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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU

PRESENT:

Hon. Burton S. Joseph,
Justice.

KRISTEN DEFILIPPO, an Infant Under the Age of
Eighteen (18) Years, by her Mother and Natural
Guardian, ANN DEFILIPPO,

Action No. 1

Plaintiff,

- against -

Trial/IAS Part 18
Index No. 25550/1999
Motion No. 006
Motion Date June 12, 2002

RICHARD T. KERINS, as Public Administrator
of the Estate of FRANK J. CHIOFALO, III,
MENDON LEASING CORPORATION, F.S.R.
TRUCKING, INC., MICHAEL A. DIGIOIA, and
ROUTE 110 SERVICE CORP.,

Defendants.

CLAIRE M. DILLON O'NEILL, as Administratrix
of the Goods, Chattels and Credits which were of
CURTIS G. DILLON, Deceased,

Action No. 2

Plaintiff,

- against -

Index No. 16598/1999

MENDON LEASING CORPORATION, F.S.R.
TRUCKING, INC., MICHAEL A. DIGIOIA and
FRANK J. CHIOFALO, III,

Defendants.

MICHAEL ZACHMAN,

Plaintiff,

Action No. 3
Kings County

- against -

Index No. 21038/2000

MENDON LEASING CORPORATION, MICHAEL A.
DIGIOIA, RICHARD T. KERINS, as Public
Administrator of the Estate of FRANK CHIOFALO, III
and ROUTE 110 SERVICE CORP.

Defendants.

JOHN J. PASSARO, as Administrator of the Goods,
Chattels and Credits that were of ASHLEY PASSARO
a/k/a ASHLEY MARIE PASSARO, Deceased
and JOHN J. PASSARO, Individually,

Plaintiffs,

Action No. 4

Index No. 9231/2001

- against -

MICHAEL A. DIGIOIA, MENDON LEASING CORP.,
F.S.R. TRUCKING INC., RICHARD T. KERINS,
PUBLIC ADMINISTRATOR, ADMINISTRATOR
OF THE ESTATE OF FRANK CHIOFALO, III
and ROUTE 110 SERVICE CORP. d/b/a CITCO
GAS STATION & FOOD MART,

Defendants.

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In this fatal motor vehicle accident, the motion by Defendant Route 110 Service Corporation d/b/a Citco Gas Station & Food Mart (hereinafter "the Mart"), for summary judgment, is denied.

According to the pleadings herein, on the evening of December 2, 1998, Defendant Frank J. Chiofalo III, was driving his motor vehicle with teenage passengers: Plaintiffs Kristen DeFilippo, Curtis G. Dillon, Michael Zachman and Ashley M. Passaro. They apparently had no particular destination in mind, but drove "for a while telling stories" to Mt. Misery Road in Suffolk County and, at some point, entered onto Route 110. It is alleged that they purchased beer and other alcoholic beverages from the Citco Gas Station and Mart located on Route 110, which is owned and operated by Defendant Route 110 Service Corp. The teenagers imbibed those alcoholic beverages prior to and while driving.

At approximately 9:20 P.M. of that night, Defendant Michael Digioia, the operator of a tractor owned by Defendant Mendon Leasing Corporation attached to a trailer owned by Defendant F.S.R. Trucking (hereinafter collectively "Mendon"), had stopped at a red light at the intersection of Route 110 and Baylis Road in the Town of Huntington, County of Suffolk. After the light changed to green, he moved for about ten feet when the Chiofalo motor vehicle violently struck the rear of the tractor trailer at a very high rate of speed. As a result of this motor vehicle accident, Defilipo and Zachman were seriously injured while Chiofalo, Dillon and Passaro perished.

In 1999, DeFilippo commenced the instant action against the Mart, Mendon and Chiofalo's estate to recover damages for the personal injuries she sustained in the accident, alleging, *inter alia*, negligence claims against all the Defendants and, specifically, an action

under General Obligations Law § 11-100, commonly known as the Dram Shop Act, against the Mart. Thereafter, Zachman and the administrators of the estates of Dillon and Passaro commenced separate actions sounding in negligence and wrongful death against the same Defendants. The four separate actions were joined for trial purposes by Short Form Order dated April 27, 2001. Issue was joined in all the actions by the interposition of verified answers essentially denying the allegations of wrongdoing. Discovery proceedings have been concluded. By Memorandum Decision dated January 30, 2002, this Court granted summary judgment and dismissed the complaints insofar as asserted against Mendon. The remaining claims are currently awaiting trial assignment in the Calendar Control Part.

By Notice of Motion, returnable June 12, 2002, the Mart now moves for summary judgment dismissing all the complaints insofar as asserted against it, pursuant to CPLR 3212, arguing that no liability can be imposed under the Dram Shop Act for this tragic collision. Particularly, the Mart argues that Chiofalo's high blood alcohol level by itself is inadequate to maintain a Dram Shop cause of action as there must be clear proof that intoxication impaired Chiofalo's driving ability. In opposition to the motion, Defilipo, Dillon, Chiofalo, Passaro and Zachman argue that such evidence exists directly and circumstantially. This Court agrees.

The Dram Shop Act, section 11-100 of the General Obligations Law, provides in part that:

Any person who shall be injured in person, property * * * by reason of the intoxication or impairment of ability of any person under the age of twenty-one years, whether resulting in his death or not, shall have a right of action to recover actual damages against any person who knowingly causes such intoxication or impairment of ability by unlawfully furnishing * * * alcoholic beverages for such person with knowledge or reasonable cause to believe that such person was under the age of twenty-one years

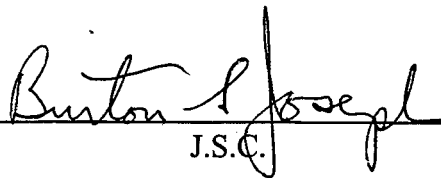
(see *Adamy v Ziriakus*, 92 NY2d 396, 401). To recover under the Act, a plaintiff has the burden of establishing that there was an unlawful sale of liquor to an underage person and “some reasonable or practical connection between the sale of alcohol and the resulting injuries” (*Catania v 124 In-To-Go, Corp.*, 287 AD2d 476, 477; *Church v Burdick*, 227 AD2d 817, 818). The elements of a cause of action under the Dram Shop Act may be established through direct or circumstantial evidence (see *Romano v Stanley*, 90 NY2d 444, 450).

Applying these principles to the matter at bar, the Mart has failed to establish an entitlement to summary judgment dismissing the complaints. Contrary to the Mart’s arguments, there is evidence of Chiofalo’s intoxication and his impaired driving ability, which caused this accident. The record reveals not only that the underage Chiofalo and his friends purchased alcoholic beverages at the subject Mart station, but that he imbibed them and drove his car until its fatal conclusion. Chiofalo’s intoxication can also be inferred from the fact that his high-speeding vehicle inexplicably rear-ended Mendon’s tractor-trailer which was slowly accelerating after stopping at the red light. This direct and circumstantial proof raises issues of fact and credibility better left to the jury to determine (see CPLR 3212[b]).

In accordance with the foregoing, the Mart’s motion for summary judgment in its favor is denied. This constitutes the decision and order of the Court.

ENTER:

Dated: Mineola, New York
June 19, 2002



J.S.C.

ENTERED

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JUN 20 2002

NASSAU COUNTY
COUNTY CLERK'S OFFICE