

PRESENT: PAULA J. OMIANSKY

PART 47

Justice

0104349/1999

WILSON, ROGER W., JR.

vs

DICAPRIO, LEONARDO

INDEX NO. _____

MOTION DATE 7/16/04

MOTION SEQ. NO. _____

MOTION CAL. NO. 8

SEQ 13

SUMMARY JUDGMENT

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

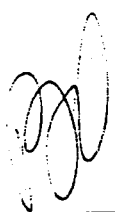
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross motion*

are decided in accordance with the accompanying memorandum decision

FOR THE FOLLOWING REASON(S):

Dated: 9/23/04



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

-----X
ROGER WILSON, JR.

Index No. 104349/99

Plaintiff,

DECISION AND ORDER

-against-

LEONARD DICAPRIO, JAY FERGUSON, KEVIN CONNELLY,
VINCENT LARESCA, KAREN TENZER, ASIA DE CUBA
RESTAURANT, INC. TODD HEALY and JOHN DOES 2 THROUGH 4,
WHOSE NAMES ARE UNKNOWN

Defendants.

----- X
ASIA DE CUBA RESTAURANT,

Third-party plaintiff,

-against-

GSS SECURITIES SERVICES, INC.

Third-party defendant.

----- X
PAULA J. OMANSKY, J.:

In this action for assault, battery and related claims, defendant Asia De Cuba Restaurant Inc. moves for summary judgment and to dismiss the complaint and all remaining cross claims on the ground that there is no evidence that the restaurant served alcoholic beverages to any visibly intoxicated person.

Defendants DiCaprio, and Kevin Connelly, and Jay Ferguson cross-move for summary judgment and to dismiss the complaint and all cross claims.

FACTS

On March 2, 1998, plaintiff Roger W. Wilson Jr. and his actress girlfriend, Elizabeth Berkley, a non-party, were invited by

a publicist to attend the opening premier of Mr. DiCaprio's latest film, "The Man in the Iron Mask," at New York's Zigfield Theater. Defendants Kevin Connelly and Jay Ferguson both actors, were also invited to the screening, and were introduced to Ms. Berkley. Mr. Ferguson was attracted to Ms. Berkley.

Plaintiff and Ms. Berkley were also invited to attend the party held after the showing. While plaintiff was mingling with other guests, defendant Karen Tenzer¹ allegedly approached Ms. Berkley and asked her to join Mr. DiCaprio and his actor friend, defendant Jay Ferguson, at another party at Elaine's Restaurant. Ms. Berkley politely declined.

On March 3, 1998, just before midnight, Ms. Berkley's telephone rang. Plaintiff alleges that defendants DiCaprio and Ferguson had urged Ms. Tenzer to call Ms. Berkley at her home, which she shares with plaintiff. Defendants DiCaprio and Ferguson allegedly placed several calls to Ms. Berkley's telephone pager asking Berkley to meet them at the Asia De Cuba Restaurant later that evening without her boy friend. According to plaintiff, these calls were harassing and continued until midnight, March 3, 1998. At midnight, Ms. Berkley received an urgent message from Ms. Tenzer's assistant who stated that "Karen needs you immediately." Worried, Ms. Berkley returned that call, only to be berated by Ms. Tenzer or her assistant for refusing the alleged solicitations of Mr. DiCaprio and Mr. Ferguson. Ms. Berkley immediately ended the conversation and informed plaintiff of the incident.

¹Plaintiff has discontinued the action against Ms. Tenzer.

According to plaintiff, his girl friend was visibly upset, crying and shaking. Plaintiff asked the reason. Ms. Berkley allegedly stated to plaintiff that Karen Tenzer's assistant had "launched into her" for not returning the ten or so telephone messages from Ms. Tenzer and defendants DiCaprio and Ferguson, and threatened her career.

Plaintiff then called Ms. Tenzer twice. Both times the woman who responded hung up. Plaintiff called a third time and asked for Ferguson. The woman who answered asked who was calling for Mr Ferguson, and plaintiff answered "Elizabeth Berkley." After a moment, a man's voice said "Hey baby, been waiting for your call," to which plaintiff asked, "Is this Jay Ferguson," to which the male voice answered, "Yeah."

Plaintiff then identified himself and reminded Ferguson that they met the prior evening. Plaintiff related to Ferguson that his girlfriend was upset and demanded that Ferguson stop calling her. Ferguson started cursing at plaintiff and allegedly told him, "If you don't want us to call your house come down here and tell us."

After ending his call to Ferguson, plaintiff got dressed, and told Ms. Berkley that he was going down to the Asia De Cuba Restaurant to reprimand Ms. Tenzer for giving out Ms. Berkley's telephone number and to tell defendants DiCaprio and Ferguson to stop harassing him and Ms. Berkley.

Plaintiff went inside the Asia de Cuba Restaurant where he allegedly found defendants DiCaprio, Ferguson, Kevin Connelly,

Vincent Laresca², and other persons. According to plaintiff, Kevin Francis, a non-party, and an employee of the GSS Security Company, Inc. ("GSS Security," a non-party) was working security at the door of the restaurant.

Plaintiff entered the restaurant, saw the security guard (Mr. Francis) and informed him that he was there to see Mr. DiCaprio and that it would be very brief.

Plaintiff approached the defendants and demanded to know why Ms. Tenzer was giving his home number to Mr. DiCaprio and Mr. Ferguson. Mr. Ferguson continued his tirade telling plaintiff "its time for you and me to go outside." Plaintiff states that he ignored Mr. Ferguson's insults and said "[y]ou told me to come down here to tell you not to call my family. I'm here. Don't call my family." Plaintiff alleges that he warned defendants that he would call the police if the calls persisted. Plaintiff alleges that he decided to leave, turned away, and began to walk out of the restaurant.

Mr. Ferguson testified that plaintiff came up to the table and that words passed between them. When someone suggested that he (Ferguson) and plaintiff go outside, both men agreed.

The security guard Francis states that he heard a loud commotion and went back to the table where defendants were seated to find out what the commotion was. Mr. Francis testified that "the words had already been exchanged, and he [plaintiff] was turning to walk out."

²Plaintiff has discontinued the case against Mr. Laresca.

As plaintiff was leaving the restaurant, Mr. Francis testified that he saw another young man (Caucasian, approximately six feet tall, thin, clean-cut, nice-looking with dark hair) walk up to and stand next to Mr. DiCaprio. This tall young man was dressed more conservatively than the other young men at the table, who were all wearing baggy jeans. Mr. Francis also described the man as wearing a big fur hat and goatee. In addition, Mr. Francis stated that the man "was wearing something like a polo shirt, a jockey shirt."

Although he did not know the identity of the man, Mr. Francis testified that he knew the man to be part of defendant DiCaprio's entourage since he had always seen this individual with Mr. DiCaprio on each of the several occasions he saw defendant DiCaprio at the Asia de Cuba Restaurant. According to Mr. Francis, he observed the tall young man and Mr. DiCaprio having a conversation. Security guard Francis, who was only a foot or two away from defendant DiCaprio, overheard defendant DiCaprio say to the tall young man "Go out there and kick his ass."

Mr. Ferguson claims that he did not hear Mr. DiCaprio's statement to the man with the goatee since he had already left the table to go outside.

The tall man left the table and followed plaintiff out of the restaurant. Mr. Francis then turned to walk out to the front of the restaurant and returned to his security post at the front door. After he reached the door, Mr. Francis later saw a group of people gathered outside the door of Asia De Cuba Restaurant.

Events Outside of the Restaurant

Plaintiff states that after he went outside, he saw defendants Laresca, Connelly, and five to six other men come out of the restaurant. Mr. DiCaprio allegedly followed directly behind his friends.

Plaintiff states that Ferguson, Laresca, Connelly and the other men encircled him, threatening and taunting him. According to plaintiff, defendants Ferguson and Connelly kept challenging plaintiff to fight, yelling at him to "throw a punch, throw a punch or we'll kick your f----in' ass."

According to plaintiff, Mr. DiCaprio also came out of the restaurant, accompanied by two security guards.

According to plaintiff, DiCaprio, who had a drink in one hand and a cigarette in the other, joined co-defendants Ferguson and Connelly in the semi-circle of men surrounding plaintiff. Defendant Ferguson kept looking at plaintiff and saying, "throw a punch," to which plaintiff cursed in return and responded, "I will not throw a punch, but if you strike me, I will defend myself." Defendant Connelly, who was also holding a drink in his hand, put his drink down and took off his glasses, and said to plaintiff and the crowd, "I'll go and kick this mother f----er's ass myself."

At this point, Ms. Tenzer exited the restaurant holding her cellular telephone up in the air. Ms. Tenzer called to plaintiff, "Roger, Roger I can explain."

As plaintiff turned left toward Ms. Tenzer, he felt a hard punch to the right side of his throat. The blow landed on plaintiff's Adam's apple, allegedly damaging plaintiff's larynx and

other internal organs³. Plaintiff maintains that he doubled over in pain and that he was unable to breathe due to the swelling in his throat.

Plaintiff looked to see who had struck him and saw a young man standing over him, who was wearing a flannel shirt and jeans and had short hair. When he was standing over plaintiff, this assailant, now known to be defendant Todd Healy, shouted "I'm going to f---ing kill this mother f---er." Mr. Connelly, Mr. Ferguson and other men grabbed the assailant, Mr. Healy, cursing at him, "You stupid asshole." As plaintiff tried to rise from the ground, Mr. Laresca allegedly grabbed plaintiff and told him, "Roger, stay down, this guy is a killer, he'll kill you." Mr. Healy again tried to lunge for plaintiff. Plaintiff put his fists up and defendant Connelly and a few other men grabbed defendant Healy.

Mr. Connelly admits that he invited Healy to join him at the restaurant but maintains that the invitation was extended solely because the former had not seen the latter in a long time, had known that Healy was going to college in Manhattan, and had wanted to see him. Mr. Connelly stated that he told Healy that he was not sure when the group would be going to dinner but to look for him at the Asia De Cuba Restaurant if he (Connelly) was not in his room at

³Plaintiff's injuries are alleged to include a severe hematoma to plaintiff's right vocal cords and right sinus region, and extreme tenderness to the tracheal rings of the neck. Follow-up medical examinations allegedly revealed that the nodules along the edge of plaintiff's vocal cords have thickened and become enlarged. This condition allegedly impedes the closure of the vocal cords and interferes with phonation and singing. Plaintiff maintains that he must undergo surgery to have these nodules removed.

the hotel. According to Connelly, Ferguson and plaintiff were "squaring off" -- both had their fists up and were standing approximately four feet away from each other when he exited the restaurant to go outside. Connelly also testified that Mr Ferguson and plaintiff were taking turns yelling at one another challenging each other to hit first. Connelly states that plaintiff also challenged him and Vincent Laresca to fight. Connelly states that he did not see the actual blow to plaintiff's neck since he walked away from the plaintiff soon after Mr. Healy came up to the group.

Mr. Healy states that he was invited by Mr. Connelly to go to the Asia De Cuba Restaurant. According to Healy, he never went inside the Asia De Cuba Restaurant. When he arrived at the scene, Healy testified that he saw a crowd outside the restaurant, heard Mr. Connelly telling plaintiff to leave and saw

a guy with a wool hat being loud and hostile and saying "Who wants it?" and Kevin [Connelly] was in front of him like I guess trying to talk to him, and Jay [Ferguson] was behind him and I walked over and told the guy to calm down and relax.

I just walked across. I didn't know what was going on, I just walked across the street and I said "Calm Down." He cocked back his hand and I proceeded to hit him on the jaw line.

(Healy, 10/30/2001 EBT at 74 (lines 16 to 25) to 75 (lines 1-2)).

Plaintiff further alleges that, during the time of the altercation outside the restaurant, Mr. DiCaprio had moved inside the lobby, and was behind a large glass facade of the Morgans Hotel which was adjacent to the Asia De Cuba Restaurant. According to plaintiff, DiCaprio stood watching the assault and battery and smoking a cigarette. Ms. Tenzer also witnessed the attack.

Plaintiff maintains that the Morgans Hotel security guards did nothing to assist plaintiff, and even threatened to have him arrested. Plaintiff states that he only escaped from defendants by jumping into a passing taxi. In turn, Ferguson, Connelly, and Healy allegedly rushed into the Morgans Hotel and into the hotel elevators.

Charles Garelick, the managing director of GSS Security, states that his company had a standard contract with the Asia De Cuba Restaurant. Mr. Francis was the only employee on duty at the time of the incident, and was stationed at the front door. His duties were to assist the Asia de Cuba "door person" and door staff as guests were admitted to and exited the restaurant. According to Garelick, GSS Security never agreed to patrol the outside of the restaurant and was not responsible for the safety of any patrons.

Police Investigation After the Assault: Interview with Mr. DiCaprio and Other Witnesses.

Plaintiff states that he reported the attack to the New York City Police Department's 6th Precinct, where charges for assault were filed. Plaintiff spoke with New York City Police Detective George Wich, whom he knew from a prior unrelated matter. Wich told plaintiff that the assault took place outside his district. However, Wich opened a detective folder on the complaint in which he included a DD5 report, a police department form used to document the steps in an investigation.

Detective Wich interviewed security guard Francis, who told

Detective Wich and his partner that he [Francis] overheard DiCaprio tell a tall young man and the others at his table while inside the Asia De Cuba Restaurant to "Take him outside and kick his ass."

In September 1998, Detective Wich served defendant DiCaprio with a subpoena which directed him to come to the Manhattan District Attorney's Office. In October 1998, Wich and Assistant District Attorney Jane Illuzzi, interviewed DiCaprio. At the interview, Defendant DiCaprio told Detective Wich that he learned that plaintiff was coming to the restaurant, and that Ferguson and Laresca both called some friends on their cellular phone after learning that plaintiff was coming to the Restaurant. DiCaprio allegedly stated that Ferguson likes to act like a "tough guy."

According to Detective Wich, DiCaprio stated that when he stepped back inside to the lobby of the hotel to watch, he said to someone that "someone should kick this guy's ass," referring to plaintiff.

When Mr. DiCaprio was asked if he told anyone to hit or kick Roger's ass, defendant said that he did not, but also stated that "sometimes people take things he says the wrong way." Detective Wich states that he later prepared a draft of the DD5, from his hand written notes of the interview.

Detective Wich concluded that there was not sufficient evidence to arrest or charge Mr. DiCaprio with any crime.

DISCUSSION

New York specifically recognizes a cause of action for aiding and abetting an assault and battery (Steinberg v Goldstein, 27 AD2d

955, 956 [2d Dept 1967]). The elements of aiding and abetting are (1) a wrongful act producing an injury, (2) the defendant's awareness of a role as part of an overall illegal or tortious activity at the time he provides the assistance; and (3) the defendant's knowing and substantial assistance in the principal violation (see, Lindsay v Lockwood, 163 Misc2d 228, 233 [Sup Ct, Monroe County 1994], quoting Halberstam v Welch, 705 F2d 472, 477 [DC Cir 1983]).

In New York, liability under an aiding and abetting theory also "requires more than an intention; there must be some act on the part of the aider connected with the act causing the injury" (Lindsay v Lockwood, supra, 163 Misc 2d, at 233). In this State, the mere presence of a person

when an assault and battery is committed by another, even though he mentally approves the same, but without encouragement of it by word or sign, is not sufficient of itself to charge him as a participator in the assault; he must in some way command, authorize, justify, or approve it

(Steinberg v Goldstein, 51 Misc 2d 825, 826 [Sup Ct, NY County 1966], affd 27 AD2d 955 [2d Dept 1967], quoting 6 CJS Assault and Battery, § 27).

In affirming this Court's November 30, 1999 order sustaining the first cause of action alleging that defendant DiCaprio aided and abetted the others in an assault and battery upon plaintiff, the First Department held (Wilson v DiCaprio, 278 AD2d 25, 26 [1st Dept 2000]):

[t]he assertions of a close relationship between Mr. DiCaprio and the other persons involved, DiCaprio's shout to the group, "We'll go kick his ass," and the