

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D18435
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_____AD3d_____

Submitted - January 31, 2008

REINALDO E. RIVERA, J.P.
HOWARD MILLER
MARK C. DILLON
ARIEL E. BELEN, JJ.

2006-08218

DECISION & ORDER

Ebony Wilkerson, respondent, v
134 Kitty's Corp., et al., appellants,
et al., defendant.

(Index No. 20508/05)

Eppinger, Reingold & Korder, Larchmont, N.Y. (Ronald E. Eppinger of counsel), for
appellants.

In an action to recover damages for personal injuries, the defendants 134 Kitty's Corp., 134 Kitty's Corp., d/b/a Freddy's, 134 Kitty's Corp., d/b/a Slammer's, and Efen Rivera appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Vaughan, J.), dated July 19, 2006, as denied those branches of their motion which were for summary judgment dismissing the complaint insofar as asserted against them or, alternatively, for a change of venue of this action from Kings County to Otsego County.

ORDERED that the order is modified, on the law, by deleting the provision thereof denying that branch of the appellants' motion which was for summary judgment dismissing the plaintiff's cause of action alleging assault insofar as asserted against them, and substituting therefor a provision granting that branch of the motion; as so modified, the order is affirmed insofar as appealed from, with costs payable by the plaintiff.

The cause of action seeking to recover damages for assault is asserted against all the defendants. Since the underlying events occurred on September 28, 2002, and the action was not commenced by filing until July 5, 2005, the assault cause of action is untimely under the applicable one-year statute of limitations (*see* CPLR 215[3]), and the Supreme Court should have granted that

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branch of the appellants' motion which was for summary judgment dismissing that cause of action insofar as asserted against them.

However, as to the negligence cause of action including, inter alia, the issue of piercing the corporate veil as to the defendant Efren Rivera, the appellants failed to establish their prima facie showing of entitlement to summary judgment (*see Guiffrida v Citibank Corp.*, 100 NY2d 72, 81; *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Allstate Ins. Co. v Persampire*, 45 AD3d 706).

The Supreme Court providently exercised its discretion in denying that branch of the appellants' motion which was to change the venue of the action from Kings County to Otsego County based upon "the convenience of material witnesses and the ends of justice" (CPLR 510[3]). The appellants failed to submit sufficient evidence of the criteria necessary to demonstrate entitlement to that relief (*see O'Brien v Vassar Bros. Hosp.*, 207 AD2d 169, 172-173; *Frankel v Stavsky*, 40 AD3d 918, 919; *Shindler v Warf*, 24 AD3d 429, 430). That branch of the appellants' motion which was to change the venue of the action as a matter of right was properly denied, as it was untimely (*see CPLR 511[b]*; *Castillo v Metropolitan Laundry Machinery Co., Inc.*, 299 AD2d 247).

The appellants' remaining contention is without merit.

RIVERA, J.P., MILLER, DILLON and BELEN, JJ., concur.

ENTER:


James Edward Kelly
Clerk of the Court