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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HON. JOHN P. DUNNE, Justice

TRIAL/IAS, PART 8

STEPHEN VETRONE and ANGELA VETRONE

Index No.6552/01
Motion Seq. No. 2&3
Motion Submission: 11/10/03

Plaintiff(s),

- against -

HA DI CORP., d/b/a EVA's GARDEN, STEVE CHANG, SCOTT A. GIOVANNI, JOSEPH GIOVANNI, MICHAEL B. GLOTCHE, SEYEDI M. TAVAKOLIAN and PAYAM KERMANIAN

Defendant(s)

The following papers read on this motion:

Notice of Motion x
Order to Show Cause x
Answering Affidavits xxxxxxx
Reply.....xx
Memo xx

Upon the foregoing papers, it is hereby ordered that the motion by defendants Ha Di Corp., d/b/a Eva's Garden ("Ha Di") and Steve Chang for summary judgment dismissing the complaint against them is granted.

The motion by defendant Scott Giovanni for summary judgment dismissing the complaint, all cross-claims, and all counterclaims against him is granted to the limited extent that the first cause of action alleging Dram Shop Act violations against defendant Giovanni is dismissed, and denied as to the remainder of the relief sought.

Plaintiff Stephen Vetrone was hired to be one of two security guards at a New Year's Eve party on December 31, 2000, at Eva's Garden, a restaurant owned by defendant Ha Di, and managed by defendant Chang. Arrangements for the party were made by defendant Scott Giovanni with defendant Chang. According to Giovanni, the party would include a gourmet dinner and an open bar, for which the restaurant would be paid $45 per person. Giovanni's friends printed up prepaid tickets for sale which indicated a prepaid price of $65 per person, thereby yielding a profit of $20 per person for Giovanni and his friends. The tickets also indicated that admission at the door would cost $100 per person. Chang claims that the restaurant was to be paid $20 per person and that only a cash bar would be available.

Chang testified that he told Giovanni the seating capacity of the restaurant was 150 persons and that security would have to be provided for such a large group. Giovanni testified that Chang told him the capacity of the restaurant was between 300 to 400 persons, but it didn't matter because he only knew about 100 people. Chang admitted that he knew tickets had been sold in advance, but he did not know how many. Giovanni testified that he saw the list of prepaid ticket holders sometime in

November or December, 2000, but never saw it again.

On the evening of the party, when the restaurant became dangerously overcrowded, Chang asked Vetrone to go outside and shut the door, and thereby admit no more patrons. Approximately 30 to 40 persons were waiting outside for admission to the party. Several of these persons who had prepaid for their tickets to the party attacked Vetrone for denying them admission. These persons included defendants Goltche, Tavakolian and Kermanian. Defendant Goltche was arrested at the scene, and defendant Tavakolian was arrested the next day. Both pled guilty to charges of disorderly conduct. Defendant Ha Di received a $1500 fine and its liquor license was suspended for one month for the events of December 31, 2000, including underage drinking and overcrowding of the premises.

In the first cause of action plaintiffs allege claims based upon violations of General Obligations Law §11-101, otherwise known as the Dram Shop Act. On these motions defendants Ha Di, Chang and Giovanni seek dismissal of these Dram Shop Act claims on the grounds that the ticket holders who attacked plaintiff Stephen Vetrone never gained access to the restaurant and therefore never had any access to alcohol at the subject restaurant. The moving defendants consequently argue that the disputed facts as to whether the attackers were intoxicated and whether the restaurant provided an open bar are irrelevant.

In response, plaintiffs ask this court to find that the advance ticket sale to

defendants Goltche, Tavakolian and Kermanian was tantamount to having already furnished these three defendants with alcohol. However, this equation is not valid .The Dram Shop Act applies where a defendant causes or contributes to the intoxication of a wrongdoer "by unlawful selling to or unlawfully assisting in procuring liquor" for the intoxicated wrongdoer. Here the defendants did not in fact sell to or procure liquor for any of the defendants who attacked plaintiff Stephen Vetrone (see ***Fox v Clare Rose Beverage Inc***, 262 AD2d 526, lv app den 94 NY2d 755). Furthermore, whether the attacking defendants would have been served alcohol if they had gained admission to the restaurant is pure speculation. Plaintiffs' reliance upon ***Rust v Reyer*** (91 NY2d 355) is misplaced as that case construes General Obligations Law §11-100. Overall, it is clear that the facts of this case do not fit a Dram Shop violation against any defendant, and consequently, plaintiffs' Dram Shop claims found in the first cause of action must be dismissed.

In the second cause of action, plaintiffs allege claims based upon common law negligence. Defendants Ha Di, Chang and Giovanni each insist that their conduct was not the proximate cause of plaintiff Stephen Vetrone's injuries. For liability to be established, a defendant's negligence must be shown to be a "substantial cause of the events which produced the injury" (***Derdiarian v Felix Contr Co.***, 51 NY2d 308, 315).

As to Ha Di and Chang, who played no role in selling prepaid tickets to the

party, the court finds that these defendants merely furnished the condition or occasion for the occurrence of the event, rather than one of its causes (***Sheehan v City of New York***, 40 NY2d 496, 503; ***Shatz v Kutshers Country Club***, 247 AD2d 375). As to defendant Giovanni, who was responsible for making the arrangements for the party and who knew that prepaid tickets had been sold, triable issues of fact are presented as to whether his conduct was a substantial cause of the overcrowding, and whether overcrowding was a proximate cause of plaintiff Stephen Vetrone's injuries. Accordingly, the motion by defendants Ha Di and Chang for summary judgment dismissing the second cause of action for common law negligence is granted, and the motion by Giovanni for the same relief is denied.

Defendant Giovanni further seeks dismissal of the plaintiffs' claims against him on the grounds that Stephen Vetrone assumed the risk of his injuries when he agreed to be a security guard at the New Year's Eve party. Ordinarily, a party does not consent to acts which are reckless or intentional (***Turcotte v Fell***, 68 NY2d 432, 439; see also ***Morgan v State***, 90 NY2d 471, 485). To the extent that assumption of risk is applicable in this action, the court agrees with plaintiffs that it presents a triable question of fact for the jury (see generally ***Convey v Rye School Dist***, 271 AD2d 154). Consequently defendant Giovanni's request for dismissal on the grounds of assumption of risk must be denied.

The third cause of action fails to state a claim against HaDi and Chang as there

is no evidence that any of Vetrone's attackers were employees of Ha Di. The fourth, fifth, and sixth causes of action allege claims against Goltche, Tavakolian, and Kermanian. The seventh cause of action is a derivative one by Angela Vetrone which must be dismissed against Ha Di and Chang, because of the dismissal of the main claims by Stephen Vetrone against these defendants (see ***Ramautar v Wainfeld***, 273 AD2d 214). As a result, the entire complaint against Ha Di and Chang must be dismissed.

It is, so Ordered.

Dated: January 7, 2004

Hon. John P. Dunne

ENTERED

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