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| Epstein v T.R. Designs, Inc. |
| 2017 NY Slip Op 31154(U) |
| May 30, 2017 |
| Supreme Court, New York County |
| Docket Number: 150294/2015 |
| Judge: Erika M. Edwards |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CAROLE EPSTEIN and ALAN EPSTEIN,

Index No.: 150294/2015

Plaintiffs,

DECISION/ORDER

v.

Motion Seq. 003 and 005

T.R. DESIGNS, INC., 540 WEST 21ST STREET
HOLDINGS, LLC, BERDELLA, INC., and
OVERBROOK COMMUNICATIONS, INC., d/b/a
JOSEPH CADY EVENTS,

Defendants.

T.R. DESIGNS, INC., 540 WEST 21ST STREET
HOLDINGS, LLC, and OVERBROOK
COMMUNICATIONS, INC., d/b/a JOSEPH
CADY EVENTS,

Third-Party Plaintiffs,

v.

BERDELLA, INC., STEFAN C. CAMPBELL, 6UP
(÷ OF N6) AND NORTH SIX, INC.,

Third-Party Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

| Papers | Numbered |
|---|----------|
| Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed (003) | <u>1</u> |
| Opposition Affidavits/Affirmations and Memos of Law annexed (003) | <u>2</u> |
| Reply Affidavits/Affirmations/Memos of Law annexed (003) | <u>3</u> |
| Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed (005) | <u>4</u> |
| Opposition Affidavits/Affirmations and Memos of Law annexed (005) | <u>5</u> |
| Reply Affidavits/Affirmations/Memos of Law annexed (005) | <u>6</u> |

ERIKA M. EDWARDS, J.:

Plaintiffs Carole Epstein and Alan Epstein (“Plaintiffs”) brought this action against Defendants T.R. Designs, Inc. (“T.R.”), 540 West 21st Street Holdings, LLC (“540 West”), Berdella, Inc. (“Berdella”), and Overbrook Communications, Inc. d/b/a Joseph Cady Events (“Cady”) for personal injuries Plaintiff Carole Epstein sustained when she tripped and fell while attending T.R.’s fashion show on September 7, 2014, held at a venue owned by 540 West. Plaintiffs allege that the accident was caused by a painted black platform that Plaintiff Carole Epstein could not see because of a dangerous, defective and hazardous condition which included insufficient lighting, an improperly placed platform and unsafe lighting, floors, walkways, platforms and event space.

Defendants T.R., 540 West and Cady (collectively “Third-Party Plaintiffs”) brought a Third-Party action against Berdella, Stefan C. Campbell (“Campbell”), 6UP (+ of N6) (“6UP”) and North Six, Inc. (“North Six”) for common law indemnification and contribution.

Berdella and Campbell now move to dismiss the Third-Party complaint against them under motion sequence number 003 and Berdella moves to dismiss Plaintiffs’ complaint against it under motion sequence 005, pursuant to CPLR 3211(a)(1), (a)(7) and 3013. The Third-Party Plaintiffs and Plaintiffs opposed the motions to dismiss their respective complaints. These motions are hereby consolidated for disposition as set forth herein. The court denies dismissal of Plaintiff’s complaint and the Third-Party Plaintiff’s complaint against Berdella, but grants dismissal of the Third-Party complaint against Campbell. Therefore, the Third-Party complaint is dismissed against Campbell only.

T.R. hired Berdella as its sole creative director and executive producer to design and create the look and feel of its Tracy Reese Spring fashion show and the parties entered into a written contract for such services. The contract specified that Berdella could hire a production company and/or line producer to manage the production of the show and execute the show design and concept. Berdella hired 6UP to perform such services and the plans were approved by T.R. The contract references a separate contract between T.R. and 540 West and Cady to rent the venue and to provide certain elements, including the lighting of the venue. The contract also indicates that Berdella and Campbell are not liable for the actions of the production company/services enlisted. Campbell is Berdella's President and the contract expressly states that he signed the contract "For Berdella Inc."

Berdella and Campbell argue in substance that based on the express terms of the contracts, the documentary evidence demonstrates that they are not responsible for the alleged damages claimed by Plaintiffs as to Berdella and Third-Party Plaintiffs as to both. Berdella and Campbell allege that they are not responsible for the lighting; that T.R. hired Cady to install and operate the lighting; that Campbell directed Cady to install two overhead lights and additional lighting in the area where Plaintiff Carole Epstein fell; that Cady failed to properly implement the lighting plan and that the contract specifically relieves Berdella and Campbell of all liability related to the alleged cause of Plaintiffs' injuries and damages. They further allege that T.R. hired a security company to handle the guest flow at the show and Berdella and Campbell were not responsible for guest flow. Additionally, the Third-Party complaint fails to state a cause of action with any particularity against Campbell and fails to allege specific facts to justify piercing the corporate veil and holding Campbell responsible in his individual capacity. Finally, the complaint fails to state a cause of action with particularity against Berdella.

In Third-Party Plaintiffs' opposition, they argue in substance that the deposition testimony of Cady's and T.R.'s witnesses demonstrate that, as the show's creative director, Berdella and Campbell were responsible for the lighting and for the placement of the stage/platform. Cady alleges that it manages the event space and did not control the lighting for the show. The amount of lighting was controlled by a dimmer on the day of the event as directed by Berdella and Campbell. Campbell also controlled the platform, when to seat the guests and the path of the models. Additionally, they allege that the purported indemnification clause was drafted by Berdella in a one-sided manner and it violates New York's General Obligations Law because it attempts to indemnify Berdella for its own negligence.

Plaintiffs oppose Berdella's motion and argue in substance that Berdella failed to demonstrate that dismissal of the complaint is warranted as the complaint sets forth cognizable claims and the documentary evidence submitted by Berdella does not conclusively establish a defense to the claims asserted against it. Plaintiffs also rely on the deposition testimony to demonstrate that Campbell maintained overall control of the production and that Berdella controlled the lighting design and manipulated the lighting at the event.

In Reply, Berdella and Campbell argue in substance that the deposition testimony was false and attempts to blame them because they are not insured by Chubb Insurance Company. Also, they allege that Cady was responsible for constructing the platform and for the lighting in the area of the alleged accident.

Dismissal is warranted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (CPLR 3211[a][1]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Dismissal is proper where the documents relied upon

definitively disposed of a plaintiff's claim (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 634 NYS2d 62, 63 [1995]).

When considering Defendants' motion to dismiss the complaint and Third-Party complaint for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleadings a liberal construction, accept all facts as alleged in the pleadings to be true, accord the Plaintiffs and Third-Party Plaintiffs the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*, 179 AD2d 454, 457, 579 NYS2d 335 [1st Dept 1992]). However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence (*Simkin v Blank*, 19 NY3d 46, 52, 945 NYS2d 222, [2012]).

Generally, a defendant "whose liability to an injured plaintiff is merely secondary or vicarious is entitled to common-law indemnification from the actual wrongdoer who by actual misconduct caused the plaintiff's injuries, and whose liability to the plaintiff is therefore primary [internal quotation marks and citations omitted]" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 366 [1st Dept 2006]). It is premised on "vicarious liability without actual fault," which requires that "a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine [internal quotation marks and citations omitted]" (*id.* at 367). The shifting of loss under common-law indemnification may be implied to prevent the unjust enrichment of one party at the expense of another (*id.* at 375). However, a party cannot obtain common-law indemnification "unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part" (*id.* at 377-378).

Generally, a plaintiff seeking to pierce the corporate veil must show that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Morris v State Dep't of Taxation & Fin.*, 82 NY2d 135, 141 [1993] [internal citations omitted]). There must be some showing of a wrongful or unjust act toward plaintiff and that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against plaintiff such that a court in equity will intervene (*id.* at 141-142 [internal citation omitted]).

Here, the documentary evidence presented, including the contracts and documents provided, failed to establish Berdella's defense as a matter of law and they do not utterly refute the allegations against it asserted in either complaint. Issues remain as to who controlled or directed the amount and type of lights installed in the area where Plaintiff Carole Epstein tripped and fell; the focus of the spotlights and dimness of the lighting condition in the area of the accident at the time of the accident; and the color, construction and placement of the platform. Additionally, Berdella and Campbell failed to demonstrate how Cady failed to properly implement the plans for the overhead lighting in the area where Plaintiff Carole Epstein tripped and fell. Furthermore, Berdella and Campbell failed to demonstrate that dismissal of the indemnification and contribution causes of action in the Third-Party complaint are warranted as they failed to show that they were held to be vicariously liable without proof of any negligence or actual supervision on their own part.

As such, Berdella's motions to dismiss the complaint and Third-Party complaint are denied.

However, the court grants Campbell's motion to dismiss the Third-Party complaint against him as this complaint fails to state a cause of action against him individually. The contract between Berdella and T.R. clearly indicates that Campbell signed on behalf of Berdella and not in his individual capacity. Additionally, the Third-Party Plaintiffs failed to assert any facts to satisfy the elements needed to pierce the corporate veil. Specifically, they failed to demonstrate Campbell's domination of Berdella as its President or that any fraud or wrong was committed against Plaintiff required to hold Campbell individually responsible. As such, the court dismisses the Third-Party complaint and all claims against Campbell.

Accordingly, it is hereby

ORDERED that Defendant/Third-Party Defendant Berdella, Inc.'s motion to dismiss Plaintiffs Carole Epstein's and Alan Epstein's complaint (motion sequence 005) is denied with prejudice and without costs; and it is further

ORDERED that Defendant/Third-Party Defendant Berdella, Inc.'s and Third-Party Defendant Stefan C. Campbell's motion to dismiss Third-Party Plaintiffs T.R. Designs, Inc.'s, 540 West 21st Street Holdings, LLC's, and Overbrook Communications, Inc., d/b/a Joseph Cady Events' Third-Party complaint (motion sequence 003) herein is denied as to Defendant/Third-Party Defendant Berdella, but granted as to Third-Party Defendant Stefan C. Campbell as to all claims, with prejudice and without costs. The Clerk is directed to enter judgment accordingly in favor of Third-Party Defendant Stefan C. Campbell for all claims and cross-claims as against the Third-Party Plaintiffs only; and it is further

ORDERED that all remaining parties are directed to appear in court for a compliance conference on July 27, 2017, at 9:30 a.m., in Part 47, located in room 320, 80 Centre Street, New York, New York.

Date: May 30, 2017



HON. ERIKA M. EDWARDS, JSC