SHORT FORM ORDER

INDEX No. 603804/2019
CAL. No. 202100708OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 1/5/22
ADJ. DATE 3/24/22
Mot. Seq. # 004 MG

JOHN FOX,

Plaintiff,

- against -

PARKSTOWN, INC., d/b/a NAPPER TANDY'S IRISH PUB, and GEOFFREY BOWEN,

Defendants.

SIBEN & SIBEN
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Attorney for Defendant Parkstown, Inc. d/b/a Napper Tandy's Irish Pub
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Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendant Parkstown, Inc, filed December 1, 2021 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers by plaintiff, filed March 10, 2022 ; Replying Affidavits and supporting papers by defendant Parkstown, Inc., filed March 23, 2022 ; Other _____; it is

ORDERED that the motion by defendant Parkstown, Inc., d/b/a Napper Tandy's Irish Pub, pursuant to CPLR 3212 for summary judgment dismissing the complaint against it is granted.

This is an action to recover damages for personal injuries sustained by plaintiff John Fox as a result of an assault by defendant Geoffrey Bowen, which occurred on July 31, 2019 at premises operated by defendant Parkstown, Inc., known as Napper Tandy's Irish Pub. Plaintiff's first cause of action alleges, among other things, that defendant Parkstown was negligent in its supervision and control of the pub by permitting defendant Bowen, a guest, to make contact with plaintiff. The second cause action alleges that defendant Parkstown was negligent in providing alcoholic beverages to patrons without properly ascertaining their physical and mental condition. The third and fourth causes of action allege that defendant Bowen assaulted plaintiff. Pursuant to a decision of this Court dated August 14, 2020, a default judgment was granted against defendant Bowen.

Defendant Parkstown now moves for summary judgment dismissing the complaint against it, arguing that there is no evidence that defendant Bowen was served alcohol while visibly intoxicated. It also argues that it cannot be found negligent for the assault as it was unforeseeable. In support of its motion, defendant Parkstown submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, a digital video disc (DVD) of the surveillance video showing the incident, and affidavits of its employees. Plaintiff opposes the motion, arguing that questions of fact exist as to defendant Parktown's negligence regarding the actions and or inactions of its security staff.

At his examination before trial, plaintiff testified that on the day of the subject incident, he attended a game at Yankee Stadium with some friends and at about 12:30 a.m., he went to the pub operated by defendant to meet up with other friends. Plaintiff testified that he had alcoholic beverages at the Yankees game and at the pub, but did not recall how much he drank. He did not recall having a physical altercation inside the pub, but testified that when he was leaving the pub with a few friends, he was assaulted. He had no recollection of how the incident occurred.

At his examination before trial, nonparty witness Joseph Gange testified that he was with plaintiff at the pub and he observed a gentleman "instigating" plaintiff. Gange testified that there was a confrontation with a member of the security staff from the pub, and that there was verbal dispute going back and forth between the security staff member and plaintiff. Gange testified that he, plaintiff and their group of friends started to leave the pub, but the security staff member kept verbally "egging on" plaintiff. According to Gange, two or three members of the security staff escorted them outside, but none of them touched plaintiff. Within seconds of going outside, defendant Bowen "came around from the street out of nowhere and struck [plaintiff] from the side." Gange further testified that he learned that defendant Bowen was friends with security staff at the pub.

At his examination before trial, nonparty witness Casey Luther testified that he met up with plaintiff and a group of friends at the pub on the day of the subject incident. According to Luther, plaintiff was intoxicated and got kicked out of the pub. After a verbal altercation with a security staff member, Luther and a few friends walked plaintiff out of the pub, but the verbal altercation between plaintiff and the security staff member continued. Bowen followed them out, blind sided plaintiff, and punched him on the side of the head.

At his examination before trial, William Miller testified that he is employed as a manager by defendant Parkstown and that eight to ten employees worked security on the night of the incident. Miller testified that bartenders use their judgment in determining whether a guest is in an intoxicated condition and whether to serve that person alcohol. After the incident occurred, Miller asked all the staff members if they knew the person who struck plaintiff, but no one was able to identify him.

The affidavit of Heather Stapleton states she was employed by defendant Parkstown as a bartender and was working on the day of the subject incident. She had no memory of serving Bowen any alcoholic beverages on that night. Stapleton testified that she is trained to recognize signs of intoxication and does not serve alcoholic beverages to intoxicated patrons. The affidavits of bartenders Karly Dodge and James Wilkom are similar to the affidavit of Stapleton.

Leonardo Maldonado states in his affidavit that he was employed by defendant Parkstown at the time of the subject incident, but was not working there that day. On the day of the incident, he went to a Yankees game with plaintiff and then went to the subject pub. He did not observe any visibly intoxicated persons being served alcohol while he was at the pub.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

As to the first cause of action, generally, landowners have a duty to exercise reasonable care to prevent harm to patrons on their property (*see* ***D'Amico v Christie***, 71 NY2d 76, 524 NYS2d 1 [1987]; ***Hegarty v Tracy***, 125 AD3d 804, 4 NYS3d 254 [2d Dept 2015]; ***Kranenberg v TKRS Pub, Inc.***, 99 AD3d 767, 952 NYS2d 215 [2d Dept 2012]). A landowner owner is obligated to take reasonable precautionary measures to minimize the risk of criminal acts and make the premises safe for visitors when the owner is aware, or should be aware, that there is a likelihood of conduct on the part of third parties that would endanger visitors (*see* ***Mason v U.E.S.S. Leasing Corp.***, 96 NY2d 875, 730 NYS2d 770 [1st Dept 2001]; ***Gentile v Town & Vil. of Harrison, N.Y.***, 137 AD3d 971, 27 NYS3d 207 [2d Dept 2016]). Thus, the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults (*see* ***Gentile v Town & Vil. of Harrison, N.Y.***, *supra*; ***Hegarty v Tracy***, *supra*; ***Kranenberg v TKRS Pub, Inc.***, *supra*).

Here, defendant Parkstown has established, prima facie, that it had no duty to protect plaintiff from the criminal acts of a third party on its premises (*see* ***Mason v U.E.S.S. Leasing Corp.***, *supra*; ***D'Amico v Christie***, *supra*;). The manager of the pub testified that the pub employed eight to ten security personnel on the night of the subject incident. Moreover, the deposition testimony of the parties reveal that defendant Bowen "blind sided" plaintiff and struck him, and that there was no prior altercation between the two parties. Specifically, plaintiff's friend, Joseph Gange testified that the incident occurred within seconds of their group exiting the pub and that defendant Bowen came out of "nowhere." Thus, the evidence demonstrates that the subject incident was a spontaneous and unexpected event, and that defendant Parkstown could not reasonably have been expected to anticipate or prevent the incident (*see* ***Gentile v Town & Vil. of Harrison, N.Y.***, *supra*; ***Lewis v Jemanda New York Corp.***, 277 AD2d 134, 716 NYS2d 58 [1st Dept 2000]). In opposition, plaintiff failed to raise an issue of fact. Plaintiff contends that defendant Bowen "presumably" was friends with the security personnel and that the security personnel were "egging him on" prior to the incident. However, there is no evidence that the verbal altercation between plaintiff and the security staff was a proximate cause of the incident. Furthermore, as there is no evidence that the security personnel assaulted plaintiff, direct liability cannot be imposed upon it for negligent hiring, retention, or supervision

(*see* ***Ciccone v City of New York***, 138 AD3d 910, 31 NYS3d 124 [2d Dept 2016]; ***Destiny S. v John Quincy Adams Elementary Sch.***, 98 AD3d 1102, 951 NYS2d 217 [2d Dept 2012]).

With regard to plaintiff's second cause of action, "to establish a cause of action under New York's Dram Shop Act, a plaintiff is required to prove that the defendant sold alcohol to a person who was visibly intoxicated and that the sale of that alcohol bore some reasonable or practical connection to the resulting damages" (***Dugan v Olson***, 74 AD3d 1131, 1132, 906 NYS2d 277, 278 [2d Dept 2010]; *see* ***Sullivan v Mulinos of Westchester, Inc.***, 73 AD3d 1018, 901 NYS2d 663 [2d Dept 2010]; ***McArdle v 123 Jackpot, Inc.***, 51 AD3d 743, 746, 858 NYS2d 692 [2d Dept 2008]). So long as "there is a reasonable and practical connection between the unlawful sale and the resulting injuries, the presence of intervening acts or independent wrongdoing does not eliminate liability under the Dram Shop Act" (***Oursler v Brennan***, 67 AD3d 36, 43, 884 NYS2d 534, 541 [4th Dept 2009]; *see also* ***McNeill v Rugby Joe's***, 298 AD2d 368, 751 NYS2d 241 [2d Dept 2002]). Thus, "in order to establish its entitlement to judgment as a matter of law dismissing the Dram Shop Act cause of action, [a defendant is] required to establish either that [it] did not serve alcohol to [the patron] while he was visibly intoxicated or that its sale of alcohol to him had no reasonable or practical connection to the assault" (***Dugan v Olson***, *supra* at 1133, 906 NYS2d 277).

Defendant Parkstown established its prima facie entitlement to summary judgment dismissing this claim against it by submitting evidence that defendant Bowen was not served alcoholic beverages while visibly intoxicated on the night of the subject incident (*see* ***Dugan v Olson***, *supra*; ***Kelly v Fleet Bank***, 271 AD2d 654, 706 NYS2d 190 [2d Dept 2000]). Here, defendant Parkstown submitted affidavits of the bartenders who worked the night of the subject incident, in which they deny serving alcoholic beverages to defendant Bowen and averred that they do not serve alcohol to visibly intoxicated patrons (*see* ***Flynn v Bulldogs Run Corp.***, 171 AD3d 1136, 100 NYS3d 35 [2d Dept 2019]; ***Giordano v Zepp***, 163 AD3d 781, 782, 79 NYS3d 659 [2d Dept 2018]). In opposition, plaintiff failed to submit any evidence or make any arguments to support the allegation that defendant Bowen was visibly intoxicated on the night of the subject incident.

Accordingly, the motion by defendant Parkstown for summary judgment dismissing the complaint against it is granted.

Dated: June 27, 2022

HON. GEORGE NOLAN, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**