

<b>Potter v Music Hall of Williamsburg, LLC</b>
2018 NY Slip Op 33422(U)
December 18, 2018
Supreme Court, Kings County
Docket Number: 503197/13
Judge: David B. Vaughan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 4 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18<sup>th</sup> day of December, 2018.

P R E S E N T:

HON. DAVID B. VAUGHAN,  
Justice.

-----X

SHANNON POTTER,

Plaintiff,

- against -

MUSIC HALL OF WILLIAMSBURG, LLC,  
THE BOWERY PRESENTS LLC,  
“MAD DECENT,”<sup>1</sup> “MAJOR LAZER,”  
THOMAS WESLEY PENTZ, d/b/a “DIPLO”  
and/or “MAJOR LAZER,” “JOHN DOE,” “JANE DOE,”  
as further described in the annexed complaint,  
and EMBRACE USA, INC.,<sup>2</sup>

Defendants.

-----X

**DECISION, ORDER, AND  
JUDGMENT**

Index No. 503197/13

Mot. Seq. No. 14-17

The following e-filed papers read herein:

NYSCEF No.

Notice of Motion/Cross Motion, Supporting Affirmations,  
Memoranda of Law, and Exhibits Annexed \_\_\_\_\_  
Affirmations (Affidavits) in Opposition \_\_\_\_\_  
Reply Affirmations \_\_\_\_\_

244-259; 260-278, 279; 295-305;  
329-346  
306-308; 309-310; 311-313; 314-316;  
317-319; 348-359; 365, 366  
320-322; 323-325, 326; 327-328;  
364, 367, 368-372

In this action to recover damages for personal injuries, the following motions and cross motion have been consolidated for disposition:

In Seq. No. 14, the defendants “Major Lazer” and Thomas Wesley Pentz, d/b/a “Diplo” and/or “Major Lazer,” move for summary judgment;

<sup>1</sup> The defendant “Mad Decent” has not appeared in this action.

<sup>2</sup> The remaining defendants Bacardi Ltd., d/b/a “42 Below,” Bacardi U.S.A., Inc., d/b/a “42 Below,” and “Bacardi,” d/b/a “42 Below,” were dismissed from this action by Decision/Order, dated June 9, 2017 (Graham, J.) (NYSCEF #140).

In Seq. No. 15, the defendants Music Hall of Williamsburg, LLC and The Bowery Presents LLC move for summary judgment dismissing all claims and cross claims against them;

In Seq. No. 16, the remaining answering defendant Embrace USA, Inc., cross-moves for summary judgment dismissing all claims against it; and

In Seq. No. 17, the plaintiff Shannon Potters, incorrectly suing herein as Shannon Potter (the plaintiff), moves for an order (1) pursuant to CPLR 5015 (a) (1), and/or the inherent authority of the Court, (a) vacating and/or excusing her default in responding to two of the Court's orders dated March 16, 2018 and March 28, 2018, which orders conditionally precluded her; and/or (b) relieving her from said orders [and/or the effect(s) thereof];<sup>3</sup> and/or (c) vacating the preclusion provisions thereof; all on the grounds of excusable default; or, in the alternative, (2) pursuant to CPLR 2004 and/or 2005, extending her time to comply with said orders; and (3) pursuant to CPLR 5015 (a) (1), and/or the inherent authority of the Court, vacating and/or excusing her default in not seeking review of the March 16, 2018 order within five days thereof; or, in the alternative (4) pursuant to CPLR 2004 and/or 2005, extending her time to seek such review; and, in any event, (5) pursuant to CPLR 3104 (d), and/or the inherent authority of the Court, reviewing a certain order made by a referee and/or JHO; to wit, the order of JHO Muriel Hubsher, dated March 16, 2018, which order erroneously included preclusion language; and, upon such review (6) pursuant to CPLR 3104

---

<sup>3</sup> The bracketed language appears as such in the notice of motion.

(d), modifying said March 16, 2018 order to exclude the conditional preclusion language therein; and (7) upon granting the above-requested relief, pursuant to CPLR 2221 (a), vacating the Court's orders dated April 30, 2018 and June 7, 2018 on the grounds that said orders would be rendered a nullity, there no longer being a preclusion order in effect; and (8) if the relief herein is granted to the extent of lifting the preclusion order, then permitting the plaintiff to amend her opposition papers submitted in response to the aforesaid summary judgment motions to the extent of including an affidavit from the plaintiff and making additional arguments thereon.<sup>4</sup>

#### ***Background***

By order, dated March 16, 2018 (the Preclusion Order), JHO Muriel Hubsher held, after oral argument, that:

"If  $\pi$  [the plaintiff] fails to comply with this Order [i.e., to provide outstanding discovery listed therein within 30 days thereof],  $\pi$  will be precluded from testifying or offering an aff in supp or opp to a dispositive motion.  $\pi$  has failed to comply with the P.C., CC and Order dated 12/4/17."

(Preclusion Order at 2 [NYSCEF #205] [underlining in the original]).

On April 16, 2018, the preclusion order, initially conditional, became absolute because of the plaintiff's undisputed failure, in the interim, to comply with its terms.<sup>5</sup>

---

<sup>4</sup> The remaining branch of the plaintiff's motion for an order adjourning the aforementioned summary judgment motions so as to be argued, heard, and decided together with the plaintiff's motion, has been rendered moot.

<sup>5</sup> The plaintiff sought no review of the Preclusion Order within the five-day limit of CPLR 3104.

By order, dated April 30, 2018 (the Memorialization Order), JHO Martin Schneier held, after oral argument, that:

“pursuant to this Court’s prior order of 3/16/18 [i.e., the Preclusion Order], Plaintiff is precluded from testifying at trial or offering any affidavit in opposition to any dispositive motion[,] for having failed to abide by said order, the P.C., C.C., and 12/4/17 orders.”

(Memorialization Order at 1 [NYSCEF #243]).

By order, dated June 7, 2018, the Court (Knipel, J.) denied the plaintiff’s motion to vacate, holding that:

“Plaintiff was precluded by operation of the 3/16/18 order of the JHO. The 3/16/18 order was never appealed from. The preclusion provided for in the 3/16/18 order became operational when plaintiff failed to comply with the terms of the 3/16/18 order. The 4/30/18 order merely memorialized the preclusion directed in the 3/16/18 order. Accordingly, [the plaintiff’s] mtn. denied.”

(Order at 1 [NYSCEF #361]).

By order, dated July 25, 2018, this Court referred the instant summary judgment motions to Justice Knipel “for interpretation of the extent of π’s preclusion as it relates to the summary judgment motions in light of the March 16, 2018 preclusion order & subsequent April 30, 2018 order, based on Judge Knipel’s June 7, 2018 order denying π’s motion to vacate the April 30, 2018 order” (NYSCEF #347).

By order, dated August 16, 2018, Justice Knipel returned the instant summary judgment motions to this Court, noting that:

“The 6/7/18 order of this Court denied the [CPLR] 3104 appeal of the 3/16/18 JHO order. This denial is clear and unambiguous and there is no need for interpretation.”

(NYSCEF #360).

### ***Discussion***

The moving defendants have established their *prima facie* entitlement to judgment as a matter of law by demonstrating that the Preclusion and the Memorialization Orders prevent the plaintiff from testifying at trial or offering any affidavit in opposition to the moving defendants’ summary judgment motions or any other dispositive motions, thereby preventing her from making out a *prima facie* case (*see Mahgoub v 880 Realty, LLC*, 150 AD3d 1216, 1219-1220 [2d Dept 2017]; *CDJ Corp. v Commodore Mfg. Corp.*, 50 AD3d 1084, 1084 [2d Dept 2008]; *Callaghan v Curtis*, 48 AD3d 501, 502 [2d Dept 2008]). In opposition, the plaintiff has failed to raise a triable issue of fact. Not only is the plaintiff prevented by the Preclusion and the Memorialization Orders from offering her ex-boyfriend’s affidavit in opposition to the instant summary judgment motions, but she is also precluded in that regard because she failed to disclose the address of this witness until after she filed the note of issue and then only in opposition to the instant summary judgment motions (*see Ravagnan v One Ninety Realty Co.*, 64 AD3d 481, 482 [1st Dept 2009]; *Kontos v Koakos Syllogos “Ippocrates,” Inc.*, 11 AD3d 661 [2d Dept 2004]).<sup>6</sup>

---

<sup>6</sup> Unlike the circumstances in *Lee v Barnett* (134 AD3d 908, 910 [2d Dept 2015]), where defendants failed to establish that without plaintiff’s testimony, she would be unable to make out a *prima facie* case, this plaintiff’s trial testimony and “any affidavit in opposition to any dispositive (continued...)

Lastly, the Court denies the plaintiff's motion for, among other things, vacatur of the Preclusion Order pursuant to CPLR 5015 (a) (1). The parameters for review of an order made by a referee supervising disclosure are strict – “[t]he application shall be by motion made in the court in which the action is pending within five days after the order is made” (CPLR 3104 [d]). The plaintiff has not timely sought review of the Preclusion Order under CPLR 3104 (d), and the Court declines to use CPLR 5015 (a) (1) to expand on its limited powers of review of disclosure referee orders under CPLR 3104 (d) and thereby usurp the general authority granted to disclosure referees under CPLR 3104. The plaintiff has shown no reason to reopen this action, post-Note of Issue, to excuse her multiple failures to comply with the defendants' discovery requests throughout this action. That the plaintiff, by virtue of her (and/or her counsel's) noncompliance, has become unable to successfully oppose the defendants' summary judgment motions, is unfortunate but is insufficient to prompt the Court to deviate from the statutory remedy under CPLR 3104 (d) outlined above.

---

<sup>6</sup> (...continued)  
motion” herein are the only means by which she can make a *prima facie* case.

***Conclusion***

Accordingly, based on the foregoing and after oral argument, it is ORDERED that (1) in Seq. No. 14, the summary judgment motion of the defendants "Major Lazer" and Thomas Wesley Pentz, d/b/a "Diplo" and/or "Major Lazer"; (2) in Seq. No. 15, the summary judgment motion of the defendants Music Hall of Williamsburg, LLC and The Bowery Presents LLC; and (3) in Seq. No. 16, the summary judgment cross motion of the defendant Embrace USA, Inc.; are each granted, and all of plaintiff's claims and all of defendants' cross claims are dismissed with prejudice and without costs or disbursements; and it is further

ORDERED that the action is severed and continued against the remaining defendants (1) "Mad Decent," and (2) "John Doe" and "Jane Doe"; and it is further

ORDERED that in Seq. No. 17, the plaintiff's motion for an order, among other things, pursuant to CPLR 5015 (a) (1), vacating the Preclusion Order and for other relief is denied in its entirety; and it is further

ORDERED that counsel to the defendants Music Hall of Williamsburg, LLC and The Bowery Presents LLC is directed to electronically serve a copy of this decision, order, and judgment on the respective counsel to the plaintiff and each of the co-defendants, and to electronically file an affidavit of said service with the Kings County Clerk.

This constitutes the decision, order, and judgment of the Court.

E N T E R,

2019 JAN - 3 AM 10:11

FILED  
KINGS COUNTY CLERK

*David B. Vaughan*  
J. S. C.

HON. DAVID B. VAUGHAN  
J.S.C.

NANCY T. SUNSHINE  
Clerk