

Schoonover v City of New York

2018 NY Slip Op 31777(U)

July 24, 2018

Supreme Court, New York County

Docket Number: 158781/2013

Judge: Alexander M. Tisch

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 52

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GEORGE A. SCHOONOVER, AS ADMINISTRATOR OF
THE ESTATE OF ANDREW R. SCHOONOVER,
DECEASED,

DECISION AND ORDER
Index No. 158781/2013

Plaintiff,

- against -

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF SANITATION, JOSEPH P. VENTO,
FIELDING MELLISH, LLC d/b/a TWO BOOTS UPPER
EAST SIDE AND 84th ST and 2nd AVENUE, LLC.,

Defendants.

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FIELDING MELLISH, LLC, D/B/A TWO BOOTS UPPER
EAST SIDE,

Third-Party Index No.
595462/2016

Third-Party Plaintiff,

- against -

1616 SECOND AVENUE RESTAURANT, INC., D/B/A
DORRIAN'S RED HAND RESTAURANT and OLD
HEIDELBERG CORP., D/B/A HEIDELBERG
RESTAURANT,

Third-Party Defendants.

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ALEXANDER M. TISCH, J.:

In this wrongful death action, third-party defendant 1616 Second Avenue Restaurant, Inc. d/b/a Dorrian's Red Hand Restaurant (Dorrian's) in Motion Sequence No. 002 moves, pursuant to CPLR 3211 (a) (7), for dismissal of the third-party complaint against it. In Motion Sequence No. 003, third-party defendant Old Heidelberg Corp. d/b/a Heidelberg Restaurant (Heidelberg) adopts the arguments set forth in the motion filed by Dorrian's and also moves for dismissal of the

complaint. The two motions are consolidated for disposition and denied for the reasons stated herein.

BACKGROUND

Plaintiff commenced this action as the administrator of the estate of his son, decedent Andrew R. Schoonover (decedent). The amended verified complaint alleges that decedent, a pedestrian, tripped over garbage bags that had been placed on the public sidewalk at the southwest corner of Second Avenue and East 84th Street by defendant Fielding Mellish d/b/a Two Boots Upper East Side (Two Boots), a restaurant located at 1617 Second Avenue. Decedent then fell into the roadway where he was struck by a garbage truck owned by defendant City of New York (City) and operated by defendant Joseph P. Vento (Vento), an employee of defendant New York City Department of Sanitation (DOS). The incident occurred on October 22, 2012.

Two Boots commenced a third-party action against Dorrian's and Heidelberg for contribution and common-law indemnification. It is alleged that, prior to the incident, plaintiff had been served alcoholic beverages at Dorrian's, a restaurant located at 1616 Second Avenue, and at Heidelberg, a restaurant located at 1648 Second Avenue, in violation of General Obligations Law § 11-101 (1), more commonly known as the Dram Shop Act.

Third-party defendants argue that dismissal is warranted because recovery under the Dram Shop Act is limited to those who were injured by an intoxicated person, and not the person who became intoxicated as the result of an unlawful sale. Plaintiff did not allege a Dram Shop Act violation in the complaint or bring suit against Dorrian's or Heidelberg. The motions are supported by the pleadings and deposition transcripts.

Two Boots contends that it has pleaded a valid cause of action for contribution. It alleges that third-party defendants were actively negligent by selling alcohol to plaintiff's decedent, which

may have contributed to decedent's accident. It submits uncertified copies of the Police Accident Report (MV-104AN) and an autopsy report prepared by the Office of Chief Medical Examiner.

Defendants City, DOS and Vento take no position on the two motions. They ask that the court make no factual findings that would affect the primary action.

In reply, Dorrian's and Heidelberg urge the court to grant them summary judgment because Two Boots failed to present evidence that decedent had been served alcohol at their establishments. Heidelberg also contends that the purpose behind the Dram Shop Act is to protect the general public, not Two Boots, from the effects of selling alcohol to intoxicated persons. It argues that, in the absence of an independent duty running from Heidelberg (and Dorrian's) to Two Boots, Two Boots cannot maintain a claim for contribution.

DICUSSION

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord [the 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, 87-88 [1994] [citations omitted]). Allegations that are ambiguous must be resolved in plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). A motion to dismiss the complaint will be denied "if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] [citations omitted]). However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). "When documentary evidence is submitted by a defendant the standard morphs from whether the plaintiff stated a cause of action to whether it

has one” (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [internal quotation marks and citation omitted]).

General Obligations Law § 11-101 (1) states:

“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.”

Liability under the statute is predicated upon the commercial sale of alcohol to a visibly intoxicated person (*see Adamy v Ziriakus*, 92 NY2d 396, 400 [1998]; *D'Amico v Christie*, 71 NY2d 76, 84 [1987]). However, there is no recovery for a person who sustained injuries as the result of that person’s voluntary intoxication (*see Butler v New York City Tr. Auth.*, 3 AD3d 301, 301-302 [1st Dept 2004]).

CPLR § 1401 provides for contribution where “two or more persons . . . are subject to liability for damages for the same personal injury, injury to property or wrongful death” Contribution is available to a defendant from a third-party where there is a breach of duty owed to plaintiff that contributed to plaintiff’s injuries (*see Rosner v Paley*, 65 NY2d 736, 738 [1985]). Where there is no duty running from the third-party to plaintiff, defendant may seek contribution “if there has been a breach of a duty that runs from the contributor to the defendant who has been held liable” and if “the breach of duty by the contributing party . . . had a part in causing or augmenting the injury for which contribution is sought” (*Raquet v Braun*, 90 NY2d 177, 182-183 [1997] [internal citations omitted]).

The case of *O’Gara v Alacci* (67 AD3d 54 [2d Dept 2009]) is particularly instructive to the case at bar. Plaintiff in that action brought an action after she was struck by defendants’ motor vehicle while attempting to cross a parkway (*id.* at 55). It was alleged that, prior to the accident,

plaintiff had consumed alcohol at a bar operated by third-party defendants (*id.*). Defendants, the owner and operator of the motor vehicle that struck plaintiff, commenced a third-party action against the third-party defendants seeking contribution based on a violation of the Dram Shop Act (*id.* at 55-56). The Appellate Division, Second Department, denied the third-party defendants' motion, brought under CPLR 3211 [a] [7], because a jury could potentially find that the third-party defendants' breach of the Dram Shop Act could have "played a part in causing or augmenting the injury for which the defendant seeks contribution" (*id.* at 58).

Here, it is alleged that Dorrian's and Heidelberg may have breached their "statutory duty not to provide alcohol to a visibly intoxicated person" which could have contributed to the accident (*Oursler v Brennan*, 67 AD3d 36, 45 [4th Dept 2009], *lv granted* 68 AD3d 1824 [4th Dept 2009], *appeal withdrawn*, 15 NY3d 848 [2010]; *Johnson v Plotkin*, 172 AD2d 88, 90 [3d Dept 1992], *lv dismissed* 79 NY2d 977 [1992]; *Tratt v Washington Bldg. Mgt. Co.*, 15 Misc 3d 1136(A) [Sup Ct, Broome County 2007]). Thus, Two Boots may maintain its third-party claim for contribution.

Heidelberg in reply contends that the purpose behind the Dram Shop Act is to "protect the community" (*O'Gara*, 67 AD3d at 58), and not a commercial establishment such as Two Boots. This additional factor, though, does not preclude Two Boots from asserting a claim for contribution. It is the alleged breach of the Dram Shop Act by the third-party defendants that gives rise to the claim (*see Oursler*, 67 AD3d at 45). Moreover, Heidelberg presents no case law to support its erroneous contention that a commercial establishment is not a part of "the community" to be protected.

Dorrian's also cites to *Fowler v Taffe* (152 Misc 2d 343 [Sup Ct, Bronx County 1990]) and *Ploskikh v Vcherashansky* (2017 NY Slip Op 32104[U] [Sup Ct, Kings County 2017]), two cases involving facts similar to those in *O'Gara* (67 AD3d at 55). However, both of those decisions were issued at the trial court level, with *Ploskikh* disposed of on summary judgment primarily

because it was not established that the plaintiff was visibly intoxicated when sold alcohol by the bar.

Finally, the argument that Two Boots failed to present evidence of a Dram Shop Act violation is “of no moment” (*Lowenstern v Sherman Sq. Realty Corp.*, 143 AD3d 562, 562-563 [1st Dept 2016]). Third-party defendants moved for dismissal based on Two Boots’ failure to state a cause of action, not summary judgment under CPLR 3212, and Dorrian’s did not raise dismissal pursuant to CPLR 3212 until its reply. As such, the court declines to convert the motions to dismiss into motions for summary judgment (*see* CPLR 3212 [c]).

Accordingly, it is

ORDERED that the motion of third-party defendant 1616 Second Avenue Restaurant, Inc. d/b/a Dorrian’s Red Hand Restaurant for dismissal of the third-party complaint (Motion Sequence No. 002) is denied; and it is further

ORDERED that the motion of third-party defendant Old Heidelberg Corp. d/b/a Heidelberg Restaurant for dismissal of the third-party complaint (Motion Sequence No. 003) is denied.

Dated: July 24, 2018

ENTER:



A.J.S.C.

HON. ALEXANDER M. TISCH