COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

16-P-618

TIMOTHY RIVERA

vs.

BROAD STREET ENTERPRISES, INC.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial, the defendant, Broad Street Enterprises, Inc., doing business as The Bar Room (Bar Room), was found to have been negligent in an incident where a bar patron, the plaintiff, Timothy Rivera, was injured by a beer bottle. The Bar Room appeals from the judge's denial of its motions for a directed verdict and for judgment notwithstanding the verdict. Because the plaintiff has not met his burden of proving negligence, we reverse.

"In reviewing the denial of a directed verdict or a judgment notwithstanding the verdict, the question before us is the same: that is, whether 'anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in

[1] Doing business as The Bar Room.

favor of the plaintiff[s].'" Rolanti v. Boston Edison Corp., 33 Mass. App. Ct. 516, 520 (1992), quoting from Dobos v. Driscoll, 404 Mass. 634, 656 (1989). We construe the evidence in the light most favorable to the plaintiff.[2] Zinck v. Gateway Country Store, Inc., 72 Mass. App. Ct. 571, 572 (2008).

On September 10, 2010, the plaintiff, his girl friend, and two friends went to the Bar Room in Boston. It was a restaurant/lounge and a bar. There were security personnel, or bouncers, in uniform at the entrance. The restaurant was on the first floor. The plaintiff and his friends went to the second floor, where he saw additional people in uniform. There was a dance floor, a "DJ," and a bar on the second floor; there were "a lot of people there."

After standing around for about forty-five minutes, during which time the plaintiff had one bottle of beer, he and his friends tried to find a place to sit. They found a padded bench with a table and settled there. The plaintiff bought a second bottle of beer. They were talking and socializing. Sometime after midnight, the plaintiff noticed that a group of ten to twelve other patrons were getting "agitated." He heard a young woman scream but because the music was so loud, he could not hear exactly what was said. He saw people in the crowd pushing one another, but was not sure that anyone in the crowd struck

[2] The plaintiff was the only witness to testify at trial.

another person. Nobody in the plaintiff's group was involved in that confrontation.

The plaintiff saw two bouncers immediately come to the scene of the confrontation. They tried to break up the crowd, but were unsuccessful. The plaintiff remained seated, about eight to ten feet away from the confrontation. Approximately five minutes after the confrontation began, a beer bottle came flying from the area where the disturbance was occurring and hit the plaintiff on the forehead. The plaintiff was in pain and bleeding profusely. He was escorted out of the bar by security personnel.

"To be liable for negligent conduct, one must have failed to discharge a duty of care owed to the plaintiff, harm must have been reasonably foreseeable, and the breach or negligence must have been the proximate or legal cause of the plaintiff's injury." Christopher v. Father's Huddle Café, Inc., 57 Mass. App. Ct. 217, 222 (2003), citing Stamas v. Fanning, 345 Mass. 73, 75-76 (1962). See Jupin v. Kask, 447 Mass. 141, 146 (2006). The burden is on the plaintiff to prove that the defendant was negligent. Pucci v. Amherst Restaurant Enterprises, Inc., 33 Mass. App. Ct. 779, 785 (1992). To the extent that the plaintiff contends that the security measures taken by the Bar

Room were inadequate,[3] "[r]easonable steps taken to prevent the harm will discharge the duty -- such as, for example, denying service to or 'shutting off' a patron who appears intoxicated or who has requested too many drinks, or calling police when a fight occurs or an aggressive patron threatens assault." Christopher v. Father's Huddle Café, Inc., supra at 224. See, e.g., Greco v. Sumner Tavern Inc., 333 Mass. 144, 145 (1955); Carey v. New Yorker of Worcester, Inc., 355 Mass. 450, 452 (1969).

Here, the plaintiff has not demonstrated that the Bar Room failed to take reasonable steps to prevent harm stemming from the confrontation that occurred. The plaintiff did not know how many security personnel were on the second floor during the confrontation, and there was no evidence presented as to how many security personnel were working on the premises that evening, let alone that the number was unreasonably low. The plaintiff did not remember seeing police arrive at the bar; however, he did not know whether anyone had called the police or whether the police, if called, would have arrived before he had been hit by the beer bottle. In addition, the plaintiff, who had never been to the Bar Room before September 10, 2010,

[3] At oral argument, the plaintiff suggested that the Bar Room was negligent for serving alcohol in glass bottles. The plaintiff presented no evidence of prior incidents involving glass bottles at the Bar Room, such that such action would constitute negligence.

provided no evidence of prior incidents at the establishment which would have required intervention from police or security personnel.

Although generally it is "the special province of the jury" to determine whether a party breached their duty of care, Jupin v. Kask, supra, "a verdict must rest on something more than surmise or conjecture." Knox v. Lamoureaux, 338 Mass. 167, 169 (1958). Here, the evidence, even viewed in the light most favorable to the plaintiff, did not warrant a finding that the Bar Room was negligent.[4] See, e.g., Anderson v. Boston Elev. Ry. Co., 220 Mass. 28, 31 (1914) ("The plaintiff's testimony that she thought the car was going to tip over, without any other evidence to warrant the inference of negligence, is not sufficient to justify a finding that the car was improperly or

[4] Because the plaintiff failed to present evidence that the Bar Room breached its duty to him, he necessarily also failed to demonstrate that any alleged breach was the proximate or legal cause of his injuries. Moreover, even if the plaintiff had offered evidence that the number of security personnel was unreasonably low, he offered no evidence that, had more such personnel been on the premises during the incident, they would have been unoccupied and free to respond at the moment they were called, and that they would have arrived in time to break up the disturbance sufficiently that the bottle would not have been thrown. For these additional reasons, the evidence of causation was insufficient to support the verdict.

negligently operated in running around the curve").

Judgment reversed.

By the Court (Maldonado, Sacks & Shin, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: July 31, 2017.

[5] The panelists are listed in order of seniority.