**SUPREME COURT OF THE STATE OF NEW YORK** **Index No. 104110/08**
**COUNTY OF RICHMOND DCM PART 3** **Motion No.: 4**

**THOMAS VENITO**

***Plaintiff***

***against***

**MARK SALVERSON a/k/a MARK SALVESON,**
**ALPHONSE A. GENTILE;**
**JOSEPHINE GENTILE;**
**HOOLIGANS OF STATEN ISLAND, INC. and**
**KJ'S ALE HOUSE**

***Defendants***

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**The following items were considered in the review of the following motion for summary judgment:**

| Papers | Numbered |
|---|---|
| Notice of Motion and Affidavits Annexed | 1 |
| Answering Affidavits | 2 |
| Replying Affidavits | 3 |
| Exhibits | Attached to Papers |

**Upon the foregoing cited papers, the Decision and Order on this motion for summary judgment is as follows:**

The motion for summary judgment made by the defendants Hooligans of Staten Island, Inc. ("Hooligans") and KJ's Ale House ("KJ's") is denied.

## Facts

The plaintiff, Thomas Venito and a defendant, Mark Salverson, were playing a drinking game known as beer pong on the Memorial Day Weekend from the night of Sunday, May 27, 2007 through the early morning of Monday, May 28, 2007. On that night, both the plaintiff and Salverson were patrons in KJ's Ale House, located at 18 Nelson Avenue, Staten Island, NY 10308. Hooligans and KJ's operate together under the name of "KJ's Ale House". Alphonse Gentile and Josephine Gentile are the owners of KJ's premises. During the beer drinking contest a dispute arose concerning the governing rules of beer-pong. That dispute became boistrous and

physical and resulted in Salverson assaulting the plaintiff causing him serious physical injury.

The bartender on duty was Michael Fusco, an employee at KJ's. Fusco unsuccessfully intervened twice during the early part of the confrontations, and each time retreated to a position of safety behind the bar. When physical conflict commenced, Fusco attempted to intervene, then retreated again and dialed 911. Although the fight began within KJ's premises, the plaintiff was pushed and dragged through the front entrance to the outside and was chased down the street.

Salverson was arrested because of the events of that night, and plead guilty to a misdemeanor charge of assault in the third degree (Penal Law § 120.00) for which he received a sentence of sixty days in jail. The plaintiff required surgical interventions, and as a consequence of his injuries, claims permanent, serious injuries including facial fractures and an ankle fracture.

**Discussion**

Hooligans and KJ's now move for summary judgment to dismiss the plaintiff's action claiming negligence in providing adequate security, hiring, supervision and training of KJ's personnel. Hooligans and KJ's also move for summary judgment on the grounds that the plaintiff failed to establish a *prima facie* case under the "Dram Shop Act".[1]

Under CPLR § 3212, a motion for summary judgment requires that "the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."[2] "[S]ummary judgment is a drastic remedy and should not be granted when there is any doubt as the to the existence of a triable issue."[3] Notwithstanding facts

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[1]General Obligations Law 11-101.

[2]CPLR § 3212 (b).

[3]*Rotuba Extruders, Inc. v. Ceppos,* 46 NY 2d 223, 231 [1978], *itself quoting Moskowitz vs. Garlock, 23 AD 2d 943, 944 [1965]; see Gilson vs. Metropolitan Opera*, 5 NY 3d 574, 578 [2005]; *citing* Siegel, NY Practice § at 459 - 460 [4th Ed.]; *see Herrin v. Airborne Freight Corp.*, 301 AD 2d 500, 500-501 [2d Dept 2003]; *and see also American Home Assurance Co. v.*

presented by any party, "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact."[4] All evidence must be examined in the light most favorable to the non-moving party;[5] and the non-movant must be given the benefit of every favorable inference.[6]

The proponent of a motion for summary judgment has the burden of tendering sufficient evidence to show the absence of competing material issues of fact.[7] Once a moving party has made a showing of sufficient evidence, the burden shifts to the opposing party to put forth evidence in admissible form to establish a triable issue for the fact finder.[8] Mere conclusory assertions do not support the required burden of evidence.[9] Here, it is Hooligans and KJ's that have the initial burden of providing adequate evidence to show the absence of competing material issues of facts. The plaintiff must rebut the defendants' claims.

**Summary judgment on the issue of negligence in providing security and training is denied.**

The First Department of the Appellate Division has held that "licensed occupiers do owe people on their property a duty of reasonable care to maintain the premises in a safe condition in order to minimize foreseeable dangers."[10] The Court of Appeals holds that the proper standard is

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*Amerford International Corp.*, 200 AD 2d 472 [1st Dept 1994].

[4]*Rotuba Extruders, Inc. v. Ceppos,* 46 NY 2d at 231.

[5]*Nicklas v. Tedlen Realty* Corp., 305 AD 2d 385, 386 [2d Dept 2003].

[6]*Gray v. N. Y. City Transit Auth.*, 12 AD 3d 638, 639 [2d Dept 2004]; *and Perez v. Exel Logistics, Inc.*, 278 AD 2d 213, 214 [2d Dept 2000].

[7]*Wasserman v. Carella*, 307 AD 2d 225, 226 [1st Dept 2003].

[8]*Zuckerman v. City of New York*, 49 NY 2d 557, 562 [1980]; *see also Judith M. v Sisters of Charity Hosp.,* 93 NY 2d 932, 933 - 934 [1999].

[9]*Winegrad v. New York Univ. Med. Ctr.*, 64 NY 2d 851, 853 [1985]; *and see also Zutt v. State of New York*, 80 AD 3d 758, 759 [2d Dept 2009].

[10]*Broodie v. Gibco Enterprises, Ltd.*, 67 AD 3d 418 [1st Dept 2009].

"reasonable care under the circumstances", whatever may be the use of that property.[11] A property owner must control the conduct of individuals "when it has the opportunity to control such conduct and is reasonably aware of the need to do so."[12]

The night of the incident, Sunday, May 27, 2007 to Monday, May 28, 2007, was part of the Memorial Day weekend. Hooligans and KJ's provide evidence that Fusco, the bartender, was the only employee on the premises, and that Fusco provided security as well as serving drinks. Hooligans and KJ's further assert that because of the small number of anticipated patrons on a Sunday night, there was no duty to provide added security on the Sunday night in question. In rebuttal, the plaintiff states he expected from prior experience that KJ's personnel would check identification at the entrance to KJ's, and that a bouncer would be available. In addition, the plaintiff asserts that Fusco had observed the onset of the controversy with Salverson. Therefore, Fusco should have called for assistance earlier than he did, and before any patrons were injured. Issues of fact exist whether the security present on May 28, 2007 was reasonable under the circumstances, and whether assistance should have been called earlier in the developing altercation. Therefore, summary judgment must be denied on the issue of failing to provide security and training.

**The plaintiff presents a prima facie case for liability under the Dram Shop Act**

Under the New York Alcoholic Beverage Control Law § 65 (2), it is a violation to "sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to ... 2. Any visibly intoxicated person."[13] The plaintiff seeks to find Hooligans and KJ's liable for damages under the Dram Shop Act which states that "[a]ny person who shall be injured in person, property, means of support, or otherwise by any intoxicated

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[11] *Bingham v. New York City Tr. Auth.,* 8 NY 3d 176, 184 [2007], *property used for transportation*; *Maheshwari v. City of New York*, 2 NY 3d 288, 294 [2004] *property used for entertainment*; *Haymonn v. Pettit*, 9 NY 3d 324, 328 [2007], *property used for recreation*.

[12] *Rishty v. DOM, Inc.*, 67 AD 3d 662, 663 [2d Dept 2009].

[13] Alcoholic Beverage Control Law § 65 (2).

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."[14]

Salverson was engaged in a game of "beer-pong" immediately before his assault upon the plaintiff. Beer-pong is a drinking game in which beer filled cups are arranged at the ends of a table. A ping-pong ball is thrown or bounced on the table with the intent that the ball will land in a cup with beer. When the player's ball lands in a cup, the opponent must drink the beer from that cup. Variants of the rules exist, but the common object is the copious consumption of alcoholic beverages. When played in a bar, the obvious inference is that the bar profits most when players drink large quantities of beer. KJ's was the supplier of the beer for the game. Fusco, the employee of KJ's, knew that the parties were engaged in the "beer-pong" drinking game which by its very nature encouraged excessive drinking on the premises of KJ's. Here, Hooligans and KJ's provided an alcoholic beverage to the players of a beer-drinking game and Salverson was a participant in the game. By providing an alcoholic beverage to the players of the game, Hooligans and KJ's assisted in Salverson's procurement of liquor.

Hooligans and KJ's assert that there is no indication that Salverson, the plaintiff's assailant was intoxicated. However, there is no dispute that aggression was manifested by Salverson. This court notes a common sense observation that many individuals become increasingly aggressive when they become intoxicated. The Centers for Disease Control and Prevention ["CDC"] states that "[e]xcessive alcohol consumption increases aggression and, as a result, can increase the risk of physically assaulting another person."[15] The CDC cites scientific

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[14]New York General Obligations Law § 11-101 (1).

[15]CDC [Centers for Disease Control and Prevention]-Fact Sheets-Excessive Alcohol Use and Men's Health, http://www.cdc.gov/alcohol/fact-sheets/mens-health.htm [accessed June 13, 2011].

studies of this phenomenon in stating its conclusion.[16] Therefore, in this setting, Salverson's aggressive behavior by itself may have been sufficient visible evidence of his intoxication, which was observed by the defendants' employee.

Here, the elements of a violation of the Dram Shop Act have been put forth. A reasonable fact finder could find KJ's to have been the supplier of an alcoholic beverage used in a prolonged beer-drinking game, wherein the participants became intoxicated to varying degrees. As part of that game, beer was served to Salverson, who could be identified as being visibly intoxicated by his aggressive behavior. Therefore, the defendants' summary judgment motion seeking dismissal of the plaintiff's cause of action asserting a of Alcoholic Beverage Control Law § 65 (2) and General Obligations Law § 11-101 (1) must be denied.

**Summary judgment on the issue of negligence in hiring, supervising and training is denied.**

Hooligans or KJ's or both, as Fusco's employers, may be liable for his actions and omissions if he acted in the furtherance of his employer's business and within the scope of his employment.[17] Fusco was engaged in typical activities related to employment as a bartender as he served alcoholic beverages. As the only employee present on the night of the assault, Fusco was also responsible for providing security. Fusco intervened when conflict erupted, however his intervention was ineffectual. There has been no representation that both serving beverages and maintaining order are not within Fusco's scope of employment as a bartender. Therefore, Hooligans and KJ's had the duty to effectively control the actions of its patrons through their employee Fusco.[18]

No assistance was summoned by Fusco, Hooligans' and KJ's employee, prior to the

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[16]Scott KD, Shafer J, and Greenfield TK, *The roles of alcohol in physical assault perpetration and victimization*, J Stud Alcohol, 1999; 60:528-536.

[17]*N. X. v Cabrini Medical Center*, 97 NY 2d 247, 251 [2002].

[18]*Rishty v. DOM, Inc.*, 67 AD 3d at 663.

actual physical assault upon the plaintiff. During the assault, there is no available evidence that indicates effective active assistance was rendered to the plaintiff by Fusco, and he only summoned police assistance after the assault resulted in injury to the plaintiff. From the evidence of escalating confrontation, it can be inferred that earlier intervention may have averted the physical assault. Liability may attach when foreseeable dangers are not averted.[19] There may be a duty owed to a victim of an assault when an observer, from a protected site of observation, fails to summon aid.[20] Therefore, KJ's and Hooligans may have breached a duty to maintain a reasonably safe environment in the bar because of Fusco's acts and omissions. The escalating course of the controversy between the plaintiff and Salverson may have made the assault foreseeable. A fact-finder may find that summoning police intervention before the actual physical assault was both possible and reasonable. These are each issues of fact to be determined and therefore these issues preclude granting summary judgment.

There must be substantive merit in a cause of action in order to survive a motion to dismiss.[21] Hooligans and KJ's state that the plaintiff failed to show that hiring or training of personnel caused or contributed to the plaintiff's injuries. However, Hooligans and KJ's fail to provide evidence in admissible form that the personnel hired, their supervision and their training were sufficient to properly manage the premises. The plaintiff provides evidence of several ineffectual intercessions by Fusco, the bar tender. These interventions failed to prevent the escalation of a brewing altercation and failed to solicit assistance. From this evidence, a fact finder may infer a deficiency in Fusco's hiring, his supervision, his training, or in some combination of the three. Therefore, Hooligans and KJ's have failed to establish that this cause of action lacks merit. Consequently, the motion for summary judgment made by Hooligans and KJ's on these issues is denied.

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[19] *Broodie v. Gibco Enterprises, Ltd.*, 67 AD 3d at 418.

[20] *Crosland v New York City Transit Auth.*, 68 NY 2d 165, 170 [1977].

[21] *Burke v. Crosson*, 85 NY 2d 10, 14 [1995].

Accordingly it is hereby

ORDERED, that the motion made by Hooligans of Staten Island, Inc. and KJ's Ale House for summary judgment against Thomas Venito in so far as the issues of negligence in providing security, in training for security, in hiring, in supervision and in training is denied; and it is further

ORDERED, that the motion made by Hooligans of Staten Island, Inc. and KJ's Ale House for summary judgment to dismiss the plaintiff's cause of action based upon violations of Alcoholic Beverage Control Law § (65 (2) and General Obligations Law § 11-101 (1) is denied; and it is further

ORDERED, that the parties shall return to **DCM Part 3, 130 Stuyvesant Place, Third Floor** for a pre-trial conference on **Monday, July 11, 2011 at 9:30 AM.**

ENTER,

DATED: June 21, 2011

Joseph J. Maltese
Justice of the Supreme Court