

Kitt v Live Nation Concerts, Inc.
2018 NY Slip Op 32879(U)
October 30, 2018
Supreme Court, New York County
Docket Number: 155496/2017
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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STEVEN KITT,

Plaintiff,

- v -

LIVE NATION CONCERTS, INC., LIVE NATION ENTERTAINMENT, INC., LIVE NATION WORLDWIDE, INC., NIKON INC., NIKON AMERICAS INC., SKANSKA INC., SKANSKA USA INC., and SKANSKA USA BUILDING INC.,

Defendants.

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INDEX NO. 155496/2017
MOTION DATE _____
MOTION SEQ. NO. 001

DECISION AND ORDER

Plaintiff brings this action for negligence and violations of Labor Law §§ 200, 240(1), and 241(6). Defendants Live Nation Concerts, Inc. (Concerts), Live Nation Worldwide, Inc. (Worldwide), Live Nation Entertainment, Inc. (Entertainment), and Nikon Inc. and Nikon Americas Inc. (Nikon defendants) (collectively, movants), move pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the complaint and pursuant to CPLR 3211(c) for an order converting the motion to one seeking summary judgment. They also move pursuant to 22 NYCRR § 130-1.1 for an order awarding costs and attorney fees. Plaintiff opposes as to all movants except Worldwide, and as to the request for costs and attorney fees. On April 19, 2018, the parties filed a stipulation of discontinuance as to Worldwide. (NYSCEF 50).

I. FACTUAL BACKGROUND

On February 28, 2000, nonparty Beach Concerts, Inc. (Beach) entered into a concession license with the New York State Office of Parks, Recreation, and Historic Preservation for the Jones Beach Theater (NYSCEF 56). On April 1, 2006, Beach entered into a sponsorship and sub-license agreement with Nikon Inc. In it, Worldwide is identified as the “successor in interest to [Beach].” (NYSCEF 59-61). On December 31, 2008, Beach merged into Worldwide. (NYSCEF 57).

On June 17, 2014, while working at the theater, plaintiff, an employee of Worldwide, stepped into a hole between the stage foundation and stage, and fell, sustaining injury. He alleges in his complaint, in pertinent part, that upon information and belief, at the time of his accident, movants owned, operated, managed, maintained, repaired, constructed, inspected, controlled, and/or supervised the premises, appurtenances, and fixtures at the theater. (NYSCEF 23).

On July 16, 2017, plaintiff filed his verified complaint. (NYSCEF 1). Communications among the parties ensued concerning the merit of plaintiff's claims, with movants demanding voluntary dismissals, and plaintiff failing to respond for months (Affirmation of Steven H. Rosenfeld, Esq., dated Jan. 22, 2018 [NYSCEF 21, 24-30]).

II. CONTENTIONS

A. Movants (NYDCEF 20-39)

In an affidavit dated January 11, 2018, Worldwide's general manager at the theater, denies that Entertainment or Concerts ever had an ownership, operational, or managerial interest, or any involvement in the theater. (NYSCEF 31).

By affidavit dated January 10, 2018, Nikon Inc.'s vice president and general counsel, states that on the day of plaintiff's accident, Nikon Inc. was a title sponsor of the theater pursuant to an agreement between it and Worldwide, and he denies that either Nikon defendant ever had an ownership, operational, or managerial interest in the theater. (NYSCEF 36).

Relying on the aforementioned affidavits, movants assert that they are entitled to a dismissal as to Entertainment and Concerts. They also claim that plaintiff's decision to bring this action is sanctionable, as all claims against Worldwide are barred by plaintiff's workers' compensation benefits, and as defense counsel had informed plaintiff's counsel by email that movants have no interest in the theater. (Memorandum of Law, NYSCEF 38).

B. Plaintiff (NYSCEF 44-45)

Although plaintiff opposes movants' attempt to convert their motion to dismiss to one seeking summary judgment, he addresses whether the evidence offered by movants is sufficient to warrant summary judgment in their favor and offers evidence in opposition, namely, a form 10-k that Entertainment filed with the Securities and Exchange Commission in which it is stated that "[a]t December 31, 2013, we owned, leased, operated, had exclusive booking rights for or had an equity interest in" the theater, with a 20-year license agreement to expire in 2019. (NYSCEF 45). Counsel affirms that Entertainment's forms 10-k for succeeding years do not address its interest in the theater and argues that because the form contradicts the denial of any such interest by Worldwide's general manager, he is entitled to discovery from both Entertainment and Concerts. (NYSCEF 44).

Plaintiff contends that the Nikon defendants cannot rely on Browne's January 10 affidavit for dismissal as it is not dispositive absent the sponsorship agreement. (*Id.*).

According to plaintiff, sanctions are unwarranted because his claims are meritorious and not frivolous, and that in any event, there are no "significant legal expenses" incurred by movants. (Affirmation of Michael D. Schultz, Esq., dated Apr. 16, 2018, NYSCEF 44).

C. Movants' reply (NYSCEF 51-61)

By affidavit dated April 27, 2018, Worldwide's claims manager states that in light of the concession license and merger of Beach into Worldwide (NYSCEF 56, 57), the sole Live Nation entity with operational or management interest in the theater is Worldwide. (NYSCEF 55).

Movants complain that plaintiff improperly extrapolates from Entertainment's 2013 form 10-k a "blanket ownership/operational responsibility as to all of the Live Nation defendants." They maintain that because the terms "we," "Live Nation," "us," and "our" are defined in Part I as including Entertainment "and its subsidiaries, or one of our segments or subsidiaries, as the contexts requires," and as the concession license and merger of Beach into Worldwide conclusively demonstrate that only Worldwide has the pertinent interest in the theater, the definitions are limited, "as the context requires," by the concession license and merger. Movants do not address plaintiff's acknowledgement that the form covers 2013 only. (NYSCEF 51),

By affidavit dated April 27, 2018, Nikon's vice president reiterates Nikon defendants' denial of any ownership, operational, or managerial interest in the theater, as set forth in his January 2018 affidavit, and annexes the sponsorship and sub-license agreement and amendments thereto (NYSCEF 58, 59-61), which provide in section 2.2(k) that "[Worldwide] shall be solely responsible for and shall perform, keep, and maintain the repair, maintenance, and replacement (capital or otherwise), and operation of the Theater, . . ." (*Id.*).

D. Oral argument (NYSCEF 67)

Plaintiff neither objected to movants' submission of documentary evidence on reply nor sought leave to file a sur-reply.

III. ANALYSIS

A. CPLR 3211(c)

Where parties receive no notice from the court that a motion to dismiss is converted into one seeking summary judgment, the motion may nonetheless be converted if all parties (1) specifically request it, (2) indicate that the case involves purely legal questions, or (3) deliberately chart a course for summary judgment. (*Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]).

Here, although plaintiff received notice from movants that they sought to convert their motion to one seeking summary judgment, no such notice issued from the court. (*See Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987] [notice that motion will receive summary judgment treatment must come directly from court]). Moreover, in arguing that there exist issues of fact precluding summary judgment and that those issues warrant discovery from Concerts and Entertainment, plaintiff indicates that the case does not involve purely legal questions, and he charts no course for summary judgment. (*See Bokara Rug Co. v Kapoor*, 93 AD3d 583, 583 [1st Dept 2012] [motion to dismiss should not be converted to one for summary

judgment even when non-movant submitted some evidence in opposition]). Accordingly, there is an insufficient basis for converting the motion into one for summary judgment.

B. Motion to dismiss

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Thomas v Thomas*, 70 AD3d 588 [1st Dept 2010]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*). Moreover, on a motion to dismiss under this subdivision, the plaintiff has no obligation to offer evidence supporting the allegations set forth in the complaint. (*Stuart Realty Co. v Rye Country Store, Inc.*, 296 AD2d 455, 456 [2d Dept 2002]). Affidavits may be relied on solely to remedy defects in the complaint or if they conclusively establish that plaintiff has no cause of action. (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]; see *Basis Yield Alpha Fund (Master) v Goldman Sachs Grp., Inc.*, 115 AD3d 128, 134 [1st Dept 2014] [affidavits attacking pleading's sufficiency rarely warrant dismissal]).

Pursuant to CPLR 3211(a)(1), a party may move to dismiss a pleading on the ground that it has a defense based on documentary evidence, although such a motion will only be granted if the evidence conclusively establishes a defense to a claim as a matter of law. (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). Affidavits do not constitute documentary evidence for the purposes of CPLR 3211(a)(1). (*Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651 [1st Dept 2011]).

To be held liable for negligence arising from an accident on premises, a party must have an ownership, operational, or managerial interest in the premises. (*Colon v Corp. Bldg. Groups, Inc.*, 116 AD3d 414, 414 [1st Dept 2014]). Such liability may not be predicated solely on a parent-subsidiary relationship. (*Billy v Consol. Mach. Tool Corp.*, 51 NY2d 152, 163 [1980]).

As movants offer the concession license and sponsorship and sub-license agreement in response to plaintiff's opposition to their motion and absent any objection or request for leave to file a sur-reply, the documents are considered. (See *Kelsol Diamond Co. v Stuart Lerner, Inc.*, 286 AD2d 586, 587 [1st Dept 2001] [evidence submitted for first time on reply is permitted where submitted in direct response to opposition and opposing party sought no leave to file sur-reply]).

1. Live Nation defendants

Although the existence of a parent-subsidiary relationship alone cannot be a basis for finding Concerts or Entertainment liable, assuming all facts in the complaint as true and giving plaintiff the benefit of every favorable inference, movants offer neither evidence nor contravening allegations that Entertainment and/or Concerts have an interest in the theater. And although the sponsorship and sub-license agreement provides that Worldwide is solely responsible for the theater, it does not address Entertainment and Concerts as it is solely between

Worldwide and Nikon defendants. Moreover, although plaintiff has no obligation to submit evidence supporting his allegations, the definition of Live Nation as set forth in the form 10-k indicates that Entertainment and Concerts may have an interest in the theater. Thus, movants' evidence does not "utterly refute" plaintiff's factual allegations that Entertainment and/or Concerts have pertinent interests in the theater. (*See Mill Fin., LLC v Gillett*, 122 AD3d 98, 103 [1st Dept 2014]; *see Amsellem v Host Marriott Corp.*, 280 AD2d 357, 359 [1st Dept 2001] [denying motion to dismiss for lack of personal jurisdiction where discovery required to understand nature of defendants' parent-subsidary relationship]).

2. Nikon defendants

As the sponsorship and sub-license agreement and its amendments unambiguously provide that the manager, Worldwide, and not the sponsor, Nikon, is solely responsible for maintenance and operation of the theater, movants establish that Nikon defendants are entitled to dismissal of the action as to them.

C. Sanctions

Pursuant to 22 NYCRR § 130-1.1, sanctions may be imposed on a party that engages in frivolous conduct, which is therein defined, as pertinent here, as conduct completely without merit in law or undertaken primarily to delay or harass.

Here, the only claims possibly warranting an imposition of sanctions against plaintiff are those against Worldwide; the claims against the other defendants are not completely without merit in law or devoid of colorable argument. (*Kremen v Benedict P. Morelli & Assocs., P.C.*, 80 AD3d 521, 522 [1st Dept 2011]). Although counsel's possibly sanctionable conduct in stonewalling and ignoring movants' unquestionable assertion that his claims against Worldwide were baseless, absent evidence that he was motivated by a desire to prolong or delay the litigation, sanctions are unwarranted. Moreover, he discontinued the claims against Worldwide before movants filed their reply papers, and no other litigation had been undertaken. Thus, this action has not progressed so far as to conclude that plaintiff attempted to delay in bad faith. (*Yenom Corp. v 155 Wooster St., Inc.*, 33 AD3d 67, 70 [1st Dept 2006]; *see also Curtis v Tabak is Tribeca, LLC*, 144 AD3d 509, 510 [1st Dept 2016] [plaintiff did not prolong litigation where only documents filed by plaintiff were initial pleadings]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that movants' motion is denied to the extent that it seeks to convert its motion into one for summary judgment; it is further

ORDERED, that the motion is denied to the extent it seeks dismissal of all claims asserted against defendants Live Nation Entertainment, Inc. and Live Nation Concerts, Inc.; it is further

ORDERED, that the motion is granted to the extent it seeks dismissal of all claims asserted against Nikon, Inc. and Nikon Americas, Inc.; it is further

ORDERED, that the motion is denied as to sanctions; it is further

ORDERED, that the remainder of the action shall continue; and it is further

ORDERED, that the remaining parties appear for a preliminary conference on January 9, 2019 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

10/30/2018

DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: