Toma v Karavias
2018 NY Slip Op 33313(U)
December 19, 2018
Supreme Court, Kings County
Docket Number: 511393/18
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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ROBERT TOMA and, NIGHTGLOW TOUR, LLC,

Plaintiff,

-against-

GEORGE KARAVIAS, MARIO COSTANTINI and OFF CAMPUS PRESENTS, LLC,

Defendant.

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DECISION / ORDER
Ind. No. 511393/18
Mot. Seq. #1
Sub. 10/4/18

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion to dismiss the complaint.

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmation and Exhibits Annexed, Memo.....	4 -12
Affidavit in Opposition and Exhibits Annexed.....	15 -17
Reply	18

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Defendants move, pursuant to CPLR 3211(a)(4) and (a)(7), to dismiss the plaintiffs' amended complaint on the grounds that there is a prior pending action between the same parties, or in the alternative, because the complaint fails to state a cause of action.

Turning first to the defendants' claim that there is a prior pending action which should result in a dismissal of this one, the court finds that defendants have failed to establish that the prior action asserts the same claims as this one, and, since defendants do not ask that the two actions be consolidated, the court must simply deny the motion.

Two of the defendants in the related action are the same two individual defendants in this action and the related action names a different third co-defendant, USA Teens, LLC. This action was commenced in May 2018. Both of the business entities which are co-plaintiffs (one in each action) are active entities registered to do business in New York. Defendant business in this action, Off Campus Presents, LLC, was not created until February 6, 2018, and thus could not be a defendant in the first action, which was commenced before it was formed, while USA Teens LLC was formed in 2017.

This appears to be an action for a "business divorce" filed by individual plaintiff Toma, who claims he formed co-plaintiff Nightglow Tour, LLC [hereinafter "Nightglow"] in 2015, and at some point the individual defendants became owners, but they subsequently quit the business and (among other claims) they took the books and records of plaintiff Nightglow, and started a new business, defendant Off Campus Presents, LLC [hereinafter "Off Campus"], which is in direct competition with Nightglow. This action is brought by plaintiffs Toma and Nightglow against the other two individual owners, Karavias and Costantini, as well as against Off Campus. In the amended complaint in this action, plaintiff avers in ¶7 that Nightglow, the co-plaintiff entity, promotes "nightclub events for college students, aged 18 years and older."

The related action, Ind. 500687/18, was commenced in January 2018 by the individual plaintiff in this action, Robert Toma, and a different co-plaintiff, Noid Events, Inc. [hereinafter "Noid"]. In the complaint in that action, plaintiff avers in ¶7 that he formed Noid Events, Inc., the co-plaintiff entity, in 2009, and was the sole shareholder until some time in 2013, when defendants Karavias and Constantini became "partners"

[sic]. He states that the business promotes "nightclub events without alcohol for teenagers." Plaintiff also claims in that action that after the individual defendants became owners ("partners"), they subsequently quit the business and took the books and records of co-plaintiff Noid Events, Inc. and started a new business, defendant USA Teens, LLC, [hereinafter "USA Teens"] which is in direct competition with Noid. The related action is brought by plaintiffs Toma and Noid against the two individuals Karavias and Costantini, as well as against USA Teens, LLC.

Defendants support their motion with copies of the complaint and of the amended complaint, as well as the complaint in the related action, but have failed to include, and have failed to e-file, their answer to the complaint. The court knows there was an answer served, as plaintiff has replied to the counterclaims therein, and has e-filed same.

The court finds that, while the allegations in both complaints are similarly worded, they assert "different actionable wrongs" and thus dismissal of this second action is not warranted. Dismissal pursuant to CPLR 3211(a)(4) is warranted where there is another action pending between the same parties for the same cause of action. That is, "the movant must prove that both suits arise out of the same actionable wrong and that there is no good reason why one action should not be sufficient to resolve the disputed issues." (See *Hinman, Straub, Pigors & Manning, P. C. v Broder*, 89 AD2d 278, 280 [3d Dept 1982].) That is not the case here. However, consolidation would be appropriate, should plaintiffs or defendants seek that relief.

Turning to the branch of the motion which seeks a stay of this action pending the outcome of the prior pending action, the court finds that this relief is also unwarranted,

as the claims relate to two distinct businesses, and thus while the parties may overlap, the claims do not. It would certainly be preferable, for judicial economy, for the cases to be consolidated and tried together, but that is not required.

Finally, defendants move under CPLR 3211(a)(7) to dismiss the complaint for failing to state a cause of action. This too must be denied.

In determining a motion to dismiss pursuant to CPLR 3211 (a)(7), the court's role is ordinarily limited to determining whether the complaint states a cause of action. *Frank v Daimler Chrysler Corp.*, 292 AD2d 118 [1st Dept 2002]. On such a motion, the court must accept as true the factual allegations of the complaint and accord the plaintiff all favorable inferences which may be drawn therefrom. *Dunleavy v Hilton Hall Apartments Co., LLC*, 14 AD3d 479, 480 [2nd Dept 2005]. *See also Leon v Martinez*, 84 NY2d 83, 87–88; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Dye v Catholic Med. Ctr. of Brooklyn & Queens*, 273 AD2d 193 [2nd Dept 2000].

The standard of review on such a motion is not whether the party has artfully drafted the pleading, "but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." *Offen v Intercontinental Hotels Group*, 2010 NY Misc. LEXIS 2518 [Sup Ct NY Co 2010] quoting *Stendig, Inc. v Thorn Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; See also *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997]; *Feinberg v Bache Halsey Stuart*, 61 AD2d 135, 137-138 [1st Dept 1978]; *Edwards v Codd*, 59 AD2d 148, 149 [1st Dept 1977]. If the plaintiff can succeed upon any reasonable view of the allegations, the complaint may not be dismissed. *Dunleavy v Hilton Hall Apartments Co. LLC*, 14 AD3d 479, 480 [2d Dept. 2005]; *Board of Educ. of City School Dist. of City*

of New Rochelle v County of Westchester, 282 AD2d 561, 562. The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" *Dee v Rakower*, 2013 NY Slip Op 07443 (2d Dept), citing *Leon v Martinez, 84* NY2d 83 at 87 (1994). Finally, when considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed. *Offen v Intercontinental Hotels Group*, 2010 NY Misc LEXIS 2518.

Accordingly it is

ORDERED that the motion is denied.

The attorneys for the parties shall appear in the Intake Part for a Preliminary Conference on January 23, 2019.

This constitutes the decision and order of the court.

Dated: December 19, 2018

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court