

<b>Folan v Bonsignore</b>
2017 NY Slip Op 33311(U)
December 19, 2017
Supreme Court, New York County
Docket Number: 116645/09
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

JOSHUA FOLAN,  
Plaintiff,

Index No.: 116645/09

Motion Date: \_\_\_\_\_

- v -

Motion Seq. No.: 07

TOMMY BONSIGNORE, BAR XII, and FELTRIM  
RESTAURANT CORP. d/b/a BAR XII,  
Defendants.

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits  
Answering Affidavits - Exhibits  
Replying Affidavits - Exhibits

PAPERS NUMBERED

1
2, 3
4

**FILED**  
DEC 21 2017

Cross-Motion:  Yes  No

COUNTY CLERKS OFFICE  
NEW YORK

Upon the foregoing papers, it is ordered that the motion shall be granted.

Co-defendants Bar XII and Feltrim Restaurant Corp. move for summary judgment dismissing the complaint and cross-claim against them. Co-defendant Tommy Bonsignore and plaintiff Joshua Folan oppose the motion.

This action arises out of an altercation that took place at movants' bar on September 9, 2009, as a result of which plaintiff alleges that he was injured after having been struck by co-

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

defendant Bonsignore in part due to the negligence of the movants in failing to provide adequate security on the premises.

Movants argue that they are entitled to summary judgment because the alleged actions of co-defendant Bonsignore in assaulting the plaintiff were sudden and unforeseeable and therefore a claim of negligent provision of security cannot be demonstrated. Zamore v Bar None Holding Co., LLC, 73 AD3d 601 (1<sup>st</sup> Dept 2010); Lewis v Jemanda New York Corp., 277 AD2d 134 (1<sup>st</sup> Dept 2000) ("Inasmuch as the incident was attributable to the sudden, unexpected and unforeseeable act of plaintiff's assailant, its prevention was beyond any duty defendant may have had as a landowner to its patrons").

However, in response, Bonsignore argues that the movants are not entitled to summary disposition because there is evidence that at the time of the incident the plaintiff was employed on the premises by the movants and therefore there is an issue of fact as to whether movants acquired knowledge which imposed upon them a legal duty to act.

The testimony of non-party Sean Sugrue, plaintiff's co-worker tending bar on the night of the altercation, was that plaintiff was a "staff member" of the defendant bar and that plaintiff worked as a bartender that evening up to one hour prior to the incident. Sugrue also testified that although he was unaware if plaintiff drank from the bar after finishing his

shift, it was his recollection that there was no prohibition against plaintiff doing so and that defendants' employees were permitted to remain on the premises following their shifts.

Bonsignore also cites the testimony of non-party Kristina Engen, his friend, that plaintiff, while working as a bartender, struck up a conversation with her and sometime later went outside of the bar and took the clip out of her hair, which allegedly precipitated the altercation that caused plaintiff's injuries.

The movants counter that none of the facts cited by Bonsignore are sufficient to raise any issue of fact tending to establish that they have any liability upon his cross-claims that they negligently failed to provide security. Movants argue that there are no facts in the record that would demonstrate that they were aware that plaintiff took Engen's hair clip, let alone that such action on the part of their bartender would have precipitated Bonsignore's reaction, and that therefore they are not liable as a matter of law.

The court agrees with movants. There are no issues of fact that movants should have foreseen that plaintiff's action would lead to the incident. Thus, they are not liable, as a matter of law, for the assault by their patron, defendant Bonsignore.

The court agrees with Bonsignore to the extent that contrary to movants' assertions, Bonsignore and plaintiff's theory of liability is not based upon the plaintiff's employment

status and movants' concomitant respondeat superior responsibility but on whether given that status at the time of the incident the movants acquired knowledge making the incident foreseeable and therefore creating a duty from the movants to the other parties. However, nothing about the action of plaintiff in removing the clip from Engen's hair makes foreseeable that her friend defendant Bonsignore reaction would be to strike plaintiff. In summary, even assuming arguendo that movants were aware of plaintiff's inappropriate behavior toward Engen, movants are not independently negligent based on their failure to provide adequate security because of such imputed awareness of the behavior of plaintiff, their part-time bartender, as the altercation itself was nonetheless sudden, unexpected and unforeseeable. As a matter of fact, the evidence that plaintiff removed the clip from Engen's hair, without her permission, is not evidence of an act predictably provocative of a physically violent reaction from a third person. In fact, plaintiff himself testified that he had no warning of any kind of impending assault upon him by defendant Bonsignore.

Neither Bonsignore nor plaintiff comes forward with any evidence that movants' employees took some affirmative action to halt the altercation between the parties, thus assuming a legal duty to act. Cf Lee v Chelsea Piers, 11 AD3d 257, (1<sup>st</sup> Dept. 2004). Nor is there any evidence of prior assaults by third

parties taking place inside the bar, let alone past instances of inappropriate behavior on the part of plaintiff, on or off duty as bartender. See Zamore v Bar None Holding Co, LLC, 73 AD3d 601 (1<sup>st</sup> Dept 2010) citing Lewis v Jemanda NY Corp, 277 AD2d 134 (1<sup>st</sup> Dept 2000).

Finally, there is no evidence that any employees or other agents of movants took part in the assault upon plaintiff, which makes Alexandridis v Suede Night Club, 17 Misc3d 1103 (A) (Sup Ct, NY Co 2007) entirely distinguishable on its facts.

Accordingly, it is

ORDERED that the motion for summary judgment of defendants Bar XII and Feltrim Restaurant Corp d/b/a Bar XII is granted, and the complaint and cross claims are dismissed in their entirety as against such defendants, with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of such defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk

(Room 141B) and the Clerk of the Trial Support Office (Room 158),  
who are directed to mark the court's records to reflect the  
change in the caption herein.

This is the decision and order of the court.

**Dated:** December 19, 2017

ENTER:

*Debra A. James*  
J.S.C.

**DEBRA A. JAMES**

**FILED**

DEC 21 2017

COUNTY CLERKS OFFICE  
NEW YORK