

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

FILED  
AND  
ENTERED  
ON 12-23 2008  
WESTCHESTER  
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - CENTRAL CALENDAR PART

-----X  
DAVID MORRIS,

Plaintiff,

**SHORT FORM ORDER**

-against-

Index No. 2599/07

Motion Date: Nov. 13, 2008

BIANNA, INC. d/b/a ROCKIN ROBBINS  
and MICHAEL PENZO,

Defendants.  
-----X

NICOLAI, J.

This motion shall be determined in the Central Calendar Part pursuant to the November 30, 2007 Memorandum of the Hon. Francis A. Nicolai, Administrative Judge, Ninth Judicial District.

The following papers numbered 1 to 17 were read on this motion by defendant Bianna, Inc. d/b/a Rockin Robbins for an Order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims.

Notice of Motion - Affirmation	1- 2
Answering Affirmation	10
Replying Affirmation	16
Exhibits	3- 9, 11- 15, 17

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff commenced the present action to recover damages for personal injuries allegedly sustained on November 11, 2005, during a "college night" event, when he was viciously stabbed by defendant Michael Penzo ("Penzo"), a drunken patron who was served alcoholic beverages while "visibly intoxicated." According to the complaint which alleges causes of action under the Dram Shop Act as well as for common law negligence, plaintiff maintains that defendant Bianna, Inc. d/b/a Rockin Robbins was negligent in continually serving alcoholic beverages to Penzo. Defendant now moves for summary judgment upon the

grounds that: (1) there is no evidence that Penzo was drinking anything other than soda during the night; (2) defendant had no knowledge that Penzo, the alleged assailant, was intoxicated; and (3) defendant had no reason to believe that a physical altercation would take place.

General Obligations Law § 11-101(1), known as the Dram Shop Act, makes a party who "unlawfully" sells alcohol to another person liable for injuries caused by reason of that person's intoxication. Under Alcoholic Beverage Control Law § 65(2), it is unlawful to furnish an alcoholic beverage to any "visibly intoxicated person." Defendant argues that because there is no evidence that Penzo was served any alcohol on November 11, 2005, in a "visibly intoxicated" state, summary judgment on the Dram Shop claims should be granted.

In support of the motion, movant submitted copies of the deposition testimony of defendant Penzo who testified that he did not consume alcohol for months prior to, including the date of, the incident at the Rockin Robbins Bar. In addition, according to the deposition testimony of Rory Dolan, part owner/manager of Rockin Robbins Bar, who was present at the bar on the night of the incident and witnessed "a melee, a bunch of people going at each other" for five to ten seconds, he did not know that anyone was stabbed until two or three days later.

In opposition to the motion, plaintiff argues that defendant had ample notice of a possibility of violence and was well aware that Penzo, described as a regular, was intoxicated. According to the deposition testimony of Paul DeLuca ("DeLuca"), former employee and bar manager on the night of the incident, Penzo "had about four or five drinks" in approximately one and half hours. Although DeLuca testified that he did not actually see Penzo drinking on November 11, 2005, he noted that when Penzo walked into the bar his speech was not slurred, but after the "disaster" DeLuca stated that Penzo had "slurred speech" and was "a little drunk."

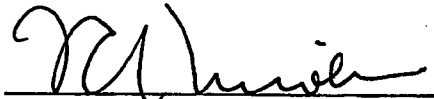
Courts have held that "[i]t is incumbent upon a plaintiff who charges a violation of the Dram Shop Act to offer evidence that the party to whom the liquor was sold acted or appeared to be intoxicated at the time of the sale." (*Nehme v Joseph*, 160 AD2d 915). In order to show that the damages suffered by plaintiff in a dram shop action arose by reason of the intoxication of a patron to whom alcohol was illegally sold, there must be some reasonable or practical connection between the sale of alcohol and the resulting injuries; proximate cause, as must be established in a conventional negligence case, is not required (*McNeill v Rugby Joe's, Inc.*, 298 AD2d 369). A lay witness is competent to testify that a person appears to be intoxicated when such testimony is based on personal observation and consists of a description of the person's conduct and speech (*Rivera v City of New York*, 253 AD2d 597; *Ryan v Big Z Corp.*, 210 AD2d 649).

Once the proponent of a summary judgment motion has made a prima facie showing of entitlement to judgment as a matter of law, the party opposing the motion must demonstrate by admissible evidence the existence of a triable issue of fact (CPLR 3212). Mere conclusions or unsubstantiated allegations or assertions are insufficient to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557). Summary judgment is

inappropriate where questions of fact or credibility are raised that require a trial. In the case at bar, Penzo stated that he was not drinking on the night of the incident because he was on probation, but there is eyewitness testimony that Penzo exhibited the visual signs often associated with a person being intoxicated. The evidence submitted by plaintiff in opposition to defendant's motion is sufficient to raise a triable issue of fact as to whether "some reasonable or practical connection" exists between the sale of alcohol and the resulting injuries (*McArdle v 123 Jackpot, Inc.*, 2008 NY Slip Op 4481; *McNeill v Rugby Joe's*, 298 AD2d 369). Accordingly, the motion to dismiss the Dram Shop Act cause of action, is hereby denied.

Although as a general rule a landowner must exercise reasonable care to protect patrons on its property (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507), the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults (*Politano v Suffolk Manor Caterers*, 245 AD2d 279). The deposition testimony establishes that there were few words exchanged between plaintiff and Penzo, but the attack was unexpected and without warning. Here, where plaintiff failed to proffer any evidence of an escalating situation between himself and Penzo, defendant Bianna, Inc. d/b/a Rockin Robbins could not be said to be on notice of the possibility of violence, nor to be in a position to anticipate or prevent the harm to plaintiff (*Languilli v Argonaut Rest. & Diner*, 232 AD2d 375). Inasmuch as defendant Bianna, Inc. d/b/a Rockin Robbins could not reasonably be expected to have anticipated or prevented a spontaneous assault by one patron against another (*Ryan v Big Z Corp.*, 210 AD2d 649), the Court finds that defendant was not negligent in its failure to supervise and prevent injury by the assaultive patron. Accordingly, defendant's motion for summary judgment is granted solely as to the common law negligence cause of action.

Dated: White Plains, New York  
December 19, 2008

  
FRANCIS A. NICOLAI  
J.S.C.

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