

Malley v Super Gourmet Food, Corp.

2017 NY Slip Op 32133(U)

October 10, 2017

Supreme Court, New York County

Docket Number: 159887/15

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

KEVIN MALLEY

INDEX NO. 159887/15

- v -

MOT. DATE

SUPER GOURMET FOOD, CORP. et al.

MOT. SEQ. NO. 004 and 005

Table listing papers read on motion: #004 Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits, Notice of Cross-Motion/Answering Affidavits — Exhibits, Replying Affidavits; #005 Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits, Notice of Cross-Motion/Answering Affidavits — Exhibits, Replying Affidavits. Includes NYSCEF DOC No(s) for each.

In this action, plaintiff seeks to recover for injuries he sustained when defendant Garron Lamp punched him in the face, breaking his jaw, while they were at a bar operated by Super Gourmet Food Corp. d/b/a Thunder Jackson's ("Thunder Jackson's"). In motion sequence number 004, Thunder Jackson's moves to vacate plaintiff's note of issue because it was unable to timely produce a witness for deposition before plaintiff was ordered to file note of issue by the Honorable Joan Kenney. While, plaintiff opposes that motion, codefendant Lamp has not taken a position with respect to it.

In motion sequence number 005, plaintiff moves for partial summary judgment on the issue of Lamp's liability for assault and battery and against Thunder Jackson's on the issue of liability as to plaintiff's cause of action sounding in violation of the Dram Shop Act (GOL § 11-101 and ABC Law § 65). Both Lamp and Thunder Jackson's oppose that motion.

The motions are hereby consolidated for the court's consideration and disposition in this single decision/order. Issue has been joined and the motion for summary judgment was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

At the outset, the court must address the motion to vacate note of issue, since one basis of Thunder Jackson's opposition to the motion for summary judgment is that plaintiff's motion is premature. The court disagrees. Summary judgment is premature when "facts essential to justify opposition may exist but cannot then be stated" (CPLR 3212[f]). Here, as plaintiff points out, Thunder Jackson's had a reasonable opportunity to produce a witness for deposition (cf. Betz v. N.Y.C. Premier Properties, Inc., 38

Dated: 10/10/17

HON. LYNN R. KOTLER, J.S.C. (with signature)

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [X] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

AD3d 815 [2d Dept 2007]). Moreover, Thunder Jackson's has not established that the sought after information was in plaintiff's exclusive control warranting further discovery. Indeed, plaintiff was able to locate, through the use of a private investigator, Thunder Jackson's bartender, Danielle Roggiro, who served plaintiff and Lamp. Therefore, the motion to vacate note of issue is denied.

The court now turns to plaintiff's motion for partial summary judgment. On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The relevant facts are based upon plaintiff, Lamp and Nair's deposition testimony. Plaintiff testified that he could not remember much of the evening. He could not remember when he arrived or left various places or recall specific conversations, so many of the facts as follows are based upon Lamp's testimony which is largely confirmed by Nair's testimony. Lamp, a medical resident, was out with friends celebrating the fact that he had received a job offer earlier that week. At approximately 3pm on the date of the incident, Lamp arrived at a restaurant called Pranna and ordered bottle service with three other friends of his, including Nair. The bottle service included two one-liter bottles of alcohol along with mixers. While at Pranna, Lamp met plaintiff, and invited him to join his table. Before that point, neither Lamp nor his friends had ever met plaintiff before. At around 8pm, Pranna closed. Lamp testified at his deposition that he had drunk at least 5-10 drinks, maybe more, and was very intoxicated prior to leaving Pranna.

After Pranna closed, Plaintiff, Lamp and Nair headed to Thunder Jackson's, a bar. Lamp and Nair knew the bartender, Roggiro, who would give them free drinks so the bill was always low. They arrived at Thunder Jackson's at around 8:30pm. While at Thunder Jackson's, Lamp admitted, and Nair confirmed, that Lamp, Nair and plaintiff had alcoholic drinks. Lamp guessed that he had "at least three" but couldn't recall what type of alcohol he drank at Thunder Jackson's. Lamp confirmed that he was "[v]ery intoxicated" when Roggiro served him. Lamp was asked if he recalled whether he was slurring his words, to which Lamp responded: "I don't recall surring my words, but I'm sure that I did." Lamp also did not know if plaintiff appeared "visibly intoxicated."

At approximately 11pm, Lamp decided that he wanted to go home. Lamp testified that plaintiff told him he wasn't allowed to leave

A. After I decided to leave, I paid my bar tab and Mr. Malley told me that I wasn't going to be able to leave. He stood in my way and said that if I was going to leave the bar I'd have to hit him.

Q. And when he said this to you, again, you were very intoxicated?

A. Yes.

Q. Did he appear to be very intoxicated?

A. Yes.

Q. And did you take him seriously?

A. He repeated himself multiple times, so yes.

Q. Okay. And so when he repeated himself multiple times, was it your understanding at that point that the only way you could have left is if you, in fact, took him up on his suggestion and hit him?

A. Yes.

Q. Was there any way to walk around Mr. Malley other than striking him?

A. Probably.

Q. Okay. And why did you choose that course of action?

A. I was fairly intoxicated and – I'm not really sure.

Q. Okay. So as you sit here now, you have no memory as to why you made the decision to strike him instead of walking around him to leave the bar other than being intoxicated?

A. No.

Q. At any time, did he threaten you?

A. Other than saying that I wasn't able to leave, no.

Q. Okay. Well, did you take that as a threat when he says, "I'm not going to let you leave unless you hit me?"

A. He stood in front of me and blocked my path to the door.

Q. Did you take it as a threat to your physical well-being?

A. I'm not sure.

...

Q. Did he instigate a physical altercation with you?

A. He never touched me physically, but he did provoke me.

Q. Okay. And how did he provoke you?

A. By saying that I wasn't able to leave.

Q. Okay. And, again, he provoked you by saying you weren't able to leave even though you could have walked around him?

A. Probably.

...

Q. Did he threaten you? Did you take any of his actions to be threatening to you physically?

A. Standing in front of me and telling me that I wasn't able to leave, yes.

Lamp eventually was arrested in connection with the incident. He pled guilty to assault in the third degree in violation of PL § 120[2], performed community service and attending an anger management session and the charges were later reduced to a violation.

Nair appeared at a deposition and generally confirmed Lamp's testimony. He agreed that they were drunk at Pranna and that they became more intoxicated at Thunder Jackson's. When asked what drinks they had at Thunder Jackson's, Nair said he knew they had shots and beers and he guessed that plaintiff and Lamp had two or three shots. Nair claimed that the bartender at Thunder Jackson's, a nurse at Brookdale Hospital named Danielle Roggiero that both Lamp and Nair knew, did not tell Lamp, Nair or Malley at any point that she had to stop serving them. When asked whether Lamp was visibly intoxicated, Nair stated:

Q. Do you know if Garron looked intoxicated?

A. Sure.

Q. When you say he looked intoxicated, in other words, some visible signs of intoxication; what do you remember seeing about him? I want you to put yourself in that bar and sort of describe for us what you saw?

A. I mean, he was drunk. His pattern of speech, he would talk slower. His eyes, the glazed look. The way he walked out of the bar it was definitely someone who was intoxicated, yes.

Q. When you say walked out of the bar, after the incident?

A. Correct.

Q. In what way did you observe him walking out of the bar that led you to further your understandings that he was intoxicated?

A. This is after the fact that I realized he was drunk, I didn't think a matter would escalate to that point when I was there at that point in time.

...

Q. While you were at Thunder Jackson's, as you sit here today, do you have any specific recollection of seeing Garron Lamp slur his words?

A. Specific recollection of him slurring his words, you mean can I remember a sentence of him slurring away?

Q. My question is, earlier you testified, we were all drunk and acting in different ways?

A. Yes.

Q. Was that an assumption that certain things were happening or do you specifically recall seeing Garron slurring his words?

A. No. We are drunk outside of Pranna itself before getting to the bar, outside of Pranna we were drunk.

Q. I understand that you were drunk.

A. Right.

Q. While you were at Thunder Jackson's, do you have a recollection of specifically seeing Garron slur his words?

A. Specifically when he would talk to me was he slurring, yes.

Q. Is that from the time you entered Thunder Jackson's through the time you were there?

A. It was before even. It was outside from Pranna itself that we were very drunk and I say he was drunk, I was pretty intoxicated too.

...

Q. While at Thunder Jackson's, do you have any specific recollection of seeing Garron yelling at anybody?

A. Was he yelling at anyone? Towards the end of when he was trying to leave, but otherwise, no. He wasn't yelling, just raising his voice a little, because he was frustrated I would say. Otherwise, no, he wasn't yelling at anyone.

Q. Putting aside yelling at anyone, did you specifically observe him acting in a a boisterous manner, maybe jubilant? (sic)

A. No.

Q. While you were at Thunder Jackson's, do you have any specific recollection of seeing Garron have issues with his balance?

A. When he walked out, yeah.

...

Q. During any of the times you saw him speaking to the bartender, to Danielle, to order drinks, did you hear him slurring his words or was he able to communicate clearly with the bartender?

A. His tone – once again, this was a couple of years ago and I was drunk myself, but I know his tone wasn't normal. I know him when he is normal and I guess that's the normal state of who Garron is, so every conversation he had I would have noticed that, yeah.

Nair was asked why Lamp punched plaintiff in the face. Nair explained:

A. Garron had come up to me first and he said – I'm not quoting him – but along the lines of, "he is annoying me and he's not letting me move around," and I think much of it. He came up to me another time maybe five or ten minutes later repeating it again, "he is annoying me and following me around," once again, I didn't think much of it, I was like, okay, we are all drunk, whatever. In the back of my mind I was think you you chatted him up in some bar so you –

Q. You get what you deserve sort of thing?

A. Yeah, I kind of just ignored it really, sort of thing.

Q. And then?

A. Until the third time he came up to me and said, "listen, I'm going home and he is not letting me go home," and this is not me quoting him, it's along the lines of what happened. He mentioned that Kevin had said, "if you want to leave you have to knock me out to leave," and once again it's we are all drunk here, I'm not taking anything seriously, and before I know it Garron put his jacket down and the kid was on the floor.

As previously noted, plaintiff could not recall many details regarding the night of the accident when he was asked about it at his deposition:

Q. And while you were at Thunder Jacksons were you drinking alcohol?

A. I don't remember.

Q. Was Mr. Lamp drinking alcohol, that you observed?

A. I don't know.

...
Meaning I'm not sure if he was drinking alcohol.

Q. Do you remember seeing Mr. Lamp being served alcohol, whether it be beer, wine, liquor, anything at all by –

A. I don't remember seeing him.

Q. Do you recall seeing Mr. Lamp while you were sitting at the table order any alcoholic beverages from, say, a waitress?

A. May I rephrase the prior question.

...
I did see him being served but I don't know if it was alcohol or what that was. I did see him being served a drink.

Q. When you saw him being served a drink where was he located?

A. He was at the table.

Q. And were you sitting at the table also?

A. Yes.

Q. And did you see him serve multiple drinks or just that one drink that we discussed?

A. I only remember that one.

Q. Do you recall him ordering the drink before it arrived?

A. No, I don't recall.

Q. Aside from the time that you were sitting at the table with Mr. Lamp was there any other time while you were at Thunder Jacksons that you observed Mr. Lamp drinking an alcoholic beverage?

A. I don't remember.

...

Q. And during the time when you were at Thunder Jacksons did you observe Mr. Lamp drinking alcohol while he was at the bar?

A. I don't recall.

Q. Do you recall seeing him being served alcohol while at the bar?

A. I don't recall.

Q. Do you recall seeing him at or near the bar whatsoever?

A. Yes.

Q. Can you tell me what you recall as far as seeing him by the bar while in Thunder Jacksons?

A. I remember talking to him at the bar.

Lamp's financial records showed that he paid a \$41.00 charge at Thunder Jackson's. Further, plaintiff's hospital records from when he was admitted after the incident show that he had a blood alcohol level of .295 at that time.

The Dram Shop Act, codified at GOL § 11-101, provides as follows:

Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.

The Dram Shop Act must be read in conjunction with ABC Law § 65 to determine whether there was an unlawful sale of alcohol (*Moyer v. Lo Jim Café*, 19 AD2d 523 [1st Dept 1963] aff'd 14 NY2d 792 [1964]). ABC Law § 65 provides in pertinent part that "[n]o person shall sell... any alcoholic beverages to... any intoxicated person..."

Plaintiff's proof, in support of his claim that Thunder Jackson's unlawfully served alcohol to Lamp who was visibly intoxicated, is based upon Lamp and Nair's testimony. Plaintiff testified that he could not recall if Lamp had any alcoholic drinks at Thunder Jackson's. Nor could plaintiff recall Lamp's demeanor or visible appearance at Thunder Jackson's. While there is no dispute that plaintiff, Nair and Lamp were all drinking alcoholic beverages on the date of the incident, plaintiff has not established as a matter of law that Lamp was visibly intoxicated so as to impose liability under the Dram Shop Act. Indeed, on this record, the details of when Lamp was served and his physical condition at that time are not clear.

A purveyor of alcoholic beverages cannot be held generally liable for providing alcohol to someone who thereafter becomes visibly intoxicated. This is because the alcohol provider must have either ac-

tual knowledge or notice of the intoxicated person's condition as a predicate for the unlawful sale (*Romano v. Stanley*, 90 NY2d 444 [1997]). The visible intoxication must be readily observable at the time that the drinks were provided to Lamp. Therefore, even if plaintiff could establish that Lamp was visibly intoxicated, plaintiff has not provided sufficient facts on this record to demonstrate a *prima facie* case of violation of GOL § 11-101, to wit, that Lamp was visibly intoxicated when Roggiero served him.

Further, even if plaintiff had met his burden, video of the underlying incident which Thunder Jackson's provided to the court raises a triable issue of fact as to whether Lamp was in fact visibly intoxicated. Nor does plaintiff's own blood alcohol content suffice to satisfy plaintiff's burden of proof, given that plaintiff testified he was 5'10.5" and weighed 160 pounds versus Lamp who testified that he was 5'10" and weight 250-260 pounds. The court notes that no expert testimony has been provided which would establish what Lamp's blood alcohol would have been at any point during the subject evening (compare *Romano*, *supra*).

Plaintiff, however, is entitled to summary judgment as to liability against Lamp. "To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact. To recover damages for battery, a plaintiff must prove that there was bodily contact, that the contact was offensive, and that the defendant intended to make the contact without the plaintiff's consent (*Bastein v. Soto*, 299 AD2d 432 [2d Dept 2002])" On this record, plaintiff has demonstrated a *prima facie* cause of action for assault and battery. Lamp's opposition, that there are triable issues of fact as to plaintiff's comparative negligence and that liability may be apportioned amongst all the parties by a fact-finder, is of no moment. Plaintiff's own negligence and apportionment are issues of fact reserved to the trial court.

Accordingly, it is hereby ordered that plaintiff's motion for partial summary judgment is granted only to the extent that plaintiff is entitled to summary judgment on the issue of Lamp's liability for assault and battery, only.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequence number 004 is denied; and it is further

ORDERED that motion sequence number 005 is granted to the extent that plaintiff is entitled to summary judgment on the issue of Lamp's liability for assault and battery, only; and it is further

ORDERED that motion sequence number 005 is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

10/10/17
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.