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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0289-15T3

RYAN FELEGI,

Plaintiff-Appellant,

v.

STONEY BROOK GRILLE,

Defendant-Respondent,

and

CHRISTOPHER KOSOVICH,

Defendant.

Argued May 23, 2017 - Decided June 26, 2017

Before Judges Koblitz and Mayer.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-349-13.

Kyle G. Schwartz argued the cause for appellant.

AnnMarie Flores argued the cause for respondent MK Food Service d/b/a Stoney Brooke Grille (Gage Fiore, LLC, attorneys; Ms. Flores, on the brief).

PER CURIAM

Plaintiff Ryan Felegi appeals the trial court's June 26, 2015 order, granting summary judgment in favor of defendant MK Food Service d/b/a Stoney Brooke Grille, improperly pled as Stoney Brook Grille (Grille). Plaintiff also appeals the August 7, 2015 order denying his motion for reconsideration. We affirm both orders.

Plaintiff filed a complaint alleging personal injuries caused by defendant Christopher Kosovich arising from a stabbing outside a restaurant known as the Grille. Plaintiff claimed the Grille was negligent in providing security to its patrons and was negligent in serving alcohol to a visibly intoxicated person in violation of the New Jersey Licensed Alcoholic Beverage Server Fair Liability Act, N.J.S.A. 2A:22A-1 to -7 (Dram Shop Act).

To support his negligent security claim, plaintiff retained an expert, who opined that the Grille had a duty "to provide a safe environment for its guests." According to plaintiff's security expert, the Grille's failure to hire properly trained security personnel and provide security in the parking lot was a breach of the Grille's duty of care.

Plaintiff also claimed that the Grille's service of alcohol to a visibly intoxicated Kosovich proximately caused his injuries. No expert report was proffered to support plaintiff's Dram Shop

Act claim against the Grille. Rather, plaintiff stated witnesses would testify at trial that Kosovich was visibly intoxicated.

We review the facts in a light most favorable to plaintiff, and therefore the following discussion summarizes plaintiff's version of the relevant events. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The Grille is a family-style restaurant that provided a disc jockey (DJ) on Friday evenings after 10:00 p.m. Although the Grille stopped serving food at 10:00 p.m. on Friday, the bar remained open for the purchase of alcohol. The Grille also removed the dining tables to create a dance club atmosphere.

The Grille did not hire private security for its DJ entertainment. Friends of the Grille's owner checked identification documentation to ensure that patrons were over twenty-one years of age.

One Friday evening, plaintiff, his brother Robert, and two friends went to the Grille for the DJ entertainment. Plaintiff saw Kosovich at the Grille. Plaintiff's brother had a prior incident with Kosovich. However, plaintiff assured Kosovich that he and his companions had no intention of causing trouble that evening.

Just prior to closing, someone told plaintiff, who was inside the Grille, that plaintiff's brother and Kosovich were about to

fight outside the Grille. One of the Grille's managers, Robert Long, saw plaintiff and other individuals run from the bar to the parking lot. An angry crowd had surrounded Kosovich. Plaintiff told Kosovich to leave the Grille parking lot before something happened. Kosovich was leaving when Long grabbed plaintiff. It was at that moment that Kosovich swung a knife cutting both plaintiff and Long.¹

Upon completion of discovery, the Grille moved for summary judgment. In a letter opinion, Assignment Judge Yolanda Ciccone granted the Grille's motion and dismissed plaintiff's claims with prejudice.

On the negligent security claim, the judge found that because no criminal activity occurred at or near the Grille for a three-year period prior to plaintiff's injury, the claim failed. While plaintiff argued that security staff was needed outside the Grille to "deter incidents," the judge rejected plaintiff's argument because there were no incidents outside the Grille prior to plaintiff's injury giving rise to a legal duty.

Similarly, the judge rejected plaintiff's argument that the Grille's change in use from a restaurant establishment to a DJ

¹ For summary judgment purposes, we must accept plaintiff's version of the facts. However, we note that Kosovich denied being the aggressor and claimed he acted in self-defense after plaintiff and his brother attacked him.

dance club altered the Grille's legal duty to provide adequate security. The judge found that plaintiff was unable to articulate any legal support for such a theory.

The judge also dismissed plaintiff's Dram Shop Act claim, concluding that plaintiff failed to establish Kosovich was visibly intoxicated. At best, plaintiff offered evidence that Kosovich had been drinking, but submitted no evidence to support a claim of visible intoxication. Plaintiff and others at the Grille were unable to state the amount of alcohol consumed by Kosovich.

Plaintiff argued that additional depositions were needed to establish that the Grille served alcohol to Kosovich after he was visibly intoxicated. However, the twice-extended discovery period expired prior to the Grille filing for summary judgment. Plaintiff submitted no affidavits or certifications from individuals who would testify as to Kosovich's visible intoxication.

Plaintiff moved for reconsideration, and Judge Ciccone denied the motion. The judge ruled that plaintiff did not satisfy Rule 4:49-2 governing a motion for reconsideration. The judge determined plaintiff was rearguing matters addressed by the court in granting summary judgment. The judge found plaintiff failed to cite any relevant evidence that the court did not consider or failed to appreciate. Nor did plaintiff articulate why the judge's summary judgment decision was palpably incorrect or irrational.

On appeal, plaintiff alleges that the judge abused her discretion as to both motions and disputed material facts warranted denial of the Grille's motion for summary judgment.

Appellate review of an order granting summary judgment is de novo, applying the same standard governing the trial court. Cypress Point Condo. Ass'n v. Adria Towers, LLC, 226 N.J. 403, 414 (2016); Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014). Summary judgment must be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. R. 4:46-2(c). Thus, we consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill, supra, 142 N.J. at 536). Courts reviewing summary judgment motions must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540. "If there is no genuine issue of material fact," an appellate court must then "decide whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013)

(citations omitted). We accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013) (citing Zabilowicz v. Kelsey, 200 N.J. 507, 512-13 (2009)).

A motion for reconsideration is reviewed for abuse of discretion. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). Reconsideration is appropriate only in those cases "in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990).

Applying these standards, we conclude the Grille was entitled to summary judgment because plaintiff failed to establish the elements necessary to prevail on his negligent security claim as well as his Dram Shop Act claim. We also conclude that the judge properly denied plaintiff's motion for reconsideration.

In general, to sustain a negligence claim, a plaintiff must prove the following elements: "(1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages." Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Polzo v. Cty. of Essex, 196 N.J. 569, 584 (2008)). Whether a duty exists is a question of law to be determined by the court. Clohesy v. Food Circus Supermarkets, 149 N.J. 496, 502 (1997). Imposition of a

legal duty to exercise care requires establishing foreseeability of harm. Ibid. Business owners, such as the Grille, "have a duty to protect patrons . . . from foreseeable criminal acts of third parties occurring on their premises." Id. at 504; see also Butler v. Acme Markets, 89 N.J. 270, 280 (1982); Pequero v. Tau Kappa Epsilon Local Chapter, 439 N.J. Super. 77, 91 (App. Div. 2015) (the duty question focuses on the foreseeability of injuries caused by third parties).

The judge properly concluded that plaintiff failed to demonstrate foreseeability by way of prior incidents to establish a duty of care. The judge found that plaintiff was unable to show any criminal conduct at or near the Grille during the three years prior to the incident. The only incidents involved public urination and/or instances of vomiting. Plaintiff did not claim that the geographic location of the Grille or the layout of the parking lot made the incident between plaintiff and Kosovich foreseeable.

On appeal, plaintiff argues the judge overlooked two cases in support of his negligent security claim, Bencivenqa v. J.J.A.M.M., Inc., 258 N.J. Super. 399 (App. Div.), certif. denied, 130 N.J. 598 (1992) and Blazovic v. Andrich, 124 N.J. 90 (1991). We find plaintiff's reliance on these cases misplaced. The Bencivenqa and Blazovic cases address apportionment of fault under

the Comparative Negligence Act, not the duty of a business owner to protect against criminal acts of a third party. See Clohesy, supra, 149 N.J. at 516-17. Simply because there was a crowd at the Grille,² coupled with the service of alcohol and live entertainment, does not prove a reasonably foreseeable link to criminal behavior.

To prevail on a Dram Shop Act claim, a party must present evidence that the establishment served alcohol to a visibly intoxicated individual. N.J.S.A. 2A:22A-5; see also Halvorsen v. Villamil, 429 N.J. Super. 568, 575 (App. Div. 2013). The Dram Shop Act defines "visibly intoxicated" as "a state of intoxication accompanied by a perceptible act or series of acts which present clear signs of intoxication." N.J.S.A. 2A:22A-3.

In support of his Dram Shop Act claim, plaintiff offered Kosovich's statement to the police after the incident that he was drunk. Also, plaintiff's friend guessed Kosovich was drunk because everyone at the Grille was drunk. Based on these statements, plaintiff argued the judge should have allowed a jury to infer that Kosovich was visibly intoxicated.

The judge properly ruled that mere evidence of drinking failed to establish visible intoxication sufficient to prevail on a Dram

² Witnesses estimated that the number of people at the Grille ranged between 100 to over 250 people.

Shop Act claim. Mazzacano v. Estate of Kinnerman, 197 N.J. 307, 320-21 (2009). Plaintiff presented no direct or circumstantial evidence supporting his claim that Kosovich was visibly intoxicated. Those who saw Kosovich did not observe him slurring his speech or behaving erratically. Plaintiff also failed to submit an expert toxicology report to substantiate a claim of visible intoxication. Absent direct evidence of visible intoxication, or an expert report establishing visible intoxication based upon the amount of alcohol consumed by Kosovich, when the alcohol was consumed, Kosovich's body weight and his tolerance to alcohol, the judge correctly dismissed the Dram Shop Act claim.


Lastly, we find the judge did not abuse her discretion in denying plaintiff's motion for reconsideration. Plaintiff failed to establish any of the bases for reconsideration. R. 4:49-2. "[A] motion for reconsideration provides the court, and not the litigant, with an opportunity to take a second bite at the apple to correct errors inherent in a prior ruling." Medina v. Pitta, 442 N.J. Super. 1, 18 (App. Div.), certif. denied, 223 N.J. 555 (2015).

Plaintiff's argument on reconsideration that the judge overlooked two key cases and additional evidence is flawed. First, the cases and evidence presented by plaintiff were not new, and

were available to plaintiff in opposing the motion for summary judgment. It was improper for plaintiff to raise those cases and evidence for the first time in his reconsideration motion. Ibid. Second, the cases that plaintiff claimed were overlooked by the judge are irrelevant to disposition of the Grille's motion.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


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