

Tansey v Coscia
2015 NY Slip Op 31778(U)
September 21, 2015
Supreme Court, Suffolk County
Docket Number: 11-25282
Judge: James C. Hudson
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SHORT FORM ORDER

INDEX No. 11-25282
CAL No. 14-01486OT**COPY**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 40 - SUFFOLK COUNTY**P R E S E N T :**Hon. JAMES HUDSON
Acting Justice of the Supreme CourtMOTION DATE 12/17/14 (#002)
MOTION DATE 1/14/15 (#003)
ADJ. DATE 3/11/15
Mot. Seq. #002 - MD
#003 - XMD

JOSEPH TANSEY,

Plaintiff,

- against -

NICHOLAS COSCIA, SNMT CORP., d/b/a
MOLLY BLOOMS and JOHN DOE
SECURITY, INC., (a fictitious name),

Defendants.

X
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Upon the following papers numbered 1 to 34 read on this motion for summary judgment and cross motion for summary judgment; Notice of Motion and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13-25; Answering Affidavits and supporting papers 26-28; Replying Affidavits and supporting papers 29-30; 31-34; Other defendant's memorandum of law (#002); (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendant SNMT Corp., d/b/a Molly Blooms for an order pursuant to CPLR 3212 granting summary judgment is denied; and it is further

ORDERED that the cross motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment and directing an immediate trial on the issue of damages is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff as a result of an assault which occurred on June 12, 2010 at approximately 3 a.m. on the premises, Molly Blooms, an establishment formerly located at 45 East Main Street, Smithtown, New York. The plaintiff commenced this action against Nicholas Coscia for negligence and assault; against defendant SNMT Corp., d/b/a Molly Blooms (hereinafter "Molly Blooms" or "the defendant"), for violation of General Obligations Law § 11-101 (the "Dram Shop Act"); and against Molly Blooms and John Doe Security, Inc., for negligent security. According to the plaintiff, he was assaulted by Coscia while inside of the bar. He was struck in the face and knocked to the ground, causing him to sustain serious personal injuries.

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Default judgment was granted against Nicholas Coscia on February 7, 2012, after his failure to appear or plead in this action. Molly Blooms now moves for summary judgment.

Preliminarily, to the extent the plaintiff raises certain claimed deficiencies in the deposition transcripts submitted in support of the defendant's motion, the Court finds the objections without merit. In particular, while the plaintiff asserts that certain pages of Coscia's transcript were missing, the Court's copy appears to be complete, and the defendant also submitted another complete copy in its Reply Affirmation. The plaintiff also alleges that "Exhibit I" (the plaintiff's statement to the police department) in support of the defendant's motion was missing, but it is present in the court record. However, the unsigned statement to the police is inadmissible (*see Rodriguez v Ryder Truck, Inc.*, *supra*; *Toussaint v Ferrara Bros. Cement Mixer*, 33 AD3d 991, 823 NYS2d 223 [2006]). The Court further notes that while the deposition transcripts provided in support of the defendant's motion each contain a reporter's certification, none is signed. With respect to the deposition transcripts of the plaintiff, Nicholas Coscia and Molly Blooms, it does appear that they were forwarded to the witnesses or their counsel for their review and signature pursuant to CPLR 3116 (a). The unsigned but certified deposition of Molly Blooms is admissible, since the transcript was submitted by the party deponent itself, and, was therefore adopted as accurate by the deponent (*see Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 937 NYS2d 602 [2012]). In addition, the unsigned but certified transcript of the plaintiff's deposition may be used by the opposing party as an admission in support of a summary judgment motion (*see Morchik v Trinity School*, 257 AD2d 534, 684 NYS2d 534 [1999]). Moreover, the plaintiff also offered, and thereby adopted, a similarly certified and unsigned copy of his own deposition transcript in support of his cross motion for summary judgment. The court may also consider the unsigned but certified deposition transcripts of Coscia and non-party Andrew Middleton, Jr. of PSA Security Company, as the plaintiff did not raise any substantive challenges as to their accuracy and also submitted and relied upon similarly unsigned copies of the same deposition transcripts in his own cross motion (*see Montalvo v United Parcel Service, Inc.*, 117 AD3d 1004, 986 NYS2d 551 [2014]; *Rodriguez v Ryder Truck, Inc.*, *supra*; *Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2011]).

The Dram Shop Act creates a cause of action against one who unlawfully sells alcoholic beverages to an intoxicated person, on behalf of a person who has sustained loss or injuries by reason of that person's intoxication (General Obligations Law § 11-101). An "unlawful" sale or delivery of alcohol is defined in Alcoholic Beverage Control Law § 65 as follows: "No person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to (1) Any person, actually or apparently, under the age of twenty-one years; (2) Any visibly intoxicated person . . ." To satisfy its *prima facie* burden on a motion for summary judgment dismissing a Dram Shop cause of action, a defendant must submit evidentiary proof in admissible form that it did not unlawfully serve alcohol (i.e., to a person known or reasonably known to be underage or to whom was visibly intoxicated) or that no reasonable or practical connection existed between the sale of alcohol and the resulting injuries (e.g. *Sherman v Robinson*, 80 NY2d 483, 591 NYS2d 974 [1992]; *Dugan v Olson*, 74 AD3d 1131, 906 NYS2d 277 [2010]; *Johnson v Verona Oil, Inc.*, 36 AD3d 991, 827 NYS2d 747 [2007]).¹

¹ Under General Obligations Law § 11-100, liability may be imposed only on a person who knowingly causes intoxication by furnishing alcohol to (or assisting in the procurement of alcohol for) persons known or reasonably believed to be underage. While the complaint only states a cause of action under General Obligations Law § 11-101, and that section does not explicitly refer to knowledge, that same requirement must be inferred because the legislative history makes plain that section 11-100 was intended to parallel the Dram Shop Act (*see*

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In support of its summary judgment motion, a movant must provide evidentiary proof, in admissible form, demonstrating the absence of any triable issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). The Court finds the defendant's evidentiary showing insufficient to meet its burden. Indeed, the evidence presented by the defendant is equivocal at best as to whether the defendant and its employees or agents served alcoholic beverages to Coscia either while he was visibly intoxicated or when they knew or had reasonable cause to know that he was underage. The defendant relies on the plaintiff's testimony that he never saw Coscia prior to the incident and did not see him drinking inside of Molly Blooms, as well as the testimony of Mr. Middleton, who provided security at Molly Blooms on the day of the incident, that he had not seen Coscia in the bar or drinking at the bar prior to the incident. The mere fact that these two individuals may not have seen Coscia drinking at Molly Blooms carries little evidentiary weight as to whether Coscia was served alcoholic beverages at Molly Blooms, especially in light of Coscia's testimony that he spent time in the "VIP Lounge." Moreover, Mr. Middleton also testified that when he grabbed Coscia to break up the fight, Coscia was slurring his words and stumbling a bit, and that he could smell alcohol on his breath. Coscia testified that he was under 21 years of age at the time of the incident and that he knew the bartenders and had full access to alcoholic beverages while at Molly Blooms. He went up to the bar between 10 to 15 times and also received drinks while in the VIP section. According to Coscia, while he was coherent upon arriving at Molly Blooms, his "tab would have been a million bucks that night," and after approximately an hour or two, he described his intoxicated state as follows: "Did you ever see the movie 'Twilight' when they were running through the meadow and everything was all beautiful? . . . It was nice. Butterflies everywhere. It was great, fantastic."

The fact that Coscia was underage at the time in question is undisputed. Mr. Damiani, the manager of Molly Blooms at the time of the incident, indicated that at events in which 18 year olds could attend, the bar had a system in place to provide bracelets to patrons over 21, and a mark on the hand of the underage patrons to indicate that they could not drink. Coscia testified that he did not receive a wristband or a mark and stated that they did not mean anything anyway because he knew the bartenders who served him regardless of the markings. Mr. Middleton did not notice a mark or bracelet on Coscia's hand. Mr. Middleton also testified that it was common for security to have to confiscate drinks from underage patrons, and that it happened once or twice on the night of the incident.

Insofar as the defendant argues that it is entitled to summary judgment because there is no evidence that it unlawfully provided alcoholic beverages to Coscia, the Court finds the defendant's argument devoid of merit; a defendant seeking summary judgment has the burden of establishing its *prima facie* entitlement to judgment as a matter of law by affirmatively demonstrating the merit of its defense, not merely pointing to gaps in the plaintiff's proof (see *Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 585 NYS2d 894 [1992]; *Jarzabeck v Tucci*, 155 AD2d 908, 548 NYS2d 956 [1989]). Consequently, the Court finds the defendant's evidence inadequate to negate the possibility that the defendant served Coscia alcohol when it knew or had reasonable cause to know that he was underage or while he was visibly intoxicated.

Sherman v Robinson, supra). It is also worth noting that recovery under General Obligations Law § 11-100 is *not* the sole civil remedy for persons injured as the result of the intoxication of a minor, and that the plaintiff may properly rely on General Obligations Law § 11-101 (see *McCauley v Carmel Lanes Inc.*, 178 AD2d 835, 577 NYS2d 546 [1991]).

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Furthermore, contrary to the defendant's assertions, it cannot be said as a matter of law that there was no reasonable or practical connection between the defendant's alleged unlawful sale of alcohol to Coscia and the subsequent injuries Coscia inflicted on the plaintiff. Coscia testified that he "abused the privilege" of free drinks towards the end of the night, had a tendency to fight or "rampage" when mad, and was repeatedly annoyed by the plaintiff. As to the defendant's claims that the assault was the result of the plaintiff's own actions, it is well established that the presence of intervening acts or independent wrongdoing does not eliminate liability under the Dram Shop Act (see *Oursler v Brennan*, 67 AD3d 36, 43, 884 NYS2d 534, 541 [2009]). In addition, proximate cause, as must be established in a conventional negligence case, is not required (see *McNeill v Rugby Joe's, Inc.*, 298 AD2d 369, 370, 751 NYS2d 241 [2002]).

As to the plaintiff's cause of action for negligent security, the defendant asserts that it is not responsible because it hired an independent contractor to provide security and, furthermore, because the assault was unforeseeable and unexpected.

There are insufficient details within the record to determine whether the security at Molly Blooms at the time of the incident was provided through an independent contractor. The general rule is that a party who employs an independent contractor for a particular task on the premises is generally not liable for the negligent acts of that contractor, absent a showing of a specifically imposed duty or knowledge by the principal of an inherent danger (see *Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 381, 639 NYS2d 971 [1995]; *Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668, 584 NYS2d 765 [1992]). The critical factor in determining whether one is an independent contractor or an employee, for purposes of assessing tort liability, is who has control of the method and means by which the work is to be done (e.g. *Berger v Dykstra*, 203 AD2d 754, 610 NYS2d 401, *lv dismissed in part, denied in part* 84 NY2d 965, 621 NYS2d 513 [1994]). While there is general testimony from Mr. Damiani and Mr. Middleton that Molly Blooms contracted with a security company that "took care of everything," no copy of the contractual agreement is provided. Absent any further details regarding the arrangement for, and provision of, security, the Court finds the record indeterminate on this issue.

As a public establishment, the defendant had a duty to act in a reasonable manner to control the conduct of third persons on its premises so as to prevent harm to its patrons (*D'Amico v Christie*, 71 NY2d 76, 85, 524 NYS2d 1 [1987]; *Panzera v Johnny's II*, 253 AD2d 864, 865, 678 NYS2d 336, 337 [1998]). However, a defendant's duty arises only when it has the opportunity to control such persons and is reasonably aware of the need for such control (*Scotti v W.M. Amusements*, 226 AD2d 522, 522, 640 NYS2d 617 [1996]). However, an "owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults" (*id.* at 522, 640 NYS2d at 617).

The defendant established its *prima facie* entitlement to judgment dismissing the claim of negligent supervision against it as a matter of law by demonstrating, through the deposition testimony of the plaintiff and Mr. Middleton, that the fight happened suddenly and without warning (e.g. *Millan v AMF Bowling Centers, Inc.*, 38 AD3d 860, 833 NYS2d 173 [2007]). In opposition, the plaintiff raised triable issues of fact regarding whether the defendant should have been aware of the need to control Coscia's conduct. Coscia testified that there were verbal confrontations between himself and the plaintiff in the bar leading up to the incident. Mr. Damiani testified that prior to this incident, there had been no fights at the bar, although bouncers had to escort people out once in a while. In addition, issues of fact exist as to whether

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there was adequate properly trained security provided on the day in question. The security was charged with checking identification and marking who was able to drink, and there are questions as to whether the underage Coscia was properly marked. The defendant's manager, Mr. Damiani, testified that he had left the bar around 1:30 a.m. on the day of the incident. Coscia also testified that the bouncer just watched him hit the plaintiff many times. The Court concludes that questions of fact raised by the parties' opposing motion papers are sufficient to defeat summary judgment (*see Pierce v Moreau*, 221 AD2d 763, 633 NYS2d 631 [1995]).

Turning now to the plaintiff's cross motion for summary judgment, it should be noted at the outset that the Court will not consider the transcript of non-party witness Travis Van Nostrand submitted in support of the motion, as it is both unsigned and uncertified (*McDonald v Mauss*, 38 AD3d 727, 832 NYS2d 291 [2007]).²

Even assuming for purposes of this determination that the plaintiff established his *prima facie* entitlement to summary judgment, the defendant raised questions of fact as to whether Coscia was served alcoholic beverages at Molly Blooms. Neither the plaintiff nor Mr. Middleton testified that they saw Coscia drinking at the bar prior to the incident and Mr. Damiani testified that the bartenders were trained not to serve intoxicated or underage patrons. In light of the conflicting deposition testimony, the Court cannot find as a matter of law that the defendant unlawfully served alcoholic beverages to Coscia either while he was visibly intoxicated or when it knew or had reasonable cause to know that he was underage.

The plaintiff failed to establish its *prima facie* entitlement to summary judgment on its cause of action for negligent security, as Coscia's testimony regarding his verbal altercations with the plaintiff prior to the fight are insufficient, without further evidence, to establish that the assault was foreseeable. It is unclear from Coscia's testimony alone whether the verbal altercations were of the nature to have made the defendant reasonably aware of the need to control Coscia's conduct.

In light of the foregoing, both the motion and the cross motion are denied.

Dated: 9/21/15



A handwritten signature in black ink, appearing to read "Hon. James Hudson".

A.J.S.C.

HON. JAMES HUDSON

 FINAL DISPOSITION X NON-FINAL DISPOSITION

² While Coscia's deposition transcript submitted in support of the plaintiff's motion is not in admissible form as it is uncertified and unsigned, since the complete and certified transcript is already in the record as submitted by the defendant, the Court will consider it in the interest of judicial expediency.