# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. JOHN J. KELLEY** **PART** **56M**

***Justice***

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JARLY J. ESPINAL,

Plaintiff,

- v -

RAYMOND RIVERA, TROY LIQUOR, INC., doing business as TROY LIQUOR BAR, and EMRG MEDIA, LLC, doing business as EMRG MEDIA,

Defendants.

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**INDEX NO.** 154752/2020

**MOTION DATE** 10/21/2022

**MOTION SEQ. NO.** 005

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 32, 33, 34, 35 were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this action to recover damages for false imprisonment, battery, and assault, the plaintiff moves pursuant to CPLR 305(a), 1003, and 3025(b) for leave to serve an amended and supplemental summons and an amended complaint adding 675 Hudson Vault, LLC (675 Hudson), as a party defendant and dropping Troy Liquor, Inc., doing business as Troy Liquor Bar (TLI) as a party defendant. 675 Hudson opposes the motion. The motion is granted to the extent that the plaintiff is granted leave to drop TLI as a party defendant, and the motion is otherwise denied.

The facts of this dispute are described in detail in this court's October 12, 2022 order disposing of Motion Sequence 003 and its November 4, 2022 order disposing of Motion Sequence 004. In short, the plaintiff alleged that he was a patron at a Manhattan bar owned and operated by TLI, which had permitted the defendant EMRG Media, LLC, doing business as EMRG Media (EMRG), to host an event at the bar. The plaintiff alleged that EMRG, in turn, hired the defendant Raymond Rivera as one of its individual hosts. In his complaint, the plaintiff asserted that, as he attempted to leave the bar, Rivera, who was inebriated at the time by virtue of alcohol provided to him by TLI, grabbed him by the wrist, refused to permit him to leave the

premises, and began to throw a punch that was blocked by the plaintiff, who, in self-defense, struck Rivera. The plaintiff further asserted that, although he was himself arrested and charged with five separate offenses, one of the charges against him was dismissed on motion, and the other four charges were superseded by one charge of assault in the third degree, of which he was acquitted. In the course of litigation, the plaintiff learned that TLI did not own the subject bar, but only a retail liquor store in Brooklyn, and that 675 Hudson actually was the owner. In its November 4, 2022 order, the court denied 675 Hudson's motion to dismiss the complaint insofar as asserted against it, concluding that it had yet to be named in the action and, thus, there was no action pending against it that could be dismissed. The plaintiff now seeks leave to amend his complaint to drop the action against TLI and add 675 Hudson as a party, and, in effect to serve an amended and supplemental summons upon 675 Hudson.

CPLR 1003 provides, in relevant part, that "[p]arties may be dropped by the court, on motion of any party, or on its own initiative, at any stage of the action and upon such terms as may be just." Since all parties agree that TLI was not a proper party, that branch of the plaintiff's motion seeking to drop TLI as a defendant must be granted (*see Aba Transp. Holding v National Gen. Ins. Co.,* 2020 NY Misc LEXIS 17619, *3 [Sup Ct, Suffolk County, Sep. 1, 2020]), and the complaint dismissed insofar as asserted against TLI.

With respect to the plaintiff's request to add 675 Hudson as a party defendant, leave to amend a pleading is to be freely given absent prejudice or surprise resulting from the amendment (*see* CPLR 3025[b]; *McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp*., 59 NY2d 755 [1983]; *360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552 [1st Dept 2011]; *Smith-Hoy v AMC Prop. Evaluations, Inc*., 52 AD3d 809 [1st Dept 2008]; *Daniels v Kromo Lenox Assoc.*, 275 AD2d 608 [1st Dept 2000]; *Bellini v Gesalle Realty Corp*., 120 AD2d 345 [1st Dept 1986]). Thus, the court recognizes that leave to amend should granted unless the proposed amended pleading is "palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc*., 74 AD3d 499, 500 [1st Dept 2010]; s*ee Hill v 2016 Realty*

*Assoc*., 42 AD3d 432 [2d Dept 2007]) or the amendment would prejudice the opposing party (*Blue Diamond Fuel Oil Corp. v Lev Mgt. Corp*., 103 AD3d 675, 676 [2d Dept 2013]). Here, however, the proposed complaint against 675 Hudson is palpably insufficient.

As explained in the October 12, 2022 order, an employer is only vicariously responsible for an assault and battery committed by its employee where the employee was acting in the scope of his or her employment (*see Rivera v State of New York*, 34 NY3d 383, 389 [2019]). By stipulation dated January 26, 2022, the plaintiff already has discontinued the action against Rivera's actual employer, the defendant EMRG Media, LLC, doing business as EMRG Media. Even if Rivera were a special employee of 675 Hudson, the issue of whether he was acting in the scope of his special employment with 675 Hudson requires the court to consider

> "'the connection between the time, place and occasion for the act; the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated' (i.e., whether it was foreseeable)"

(*id.* at 390, quoting *Riviello v Waldron*, 47 NY2d 297, 303 [1979]; *see Judith M. v Sisters of Charity Hosp.,* 93 NY2d 932, 933 [1999]). "[W]hether an employee is acting within the scope of employment requires consideration of whether the employee was authorized to use force to effectuate the goals and duties of the employment" (*Rivera v State of New York*, 34 NY3d at 390). Where "gratuitous and utterly unauthorized use of force was so egregious as to constitute a significant departure from the normal methods of performance of the [employee's] duties," the occurrence will be deemed to constitute a "malicious attack completely divorced from the employer's interests" (*id.* at 391) that would obviate any claim that the employer is vicariously liable for the tortious acts of its employee.

As described by the plaintiff in his own affidavit, Rivera, who was working as a "host," and not a bouncer or security guard, would not let him exit the bar, and either held up an arm or wrist to block the plaintiff's progress, or grabbed the plaintiff's wrist, at which point another

patron told the plaintiff that Rivera was drunk. The plaintiff further averred that Rivera cocked back his closed fist in what the plaintiff described as preparation for striking the plaintiff in the face, at which point the plaintiff, purportedly acting in self-defense, punched Rivera instead. This type of behavior on Rivera's part clearly was not undertaken in the interest of an employer and was not a natural incident of employment but, rather, involved a personal dispute between the plaintiff and someone claimed to be drunk, for which the employer may not be held vicariously liable (*see Rodriguez v Judge,* 132 AD3d 966, 967-968 [2d Dept 2015]; *Ali v State of New York*, 115 AD3d 629, 631 [2014]; *Marino v City of New York*, 95 AD3d 840, 841 [2d Dept 2012]; *Campos v City of New York*, 32 AD3d 287, 291-292 [1st Dept 2006]).

As further explained in the October 12, 2022 order, to the extent that the plaintiff implicitly contends that 675 Hudson should be held liable to him pursuant to the Dram Shop Act (General Obligations Law § 11-101), he was obligated to allege facts that established that the owner had served alcohol to Rivera while Rivera was visibly intoxicated, and that there was "some reasonable or practical connection" between the provision of alcohol to Rivera and the plaintiff's injuries (*Carver v P.J. Carney's*, 103 AD3d 447, 448 [1st Dept 2013]; *see Flynn v Bulldogs Run Corp.*, 171 AD3d 1136, 1137 [2d Dept 2019]; *Dugan v Olson*, 74 AD3d 1131, 1132 [2d Dept 2010]). Here, although the plaintiff alleged that another patron informed him that Rivera was drunk as the altercation began, and that Rivera testified at the plaintiff's criminal proceeding that he had been drinking that night, the plaintiff did not allege that the proprietor of the bar provided Rivera with alcohol *while he already was* "visibly intoxicated."

In light of the foregoing, it is

ORDERED that the plaintiff's motion is granted to the extent that the defendant Troy Liquor, Inc., doing business as Troy Liquor Bar, is dropped from the action and the complaint is dismissed insofar as asserted against that defendant, and the motion is otherwise denied; and it is further,

ORDERED that, on the court's own motion, the action is severed against the defendant Troy Liquor, Inc., doing business as Troy Liquor Bar; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendant Troy Liquor, Inc., doing business as Troy Liquor Bar; and it is further,

ORDERED that, on the court's own motion, the caption of the action is amended to read as follows:

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JARLY J. ESPINAL,

Plaintiff,

-v-

RAYMOND RIVERA,

Defendant.
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and it is further,

ORDERED that, on the court's own motion, the plaintiff is directed to serve a copy of this order with notice of entry upon the Trial Support Office (60 Centre Street, Room 148, New York, NY 10007), and shall file the notice required by CPLR 8019(c) on a completed Form EF-22 with the County Clerk, and the Trial Support Office shall thereupon amend the court records accordingly.

This constitutes the Decision and Order of the court.

12/19/2022
DATE

JOHN J. KELLEY, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |