H Danforth Irwin v Black Tap 14th St, LLC
2019 NY Slip Op 30386(U)
February 15, 2019
Supreme Court, New York County
Docket Number: 157251/2018
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH, Justice — PART IAS MOTION 32

INDEX NO. 157251/2018

MOTION DATE

MOTION SEQ. NO. 002

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H DANFORTH IRWIN,

Plaintiff,

- v -

BLACK TAP 14TH ST, LLC,BLACK TAP HOSPITALITY GROUP, LLC,BLACK TAP ICE CREAM LLC,ISIDORI BARISH MANAGEMENT, LLC,ISIDORI BARISH HOSPITALITY GROUP, LLC,CHRISTOPHER BARISH, JOSPEH ISIDORI, 248 HOSPITALITY GROUP LLC,ANGELA NICASTRO, ELENODOROS THEODOULOU, EVAN FROST, JOHN AND JANE DOES, JOHN DOE CORPORATIONS NOS. 1-10, JOHN DOE ENTITIES NOS. 1-10, A.J. MELINO & ASSOCIATES, INC.,ANGELO MELINO

Defendant.

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DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 54-60, 61, 63, 72, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for JUDGMENT - DEFAULT

The motion by plaintiff for a default judgment against defendants Black Tap 14th St, LLC, Black Tap Hospitality Group, LLC, Black Tap Ice Cream LLC, Isidori Barish Management, LLC, Isidori Barish Hospitality Group, LLC, Joseph Isidori, Angela Nicastro, Elenadoros Theodoulou, and Evan Frost is denied. The cross-motion by defendants Nicastro, Theodoulou and Frost to dismiss is granted.

Background

This action arises out of a physical altercation that occurred at a restaurant ("Black Tap") located on West 14th Street in Manhattan on August 5, 2017. Plaintiff claims that he entered Black Tap, saw an empty stool at the bar and asked the hostess whether he could sit there. Plaintiff alleges that the hostess rudely informed him that the seat was saved for a friend of the security guard. Plaintiff demanded to speak with the hostess' manager.

Plaintiff contends that the hostess told the security guard and the security guard came over to plaintiff. Plaintiff complains that the security guard started berating plaintiff and plaintiff tried to take a photo of the empty bar seat (with his phone) before attempting to leave Black Tap. Plaintiff insists that the security guard then attacked plaintiff without provocation by grabbing plaintiff's phone, hitting plaintiff on the left side of his face and grabbing him by his neck as he escorted plaintiff out of the restaurant. Plaintiff also argues that the security guard made racial comments (plaintiff is white and alleges that the security guard is black).

Default Judgment

Plaintiff moves for a default judgment against many of the named defendants. However, since the instant motion was filed plaintiff entered into a stipulation allowing certain defendants to answer (*see* NYSCEF Doc. No. 70). Therefore, the motion for a default judgment against these defendants (this includes Black Tap 14th St, LLC, Black Tap Hospitality Group, LLC, Black Tap Ice Cream LLC, Isidori Barish Management, LLC, Isidori Barish Hospitality Group, LLC and Joseph Isidori) is moot.

The motion for a default judgment against defendants Nicastro, Theodoulou and Frost is also denied as moot because plaintiff attempted to re-serve these defendants after they cross-moved to dismiss and asserted improper service (*see* NYSCEF Doc. Nos. 66, 67, 69 [affidavits of service]). Re-serving these defendants implies that they were not initially served correctly.

Cross-Motion to Dismiss

Nicastro, Theodoulou and Frost (collectively, the "Moving Defendants") cross-move to dismiss on the grounds that they were not properly served and that plaintiff has not state a cause of action against them.[1] The Moving Defendants claim that the place where all three of the

[1] The Court observes that although the Moving Defendants allege that dismissal is warranted due to improper service, their notice of motion failed to cite the relevant CPLR section and only cites CPLR 3211(a)(7).

Moving Defendants were served (a house in Staten Island) was the childhood home of defendant Theodoulou and that neither Nicastro nor Frost ever lived there. Theodoulou acknowledges that his parents still live at this address in Staten Island but insists that he no longer lives there and provides another address where he has allegedly lived for the last five years (NYSCEF Doc. No. 73, ¶¶ 3-5).

The Moving Defendants also argue that plaintiff failed to state a cause of action against these defendants because they are all principals of defendant 248 Hospitality Group LLC ("248 LLC") and plaintiff has not pled allegations sufficient to pierce the corporate veil. The Moving Defendants claim that they cannot be held personally liable for the actions of a corporation without exercising complete domination and control over the corporate entity.

In opposition, plaintiff claims that the cross-motion was defective due to its untimeliness and that the process server's affidavit should entitle plaintiff to a default judgment.

As an initial matter, the Court will address the failure to state a cause of action branch of the motion to dismiss rather than the improper service argument because, as stated above, the notice of motion failed to cite the applicable CPLR provision (CPLR 3211[a][8]) for that argument.

"On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Alden Global Value Recovery Master Fund L.P. v Key Bank Natl. Assoc.*, 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

"Generally . . . piercing the corporate veil requires a showing 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 New York State Dept. of Taxation and Finance*, 82 NY2d 135, 141, 603 NYS2d 807 [1993]).

The Court finds that plaintiff failed to state a cause of action against the Moving Defendants. The complaint alleges that the Moving Defendants operated Black Tap through 248 LLC and that there were issues regarding a license agreement to operate under the "Black Tap brand" (NYSCEF Doc. No. 1, ¶¶ 23-24). Completely absent from the complaint is any allegation that Nicastro, Frost or Theodoulou were personally responsible for plaintiff's assault or that they exerted complete domination over 248 LLC to merit liability under a theory of piercing the corporate veil. There is simply no basis to find that the Moving Defendants did anything individually that contributed to plaintiff's assault nor is there any notion that 248 LLC was a sham corporation.

And whether or not the corporate formalities were followed by the Moving Defendants is besides the point because this case is about an alleged assault by a security guard. In order for plaintiff to state a cause of action under a piercing the corporate veil theory, the alleged domination of the corporate entity must cause plaintiff's injury (*Morris*, 82 NY2d at 135). In other words, there must be a connection between the alleged domination over the corporation and the alleged assault suffered by plaintiff. That is not the case here. Plaintiff did not offer anything in his complaint or in his opposition to the Moving Defendants' cross-motion that suggests that his assault was caused by the Moving Defendants' abuse of the corporate form. Instead, the allegation appears to be that a security guard overreacted. Therefore, if there is any

liability with respect to 248 LLC, then it will remain with that entity and the Moving Defendants cannot be held personally liable.

Accordingly, it is hereby

ORDERED that the motion for a default judgment by plaintiff is denied; and it is further

ORDERED that the cross-motion by defendants Nicastro, Theodoulou and Frost to dismiss for failure to state a cause of action is granted, and the complaint is dismissed in its entirety as against these defendants with costs and disbursements as taxed by the Clerk of the Court upon presentation of proper papers therefor, and the Clerk is directed to enter judgment accordingly.

Next Conference with remaining defendants: May 14, 2019 at 2:15 p.m.

2/15/19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION		
	[ ] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[X] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE	