

Curet v Exclusive Trucking LLC

2018 NY Slip Op 30584(U)

March 23, 2018

Supreme Court, New York County

Docket Number: 159568/2014

Judge: Lisa A. Sokoloff

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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: PART 21

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RAPHAEL CURET, SALVATORE POLIZZI, ASHRAF
MAREI, GEHAN A MOUBARAK, ATEF ABDELMOTY

Index No.: 159568/2014

Mot. Seq. 8

Plaintiffs,

-against-

DECISION AND ORDER

EXCLUSIVE TRUCKING LLC, VINCENT HALUCK,
DOMINIC D. WILBY, 17TH STREET
ENTERTAINMENT II, LLC, THE BUTLER GROUP,
1 OAK d/b/a ONE OF A KIND, WYNDHAM HOTEL
GROUP, LLC, DREAM DOWNTOWN HOTEL and
MARITIME HOTEL CORPORTATION,

Defendants.

----- X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

----- X

NANCY RODRIGUEZ, as Administrator of the Estate,
of WILLIAM D. PENA and on behalf of his daughter,
GABRIELLE PENA, individually,

Plaintiffs,

-against-

EXCLUSIVE TRUCKING LLC, VINCENT HALUCK,
THE BUTLER GROUP, 1 OAK d/b/a ONE OF A KIND,
17TH STREET ENTERTAINMENT II, LLC, WYNDHAM
HOTEL GROUP, LLC, DREAM DOWNTOWN HOTEL,
MARITIME HOTEL CORPORTATION, HUB TRUCK
RENTAL CORP., 18 RABBITS, INC. and
DOMINIC D. WILBY,

Defendants.

----- X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

----- X

NEW YORK CITY TRANSIT AUTHORITY and
MANHATTAN AND BRONX SURFACE
TRANSPORTATION TRANSIT OPERATING
AUTHORITY,

-against-

Plaintiffs,

Index No.: 159568/2014
(originally 451713/2017 before
consolidated with 159568/2014
& 151018/2015)

EXCLUSIVE TRUCKING, INC., LLC, HUB TRUCK
RENTAL COMPANY, VINCENT HALUCK,
18 RABBITS, INC., DREAM HOTEL GROUP, LLC
d/b/a THE DREAM HOTEL, DOMINIC DONALD WILBY,
17TH STREET ENTERTAINMENT II, LLC, 1 OAK d/b/a
ONE OF A KIND, THE BUTTER GROUP, WYNDHAM
HOTEL, LLC, MARITIME HOTEL CORPORATION,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYCEF #
Defendant's Motion/ Affirmation/Memo of Law	<u>1</u>	205-230
Plaintiff's Memo of Law in Opposition	<u>2</u>	239-243
Defendant's Affirmation in Reply/Memo of Law	<u>3</u>	244

LISA A. SOKOLOFF, J.

In this action, the third of these three consolidated actions, Plaintiffs New York City Transit Authority and Manhattan and Bronx Surface Transportation Transit Operating Authority (collectively, "Transit") seek recovery for property damage due to the negligence and/or strict liability of Defendants 17TH Street Entertainment II, LLC ("17TH Street") and 1 OAK d/b/a One of A Kind (collectively, "1 Oak") for allegedly negligently serving Defendant Dominic Donald Whilby excessive amounts of alcohol, continuing to serve him knowing he was severely intoxicated and impaired, removing

him from the premises and allowing him to be a menace to the general public, in this instance, by irreparably damaging Transit's articulated bus and subway rail. Transit asserts that 1 Oak was negligent and violated Section 65 of the Alcohol Beverage Control Law.

1 Oak moves to dismiss Transit's complaint on the grounds that the Court does not have subject matter jurisdiction and that the complaint fails to state a cause of action pursuant to pursuant to CPLR § 3211(a)(2) and (7), respectively.

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83 [1994]; *Wald v Graev*, 137 AD3d 573 [1st Dept 2016]).

To establish a prima facie case of negligence, a plaintiff must demonstrate that the defendant owed him a duty of reasonable care, breached that duty, and that the breach was a proximate of the plaintiff's injury (*Boltax v Joy Day Camp*, 67 NY2d 617 [1986]; *Kenney v City of New York*, 30 AD3d 261 [1st Dept 2006]). The complaint must also "contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory" (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836 [1st Dept 2011]).

Section 65 of the Alcoholic Beverage Control Law, which prohibits a person from selling or giving away alcoholic beverages to a person under age 21 or any visibly intoxicated person, creates no private right of action (Alcoholic Beverage Control Law § 65[1], [2]; *Sherman v Robinson*, 80 NY2d 483, 487 [1992]; *Moyer v Lo Jim Cafe, Inc.*, 19 AD2d 523 [1st Dept 1963]; *Butler v New York City Transit Authority*, 3 AD3d 301 [1st

Dept 2004]). 1 Oak claims that co-Defendant Wilby was over age 21 at the time of the February 12, 2014 accident according to his June 1, 1991 date of birth on New York State Department of Corrections records.

1 Oak claims further that, although not specifically asserted in the complaint, Plaintiffs have no cognizable cause of action based on General Obligations Law (GOL) §§ 11-100 or 11-101, which impose civil liability on any person who, respectively, knowingly causes intoxication or impairment of ability by unlawfully furnishing to a person with knowledge or reasonable cause to believe that the person was under age 21, or unlawfully sells liquor to an intoxicated person. Since co-Defendant Wilby was over age 21, GOL § 11-100 is not applicable.

1 Oak further contends that GOL §§ 11-100 and 11-101, known as New York's Dram Shop Act, do not provide a cause of action for corporate plaintiffs such as Transit. They argue that the plain language of subsection (1) reserves a right of action to "any person" injured in person, property or means of support, and that the reference to a natural person is implicit in subsection (2) which provides that, in case of death, the action or right of action shall survive to his or her executor or administrator, and the amount so recovered by either a husband, wife or child shall be his or her sole and separate property.

Plaintiffs did not move to amend the complaint to assert a violation of the Dram Shop Act and their opposing papers failed to controvert the movant's assertions that the Dram Shop Act is inapplicable (*Tuff & Rumble Management, Inc. v Landmark Distributors, Inc.*, 225 AD2d 485 [1st Dept 1996]).

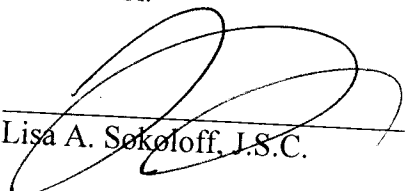
The court is mindful that since the Dram Shop Act represents creation of a liability not previously existing in the common law, the statute should be narrowly

construed (*Rust v Reyer*, 91 NY2d 355 [1998]). Despite extensive research the court has been unable to locate any decisional law involving corporate plaintiffs seeking legal redress of a claimed Dram Shop Act violation or any applicable legislative history. Yet the statute applies to "any person," and a corporation, as well as the state, is a "person," as defined in the General Construction Law (General Construction Law §§ 37, 65 [a][b]; *Schlichting v Town Bd. of Town of Bedford*, 175 AD2d 805 [2nd Dept 1991]). Moreover, the societal interest promoted by GOL§ 11-101 is to prevent or discourage the sale of intoxicating beverages to intoxicated persons by holding sellers of alcohol liable for damages for a violation of the statute (*Rutledge v Rockwells of Bedford, Inc.*, 200 AD2d 36, 38 [2nd Dept]). While the court believes that the intent of the Dram Shop Act would be served by its application in this case, since Plaintiffs have failed to plead its violation, seek to amend their pleadings to plead its violation, or oppose 1 Oak's motion on those grounds, the court is compelled to grant 1 Oak's motion to dismiss.

This constitutes the decision and order of the court which will be e-filed.

Dated: March 23, 2018
New York, New York

ENTER:


Lisa A. Sokoloff, J.S.C.