Haesler v New York Athletic Club of the City of N.Y.
2019 NY Slip Op 31406(U)
May 10, 2019
Supreme Court, New York County
Docket Number: 153176/2013
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
----------x

ANDREW HAESLER, Index No. 153176/2013

Plaintiff

- against - DECISION AND ORDER

NEW YORK ATHLETIC CLUB OF THE CITY OF NEW YORK, PETER DORAN, MATTHEW O'GRADY, and COLIN DROWICA,

Defendants

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LUCY BILLINGS,J.S.C.:

Plaintiff seeks damages for injuries he suffered when he was attacked and punched in the face while breaking up two altercations at defendant New York Athletic Club of the City of New York (NYAC). Plaintiff, a club member, claims he was assaulted and battered inside NYAC's Tap Room bar by defendant Drowica, another club member, and again in NYAC's lobby by Drowica and his guest, defendant Doran.

I. UNDISPUTED BACKGROUND FACTS

Drowica, Doran, and defendant O'Grady met at another bar after work around 5:30 p.m. on the evening of April 12, 2012, where Drowica drank two beers and Duran drank one. Drowica, Doran, and O'Grady then attended a Mercury Society event at NYAC from around 7:00 to 10:30 p.m. Drowica drank at least two beers and Doran drank four to five beers during the event. After the event, Drowica, Doran, and O'Grady proceeded to NYAC's Tap Room, where Drowica and Doran each consumed at least one more alcoholic

drink.

Around 9:00 p.m. on April 12, 2012, plaintiff arrived at NYAC's Tap Room, where he met NYAC member Kent Oszmanski. John Nicholas, another NYAC member, joined plaintiff in the Tap Room after the Mercury Society event. Plaintiff and Nicholas were preparing to leave the Tap Room around 11:30 p.m. when they heard a commotion toward the back of the bar. Plaintiff went to that area to investigate and de-escalate the altercation. Plaintiff observed Oszmanski attempting to prevent a fight between O'Grady and another patron, with Doran nearby. Drowica also was watching the altercation between O'Grady and the other patron.

II. DISPUTED FACTS REGARDING THE TWO ASSAULTS

The parties dispute what happened next. Plaintiff testified at his deposition that Drowica approached plaintiff and punched him in his left eye. According to plaintiff, he then grabbed onto Drowica to prevent him from striking again, but Drowica still grabbed plaintiff's throat. After they were separated, plaintiff returned to the Tap Room, and Drowica, Doran, and O'Grady proceeded into the hallway. Both Drowica and Doran testified at their depositions that Drowica did not strike plaintiff or physically contact him at all.

Plaintiff testified that shortly after the initial fight ended he exited the Tap Room and observed Drowica, Doran, and O'Grady confronting a security officer. The three defendants returned to the Tap Room, but plaintiff stayed outside the room and asked a security officer to summon the police. Plaintiff

testified that he proceeded downstairs to wait for the police, where he observed Drowica, Doran, and O'Grady pummeling Oszmanski in NYAC's lobby. According to plaintiff, when he intervened to break up the attack, Doran punched plaintiff in the face. Plaintiff further testified that, in self defense, he tackled Doran, taking both of them to the ground, where Duran, joined by Drowica, continued to assault and batter plaintiff.

Doran and Drowica testified that security officers briefly detained the two defendants until they broke free and returned to the Tap Room to retrieve their jackets. Accompanied by O'Grady, they then proceeded downstairs to the lobby, where Oszmanski accosted the three defendants. Doran and Drowica admitted that they pushed Oszmanski to the ground, but explained that they did so because they feared that he intended to attack them, and denied that anyone punched or kicked either Oszmanski or plaintiff.

III. PROCEDURAL BACKGROUND

The complaint claims that Doran, Drowica, and O'Grady assaulted and battered plaintiff and that NYAC negligently operated, managed, and maintained its premises by failing to provide adequate security. Plaintiff also claims that NYAC negligently hired, trained, and supervised its bartending and security employees and violated New York General Obligations Law § 11-101(1), the Dram Shop Act. NYAC cross-claims against Doran and Drowica for non-contractual, implied indemnification and for contribution and counterclaims against plaintiff for contractual

indemnification. Doran cross-claims against NYAC and Drowica for contractual and non-contractual indemnification and for contribution. Drowica cross-claims against NYAC and Doran for non-contractual indemnification and for contribution. All parties have stipulated to dismiss all claims against defendant O'Grady.

NYAC now moves for summary judgment dismissing the complaint and all cross-claims against NYAC and for summary judgment on NYAC's counterclaim against plaintiff and cross-claims against Doran and Drowica. C.P.L.R. § 3212(b). Doran moves for summary judgment dismissing the complaint and all cross-claims against him. C.P.L.R. § 3212(b).

IV. NYAC'S MOTION FOR SUMMARY JUDGMENT

A. Negligent Operation and Security of NYAC's Premises

Building owners owe persons on their premises a duty of reasonable care to maintain the premises in a safe condition. Maheshwari v. City of New York, 2 N.Y.3d 288, 294 (2004); Tagle v. Jakob, 97 N.Y.2d 165, 168 (2001); CB v. Howard Sec., 158 A.D.3d 157, 164-65 (1st Dep't 2018); Banner v. New York City Hous. Auth., 94 A.D.3d 666, 667 (1st Dep't 2012). This duty includes taking minimum safety precautions to protect against other persons' reasonably foreseeable criminal acts. Maheshwari v. City of New York, 2 N.Y.3d at 294; Mason v. U.E.S.S. Leasing Corp., 96 N.Y.2d 875, 878 (2001); JG v. Goldfinger, 161 A.D.3d 640, 640 (1st Dep't 2018); CB v. Howard Sec., 158 A.D.3d at 164-65. See Pink v. Rome Youth Hockey Ass'n, Inc., 28 N.Y.3d

994, 997-98 (2016). A danger was foreseeable if the owner knew or had reason to know from past experience that another person likely would act so as to endanger visitors. Jacqueline S. v. City of New York, 81 N.Y.2d 288, 294 (1993); Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 519 (1980). See Pink v. Rome Youth Hockey Ass'n, Inc., 28 N.Y.3d at 997-98.

NYAC maintains that it was not negligent in operating or securing its premises because it had no reason to believe that a fight would occur or that plaintiff would be assaulted, so the risk of danger to plaintiff was unforeseeable. Plaintiff, Nicholas, Drowica, and Doran all testified at their depositions that the initial altercation occurred suddenly. NYAC's general manager Roger Simon, bartender Luis Machin, and members plaintiff and Nicholas also testified at their depositions regarding their unawareness of any past fights at NYAC. NYAC thus establishes that the first altercation that led to the first assault on plaintiff was sudden and unforeseeable and therefore not actionable. Maheshwari v. City of New York, 2 N.Y.3d at 294; Ricaurte v. Inwood Beer Garden & Bistro Inc., 165 A.D.3d 586, 586-87 (1st Dep't 2018); Maria T. v. New York Holding Co. Assoc., 52 A.D.3d 356, 358 (1st Dep't 2008); Lewis v. Jemanda New York Corp., 277 A.D.2d 134, 134 (1st Dep't 2000).

Plaintiff fails to present any evidence in rebuttal demonstrating that NYAC knew or had reason to know that the fight in the Tap Room would occur or that plaintiff would be assaulted in the Tap Room. NYAC therefore is entitled to summary judgment

dismissing plaintiff's claim for negligent operation and security of the premises in connection with the fight and the assault on plaintiff in the Tap Room.

NYAC is not entitled, however, to summary judgment dismissing plaintiff's claims for negligent operation and security of the premises in connection with the second fight and the assault on plaintiff in NYAC's lobby. Plaintiff, Nicholas, Doran, and Drowica all testified that, immediately after the fight in the Tap Room, NYAC security officers responded and attempted to disperse the crowd and remove part of the crowd from the Tap Room. NYAC personnel thus were aware that the participants in the ensuing fight had fought shortly beforehand. The second fight involved the same participants and followed soon after the first fight, but not so immediately as to foreclose preventive measures. Therefore NYAC fails to establish that the second fight was either sudden or unforeseeable. Ricaurte v. Inwood Beer Garden & Bistro Inc., 165 A.D.3d at 586-87; Kavanagh v. Vigario, 309 A.D.2d 640, 640 (1st Dep't 2003); McKinnon v. Bell Sec., 268 A.D.2d 220, 221 (1st Dep't 2000).

NYAC further fails to establish that it was not negligent in securing the premises based on the testimony by plaintiff, Doran, and Drowica that NYAC's security officers detained Doran and Drowica after the Tap Room fight, but then released them without further supervision, allowing them to encounter Oszmanski and engage in the second fight. NYAC offers no evidence indicating that NYAC maintained any security presence either in the lobby or

near the participants of the previous fight to prevent the second fight, any attempt by security to remove any of the participants in the first fight from the premises, or any measures whatsoever to prevent the second fight. In sum, NYAC fails to establish that the second fight precipitating an assault on plaintiff was unforeseeable or that NYAC adequately secured the premises after the first fight or took reasonable measures to prevent the second fight. Ricaurte v. Inwood Beer Garden & Bistro Inc., 165 A.D.3d at 586-87; Kavanagh v. Vigario, 309 A.D.2d at 640; McKinnon v. Bell Sec., 268 A.D.2d at 221.

Finally, NYAC maintains that it nevertheless is entitled to summary judgment dismissing plaintiff's claim for negligent operation and security of the premises because plaintiff assumed the risk of injury when he intervened in the fight. The doctrine of assumption of risk, however, is limited to cases "appropriate for absolution of duty," such as claims for injuries arising from proximity to sporting events or from participation in athletic or recreational activities. Custodi v. Town of Amherst, 20 N.Y.3d 83, 89 (2012). Spectators of such events or participants in such activities that pose a risk of injury do not assume the risk of other persons' reckless or intentional conduct. Id.; Anand v. Kapoor, 15 N.Y.3d 946, 948 (2010); Morgan v. State, 90 N.Y.2d 471, 485 (1997); Garnett v. Strike Holdings LLC, 131 A.D.3d 817, 819 (1st Dep't 2015). Therefore plaintiff did not assume the risk of being assaulted or battered when he attempted to break up the two fights.

The doctrine of assumption of risk would apply to plaintiff only if NYAC established that he voluntarily joined in, actively participated in, and perpetuated a fight, thus consenting to any injuries from it, and severing the causal link between defendants' conduct and his injuries. Carreras v. Morrisania Towers Housing Co. Ltd. Partnership, 107 A.D.3d 618, 622 (1st Dep't 2013); Vega v. Ramirez, 57 A.D.3d 299, 300 (1st Dep't 2008). Plaintiff testified that he intervened only to stop the fights and initiated physical contact with his assailants only to prevent them from striking him again after they had struck him. Defendants present no evidence that plaintiff intended to participate in either fight, rather than prevent it. Therefore his attempt to break up each fight did not amount to consent to being assaulted and battered and did not sever the causal link between NYAC's negligence in failing to prevent the second fight and his injuries. At minimum, this record raises a factual issue whether his conduct precipitated or perpetuated the confrontation. McKinnon v. Bell Sec., 268 A.D.2d at 222.

B. Negligent Hiring, Training, or Supervision

NYAC may be held liable for negligent hiring, training, or supervision of NYAC's employees if they injured plaintiff while they were acting outside the scope of their employment. Gonzalez v. City of New York, 133 A.D.3d 65, 67 (1st Dep't 2015). See Kerzhner v. G4S Govt. Solutions, Inc., 160 A.D.3d 505, 505 (1st Dep't 2018); Troy v. City of New York, 160 A.D.3d 410, 411 (1st Dep't 2018); Karoon v. New York City Tr. Auth., 241 A.D.2d 323,

324 (1st Dep't 1997); Trotman v. New York City Tr. Auth., 168 A.D.3d 1116, 1117 (2d Dep't 2019). NYAC demonstrates that its employees were acting within the scope of their duties to bartend or to provide security leading up to and during the second fight when Doran and Drowica allegedly assaulted plaintiff. Plaintiff neither presents any evidence in opposition nor even alleges in his complaint that NYAC's employees acted outside the scope of their employment. The absence of this key element requires dismissal of plaintiff's claims for negligent hiring, training, and supervision against NYAC. Kerzhner v. G4S Govt. Solutions, Inc., 160 A.D.3d at 505; Troy v. City of New York, 160 A.D.3d at 411; Karoon v. New York City Tr. Auth., 241 A.D.2d at 324. See Gonzalez v. City of New York, 133 A.D.3d at 67.

C. Violation of the Dram Shop Act

The Dram Shop Act, General Obligations Law § 11-101(1), provides that:

> 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.

To be free from liability under this statute, NYAC must establish either that it did not serve liquor to plaintiff's assailants when they were visibly intoxicated or that there was no reasonable or practical connection between NYAC's sale of liquor and the second assault on plaintiff. Kaufman v. Quickway, Inc.,

14 N.Y.3d 907, 909 (2010); Ricaurte v. Inwood Beer Garden & Bistro Inc., 165 A.D.3d at 586; Carver v. P.J. Carney's, 103 A.D.3d 447, 448 (1st Dep't 2013); Zamore v. Bar None Holding Co., LLC, 73 A.D.3d 601, 601-602 (1st Dep't 2010).

NYAC maintains that Doran and Drowica were not visibly intoxicated and that its bartenders would not serve patrons if they were visibly intoxicated. Luis Manchin, one of three NYAC bartenders working the Tap Room the evening of April 12, 2012, acknowledged that the men involved in the Tap Room altercation had consumed alcoholic drinks. He simply did not know if "they got drunk enough" to act belligerently. Aff. Of Tracy P. Hoskinson Ex. K, at 22. Although Nicholas testified that he did not observe anyone visibly intoxicated as he arrived at the Tap Room, he further testified that he observed several visibly intoxicated persons drinking while he was in the Tap Room and that defendants involved in the altercation appeared unsteady on their feet and otherwise intoxicated. NYAC presents no other evidence demonstrating that Doran and Drowica were not visibly intoxicated while in the Tap Room.

Even if NYAC met its burden to show Doran and Drowica were not visibly intoxicated, plaintiff presents Oszmanski's affidavit that throughout the evening of April 12 and into the morning of April 13, 2012, while in the Tap Room, Oszmanski smelled alcohol on Doran and Drowica, and "they behaved enraged, perhaps drug induced and . . . . as if they were actively looking for fights." Aff. in Opp'n of Robert R. Dooley Ex. 6 ¶ 10. This evidence of

their intoxication, raises a factual issue whether Doran and Drowica were perceptibly intoxicated in the Tap Room. See Carver v. P.J. Carney's, 103 A.D.3d at 448; McGovern v. 4299 Katonah Inc., 5 A.D.3d 239, 240 (1st Dep't 2004).

NYAC further fails to establish that it did not serve Doran or Drowica liquor when they were visibly intoxicated. The testimony by Machin and Simon that NYAC bartenders were trained in serving alcohol does not establish that Machin or one of the other two bartenders working in the Tap Room the evening of April 12, 2012, never served Doran or Drowica while they were visibly intoxicated before the fights broke out. Although Manchin testified that NYAC bartenders "know" they may not serve alcohol to intoxicated persons, Hoskinson Aff. Ex. K, at 51, he never testified that he and the other two bartenders that evening did not serve anyone who was visibly intoxicated. Cohen v. Bread & Butter Entertainment LLC, 73 A.D.3d 600, 600-601 (1st Dep't 2010); McGovern v. 4299 Katonah Inc., 5 A.D.3d at 240; Duran v. Poggio, 244 A.D.2d 162, 162 (1st Dep't 1997).

In reply, NYAC presents the other two bartenders' affidavits that they never observed Doran or Drowica visibly intoxicated and did not serve alcohol to anyone who appeared intoxicated the evening of April 12, 2012. NYAC may not, however, remedy the deficiencies in its prima facie defense in reply. Eujoy Realty Corp. v. Van Wagner Communications, LLC, 22 N.Y.3d 413, 422-23 (2013); Amtrust-NP SFR Venture, LLC v. Vazquez, 140 A.D.3d 541, 541-42 (1st Dep't 2016); Scafe v. Schindler El. Corp., 111 A.D.3d

556, 556 (1st Dep't 2013); Keneally v. 400 Fifth Realty LLC, 110 A.D.3d 624, 624 (1st Dep't 2013). Even were the court to consider these affidavits, however, they still do not entitle NYAC to summary judgment dismissing plaintiff's Dram Shop Act claim.

First, all three bartenders attest that they worked in the Tap Room, but not at the Mercury Society event, so NYAC still presents no evidence that Doran and Drowica were not served alcohol when visibly intoxicated at that event. Second, Machin still attests only that he was trained not to serve alcohol to intoxicated persons and not that he never served alcohol to anyone who appeared intoxicated the evening of April 12, 2012.

Finally, the affidavits that the other bartenders did not serve alcohol to anyone who appeared intoxicated conflict with both co-defendants' and nonparties' accounts. (a) Doran and Drowica testified that they each consumed an alcoholic drink in the Tap Room. (b) Oszmanski attests that they smelled of alcohol, behaved enraged, and appeared to be drugged and looking for fights there. (c) Nicholas testified that Drowica appeared unsteady and intoxicated. These conflicting accounts raise a factual issue whether Machin or one of the other bartenders served Doran and Drowica their alcoholic drinks before or after they became perceptibly intoxicated. Cohen v. Bread & Butter Entertainment LLC, 73 A.D.3d at 600-601; McGovern v. 4299 Katonah Inc., 5 A.D.3d at 240; Duran v. Poggio, 244 A.D.2d at 162.

D. NYAC'S Counterclaims Against Plaintiff and Cross-Claims Against Doran and Drowica and the Individual Defendants' Cross-Claims Against NYAC

NYAC's claimed entitlement to summary judgment on its cross-claims against Doran and Drowica for non-contractual indemnification and contribution and to summary judgment dismissing their cross-claims against NYAC for non-contractual indemnification and contribution is premised on the absence of negligence and violation of the Dram Shop Act by NYAC. Since NYAC has failed to establish that it was not negligent and did not violate the Dram Shop Act for the reasons explained above, the court denies its motion for the further relief regarding its non-contractual cross-claims, Haynes v. Boricua Vil. Hous. Dev. Fund Co., Inc., 170 A.D.3d 509, 511 (1st Dep't 2019); Muqattash v. Choice One Pharm. Corp., 162 A.D.3d 499, 500-501 (1st Dep't 2018); Dzidowska v. Related Cos., LP, 157 A.D.3d 447, 448 (1st Dep't 2018); Gardner v. Tishman Constr. Corp., 138 A.D.3d 415, 417 (1st Dep't 2016), and co-defendants' non-contractual cross-claims. Villon v. Town Sports Intl. LLC, 128 A.D.3d 609, 609 (1st Dep't 2015); 87 Chambers, LLC v. 77 Reade, LLC, 122 A.D.3d 540, 542 (1st Dep't 2014); DeJesus v. 888 Seventh Ave. LLC, 114 A.D.3d 587, 588 (1st Dep't 2014), Bharat v. RPI Indus., Inc., 100 A.D.3d 491, 491 (1st Dep't 2012). Although NYAC's lack of culpability is unnecessary to its contribution cross-claims against Doran and Drowica, both Drowica and Doran testified that Drowica did not strike plaintiff or physically contact him, and Doran testified similarly that he never struck or physically

contacted plaintiff, precluding summary judgment even on NYAC's cross-claims for contribution. C.P.L.R. § 1401; Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp., 71 N.Y.2d 599, 603 (1988); Licata v. AB Green Gansevoort, LLC, 158 A.D.3d 487, 490 (1st Dep't 2018).

Nor is NYAC entitled to summary judgment on NYAC's counterclaim against plaintiff for contractual indemnification, as NYAC fails to present any evidence of a contract requiring him to indemnify NYAC. Echevarria v. 158th Riverside Dr. Hous. Co., Inc., 113 A.D.3d 500, 502 (1st Dep't 2014); Hughey v. RHM-88, LLC, 77 A.D.3d 520, 523 (1st Dep't 2010); Neighborhood Partnership Hous. Dev. Fund v. Blakel Constr. Corp., 34 A.D.3d 303, 304 (1st Dep't 2006); Temmel v. 1515 Broadway Assoc., L.P., 18 A.D.3d 364, 364-65 (1st Dep't 2005). Regarding Doran's cross-claim against NYAC for contractual indemnification, NYAC meets its burden to show that NYAC owes Doran no contractual duty to indemnify him by, in effect, denying that any contract required NYAC to do so. In opposition, Doran presents no evidence demonstrating a contract between NYAC and him, let alone a contract requiring NYAC to indemnify him. Doran testified that he was never even a member of NYAC, eliminating the possibility of a membership agreement that might have provided for indemnification under specified circumstances. Therefore NYAC is entitled to summary judgment dismissing Doran's cross-claim against NYAC for contractual indemnification. Villon v. Town Sports Intl. LLC, 128 A.D.3d at 609; Echevarria v. 158th

Riverside Dr. Hous. Co., Inc., 113 A.D.3d at 502; Vail v. 1333 Broadway Assoc., L.L.C., 105 A.D.3d 636, 637 (1st Dep't 2013); A & E Stores, Inc. v. U.S. Team, Inc., 63 A.D.3d 485, 486 (1st Dep't 2009).

V. DORAN'S MOTION FOR SUMMARY JUDGMENT

Doran maintains that he never struck or physically contacted plaintiff and therefore is entitled to summary judgment dismissing plaintiff's claims and any co-defendants' cross-claims against Doran. Doran testified that he never struck or even observed plaintiff during the evening of April 12, 2012. Drowica testified that he did not remember whether he observed Doran punch or otherwise physically contact plaintiff. Plaintiff's affidavit predating his deposition attested that Doran punched plaintiff in the temple while the two men were in the NYAC lobby, but plaintiff at his deposition later testified that Doran threw a punch at him when they were in the NYAC lobby and did not recall whether Doran's punch actually struck plaintiff.

Although plaintiff's deposition testimony is more equivocal than his earlier affidavit, his deposition testimony does not conflict with or negate his affidavit. Therefore the court may consider them together, Buonchristiano v. Fordham Univ., 146 A.D.3d 711, 712 (1st Dep't 2017); Kurtz v. Supercuts, Inc., 127 A.D.3d 546, 546 (1st Dep't 2015); Mike v. 91 Payson Owners Corp., 114 A.D.3d 420, 420 (1st Dep't 2014), leaving a factual issue whether Doran struck plaintiff and precluding summary judgment in Doran's favor. Even were the court to disregard plaintiff's

affidavit, his deposition testimony that Doran threw a punch unquestionably preserves plaintiff's assault claim and, absent any evidence that plaintiff was able to evade the swing, still raises an inference that Doran struck plaintiff so as to sustain his battery claim.

VI. CONCLUSION

For all the reasons explained above, the court grants defendant NYAC's motion for summary judgment dismissing plaintiff's claim that its negligent hiring, supervision, and training of its employees contributed to his injuries and that its negligent operation and security of its premises contributed to the assault and battery of plaintiff in its Tap Room. C.P.L.R. § 3212(b) and (e). The court also grants NYAC's motion for summary judgment dismissing defendant Doran's cross-claim against NYAC for contractual indemnification. Id. The court denies the remainder of NYAC's motion for summary judgment and denies defendant Doran's motion for summary judgment. C.P.L.R. § 3212(b).

DATED: May 10, 2019

LUCY BILLINGS, J.S.C.

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J.S.C.