Seeley v Emerald Point Rest. & Mar., Inc.
2011 NY Slip Op 33238(U)
August 3, 2011
Supreme Court, Orange County
Docket Number: 12646/2008
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT : ORANGE COUNTY
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CHRISTOPHER SEELEY and DAWN SEELEY,

Plaintiffs,

-against-

EMERALD POINT RESTAURANT & MARINA, INC. d/b/a EMERALD POINT RESTAURANT & MARINA, RABLO INC., SEAN FREY, ANTHOONY GIOFFRE, CHRIS SCHWARTZ, FRANKIE ROMANO, PETER BERNETTI, "JOHN" WOLF, "VINNY THE SPIC" and "JOHN DOE" #1-#5, et al.,

Defendants.
--x

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 12646/2008
Motion Date: July 5, 2011
(adjourned to July 21, 2011)

The following papers numbered 1 to 8 were read on the motion by defendant Sean Frey to dismiss plaintiffs' complaint pursuant to CPLR 3212 and for sanctions pursuant to Uniform Rule 130-1.1 (a)(1):

Notice of Motion -Affidavit-Affirmation-Exhibits. 1-4

Affirmation in Opposition-Exhibits.. 5-6

Reply Affirmation-Exhibits. 7-8

Upon the foregoing papers it is ORDERED that the motions are disposed of as follows:

Preliminarily, the Court notes that plaintiffs' opposition was served late in derogation of the CPLR. CPLR § 2214 sets forth the timeframe for movants and respondents with respect to

the service of papers. Originally, defendant moved for summary judgment and served papers by mail on June 23, 2011 with a July 5th return date. Plaintiff requested and received 2 adjournments of the motion with a final submission date of July 21, 2011. Plaintiffs chose to serve their opposition on July 20, 2011 by mail and facsimile. Given the improper form and timing of the submission of the responding papers, the Court will consider defendant's reply affirmation.

This is an action in personal injury stemming from an altercation which occurred on December 9, 2007 at approximately 2:45 a.m. in which plaintiff, Christopher Seeley, was assaulted and sustained various injuries in the parking lot of defendant Emerald Point. At no point to plaintiff identify his attacker, since the attack occurred via a shovel from behind. Plaintiff settled his claim as against Emerald Point and pursues an action against the remaining defendants, one of which is Sean Frey, who plaintiff alleges assisted in his assault. At no time has plaintiff been able to identify Mr. Frey as his attacker, and no witness testified or came forward demonstrating that Mr. Frey was in any way connected with the attack on Mr. Seeley. In fact, Mr. Frey claims that while he was present at the bar that evening, he had no involvement whatsoever in any assault. Mr. Frey testified that he was not employed or in any way connected with Emerald Point other than as a patron.

Plaintiffs oppose Frey's summary judgment motion with the non-warty affidavits of two individuals who claim that they "believed Mr. Frey was working for Emerald Point because of where he was standing, lake a bouncer/security person, at or near the bar/restaurant's front podium immediately inside the front door." Neither witness definitively states that Mr. Frey was employed by Emerald Point, that he actually engaged in any assault on plaintiff, and none of plaintiffs' evidence demonstrates that Mr. Frey was in any way involved in this assault at all.

Moreover, plaintiffs settled their claim as against Emerald Point, the bar which they allege employed Mr. Frey.

CPLR 3212(b) states in pertinent part that a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

In *Andre v Pomeroy*, 35 NY2d 361, 364 (1974), the Court of Appeals held that:

> [s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law . . . when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.

Once the proponent seeking summary judgment has established a prima facie showing of entitlement to summary judgment as required by CPLR § 3212; the burden shifts to the party opposing the motion for summary judgment to lay bare its proofs and to produce evidentiary proof in proper admissible form in opposition to the motion that is sufficient to establish the existence of material issues of fact which require a trial (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]; *Davenport v. County of Nassau,* 279 A.D.2d 497 [App.Div., 2nd Dept, 2001]; *Maviglia v. Inapart Properties Corp., et.al.,* 149 A.D.2d 482 [App.Div., 2nd Dept, 1991].)

In arriving at the decision whether to grant or to deny such a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party, which requires it to give that party all of the reasonable inferences which can be drawn from the evidence (*Fundamental Portfolio Advisors, Inc., v. Tocqueville Asset Mgt., Lp.,* 7 NY3d 96, 105

[2006]; *McGill v. Bohack Corp.,* 69 A.D.2d 853 [App.Div. 2nd Dept, 1979]; *Negri v. Stop & Shop, Inc.,* 65 N.Y.2d 625 [1985].) There is no question that summary judgment must be denied in the face of triable issues of fact (*Freese v. Schwartz,* 203 A.D.2d 513 [App.Div., 2nd Dept, 1994] .) By the same token, it must be borne in mind that conclusory and speculative allegations are insufficient to defeat a motion for summary judgment (*Maviglia v. Inapart Properties Corp., et.al., supra,* [149 A.D.2d at., 482].)

In support of defendant Frey's motion is his deposition transcript and affidavit in which he explicitly denies any involvement in any assault on Mr. Seeley and further denies any employment relationship whatsoever with Emerald Point. Defendant Frey made out a prima facie case for summary judgment based upon this evidence, thereby shifting the burden upon plaintiffs to come forward with admissible evidence demonstrating an issue of fact. Plaintiffs woefully failed to do so. In fact, after all of the time for discovery, plaintiffs failed to demonstrate that Mr. Frey was in any way involved in the incident at issue. The affidavits of the non-party witnesses fail to raise any triable issue of fact. The affidavits express only their belief that Mr. Frey may have been acting as an employee of Emerald Point, but fall far short of stating that he was so employed. The non-party witnesses beliefs are irrelevant to the issue of whether Frey was actually employed or was involved in the assault. Plaintiffs fail to put forth any admissible evidence showing that Mr. Frey was in any way culpable in this action. All of the case authority cited by plaintiffs in opposition support the proposition that a bar bears responsibility for its employees in a Dram Shop case. Plaintiffs settled with Emerald Point. Plaintiffs cite no authority supporting the notion that an alleged employee bears responsibility for actions allegedly taken by his alleged employer. In fact, there is no such authority. Additionally, any liability by Mr. Frey is premised on his alleged employment relationship, which all evidence submitted clearly

contradicts. Given the total absence of any proof of negligence by Mr. Frey, Frey motion for summary judgment must be granted in its entirety.

Turning to the issue of costs and sanctions, the Court notes that conduct is frivolous and can be sanctioned under 22 NYCRR 130-1.1 if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" or it is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1[c][1][2]; *see Stow v Stow,* 262 AD2d 550 (2nd Dept. 1999); *Matter of Gordon v Marrone,* 202 AD2d 104 (2nd Dept. 1994); *Tyree Bros. Envtl. Servs. v Ferguson Propeller,* 247 AD2d 376 (2nd Dept. 1998)). "Making claims of colorable merit can constitute frivolous conduct within the meaning of 22 NYCRR 130-1.1 if 'undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another'" (*Stow v Stow, supra* at 551, quoting 22 NYCRR 130-1.1[c][2]; *see also Matter of Gordon v Marrone, supra; Tyree Bros. Envtl. Servs. v Ferguson Propeller, supra*). Specifically, Section 130-1.1 of the Rules of the Chief Administrator of the Courts states in pertinent part:

> (a) The court, in its discretion, may award to any party in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part.
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> (c) For the purposes of this Part, conduct is frivolous if:
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> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another;
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> * * *
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> In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was

> continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

As expressed in *Park Health Center v Country Wide Ins. Co.*, 2 Misc3d 737, 740 (N.Y.City Civ.Ct.,2003):

> "In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal and factual basis for the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party." (*Id.*) [22 NYCRR 130-1.1(c)]

While the factors listed above are precatory in determining sanctionable conduct, "what remedy [to impose] is dictated by considerations of fairness and equity." (*Levy v. Carol Management Corp.,* 260 A.D.2d 27, 34, 698 N.Y.S.2d 226 [1st Dept. 1999]). Moreover, "[s]anctions are retributive in that they punish past conduct. They are also goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the bar at large. The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics. citation omitted" (*Levy,* 260 A.D.2d at 34, 698 N.Y.S.2d 226). The measure of sanctions should be proportionate to the amount sought in the lawsuit, the culpability of the party's conduct and prejudice to the adversary. (*See Vicom v. Silverwood,* 188 A.D.2d 1057, 591 N.Y.S.2d 919 [4th Dept. 1992]).

In the instant case, it is clear from the submissions that the evidence demonstrated that Mr. Frey had no connection with the assault on plaintiff. Mr. Seeley never identified his attacker, and the evidence, which is unrefuted, demonstrates that Frey was not employed by Emerald Point nor did he participate in any assault. Plaintiffs were given multiple opportunities to discontinue

the action against Frey, even in light of the compelling evidence demonstrating his non-participation. Plaintiffs failed to do so, and such conduct can be construed as nothing less than frivolous conduct. Plaintiffs' counsel's conduct in this matter demonstrates a repeated disregard for proper procedure and the law, and as such, plaintiffs' conduct is frivolous.

> CPLR 8303-a calls for the award of "costs and reasonable attorney's fees not exceeding ten thousand dollars" against a party, his attorney, or both, who are found to have brought a *frivolous action* in bad faith or as a means of "harass[ing]" the successful adversary. A similar alternate imposition of costs and financial sanctions is available under the Rules of the Chief Administrator of the Courts for *frivolous conduct* in pursuit of such litigation (22 NYCRR Subpart 130-1). Once there is a finding of frivolousness, sanction is mandatory (*Grasso v. Mathew,* 164 A.D.2d 476, 564 N.Y.S.2d 576, *lv. denied* 78 N.Y.2d 855, 573 N.Y.S.2d 645, 578 N.E.2d 443), especially in the wake of frivolous defamation litigation (*Mitchell v. Herald Co.,* 137 A.D.2d 213, 529 N.Y.S.2d 602, *appeal dismissed* 72 N.Y.2d 952, 533 N.Y.S.2d 59, 529 N.E.2d 427).

Nyitray v New York Athletic Club in City of New York, 274 AD2d 326, 327 (1st Dept., 2000).

The Court hereby directs that a hearing shall be held on **September 8, 2011** at 9:30 a.m. at Orange County Government Center, Courtroom #4 for the purposes of taking testimony to ascertain the time and expenses of defendant Frey in defending this action and reasonable attorney's fees.

The foregoing constitutes the decision and order of the court.

Dated: August 3, 2011 E N T E R
Goshen, New York

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HON. CATHERINE M. BARTLETT,
A.J.S.C.