Hafeezullah v Ask 244 LLC
2010 NY Slip Op 33987(U)
April 5, 2010
Supreme Court, New York County
Docket Number: 114680/2006
Judge: Jane S. Solomon

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

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MAJID HAFEEZULLAH,

Plaintiff,

-against-

Index No.: 114680/2006
DECISION and ORDER

ASK 244 LLC, d/b/a THE PLUMM,

Defendant.

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JANE S. SOLOMON, J.:

Plaintiff, Majid Hafeezullah, sues Defendant Ask 244 LLC, d/b/a The Plumm (The Plumm) for damages resulting from an assault by another patron when he was in The Plumm on July 16, 2006. The Plumm moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

The Plumm is a nightclub located at 246 West 14th Street, in Manhattan. Plaintiff claims he was injured by Klodjan Lala (Lala), who hit him over the head with a glass or a bottle. Lala was apprehended by club security and subsequently arrested.

Plaintiff's complaint asserts that The Plumm was negligent in allowing the assault to occur, violated the Dram Shop Act by selling alcohol to a visibly intoxicated individual, and negligently hired and trained its agents, servants and employees, because they served Lala alcohol without first ascertaining his physical condition.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute,

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and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept, 2007]). Upon a proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*People ex rel. Spitzer v Grasso*, 50 AD3d 535, 545 [1st Dept 2008] [internal quotation marks omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

A. Negligence

The Plumm argues that it has no duty to protect its patrons from an unexpected and unforeseeable act of a third party and, if it did have a duty, that duty was not breached in this case because it provided adequate security. In support of its argument, The Plumm supplies Plaintiff's deposition testimony, where he stated that Lala "popped from out of nowhere," (Plaintiff's deposition, attached to Motion, Ex. D, p.80) and then, unprovoked, hit him with a bottle. He also stated that the event lasted no longer than ten seconds (Id., p.73). Plaintiff counters that the amount of security was insufficient and, therefore, The Plumm breached its duty of care.

An operator of a public establishment has no duty to

protect its patrons from unforeseeable and unexpected assaults (Rivera v. 21st Century Restaurant, Inc., 199 AD2d 14 [1st Dept, 1993]). An unexpected altercation between a patron and a third party malefactor cannot reasonably be foreseeable or expected, without evidence of a pattern of criminal activity or similar incidents (*Davis v. City of New York*, 183 AD2d 683 [1st Dept, 1992]). Plaintiff has not made such an evidentiary showing and has not raised any triable issue of fact regarding the foreseeability and preventability of Lala's acts *(see, Lewis v. Jemanda New York Corp.*, 277 AD2d 134 [1st dept, 2000]). Accordingly, the first cause of action is dismissed.

B. Dram Act

General Obligations Law (GOL) § 11-101, known as the Dram Shop Act, covers the unlawful sale of alcohol by an establishment such as The Plumm. One such provision provides that serving alcohol to a visibly intoxicated person renders the server liable for injuries caused by that intoxicated person (GOL § 11-101).

A defendant moving for summary judgment must negate the possibility that alcohol was unlawfully served to a visibly intoxicated person (*Costa v. 1648 Second Ave. Restaurant Inc.*, 221 AD2d 299 [1st Dept, 1995]). Once this has been established, the burden shifts to the plaintiff to establish a material issue of fact (Id.)

The Plumm argues that there is no evidence that Lala was visibly intoxicated when his table was served, and, therefore, there is no evidence that it served him unlawfully. In support, it submits the deposition testimony of Cassandra Dunn (Dunn), the waitress for Lala's table on the night of the incident, and that of Kalpen Seth (Seth), a friend of the Plaintiff.

Dunn testified that Lala was not drinking on the night of the incident because he was the designated driver (Deposition of Cassandra Dunn, attached to Motion, Ex. J, p.15). She also testified that she did not recall that anyone at Lala's table was visibly intoxicated (Id. at p.22). Seth testified that while he personally believed some of the ten to fifteen individuals seated at Lala's table were intoxicated, he did not believe that Lala was intoxicated. (Deposition of Kalpen Seth, attached to Motion, Ex. H, p.51-52). These facts shift the burden to Plaintiff.

Plaintiff argues that his testimony itself raises questions of fact. However, the testimony that he points to--that he saw Lala "taking a swig directly out of the bottle itself," which allegedly shows that he was "out-of-control" (Plaintiff's deposition, attached to Motion, Ex D, p.69)--is insufficient to establish a material issue of fact that Lala was visibly intoxicated when he was served alcohol, because "[p]roof of mere consumption of alcohol is not enough to defeat a

[defense] motion for summary judgment in a Dram Shop action" (*Costa*, supra, 221 AD2d at 300). Accordingly, the second cause of action is dismissed.

C. Negligent Hiring, Retention, Training and Supervision

Plaintiff alleges that The Plumm's employees were insufficiently trained in that they "carelessly . . . served and continued to serve Klodjan Lala intoxicants without ascertaining his physical condition" (Complaint, ¶ 39), which "caused Lala to become intoxicated so as to impair his functions, senses and judgment" (Id. at ¶ 43), and strike Plaintiff.

The Plumm does not expressly argue that it was not negligent in hiring or training its employees. It does, however, argue that "[i]t was Plumm's policy that its waitresses should not serve any overly intoxicated patron" (Motion, ¶35), citing to the deposition testimony of Najanin Abdulwali, a waitress at The Plumm, and also a friend of Plaintiff, who testified that she has refused to serve patrons alcohol based on their intoxication (Deposition of Najanin Abdulwali, attached to Motion, Ex. F, p.52).

Recovery on a theory of negligent hiring and retention requires a showing that an employer was on notice of a an employee's propensity to commit the alleged acts (*White v. Hampton Management Co. L.L.C.*, 35 AD3d 243 [1st Dept, 2006]). Here, Plaintiff must show that The Plumm was on notice of its

employees' propensity to provide alcohol "without ascertaining [a patron's] physical condition." Plaintiff has not submitted any proof of such knowledge. Accordingly, the third cause of action is dismissed; and it hereby is

ORDERED that Defendant Ask 244 LLC's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to Defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it further is

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 5, 2010

ENTER:

J.S.C.

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