3d 365, 816 NYS2d 547 [2d Dept 2006]; *Chalu v Hariraj*, 304 AD2d 515, 758 NYS2d 132 [2d Dept 2003]). However, a property owner is not the insurer of a visitor's safety, and it has no duty to protect visitors against unforeseeable and unexpected assaults (*Maheshwari v City of New York*, 2 NY3d 288, 778 NYS2d 442 [2004]). If an owner is aware that there is a likelihood of conduct on the part of third parties that would endanger visitors, the owner is obligated to take reasonable precautionary measures to minimize the risk of criminal acts (*Nallan*

v Helmsley-Spear, Inc., 50 NY2d 507, 429 NYS2d 606 [1980]; *Gentile v Town & Vil. of Harrison, N.Y.*, 137 AD3d 971, 27 NYS3d 207[2d Dept 2016]). “The criminal conduct at issue must be shown to be reasonably predictable based on prior occurrences of the same or similar criminal activity at a location sufficiently proximate to the subject location” (see *Bryan v Crobar*, 65 AD3d 997, 999, 885 NYS2d 122 [2d Dept 2009]). The burden is on the owner to demonstrate that the conduct that caused the plaintiff’s injuries could not have been anticipated and prevented (see *Cole v JW’s Pub*, 133 AD3d 815, 19 NYS3d 434 [2d Dept 2015]).

Here, the testimony of plaintiff and defendants establish that the scuffle that allegedly caused plaintiff’s injuries happened quickly and was not foreseeable. The testimony establishes that adequate security was provided on the premises and both plaintiff and Beatty testified that the bouncers responded quickly. Dublin Deck established, prima facie, its entitlement to summary judgment as a matter of law on the issue of liability by tendering sufficient evidence to eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923). The burden, then, shifted to plaintiff and codefendants to proffer evidence in admissible form raising a triable issue of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595).

In opposition, counsel for Beatty alleges that plaintiff’s complaint was discontinued against Dublin Deck and refers to a stipulation dated November 3, 2016 which was not signed by defendant Dublin Deck and was not filed with the court. The court’s computerized records do not indicate that the action was discontinued against Dublin Deck and Dublin’s reply papers to the instant motion do not mention a discontinuance. Nevertheless, counsel argues that Dublin Deck has a history of police intervention and that Dublin violated General Obligations Law § 11-101, the Dram Shop Act. No evidence supporting plaintiff’s conclusion that Dublin Deck has a history of police intervention has been submitted other than counsel pointing to Miller’s deposition testimony at page 41, which testimony does not establish such history. With respect to counsel’s argument that Dublin Deck violated the Dram Shop Act, neither the complaint nor the bill of particulars or any cross-claims allege a violation of such statute (see *Kwang Sik Kim v A & K Plastic Products, Inc.*, 133 AD2d 219, 519 NYS2d 24 [2d Dept 1987]; *Bouton v County of Suffolk*, 125 AD2d 620, 509 NYS2d 846 [2d Dept 1986]; *Sobel v Midchester Jewish Center*, 52 AD2d 944, 383 NYS2d 635 [2d Dept 1976]).

To defeat a motion for summary judgment, a party opposing such motion must lay bare his proof, in evidentiary form. Conclusory allegations are insufficient to defeat the motion (see *Friends of Animals, Inc. v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790; *Burns v City of Poughkeepsie*, 293 AD2d 435 [2d Dept 2002]). Here, Beatty’s opposition, consisting solely of an affirmation of his attorney, who has no personal knowledge of the facts, is insufficient to defeat Dublin’s motion. It is well settled that an affirmation of an attorney who lacks personal knowledge of the facts has no probative value (see *Cullin v Spiess*, 122 AD3d 792, 997 NYS2d 460 [2d Dept 2014]). Accordingly, the motion of Dublin Deck, Inc. for summary judgment in its favor is granted.

Defendant Brad Raguso moves for summary judgment dismissing the complaint and cross claims on the ground that he did not strike plaintiff and was not the cause of his injuries. In support of the motion, Raguso submits two transcripts of deposition testimony by plaintiff; a deposition taken on March 11, 2013

and one taken on October 28, 2014. Further submitted are the transcripts of his deposition testimony and Beatty's testimony.

At a deposition taken on October 28, 2014, plaintiff testified that he was hit on the mouth, but that he did not know what hit him. He testified further that he does not remember if the stocky guy who he had words with, namely Beatty, hit him, or if the stocky guy intervened to stop the fight.

Raguso testified that on the date of the incident he met his friend Patrick at Dublin Deck at 7:30 p.m. He testified that Patrick and Beatty were on the upper deck and that it was very crowded. Raguso testified that he was approximately 15 feet away from Beatty when a scuffle suddenly ensued between Beatty and plaintiff. He testified that the bouncers interceded quickly, and that he did not want to get involved and left the premises. He testified that he was not involved and that he had no physical contact with anyone involved in the scuffle.

The transcript of Beatty's deposition testimony taken on June 10, 2016 is submitted. Beatty testified in this second deposition that he did not observe Raguso hit plaintiff, but that they were entangled and fell to the ground. He testified that when he pulled plaintiff off of Raguso, plaintiff grabbed him by his shirt and threw a couple of punches.

The conflicting depositions submitted by Raguso raise genuine issues of fact rather than eliminate them. The court's role on a motion for summary judgment is not to assess the credibility of the testimony (*Chimbo v Bolivar*, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]) or to engage in the weighing of evidence (*Scott v Long Is. Power Auth.*, 294 AD2d 348, 741 NYS2d 708 [2d Dept 2002]). Where as here, the facts are in dispute, conflicting inferences may be drawn, and the outcome depends on issues of credibility, a motion for summary judgment should be denied (*Ruiz v Griffin*, 71 AD3d 1112, 898 NYS2d 590 [2d Dept 2010]). Having failed to establish, prima facie, his entitlement to summary judgment dismissing the complaint, the motion of Raguso for summary judgment dismissing the complaint against him is denied.

Dated: April 24, 2017

W. Gerard Asher

J.S.C.
HON. W. GERARD ASHER

 FINAL DISPOSITION X NON-FINAL DISPOSITION