

Gaynor v P.J.'s Cocktail Lounge & Rest., Inc.

2015 NY Slip Op 31708(U)

September 8, 2015

Supreme Court, New York County

Docket Number: 150589/11

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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SYLVIA GAYNOR,

Index No. 150589/11

Plaintiffs,

Motion seq. no. 003

-against-

DECISION AND ORDER

P.J.'S COCKTAIL LOUNGE & RESTAURANT, INC., d/b/a
P.J.'S COCKTAIL LOUNGE, ELIZABETH PACE
GOODWIN, AIMCO 2252-2258 ACP, LLP, and JERRY
COGGINS,

Defendants.

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BARBARA JAFFE, J.:

For plaintiff:
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By notice of motion, plaintiff moves pursuant to CPLR 4403 to confirm the referee's report dated February 18, 2014 and to direct the entry of judgment against defendants.

The court records reflect the following:

On or about December 9, 2011, plaintiff commenced the instant action against defendants, asserting claims arising from an incident that occurred on January 15, 2010 at P.J.'s Cocktail Lounge (Lounge) when defendant Coggins brought a firearm onto the premises and accidentally shot plaintiff in the foot. Plaintiff alleged that the Lounge, Goodwin, and Lounge's owner were negligent and/or reckless in failing to prevent Coggins from entering the premises with a firearm, in not taking steps to check all persons entering the premises for firearms, and in not having properly trained security personnel so as to prevent the discharge of Coggins's

firearm. (NYSCEF 1).

After all of the defendants but Aimco 2252-2258 failed to answer, the court, by order dated April 26, 2013, granted plaintiff's motion for a default judgment as to liability only and referred to the issue of damages to a special referee to hear and determine. (NYSCEF 24). The action against Aimco was later settled. (NYSCEF 33).

On October 21, 2014, the Judicial Hearing Officer (JHO) conducted the inquest. Coggins, who was incarcerated, participated by video conference call. Plaintiff testified that Coggins entered the Lounge with a firearm and shot her in the right foot, and she submitted a copy of her medical records. Nobody at the inquest questioned plaintiff or Coggins about security at the Lounge, how he brought the firearm into the Lounge, or asked them any questions related to the Lounge. The JHO recommended a judgment of \$50,000 and then closed the hearing.

However, the JHO subsequently noted on the record that Goodwin was present, and then learned that Patricia Peek, owner of the Lounge, was also there. He asked Goodwin if she wanted to ask plaintiff any questions, but Goodwin said no, stating that she was not at the Lounge on the date of the incident and was only the owner of the liquor license. After asking Goodwin and Peek a few questions regarding the license and ownership of the Lounge, the JHO stated "I did not realize we had . . . I thought they were friends of the Plaintiff here to observe the situation." Although the JHO thus apparently and belatedly realized that Goodwin and Peek had appeared for the inquest, he did not reopen the hearing, permit them to ask Coggins any questions or to see or contest plaintiff's medical records, or permit plaintiff to question Goodwin or Peek. (NYSCEF 38).

While the instant motion was originally submitted on default, it was scheduled for a conference on June 24, 2015. On that date, defendant Goodwin and Peek appeared without an attorney, and were advised to, on or before August 26, 2015, either file opposition to plaintiff's motion or file a motion to vacate the default judgment entered against them, and to appear for a further conference on that date. After they failed to appear on August 26, 2015, the motion was again submitted on default.

Pursuant to CPLR 4403, a judge may confirm or reject, in whole or in part, the report of a referee, may make new findings with or without taking additional testimony, and may order a new trial or hearing.

Here, while Goodwin (and Peek, although without an attorney) appeared at the inquest, they were not given the opportunity to testify, question Coggins, present any evidence, or challenge plaintiff's damages, and while the JHO became aware at the end of the inquest that they were present, he did not reopen the hearing. (*See Minicozzi v Gerbino*, 301 AD2d 580 [2d Dept 2003] [defaulting defendant is entitled to present testimony and evidence and cross-examine plaintiff's witnesses at inquest]; *Bowdren v Peters*, 208 AD2d 1020 [3d Dept 1994] [defaulting defendant at inquest entitled to full opportunity to cross-examine witnesses, give testimony, and offer proof in mitigation of damages]).

I additionally observe that there was no evidence presented at the inquest which established that defendants Lounge or Goodwin should be held liable, jointly and severally, along with Coggins for plaintiff's injury. No evidence demonstrated that they were negligent or reckless related to the security at the Lounge or that they were legally obligated to provide security or search customers for weapons before entering the Lounge. (*See eg Hegarty v Tracy*,

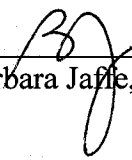
125 AD3d 804 [2d Dept 2015] [owner's duty to control conduct of persons on its premises arises only when it has opportunity to control such conduct and is reasonably aware of need for such control, and owner of public establishment has no duty to protect patrons against unforeseeable and unexpected assaults]; *James v Terrace Tavern, LLC*, 46 Misc 3d 470 [Sup Ct, Orange County 2014] [finding that bar owner and landlord could not be held liable to patron who was shot as fact that shooter brought gun into bar irrelevant; "[n]either the common law nor, for that matter, the State Liquor Authority imposes any obligation upon a bar owner . . . to have potential patrons run the gauntlet of a metal detector, frisk, and/or body search as a condition of entry."]). Moreover, plaintiff identified no duty owed or breached by Goodwin as the Lounge's liquor licensee.

For these reasons, the referee's report is confirmed only to the extent of entering a judgment against Coggins. Accordingly, it is hereby

ORDERED, that plaintiff's motion to confirm the referee's report is granted only as to defendant Coggins; and it is further

ORDERED, that a judgment is entered in favor of plaintiff against defendant Jerry Coggins in the sum of \$50,000, along with costs and disbursements as taxed by the clerk of the court, and the clerk is directed to enter judgment accordingly.

ENTER:



Barbara Jaffe, JSC

DATED: September 8, 2015
New York, New York