

Peterson v G Lounge
2018 NY Slip Op 30009(U)
January 2, 2018
Supreme Court, New York County
Docket Number: 155337/16
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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FRANK PETERSON,

DECISION/ORDER

Plaintiff,

Index No.: 155337/16

-against-

Mot. Seqs. 003 and 005

G LOUNGE, 223 WEST 19TH STREET CONDOMINIUM INC., SSM OF NEW YORK, LLC, 223 WEST CORP., MICHAEL J. MCGRAIL JR., JAMES B. FERRARI, PAT ROGERS, ROBERT S. BARBERO, JOSEPH JOHN FONTECCHIO and JOHN DOE, known to be an employee of G LOUNGE, 223 WEST 19TH STREET CONDOMINIUM INC., SSM OF NEW YORK, LLC, 223 WEST CORP., MICHAEL J. MCGRAIL JR., JAMES B. FERRARI, PAT ROGERS, ROBERT S. BARBERO and JOSEPH JOHN FONTECCHIO,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for personal injury. In motion sequence 003, defendant 233 West 19th Street Condominium, Inc. (the “Condo”) now moves pursuant to CPLR 3212 to dismiss the amended complaint (“Complaint”) of plaintiff, Frank Peterson (“Plaintiff”). In motion sequence 005, defendants Michael J. McGrail and Robert S. Barbero (“Individual Defendants”) move pursuant to CPLR 3211 (a)(7) and 3212 to dismiss the Complaint. The motions are consolidated for disposition.

Factual Background

Plaintiff alleges that on June 28, 2015, he was assaulted while at “G Lounge” (the “Premises”), a nightclub. Plaintiff further alleges that the Premises occupied the ground

floor unit of the condominium located at 223 West 19th Street, New York, New York. The condominium is owned by the Condo. Defendant 223 West Corp. operated the Premises on the date of Plaintiff's injury. Defendant McGrail was the president, and defendant Barbero the secretary of defendant 223 West Corp. on the date of Plaintiff's injury. According to the Complaint, Plaintiff's injury was caused by, *inter alia*, the negligent manner in the ownership, operation, management, maintenance and control of the Premises by the Individual Defendants (first cause of action) (Compl. ¶66). The second and third causes of action allege that John Doe, an unnamed individual, acting for and on behalf of the Individual Defendants and in the scope of his employment, assaulted and beat Plaintiff (second cause of action, *id.* ¶73; *see* third cause of action, *id.* ¶78).

Motion Sequence 003

The Condo is entitled to summary dismissal of the Complaint. The affidavit of Mark Reed, the president of the Board of Managers of the Condo, establishes that the Condo was neither the owner, nor in possession of condominium unit where Plaintiff's alleged injury occurred ("unit one"). Reed further affirms that the Condo was not involved in the operation of unit one at the time of Plaintiff's injury. Plaintiff failed to file an opposition to the Condo's motion. Accordingly, the Condo's motion for summary dismissal is granted (*see Perez v. Folio House, Inc.*, 123 A.D.3d 519, 520 [1st Dept 2014] (failure to address claims indicates an intention to abandon them as a basis of liability); *Kronick v. L.P. Thebaull Co.*, 70 A.D.3d 648, 649 [2d Dept 2010] (plaintiff abandoned her claim "by failing to oppose the branch of the defendant's motion which was to dismiss it").

Motion Sequence 005

The Individual Defendants' Motion

The Individual Defendants first argue that their affidavits demonstrate that they did not assault Plaintiff. The individual Defendants further argue that all acts taken in connection with the Premises were in the Individual Defendants' capacity as officers of the 233 West Corp. Moreover, the Individual Defendants contend that the Complaint fails to allege any specific allegations against the Individual Defendants. Further, the Individual Defendants contend that Plaintiff's response to the first set of interrogatories fails to specifically set forth which defendants allegedly assaulted Plaintiff. Next, the Individual Defendants argue that Plaintiff has failed to plead facts sufficient to pierce the corporate veil, since Plaintiff pleads identical boilerplate allegations against all defendants and fails to allege that the Individual Defendants, through their domination of the entity, abused the corporate form to harm Plaintiff. Further, the Individual Defendants argue that Plaintiff is not entitled to further discovery to determine if Plaintiff would be successful on a claim to justify piercing the corporate veil.

Plaintiff's Opposition

In opposition, Plaintiff argues that the Individual Defendants' affidavits create an issue of fact as to whether they were involved in the operation, management and control of the premises, as they admit being officers of defendant 223 West Corp. Plaintiff further contends that summary dismissal of the Complaint is premature, since depositions of the Individual Defendants have yet to take place, and thus, Plaintiff has not had the

opportunity to question them as to their roles within the corporation. Moreover, Plaintiff argues that the affidavits of the Individual Defendants are self-serving and unpersuasive.

Individual Defendants' Reply

In reply, the Individual Defendants argue that Plaintiff's opposition fails to raise an issue of fact since it fails to specify what material issues of fact exist. The Individual Defendants further argue that Plaintiff has failed to plead any facts to pierce the corporate veil. Additionally, the Individual Defendants argue that Plaintiff failed to show that additional discovery will lead to relevant evidence against them. Moreover, the Individual Defendants assert that Plaintiff fails to show that facts essential to oppose the motion for summary dismissal are exclusively within the knowledge and control of the Individual Defendants. Finally, the Individual Defendants contend that Plaintiff fails to offer any proof that the affidavits submitted in support of their motion are incredible.

Discussion

In deciding a motion to dismiss directed at the sufficiency of the pleadings pursuant to CPLR 3211 (a)(7), a court must accept the allegations as true, according them the benefit of every favorable inference to determine whether they come within the ambit of any cognizable legal theory (*see Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634 [1976]).

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact (*see Wayburn v. Madison Land Ltd. Partnership*, 282 A.D.2d 301 [1st Dept 2001]). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact (*see Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]). Once the

movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim” (*Id.*).

In order to pierce corporate veil, plaintiff must allege facts to 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 of wrong against the plaintiff which resulted in plaintiff’s injury” (*Shisgal v. Brown*, 21 A.D.3d 845, 848 [1st Dept 2005] [internal quotation marks omitted]; see *Berenger v. 261 West LLC*, 93 A.D.3d 175 [1st Dept 2012]). Further, a plaintiff must allege, with the requisite “particularized statements detailing fraud or other corporate misconduct,” facts that would warrant piercing the corporate veil (*Sheridan Broadcasting Corp v. Small*, 19 A.D.3d 331, 332 [2005]; *Sheinberg v. 177 E. 77*, 248 A.D.2d 176, 177 [1998], *lv denied* 92 N.Y.2d 844 [1998] [holding that the dismissal of the complaint was warranted as plaintiff “failed to allege particularized facts to warrant piercing the corporate veil”]).

To defeat for a motion for summary judgment due to incomplete discovery, there must be “some evidentiary basis . . . offered to suggest that discovery may lead to relevant evidence” (*DaSilva v. Haks Engineers, Architects & Land Surveyors, P.C.*, 125 A.D.3d 480, 482 [1st Dept 2015]). “The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion” (*Davila v. New York City Transit Auth.*, 66 A.D.3d 952, 953 [1st Dept 2009], quoting *Lopez v. WS Distribution, Inc.*, 34 A.D.3d 759, 760 [2d Dept 2006]).

Here, the Complaint is completely void of facts that would persuade this Court to pierce the corporate veil, as it only contains generalized allegations and fails to allege that the Individual Defendants exercised complete domination of the corporation and abused the corporate form to perpetuate a wrong against Plaintiff. Accordingly, the Individual Defendants' motion to dismiss the Complaint is granted, to the extent that the first cause of action is dismissed.

Even if the Complaint did allege facts sufficient to pierce the corporate veil, the Individual Defendants met their *prima facie* burden entitling them to summary dismissal by submitting the sworn affidavits of the Individual Defendants stating, among other things, that neither of them operated, managed, maintained or controlled the Premises, hired the workers employed at the Premises or supervised or trained employees, in their respective individual capacity (McGrail Aff. ¶¶9-10; Barbero Aff. ¶¶9-10). Nothing in the Complaint or Plaintiff's opposition establishes a factual basis for finding that the corporate form should be pierced in order to hold the individual defendants liable.

Further, Plaintiff's assertion that the Individual Defendants' motion for summary dismissal is premature as discovery is incomplete is without merit. Although no depositions have taken place, Plaintiff has indeed offered no facts from which it could be inferred that the depositions sought will produce evidence that either Individual Defendant operated, managed, or controlled the premises in their individual capacity. Plaintiff's hope that depositions will lead to further discovery in this case is without basis. Specifically, Plaintiff's assertion that the Individual Defendants respective positions as officers of the corporation by itself does not suggest that the Individual Defendants acted in their individual capacity in operating, managing or maintaining the Premises.

Finally, there is no evidence on the record suggesting that the Individual Defendants assaulted Plaintiff and, tellingly, Plaintiff's opposition fails to address this allegation. Thus, the Individual Defendants' motion for summary judgment is granted as to the second and third causes of action.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of defendant 233 West 19th Street Condominium, Inc. for summary dismissal of the Complaint as against it is granted. The Complaint is dismissed against defendant 233 West 19th Street Condominium. It is further

ORDERED that the motion of defendants Michael J. McGrail and Robert S. Barbero to dismiss the Complaint as against it, pursuant to CPLR 3211 and 3212, is granted. The Complaint is dismissed against defendants Michael J. McGrail and Robert S. Barbero. It is further

ORDERED that the Clerk enter judgment accordingly. It is further

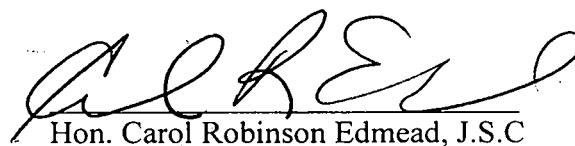
ORDERED that the action is severed and continues against the remaining defendants. It is further

ORDERED that the remaining parties shall appear for an in-court conference to address motion sequence 004 and outstanding discovery on January 9, 2018 at 9:30 a.m. It is further

ORDERED that defendants Michael J. McGrail and Robert S. Barbero shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 2, 2018


Hon. Carol Robinson Edmead, J.S.C.
HON. CAROL R. EDM
J.S.C.