

Belles v Sit-N-Bull Pub, LLC
2017 NY Slip Op 30244(U)
February 6, 2017
Supreme Court, Tioga County
Docket Number: 46512
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 9th day of DECEMBER, 2016.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TIOGA COUNTY

SHAWN A. BELLES,

Plaintiff,

DECISION AND ORDER

-vs-

Index No.: 46512
RJ1 No.: 2016-0291-M

SIT-N-BULL PUB, LLC and JEFFREY S.
HEITZENRATER, individually and as owner
of SIT-N-BULL PUB, LLC,

Defendants

APPEARANCES:

COUNSEL FOR PLAINTIFF:

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COUNSEL FOR DEFENDANTS:

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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court upon two separate motions. The first was made by the Plaintiff and the second, by the Defendant. The motion of Shawn A. Belles (“Plaintiff”) is made pursuant to CPLR §§306-b, 2004 and 3025 dated October 21, 2016, seeking leave to amend his complaint, and extend the time in which to serve the complaint upon the Defendants. Sit-N-Bull Pub, LLC¹ and Jeffrey S. Heitzenrater (“Heitzenrater”) (collectively “Defendants”) filed a motion dated October 31, 2016 seeking summary judgment pursuant to CPLR §3212.

The facts are not in significant dispute. Heitzenrater operates a bar called Sit-N-Bull at 107 Village Square, Painted Post, New York. The business is organized as a Limited Liability Corporation under the name Heitzenrater, LLC. Heitzenrater purchased the business from Sit-N-Bull, LLC in 1999, and continues to operate the bar at this same location; keeping the name Sit-N-Bull, but with a new Limited Liability Corporation. On June 14, 2013, Plaintiff was delivering beer for his employer to the bar, when he alleges a slip and fall injury occurring on Defendants’ property. Specifically, Plaintiff alleges that he slipped and fell on grease near a grease box injuring his left shoulder, left elbow and right knee. Plaintiff also pursued a workers compensation claim through his employer.

In December of 2014, Plaintiff’s counsel began communicating with Defendants’ insurance company, Dryden Mutual Insurance (“Dryden”), regarding the accident. Sporadic communication continued between Plaintiff’s Counsel and Dryden until March of 2016.

On April 6, 2016, Plaintiff filed a verified summons and complaint in the Tioga County Clerk’s Office. Plaintiff’s counsel retained a process server who attempted to serve Heitzenrater and Sit-N-Bull Pub, LLC (incorrectly) at the Painted Post location. The process server allegedly found

¹As more fully set forth *infra*, the intended defendants were Heitzenrater, LLC and Jeffrey S. Heitzenrater, both individually and d/b/a Sit-In-Bull.

no one at the location and saw a “for sale” sign on the property.² The process server was allegedly unable to find a home address for Heitzenrater. Plaintiff’s counsel then searched the New York Secretary of State database, and noted that Sit-N-Bull Pub, LLC was a registered entity and as such, sought to effectuate substitute service through the Secretary of State. On May 4, 2016, the Summons and Complaint were served in duplicate on the Secretary of State. Again, however, that Limited Liability Corporation is not the correct entity for this suit.

Plaintiff’s counsel provided a copy of the complaint to Dryden on July 19, 2016. Plaintiff’s counsel granted Dryden’s request for a “thirty day extension” to answer the complaint. On August 12, 2016, issue was joined by the service of Defendants’ answer. The Defendants raised jurisdiction as an affirmative defense, based upon the fact that neither Heitzenrater nor Heitzenrater, LLC d/b/a Sit-N-Bull were served. Defendants also raised the statute of limitations as an affirmative defense, as the accident had occurred in June, 2013.

Plaintiff now seeks to amend the complaint to add Heitzenrater, LLC d/b/a Sit-N-Bull³ and to extend the time in which to serve the complaint. Defendants seek summary judgment dismissing the complaint.

Leave to Extend Time to Serve

“Service of the summons and complaint...shall be made within one hundred twenty days after the commencement of the action or proceeding...” CPLR 306-b. However, where a party fails to serve the complaint within 120 days of commencement of the action, the Court may “...upon good cause shown or in the interest of justice, extend the time for service”. CPLR 306-b.

“[G]ood cause” and “the interest of justice” are two distinct bases which embody two separate standards. *Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95 (2001). Good cause requires a

²Heitzenrater disputes the presence of a “for sale” sign and points out that the business continues to be a going concern.

³Plaintiff also seeks to strike Sit-N-Bull Pub, LLC as a party.

showing of reasonable diligence in effectuating service. *Mead v. Singleman*, 24 AD3d 1142, 1143 (3rd Dept. 2005). “[T]he discretionary interest of justice standard allows a court to consider such factors as the plaintiff’s diligence in attempting service, the expiration of the statute of limitations, the meritorious nature of the claim, the length of the delay, diligence in seeking an extension of time and prejudice to the defendant” *Heath v. Normile*, 131 AD3d 754, 755 (3d Dept. 2015).

In the present matter, it is undisputed that the only properly named party in the complaint is Jeffrey S. Heitzenrater, individually. Sit-N-Bull Pub, LLC is a prior entity that owned the subject business, and there is no showing that it had any connection to the subject business as of the date of Plaintiff’s accident. Further, it is undisputed that Heitzenrater is neither a principal in nor has any connection to Sit-N-Bull Pub, LLC. However, Heitzenrater concedes that he does own the property where the accident occurred. Therefore, the Court will address the Plaintiff’s application for leave to extend the time to serve the complaint only with regard to Heitzenrater.

The Court concludes that the Plaintiff has failed to show good cause for the failure to serve the complaint within 120 days of filing pursuant to CPLR 306-b. The Plaintiff has failed to establish that he exercised reasonable diligence in attempting to locate Heitzenrater. It is entirely unclear from this record what steps were taken to locate Heitzenrater beyond Plaintiff’s process server allegedly contacting local law enforcement and visiting his place of business. In fact, the record is devoid of any indication as to the day(s) or time(s) the process server went to Heitzenrater’s business or what other steps were taken to locate him.

With regard to the interest of justice standard, the Court reaches a different result. The Plaintiff did commence this action by filing a verified summons and complaint on April 6, 2016, which was well before the expiration of the statute of limitations. Although the Court has concluded that reasonable diligence was not used in attempting to serve Heitzenrater, the Court finds that the delay between the joining of the issue and the filing of this motion of 82 days was not

excessive⁴. More importantly, the Plaintiff has a meritorious negligence claim for a slip and fall injury occurring on property owned by Heitzenrater, resulting in significant injuries.

Additionally, there appears to be little prejudice to the Heitzenrater, as his insurance company was on notice regarding the claim as early as December 1, 2014 and had ample opportunity to investigate the claim well before the expiration of the statute of limitations. Finally, the Court notes that dismissal of this claim would result in a bar to any potential recovery in light of the expired statute of limitations. Therefore, the Court hereby extends the Plaintiff's time to serve the verified summons and complaint. **The Plaintiff shall effectuate service upon Heitzenrater individually within 20 days of the entry of this decision.**

The Plaintiff's motion to extend the time to serve is **GRANTED** with regard to Heitzenrater individually, but **DENIED** with regard to the remaining Defendants. Defendants' motion for summary judgment is **DENIED** with regard to Heitzenrater individually, but **GRANTED** with regard to the remaining Defendants.

Motion to Amend Verified Complaint

"A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties" CPLR §3025(b). "Any motion to amend or supplement pleadings *shall be accompanied by the proposed amended or supplemental pleading* clearly showing the changes or additions to be made to the pleading. CPLR §3025(b).

Plaintiff's Notice of Motion dated October 21, 2016 invokes CPLR §3025, and seeks leave to amend the verified complaint. Presumably, Plaintiff seeks to amend the complaint to include the proper parties. However, no further argument, proof or caselaw is submitted. Of particular

⁴It appears that Plaintiff was not aware that the entity served through the secretary of state was the wrong entity until the service of Defendants' verified answer. Additionally, Plaintiff granted an additional 30 days to answer the complaint thereby creating a greater delay from the time the action was filed.

significance is the fact that no proposed amended verified complaint was served with the motion. On this record, the Court has no basis to evaluate the relevant issues pursuant to *Buran v. Coupal*, 87 NY2d 173 (1995).

Therefore, pursuant to CPLR §3025(b), Plaintiff's motion to amend the verified complaint is **DENIED WITHOUT PREJUDICE.**

THIS CONSTITUTES THE DECISION OF THIS COURT.

Dated: February 6, 2017
Owego, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice

Papers submitted on the Motions

- 1) Plaintiff's Notice of Motion dated October 21, 2016, with Affidavit of Diana L. Hughes, sworn to on October 21, 2016, with attached Exhibits;
- 2) Defendants' Notice of Motion dated October 31, 2016, with Affirmation of Robert G. Bullis, dated October 31, 2016, and Affidavit of Jeffrey S. Heitzenrater, sworn to on October 26, 2016, with attached Exhibits;
- 3) Affidavit of Shawn A. Belles, sworn to on November 1, 2016;
- 4) Attorney Affirmation of Diana L. Hughes in opposition to Defendants' motion, dated November 30, 2016 with attached Exhibits, and Memorandum of Law dated December 2, 2016;
- 5) Affidavit of Jeffrey S. Heitzenrater, sworn to on November 25, 2016, with attached Exhibits and Answering Affirmation of Robert J. Bullis, sworn to on November 29, 2016, with attached Exhibits;
- 6) Answering Affirmation of Robert G. Bullis, dated December 7, 2016.