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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 17**

**Present: HON. WILLIAM R. LaMARCA
Justice**

JOSEPH LABIANCA,

Plaintiff,

-against-

INDEX NO: 20344/05

BRIAN HAHN and PATTI & JOHNNY'S, INC.,

Defendants,

MEMORANDUM DECISION AFTER TRIAL

Appearances:

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For Defendants:

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Introduction

Plaintiff, JOSEPH LABIANCA (hereinafter referred to as "LABIANCA") commenced this action against BRIAN HAHN (hereinafter referred to as "HAHN"), JOHN GUILIANO (hereinafter referred to as "GUILIANO"), individually and as an officer and share holder of the defendant corporation, and PATTI & JOHNNY'S, INC. (hereinafter referred to as "PATTI & JOHNNY'S"), for damages resulting from a violation of the General Obligations

Law (GOL) § 11-101, commonly known as the Dram Shop Act, and the Alcohol & Beverage Control Law § 65 (hereinafter referred to as "ABC § 65"). LABIANCA also alleged a violation of PATTI & JOHNNY'S common law duty to persons on its property. LABIANCA alleged that HAHN, who was visibly intoxicated at or about 3:00 A.M. on the morning of December 23, 2004, viciously attacked and assaulted him after both were consuming alcohol at PATTI & JOHNNY'S.

During the course of this litigation, Hon. Justice Joseph P. Spinola, by order dated June 9, 2006, directed that a default judgment be entered against all defendants. However, the Court later vacated the default against defendants GUILIANO and PATTI & JOHNNY'S, INC., by order dated August 18, 2006. It appears that the default judgment against HAHN remained. In deciding a pre-trial motion for summary judgment dismissing the complaint, interposed by GUILIANO and PATTI & JOHNNY'S, by Short Form Order dated October 24, 2007 Justice Spinola dismissed the complaint against GUILIANO on the grounds that insufficient evidence was presented to pierce the corporate veil to hold defendant GUILIANO personally liable, but denied summary judgment to PATTI & JOHNNY'S on the ground that the complaint stated a cause of action for violation of the Dram Shop Act and for common-law negligence. This matter was tried by the Court, without a jury, over the course of five (5) days: February 20, February 21, February 25, February 26 and, March 4, 2008.

Background

At trial, it was established that, on the evening of December 22, 2004, LABIANCA arrived at PATTI & JOHNNY'S with a friend, sometime between 8:30 and 9:30 P.M. Thereafter, the two (2) left and LABIANCA later returned to the bar, alone, at approximately

11:00 P.M. HAHN was at PATTI & JOHNNY'S at that time, along with other patrons, three of whom later gave statements to the Nassau County Police Department in its investigation of the incident. Those patrons were A. Shayne Zarzycki (hereinafter referred to as "Zarzycki"), Steve Hanover (hereinafter referred to as "Hanover") and Brian Sexton (hereinafter referred to as "Sexton") (Plaintiff's Exhibit "2b"). Their statements and testimony at trial established that the three (3) had been drinking at another bar from approximately 9:30 P.M. that evening and later arrived at PATTI & JOHNNY'S at around midnight. It appears that, at some point, they witnessed LABIANCA being tripped or thrown to the floor by HAHN, but that the incident was resolved quickly. The witnesses testified that, immediately thereafter, LABIANCA and HAHN were talking and buying each other a beer. The length of time that LABIANCA and HAHN talked is unclear, however, during the Police investigation, the statements given by PATTI & JOHNNY'S bartender, Mathew Schomburg (hereinafter referred to as "Schomburg"), and Sexton, indicated that LABIANA and HAHN talked for approximately one hour. (Plaintiff's Exhibit "2b"). All of the witnesses, including LABIANCA, thought that the matter was resolved peacefully.

After that incident, and sometime before closing at 3:00 A.M., LABIANCA had his head resting on the bar because he was either intoxicated or sleeping. In his statement to the Police, Schomberg said "he seemed drunk".

There were no other altercations at PATTI & JOHNNY'S that evening and Schomburg told the police that, just prior to closing the bar, because he had hurt his back, he asked HAHN to help get LABIANCA out of PATTI & JOHNNY'S. LABIANCA was still head down on the bar. That act will be addressed later. HAHN proceeded to pick up LABIANCA, carry him to the door of the establishment and they both exited. Schomburg

had the other patrons leave and he locked the door so he could clean the bar area. Shortly thereafter, he was called to the door and alerted that a fight was ensuing outside, but he did not pursue the matter as the altercation was not on the premises of PATTI & JOHNNY'S.

Mr. Zarzycki testified that he knew HAHN from another bar and that, when he saw HAHN carrying LABIANCA to the door, he instinctively felt, based on his experience as a bartender, that all was not right. He followed the two (2) out of the bar and observed them talking but could not hear their conversation. Zarzycki testified that LABIANCA and HAHN walked down the street and around the corner where he saw HAHN begin to assault LABIANCA. HAHN was a young strong fellow and LABIANCA was described as the "old guy".

Contentions of the Parties

LABIANCA contends that HAHN was visibly intoxicated and that PATTI & JOHNNY'S serving him alcohol amounted to an illegal sale in violation of the GOL § 11-101 and ABC § 65. He further contends that asking HAHN, in his condition, to carry LABIANCA out of the bar was common-law negligence and that PATTI & JOHNNY'S should have protected him.

PATTI & JOHNNY'S contends that there was no evidence that HAHN was visibly intoxicated and that since, after the first altercation, LABIANCA and HAHN were friendly, buying each other drinks, it was not foreseeable that HAHN would viciously assault LABIANCA.

As to Violation of the Dram Shop Act

The Law

The Dram Shop Act, GOL §11-101, provides as follows:

Compensation for injury caused by the illegal sale of intoxicating liquor:

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.

Additionally, Alcohol & Beverage Control Law § 65 provides:

Prohibited sales:

No person shall sell, deliver or give away or cause or permit or procure to be sold, delivered or given away any alcoholic beverages to

1. Any person, actually or apparently, under the age of twenty-one years;
2. Any visibly intoxicated person;
3. Any habitual drunkard known to be such to the person authorized to dispense any alcoholic beverages.

The above statutes must both be considered to establish the unlawful sale of liquor.

Matalavage v Sadler, 77 AD2d 39, 432 NYS2d 103 (2nd Dept. 1980). Under the statute, a party who unlawfully sells alcohol to a visibly intoxicated person is liable for injuries caused by reason of that person's intoxication. *Catania v 124 In-To-Go, Corp.*, 287 AD2d 476, 731 NYS2d 207(2nd Dept. 2001). In order to prove the damages suffered by a plaintiff in a Dram Shop action alleging visible intoxication of a patron to whom alcohol was illegally sold, the plaintiff must establish some reasonable and practical connection between the sale and the injuries. This is a departure from the proximate cause requirement in conventional negligence cases. *McNeill v Rugby Joe's, Inc.*, 298 AD2d 369,

751 NYS2d 241 (2nd Dept. 2002) and *Catania v 124 In-To-Go, Corp.*, supra.

Discussion

In order to prevail in this matter, LABIANCA has the burden of proving:

- 1) that PATTI & JOHNNY'S illegally sold an alcoholic beverage to HAHN, when
- 2) HAHN was visibly intoxicated;
- 3) that such sale caused or contributed to HAHN's intoxication; and
- 4) there is some reasonable connection between the intoxication and LABIANCA's injuries.

There was no doubt that PATTI & JOHNNY'S served alcoholic beverages to HAHN. As to proof of intoxication, the trial testimony of Zarzycki and Hanover support LABIANCA's claim that HAHN was intoxicated as evidenced by slurred speech. However, in cross-examination of the witnesses, it was established that HAHN's conduct in the bar was not erratic, that he did not spill drinks, that he was not staggering nor aggressive and that LABIANCA and HAHN had a friendly conversation after the earlier altercation.

Additionally, PATTI & JOHNNY'S had a surveillance system in place which recorded the interior of the bar. The DVD recording played in Court depicted the activity in the bar subsequent to the earlier altercation between LABIANCA and HAHN. The Court viewed the DVD (Plaintiff's Exhibit "9"), and saw HAHN, who was identified by LABIANCA, walking about the bar area. The Court notes that HAHN was not staggering, bumping into chairs, spilling his drinks or harassing other patrons in the bar. The Court also viewed LABIANCA who appeared to be either intoxicated or sleeping, or both, with his head resting on the bar. All seemed normal at the closing of PATTI & JOHNNY'S as HAHN picked up LABIANCA,

walked to the door without staggering and placed LABIANCA on his feet as they left the bar. As the Court only viewed images, without sound, it could not discern any slurred speech by HAHN.

There is no doubt that HAHN violently assaulted LABIANCA. He was arrested and convicted of a Class D violent felony. The conviction came as the result of a plea before Hon. Alan L. Honorof, Judge of the County Court. HAHN was sentenced to three (3) years in State prison, plus two (2) years post release supervision. In addition to fees, he was ordered to pay restitution in the sum of \$123,379.00. (Plaintiff's Exhibit "1"). During the trial LABIANCA testified that he received \$50,000.00 from HAHN. In his elocution before Judge Honorof (Plaintiff's Exhibit "3"), HAHN stated that he was intoxicated, that he did not know LABIANCA and that he did not remember the altercation outside the bar. In his colloquy with HAHN, Judge Honorof stressed, that as part of the plea, there would be a waiver of his defenses, in particular intoxication. HAHN indicated his awareness of the defense and plead guilty. Plaintiff presented this evidence at trial as proof of HAHN's intoxication. Reading the transcript of the elocution, this Court notes that HAHN stressed his intoxication and his failure to remember the events of the evening, however, it is clear to the Court that HAHN pled guilty to the charged offense, with the promise of a cap of a three (3) year sentence, because it was in his best interest to do so to avoid the possibility of conviction after trial with a more severe sentence of up to seven (7) years in State prison. It is the Court's view that said plea and elocution was self-serving, as it minimized the time of his incarceration. The Court gives this statement only the weight of knowing it as a matter of the record.

In the matter of direct evidence, this Court reviewed the testimony of the witnesses and the documentary evidence admitted at trial, including the DVD recording of the events occurring in the bar after the initial altercation between LABIANCA and HAHN. Based on a careful review of the evidence herein, the Court finds no credible direct evidence of visible intoxication of HAHN prior to his assault on LABIANCA.

LABIANCA argues that visible intoxication need not be established solely by direct proof of intoxication but may be proved by circumstantial evidence, citing *Adamy v Ziriakus*, 92 NY2d 396, 681 NYS2d 463, 704 NE2d 216 (C.A. 1998), as follows:

To the contrary, as was recognized at the time section 65 (2) was amended, the statutory language “[does] not preclude the introduction of circumstantial evidence to establish the visible intoxication of the customer” (*id.*, at 450, quoting Governor’s Approval Mem, 1986 McKinney’s Session Laws of NY, at 3194).

However, in the cases cited by LABIANCA there were several levels of proof establishing visible intoxication by circumstantial evidence. The evidence included the consumption of alcohol, a vehicular accident attended by police officers who, in their official reports, confirmed intoxication by Breathalyzer, and forensic experts who opined, based on the record, that the defendants were visibly intoxicated. *Marconi v Reilly*, 254 AD2d 463, 678 NYS2d 785 (2nd Dept. 1998) and *Adamy v Ziriakus*, *supra*. In the case at bar, such circumstantial evidence does not exist and the Court finds that plaintiff has not established, either by direct or circumstantial evidence, that HAHN was visibly intoxicated as required by the statute.

As to Common-Law Negligence

The Law

In *D'Amico v Christie*, 71 NY2d 76, 524 NYS2d 1, 518 NE2d 896 (C.A 1987), the Court of Appeals set the standard for claims in common law negligence with respect to intoxicated persons, as follows: :

Landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property (*Basso v Miller*, 40 NY2d 233, 241). In particular, they have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control (see, *De Ryss v New York Cent. R. R. Co.*, 275 NY 85). Applying this rationale, lower courts have recognized that a landowner may have responsibility for injuries caused by an intoxicated guest (see, e.g., *Joly v Northway Motor Car Corp.*, 132 AD2d 790; *Comeau v Lucas*, 90 AD2d 674; *Huyler v Rose*, 88 AD2d 755, *appeal dismissed* 57 NY2d 777). Significantly, however, these decisions have uniformly acknowledged that liability may be imposed only for injuries that occurred on defendant's property, or in an area under defendant's control, where defendant had the opportunity to supervise the intoxicated guest (see, e.g., *Delamater v Kimmerle*, 104 AD2d 242, 244; *Comeau v Lucas*, *supra*; *Wright v Sunset Recreation*, 91 AD2d 701, *supra*; *Huyler v Rose*, *supra*; *Schirmer v Yost*, 60 AD2d 789; *Paul v Hogan*, 56 AD2d 723; *Vale v Yawarski*, 78 Misc 2d 522 [Hancock, Jr.,J]). That duty emanated not from the provision of alcohol but from the obligation of a landowner to keep its premises free of known dangerous conditions, which may include intoxicated guests.

Millan v AMF Bowling Centers, Inc., 38 AD3d 860, 833 NYS2d 173 (2nd Dept. 2007),

directs, as follows:

While landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property, an owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such persons and it reasonably aware of the need for such control (see *D'Amico v Christie*, 71 N.Y.2d 76, 85, 518 N.E.2d 896, 524 N.Y.S.2d 1; *Petras v Saci, Inc.*, 18 A.D.3d 848, 796 N.Y.S.2d 673; *Cutrone v Monarch Holding Corp.*, 299 A.D.2d 388, 389, 749 N.Y.S.2d 280). Thus the owner of a public establishment has, no duty to protect patrons against unforeseeable and unexpected assaults.

Discussion

In his statement, the bartender, Schomburg, indicated that he had hurt his back earlier and had asked HAHN to help him get LABIANCA out of the bar so that he could close for the night. He stated that he saw HAHN pick up LABIANCA and carry him out of the bar. It is the judgment of the Court that, under the circumstances, allowing another patron to escort an apparently intoxicated customer out of the bar, is an act of negligence. The Court believes that it was not prudent for the bartender to delegate the duty of the establishment to a third party. In deciding the matter, the Court has considered whether it was foreseeable that the injuries suffered by LABIANCA from an assault off premises would probably result from the negligent conduct in delegating its duty to HAHN. In addition, the Court considered whether the negligence of PATTI & JOHNNY'S, by reason of Schomburg's conduct, was reasonably and practically connected to LABIANCA's injuries.

As the case was tried without a jury, the Court was the Judge of both the law and the facts. The Court considered the evidence introduced and weighed the testimony of the witnesses who appeared at the trial. The Court had no testimony from HAHN, incarcerated at the time of trial, from the bartender, Schomburg, no longer employed by PATTI & JOHNNY'S, or from Sexton a patron in the bar that evening. However, the Court reviewed their statements given to the Nassau County Police Department in its investigation. (Plaintiff's Exhibit "2b"). The plaintiff gave testimony, which was at times at odds with previous statements he had made to the Police. This cast some doubt about how much he remembered of the events leading to the criminal assault he had endured, due to his alcohol consumption on that night. In his statement, Schomberg indicated, among other

things, that LABIANCA consumed approximately five (5) beers and several shots the night of the incident. In his statement to the Police, LABIANCA reported that he didn't recall any problems in the bar that night and that two (2) unknown males took him outside and beat him up. He stated he didn't recall the details of the beating as he had been drinking. He also acknowledged that, before the assault, he passed out and slept at the end of the bar. (Plaintiff's Exhibit "2b").

The testimony of the two (2) independent witnesses, Zarzycki and Hanover, were helpful to the Court as they were able to describe the earlier incident between LABIANCA and HAHN. They also testified that HAHN was intoxicated, however, their testimony also established that LABIANCA and HAHN were on friendly terms for several hours after the earlier incident, bought each other a drink and testified that HAHN exhibited no external signs of intoxication such as staggering, dropping his drinks or aggression during that time. Although Zarzycki testified that, based on his experience as a bartender, his instinct suggested that all was not right when HAHN and LABIANCA left the bar, he did not make his feeling known to Schomburg.

It is undisputed that LABIANCA and HAHN bought at least one drink for the other. In the comparable case of *Campbell v Step/Lind Restaurant Corporation*, 143 AD2d 111, 531 NYS2d 576 (2nd Dept. 1988), the plaintiff was suddenly shot by another patron in the bar. Prior to the shooting, they reciprocated by buying each other drinks. The Court held, as follows:

Under these circumstances, the plaintiff cannot sustain a cause of action predicated on common-law negligence against the appellant because the nature of the shooting incident was such that it was unforeseeable and could not have been guarded against (see, *Silver v Sheraton-Smithtown Inn*, 121 AD2d 711). Similarly, the plaintiff's cause of action based on Alcoholic

Beverage Control Law § 65 must be dismissed. Alcoholic Beverage Control Law § 65 is to be read in conjunction with the Dram Shop Act (General Obligations Law § 11-101; see, Matalavage v Sadler, 77 AD2d 39, 42). In any event, recovery under the Dram Shop Act is precluded because the plaintiff procured an alcoholic beverage for the person who inflicted the injuries (see, Vandenburg v Brosnan, 129 AD2d 793, *affd* 70 NY2d 940).

Based on the foregoing, the Court finds that HAHN's assault of LABIANCA was unforeseeable and unexpected. Under the facts in this case it can not be said that there was a natural and continuous sequence of events leading to the assault and it would be an unreasonable stretch to expect PATTI & JOHNNY'S to have anticipated or prevented this apparent spontaneous, off premises, attack by HAHN on LABIANCA. *Cf., D'Amico v Christie, supra.*

Conclusion

In conclusion, the Court finds that plaintiff has not established a violation of the Dram Shop Act in that plaintiff has not demonstrated that PATTI & JOHNNY'S served a visibly intoxicated patron or that HAHN's alleged intoxication was reasonably connected to LABIANCA's injuries. Moreover, recovery under the Dram Shop Act is precluded because LABIANCA procured an alcoholic beverage for HAHN who inflicted the injuries. See, Vandenburg v Brosnan, 70 NY2d 940, 524 NYS2d 672, 519 NE2d 618 (C.A. 1988); Campbell v Step/Lind Restaurant Corporation, supra.

With respect to common-law negligence, the Court finds that PATTI & JOHNNY'S was negligent to the extent that it permitted another patron to escort an apparently intoxicated customer out of the bar and delegated the duty of the establishment to a third party. However, the Court finds that said negligence was not a substantial factor in causing the injuries to LABIANCA. The Court finds that HAHN's assault on LABIANCA

was not foreseeable and the evidence does not support a reasonable and practical connection between the sale and the injuries.

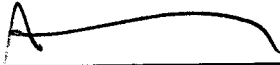
For the above stated reasons, the plaintiff's complaint is dismissed as to PATTI & JOHNNY'S.

In the matter of HAHN's default, the Court finds that plaintiffs Notice of Inquest was defective as it was served upon HAHN by mail at his home address, on June 22, 2006, when he was immediately incarcerated after sentencing on June 13, 2006. The Court directs that plaintiff re-notice HAHN at the address where he is presently incarcerated as defendant is entitled to participate in the inquest even though he has defaulted in the action. *Kocsis v McLean*, 18 Misc3d 1127 Ad. 856 NYS2d 498 (Supreme Clinton Co. 2004).

This constitutes the decision of the Court. .

Submit judgment on notice.

Dated: August 5, 2008


WILLIAM R. LaMARCA, J.S.C.

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ENTERED

AUG 08 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**