

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
ANN MCGRANE,

Plaintiff,

-against-

RICHARD YEVOLI and DOMINICK CURATOLA,

Defendants,  
-----X

**MICHELE M. WOODARD**  
**J.S.C.**  
TRIAL/IAS Part 14  
**Index No.: 016689/05**  
**Motion Seq. No.: 05**

**DECISION AND ORDER**

**Papers Read on this Motion:**

Defendant's Notice of Motion	05
Plaintiff's Opposition	XX
Defendant's Reply Affirmation	XX

The Plaintiff, Ann McGrane, filed suit against the Defendant, Richard Yevoli, for negligently allowing her to be assaulted and battered by Dominick Curatola, while she was a guest in Richard Yevoli's home. The incident in question took place on the evening of November 24, 2004 and in the early morning hours of November 25, 2004.

The Plaintiff's testimony indicates that Richard Yevoli (hereinafter Yevoli), Dominick Curatola (hereinafter Curatola), Eric Bard (hereinafter Bard), and the Plaintiff met at Yevoli's home and proceeded to dinner, in Yevoli's car. Afterwards, the foursome went to a local bar for drinks. The Plaintiff testified that she and Yevoli returned home and engaged in consensual sexual relations. However, Curatola and Bard declined to leave the bar despite their cars remaining at Yevoli's home. According to the Plaintiff, after she and Yevoli engaged in sexual relations, Curatola called Yevoli to request a ride back to Yevoli's home. The Plaintiff testified that Yevoli closed the door to his bedroom where she was before he left to pick up Curatola and that she subsequently fell asleep. While talking to Curatola at Yevoli's home, Yevoli received another call, this time from Bard asking for a ride back to

his car parked at Yevoli's home. Yevoli testified that he does not believe he informed Curatola that the Plaintiff was naked. Subsequently, Yevoli told Curatola that he was going to pick up Bard. According to Yevoli, there was no discussion regarding Curatola having any sexual interest in the Plaintiff or making any sexual advances towards the Plaintiff.

At Yevoli's deposition, Yevoli explained that Curatola had a key to Yevoli's home and would sleep over often. Additionally, Yevoli alleges that he had no previous knowledge regarding any alleged incidents for which Curatola was arrested or any allegations made by a female against Curatola. Yevoli further testified that he had no reason to foresee Curatola's actions because Curatola appeared sober, even though Curatola asked where the Plaintiff was when they returned from the bar. Yevoli admitted that prior to returning home the Plaintiff exposed herself, dressed provocatively and was flirtatious throughout the evening.

Curatola denied, at his deposition, discussing his sexual feelings regarding the Plaintiff with Yevoli. However, Curatola admits that he told Yevoli that the Plaintiff was "hot" and "attractive." Curatola concurs with Yevoli's testimony that the Plaintiff "flashed" the three men the night of the assault. Contrary to Yevoli's testimony, Curatola alleges that when he arrived at Yevoli's house having left Curatola alone in the house while Plaintiff slept, Yevoli might have told him that the Plaintiff was naked. Contrary to the Plaintiff's testimony, Curatola testified that the bedroom door was open. After Yevoli left, Curatola went into the bedroom where the Plaintiff was sleeping. According to the Plaintiff, Curatola started kissing the Plaintiff's neck and then performed oral sex on her. During the sexual assault, the lights were off and no conversation took place between Curatola and the Plaintiff. Subsequently, the Plaintiff woke up and discovered Curatola. Curatola testified that the Plaintiff went crazy and screamed, "What are you doing?" Afterwards the Plaintiff ran next door and called the police. When Yevoli returned with Bard, Curatola was outside, and the Plaintiff was with the neighbors.

Yevoli argues that he was not negligent because he had no reason to know or foresee that Curatola would sexually assault the Plaintiff. Yevoli claims Curatola has no history of sexual abuse, and Yevoli could not reasonably be expected to foresee such an incident. Furthermore, he argues that the fact that the sexual assault took place in Yevoli's home is not sufficient to sustain a claim for negligence. The Defendant further points out that, unlike Curatola, he, was never criminally charged, due to the incident and the Plaintiff never moved for summary judgment against him as to liability.

According to the Plaintiff, it is a question of fact as to whether Yevoli was reasonably aware that he should control Curatola, and it is a question of fact as to whether the injury was foreseeable by Yevoli. The Plaintiff argues that based upon everyone's flirtatious conduct that evening, and the alcohol consumption Yevoli was aware of the need to control Curatola; therefore, the injury was foreseeable. As a preventative measure, the Plaintiff contends that Yevoli could have or should have locked the door to the bedroom or taken Curatola along with him to pick up Bard.

It is well-settled that summary judgment is a drastic remedy and should not be granted when there is any question as to the moving party's right to such dispositive relief. The proponent of a summary judgment motion must make a *prima face* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case, and its failure to make such showing requires summary denial of the motion, regardless of the sufficiency of the opposing papers *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985); *Emphanque Capital Corp. v Griffith*, 198 AD2d 259 (2d Dept 1993). Landowners only have to control third party guests when they are able to do so, and the landowner is reasonably aware that they should control the third party guests. *Crowingshield v Proctor*, 31 AD3d 1001, 1002 (3d Dept 2006). Thus, "[t]he question of foreseeability is usually for the jury to resolve . . . when . . . varying inferences may be drawn from the facts and evidence." *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 329 (1991); see *Kriz v Schum*, 75 NY2d 25, 34 (1989); see also *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315

(1980). More than mere alcohol consumption by adults must be alleged in order to create a question of fact regarding the foreseeability of an assault. *Crowingshield*, 31 AD3d at 1003.

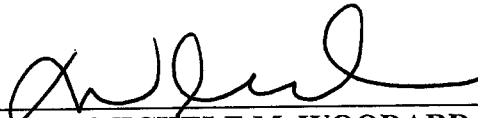
The Defendant has failed to eliminate all material issues of fact from this case. It is clear that there are material issues of fact regarding foreseeability when viewed in the context of the sexual atmosphere and attitude on the evening of November 24-25, 2004. The Defendant alleges that the atmosphere that night consisted of discussions regarding the Plaintiff's looks, discussion regarding the Plaintiff being naked, flashing by the Plaintiff, and other sexual conversation and flirtatious conduct by the four individuals that evening. This atmosphere indicates that there is more than mere alcohol consumption that gives rise to a material issue of fact regarding the foreseeability of the injury. A fact finder is necessary in order to determine if the sexual assault could have and should have been foreseen by Yevoli. Therefore, the Defendant's motion for summary judgment is **denied**. It is hereby

**ORDERED**, the parties are directed to appear on September 15, 2009 at 9:30 am in Central Jury for trial.

This constitutes the **DECISION** and **ORDER** of the Court.

**DATED:** June 30, 2009  
Mineola, N.Y. 11501

**ENTER:**

  
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**HON. MICHELE M. WOODARD**  
J.S.C.

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**ENTERED**  
JUL 07 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE