

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
PLCV2012-1117B

PAUL BRINKMAN

vs.

PAUL KEATING & another¹

MEMORANDUM OF DECISION AND ORDER ON
DEFENDANTS PAUL KEATING AND RACHEL KEATING'S
MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff Paul Brinkman ("Brinkman") filed this action against Paul and Rachel Keating to recover for personal injuries he sustained when he was shot in the chest by a guest who consumed alcohol at the Keatings' home. This matter is before the court on Paul Keating and Rachel Keating's Motion For Summary Judgment pursuant to Mass. R. Civ. P. 56. For the reasons discussed below, the motion is ALLOWED.

BACKGROUND

Viewed in the light most favorable to the plaintiff as the non-moving party, the undisputed facts as revealed by the summary judgment record are as follows. On Saturday, September 19, 2009, Paul Keating ("Paul"), Rachel Keating ("Rachel"), Brinkman, his wife Heather, and his brother John attended a benefit at the Norwood Elks Club to raise money for the son of the Brinkmans' deceased brother, Mark, a Boston EMT. Also in attendance were John's girlfriend Patrice Dykens ("Dykens"), Sean Leonard ("Leonard"), and Paul Keating's brother, Michael. The benefit was

¹Rachel Keating

scheduled to run from 7:00 p.m. to 11:00 p.m. Rachel was the designated driver for the group, and the Keatings invited the Brinkmans, John, Dykens, Michael, and Leonard back to their house at 59 North Avenue in Abington after the benefit so that they would have a safe place to gather and sleep. Someone asked Paul whether he had beer back at the house, and he said he did not. Near the end of the benefit, between 9:00 and 10:00 p.m., Dykens, Rachel, and Heather went to a package store to purchase alcoholic beverages to bring back to the house for an "after party." Dykens purchased two 30 packs of beer and two bottles of wine. Paul and Rachel contend that they did not contribute any money toward the alcohol. According to Heather, however, she and Rachel each gave Dykens some cash. Dykens' recollection is that Paul and all the other guys each contributed some cash and she paid for the alcohol in cash. The alcohol remained in Dykens' SUV.

There was a cash bar at the benefit and Rachel had one glass of wine. Brinkman had several light beers during the benefit. At the end of the benefit, Rachel and Paul, John, Dykens, Michael, Leonard and Heather got into Dykens' SUV, so Rachel could drive back to the Keating residence. Rachel told Brinkman that they would make room for him in the SUV, but he stated that there was not enough room. Brinkman got into a vehicle driven by Rhys Williams ("Williams"), who followed Rachel to the Keating residence. Williams had been Mark's EMT partner for five years and was a pallbearer at Mark's funeral. Williams and Brinkman had met for one or two hours at the 99 Restaurant in Pembroke several weeks earlier to plan the benefit at the Elks Club. Other than meeting them briefly at the funeral, Williams did not know the other people going back to the Keating residence. Paul had met Williams briefly at Mark's wake and funeral, but Rachel had never met Williams prior to the benefit. Neither Paul nor Rachel invited Williams to return to their house after the benefit.

When the group arrived at the Keating residence at approximately 12:20 a.m., they brought the beer and wine purchased by Dykens into the house. The wine was placed on the counter and the beer was placed in the refrigerator and on the back deck for guests to serve themselves. Rachel brought out a few wine glasses for the girls, and possibly cups and ice for the beer. There was a large bottle of Captain Morgan's rum on the kitchen counter which Leonard had brought to the Keatings' house when he arrived from Colorado on Friday. The Keatings' children, two year old Joseph and five month old Fallon, were asleep and being watched by Rachel's 24 year old niece, Dru Carver-Brown ("Carver-Brown"), who was sleeping over that night.

The men engaged in "fake hockey fighting" on the back deck in which they playfully reenacted fights from video-taped hockey games, without actually hurting each other. Williams spent most of time in the kitchen with the women. Around 3:00 a.m., however, Williams attempted to join in the fighting. He tackled Brinkman to the floor inside the house and punched him in the head, and Paul told Williams that he had gone overboard with the contact and not to fight inside the house.

Neither Paul nor Rachel poured or served alcoholic beverages to Williams. They both observed Williams sipping rum from a small juice glass he took from their cabinet. Williams also ate some of the left over pasta from the benefit. At no point did Rachel observe Williams slurring his words, speaking incoherently, or showing other signs of intoxication. Rachel felt comfortable enough with Williams that she allowed him to hold Fallon when the baby awoke around 2:00 a.m., after having a conversation about him having a baby on the way.

Brinkman, Heather, John, and Dykens observed Williams drinking rum straight from the bottle and drinking cans of beer. In Brinkman's opinion, Williams was drinking heavily. Brinkman

saw Williams standing too close to Rachel and acting inappropriately. Paul heard Williams tell Rachel, "I could kiss you" and ask to make out with her. Heather observed Williams acting loud, goofy, and obnoxious but did not know whether that was his regular personality or whether he was intoxicated. John also characterized Williams as loud and obnoxious, saying ridiculous things, but did not know if "he was just a whack job." John observed Williams following Carver-Brown around and described him as loud and aggressive and "basically out of control." John formed the opinion that Williams was intoxicated. Rachel heard Williams tell Carver-Brown that she was pretty and ask whether she had a boyfriend. Rachel thought this was inappropriate and told Carver-Brown to go upstairs with the children. Paul asked Williams to leave his house several times, but Williams stayed.

At some point, Brinkman had a conversation with Williams in which he asked if Williams knew the EMTs that Brinkman and Heather were charged with assaulting in an incident in Boston a few months earlier. Williams told Brinkman that he would talk to the EMTs to see what he could do.

Dyken and Williams had a heated conversation at the kitchen table. Williams told Dyken about living in Dorchester and lifted his shirt to show her scars from being stabbed. Williams stated that he would not let that happen again because he now owned a gun and was willing to use it. Dyken opined that he should not live in such a dangerous area. Neither Paul nor Rachel Keating heard Williams say that he owned a gun. Around 6:30 a.m., John told Williams that he had a big mouth and ordered him to leave the Keating residence. Williams asked if he could finish his beer first, and John said no, taking the beer out of Williams' hand. Williams left and Paul locked the front door of the house. Williams then sat in his car, which was parked on the street in front of the

house.

At approximately 7:10 a.m. on September 20, Abington Police Officer Mark Kilgour stopped to speak to Williams because some joggers had complained that his car was blocking the sidewalk. Officer Kilgour did not note in his report that Williams acted or sounded intoxicated or smelled of alcohol. Officer Kilgour did not arrest Williams for operating under the influence but asked him to move his vehicle down the road so it was not blocking the sidewalk. As Officer Kilgour drove away, he observed in his rear view mirror that Williams' brake lights lit up. Williams drove his vehicle around the corner and parked on Bates Avenue.

At about 7:20 a.m., Williams walked back to the house where Rachel was standing outside. She told him that she thought he had already left and asked if he needed something. Williams responded that the others had called him an asshole and told him to leave. Rachel stated that there was a Dunkin' Donuts up the street and he could get a coffee and newspaper and relax until he was ready to drive home. He thanked her and headed up the street toward Dunkin' Donuts.

A few minutes later, Williams walked up the Keatings' driveway, opened a gate, and walked into the Keatings' backyard, holding a coffee. Brinkman, John, Paul, and Dykens were sitting on the back deck. Brinkman was drinking a beer. There are no stairs from the backyard to the deck, which is very high off the ground. Williams yelled up to the group that they were assholes for calling the police on him and he was not going to help with Brinkman's assault case. Paul yelled back, "Get off my fucking property" and John yelled, "Get the fuck out of here" but Williams did not move. Brinkman then whipped a beer can toward Williams. Williams ran out of the backyard through the gate and headed back to his car.

In a fit of anger, Brinkman ran through the Keating house and out the front door in pursuit

of Williams. John, Dykens, and Heather attempted to physically restrain him from going out the front door, ripping his shirt in the process. However, Brinkman exited the house and ran around the corner onto Bates Avenue, looking for Williams. John and Paul followed him, yelling at him to stop. Brinkman ran past Williams' vehicle, which was parked on the side of the road on Bates Avenue. John observed Williams sitting in his vehicle with the windows up and the doors closed. John and Paul approached the vehicle, knocked on the window, and told Williams to leave. According to Paul, Williams looked scared and did not have time to leave because Brinkman jumped on the hood of Williams' car and smashed in his windshield. Brinkman then approached the driver's side of the car. Williams shot John in the leg and Brinkman in the upper abdomen and lower chest area. Williams, who was ranting and raving, took out a first aid kit and began bandaging the victims' wounds. Paul grabbed the gun and ran back to his house to call 911.

Williams told police that he consumed three beers and a Jack and Coke at the Elks Club, and five or six beers and three glasses of rum at the Keating residence. He told police that he remained in the area in his car for so long because he was not sober enough to drive and was unable to obtain a ride home despite making several phone calls. Williams stated that he shot Brinkman and John because they were attempting to pull him out of his car.

DISCUSSION

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively

demonstrating the absence of a triable issue and that the summary judgment record entitles the moving party to judgment as a matter of law. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of her case at trial. Flesner v. Technical Commc'ns Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

The Keatings contend that they are entitled to summary judgment because Brinkman has no reasonable expectation of establishing their liability as social hosts. There is no special relationship between a homeowner and a social guest which, absent other factors, obligates the homeowner to protect guests on his premises from harmful conduct on the part of other guests. Luoni v. Berube, 431 Mass. 729, 732 (2000). In addition, a social host has a duty to one injured by an intoxicated guest only where the host either serves the alcohol or makes it available and effectively controls its supply. Juliano v. Simpson, 461 Mass. 527, 532 (2012). The social host is liable if he knew or should have known that the guest was drunk but nevertheless served him or permitted him to take another alcoholic drink, and the guest harms a third person because of his intoxication. Id. at 533; McGuiggan v. New England Tel. & Tel. Co., 398 Mass. 153, 162 (1986); Pollard v. Powers, 50 Mass. App. Ct. 515, 517-518 (2000), rev. den., 434 Mass. 1103 (2001).

The Keatings argue that they are entitled to judgment as a matter of law because there is no evidence that Williams was obviously intoxicated at the time he had his last beer at their house. The record contains evidence that some members of the group could not tell whether Williams was intoxicated or simply obnoxious by nature. Nonetheless, viewing the record in the light most

favorable to Brinkman, there is a genuine issue of material fact as to whether Williams was obviously intoxicated. The record contains evidence that Williams' behavior was loud, obnoxious, and inappropriate, and he appeared to at least one member of the group to be "out of control" and intoxicated. See Cimino v. Milford Keg, Inc., 385 Mass. 323, 328 (1982) (loud and vulgar conduct sufficient to raise factual question as to whether individual was visibly intoxicated when served). In addition, Rachel apparently recognized that Williams needed to sober up before he could drive home, sending him to Dunkin' Donuts to get coffee. Thus, the Keatings are not entitled to summary judgment based on a lack of evidence of obvious intoxication.

The Keatings further argue that Brinkman cannot prevail because it was unforeseeable that Williams would shoot Brinkman as a result of his intoxication. However, the record contains evidence that Williams had inappropriately and aggressively tackled Paul earlier that morning and was belligerent during a heated discussion with Dykens. It is not dispositive that Paul and Rachel were not aware that Williams had a gun. The specific kind of harm posed by an intoxicated guest need not be foreseeable as long as it was foreseeable that there would be violence toward others. Pollard v. Powers, 50 Mass. App. Ct. at 519 (it was question for jury whether it was foreseeable that intoxicated guest would sucker punch another guest, where he arrived at party visibly drunk, was loud and obnoxious, and verbally assaulted homeowner's sister). Viewing the record in the light most favorable to Brinkman, there is a genuine issue of material fact as to whether the shooting was a foreseeable consequence of Williams' intoxication.

Finally, the Keatings contend that Brinkman has no reasonable expectation of proving that they served or controlled the supply of alcohol. The factor of control is the dominant consideration in a case of social host liability. Lev v. Beverly Enterprises-Mass., Inc., 457 Mass. 234, 241 (2010);

Cremins v. Clancy, 415 Mass. 289, 293 (1993). A social host can effectively prevent a guest from drinking the host's own supply of alcohol, much like a bartender at a licensed establishment who can "shut off" intoxicated guests. Juliano v. Simpson, 461 Mass. at 535; Ulwick v. DeChristopher, 411 Mass. 401, 406 (1991). In contrast, a social host who allows a guest to consume the guest's own alcohol lacks the means to effectively control the supply of alcohol and stop others from drinking. Juliano v. Simpson, 461 Mass. at 535. As a policy matter, there are a number of difficulties in imposing on a social host a duty to police the conduct of guests who consume their own alcohol, including the potentially counterproductive methods available to hosts such as physically ejecting an intoxicated guest from the property, increasing the likelihood that he will drive while drunk. Juliano v. Simpson, 461 Mass. at 535-536; Ulwick v. DeChristopher, 411 Mass. at 406. The ability to control which is the foundation of social host liability simply is not present when the alcohol belongs to the guest. Ulwick v. DeChristopher, 411 Mass. at 406; Makynen v. Mustakangas, 39 Mass. App. Ct. 309, 311, rev. den., 421 Mass. 1107 (1995).

Viewed in the light most favorable to Brinkman, even if Paul and Rachel did in fact contribute money toward the beer and wine, the record nonetheless shows no more than shared ownership of the alcohol consumed by Williams. Where alcohol is purchased jointly by a host and his guests, the host is not deemed to have served it or made it available to others, even if he provides the premises on which it is consumed. See Cremins v. Clancy, 415 Mass. at 294 (homeowner who provided setting for party in his home not liable for injuries caused to third party by intoxicated guest, where guest brought beer into home for people to help themselves and homeowner considered supply of beer to belong to himself and guests jointly); Maxwell v. Mullin, 2012 Mass. App. Unpub. LEXIS 836 at *5-6 & n.6 (Rule 1:28) (homeowner not liable for injuries caused to third party by

intoxicated guest where homeowner was not sole or even predominant supplier of the alcohol and did not exercise control over communal supply); Southworth v. Wunschel, 2008 Mass. App. Unpub. LEXIS 120 at *5-7 (Rule 1:28), rev. den., 451 Mass. 1109 (2008) (homeowner not liable for injuries to third party by intoxicated guest where he contributed money toward purchase of communal beer brought by guest). Cf. Pollard v. Powers, 50 Mass. App. Ct. at 518 (homeowner could be liable where she requested that guests bring two kegs to her house party and she fully reimbursed them for the kegs).

Brinkman argues that the Keatings already had some beer in their refrigerator prior to the after party, citing John's testimony that "Paul always has beer in the fridge" and his testimony that some of the group's beer was placed on the back deck because there was only so much room in the fridge, which was fairly full. Notably, John did not testify that on the night in question he actually observed Paul's own supply of beer in the fridge before part of the group's two 30 packs was placed there.² Moreover, John's testimony does not establish that the fridge was full of beer, as opposed to food. There is no evidence in the record that anyone saw Williams taking out of the refrigerator a beer that was part of a pre-existing supply, as opposed to drinking from the two 30-packs purchased by Dykens and placed in the refrigerator and on the back deck for people to help themselves. See Commerce Ins. Co. v. Ultimate Livery Serv., Inc., 452 Mass. 639, 646 (2008) (commercial van service entitled to summary judgment on social host claim where there was no evidence that alcohol was already in van when it picked up bachelor party and no evidence that intoxicated guest consumed any alcohol other than that the group drank at clubs or purchased at


²The vague suggestion of a pre-existing supply is contradicted by Paul's undisputed testimony that someone in the group asked whether he had beer at home, and the women decided to travel to the package store to buy some when he replied that he did not.

liquor store and brought into van). Thus, the record does not support the assertion that the Keatings served or made available to guests their own alcohol supply.

Rather, the record shows that the Keatings and their guests jointly purchased alcohol for the after party. Because the Keatings did not own the alcohol, as a practical matter they lacked the ability to prevent any of the guests from consuming it. Absent control over the liquor supply, they had no duty to monitor their guests' alcohol consumption or to cut off an intoxicated guest. See Juliano v. Simpson, 461 Mass. at 538-539 (host who allows underage guests to consume their own alcohol at her house not liable); Luoni v. Berube, 431 Mass. at 734 (social host has no duty to supervise guests who misuse alcohol not provided by host); Ulwick v. DeChristopher, 411 Mass. at 407 (homeowner not liable for hosting "BYOB" drinking party even though he provided juice, ice, and glasses in cabinet and knew guest was intoxicated but failed to prevent him from driving); Langemann v. Davis, 398 Mass. 166, 168 (1986) (homeowner had no duty to supervise alcohol consumption of minor guests where she provided location for party but did not serve or make available alcohol, even if she knew guests would bring alcoholic beverages to party). Only where the host owns and thus controls the liquor supply is it reasonable to assume that he has the ability to supervise the alcohol consumption of guests and interrupt the supply of alcohol to one who is intoxicated. Kelly v. Avon Tape, Inc., 417 Mass. 587, 589 (1994); Ulwick v. DeChristopher, 411 Mass. at 407; Dube v. Lanphear, 69 Mass. App. Ct. 386, 391, rev. den., 449 Mass. 1111 (2007). Because the record shows no more than joint ownership of a communal supply of alcohol, Brinkman has no reasonable expectation of establishing social host liability at trial and the Keatings are entitled to judgment as a matter of law.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Defendants Paul Keating and Rachel Keating's Motion For Summary Judgment be **ALLOWED**.


Richard J. Chin
Justice of the Superior Court

DATED: November 24, 2014

Entered 11/28/14

m/scc: Lcl
HR