

Bryan v Barilich

2008 NY Slip Op 30080(U)

January 7, 2008

Supreme Court, Queens County

Docket Number: 0011279/2007

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 22

ANTOINETTE BRYAN and ANGELITA
DUNKLEY,
Plaintiffs,

Index No. 11279/07
Motion
Date November 27, 2007

-against-

KENNETH BARILICH d/b/a CROBAR,
CALLIN FORTIS d/b/a CROBAR, 530
530 WEST 28th STREET, LP d/b/a
CROBAR a/k/a 530 WEST 28th STREET,
INC. d/b/a CROBAR BRUCE DUNSTON
d/b/a CROBAR and JOEY MORRISSEY
d/b/a CROBAR,
Defendants.

Motion
Cal. No. 5
Motion
Sequence No. S001

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	1-7
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Upon the foregoing papers it is ordered that this motion is determined as follows:

That branch of defendants' (defendants' referring to all captioned defendants except for defendant Joey Morrissey d/b/a Crobar) motion which seeks an Order pursuant to CPLR § 3211(a)(8), dismissing the action against defendants Kenneth Barilich i/s/h/a Kenneth Barilich d/b/a Crobar, ("Barilich") Callin Fortis i/s/h/a Callin Fortis d/b/a Crobar ("Fortis") based on plaintiffs', Antoinette Bryan and Angelita Dunkley, failure to properly effectuate service is hereby granted.

This action arises out of an incident whereby plaintiffs alleged sustained gun shot wounds on July 14, 2006, while patrons at a nightclub known as Crobar located at 530 West 28th Street, New York, New York.

Defendants maintain that the plaintiffs failed to effectuate proper service on defendants Barilich and Fortis. They assert that plaintiffs attempted to effectuate service pursuant to CPLR 308(2) which section permits service upon a natural person by "leaving it with a person of suitable age and discretion at the actual place of business, dwelling place, or usual place of abode of the person to be served." They argue that the plaintiffs attempted to effectuate service upon Kenneth Barilich and Callin Fortis at a location where neither did business or resided. They assert that the plaintiffs attempted to effectuate service upon Barilich and Fortis by leaving a copy of the Amended Complaint with a person of suitable age and discretion, Brad Miller, at 530 West 28th Street, New York, New York 10021. Additionally, defendants allege that at the time of the alleged incident, neither party had any interest or relationship with the subject premises or the Crobar nightclub at the subject premises. Defendants submit an Affidavit of Bruce Dunston, the President and sole shareholder of 530 West 28th Street, Inc. which is the general partner of a limited partnership known as 530 West 28th Street, LP., wherein Mr. Dunston asserts that neither Barilich nor Fortis had at the time plaintiffs allege to have been injured, any authority or control over the financial and operational aspects of 530 West 28th Street, LP or of 530 West 28th Street, Inc. Defendants also submit the Affidavits of Kenneth Barilich and Callin Fortis, wherein they assert that at the time of the alleged incident, neither of them had any ownership interest or operational authority in either 530 West 28th Street, LP or in 530 West 28th Street, Inc., (and have not had any since July, 2005), nor did either of them conduct any business or maintain an office at the subject premises. Furthermore, it is asserted that 530 West 28th Street has not been an actual place of business for either Barilich or Fortis since October 2004 and neither have ever resided at that location.

Plaintiffs maintain that service was properly effectuated on Kenneth Barilich and Collin Fortis, in that they were served at Crobar a/k/a 530 West 28th Street, New York, New York, which was defendants last known place of business at the time of service. They argue that defendants Barilich and Fortis were owners and operators of Crobar a/k/a 530 West 28th Street, New York, New York. Plaintiffs assert that the business is defunct and since plaintiffs do not know the whereabouts of said defendants, service should be deemed effectuated via the corporation. Plaintiffs attach as an exhibit the Affidavits of Service for Barilich and Fortis.

This Court finds that defendants have failed to demonstrate that either defendant Barilich or Fortis was properly served. Pursuant to the Affidavits of Service submitted with the instant motion, it appears that on July 10, 2007 defendants attempted to

serve Barilich and Fortis by leaving a copy of the Supplemental Summons and Amended Verified Complaint with Brad Miller, a person of suitable age and discretion, a co-worker of Barilich and Fortis', at 530 West 28th Street, New York, New York, and then mailing a copy of same the next day. CPLR 308(2) states that service can be effectuated upon a natural person by first "leaving it with a person of suitable age and discretion at the actual place of business, dwelling place, or usual place of abode of the person to be served." Both Barilich and Fortis state in the Affidavits that they have never resided at 530 West 28th Street, New York, New York. Furthermore, both men state in their affidavits that they have not conducted any business at 530 West 28th Street, New York, New York since July 2005. Plaintiffs failed to effectuate service upon either Barilich and Fortis pursuant to CPLR § 308(2), since 530 West 28th Street, New York, New York was neither of their actual places of business, dwelling places, or usual places of abode on July 10, 2007 (or on July 14, 2006 for that matter). Plaintiffs' argument that since they do not know the whereabouts of said defendants, service upon their last known address is proper, is completely without merit and contrary to the CPLR. Accordingly, as the Court lacks personal jurisdiction over the defendants, the action is dismissed as against defendants Barilich and Fortis based on plaintiffs' failure to properly effectuate service upon them.

That branch of defendants' motion for an Order pursuant to CPLR 3211(a)(4) dismissing the action as to defendant 530 West 28th Street, LP i/s/h/a 530 West 28th Street, LP d/b/a Crobar a/k/a 530 West 28th Street, Inc. ("Crobar") in that there is another action pending between the plaintiffs and Crobar for the same cause of action under Index Number 16373/06 is hereby granted.

Defendants argue that pursuant to CPLR 3211(a)(4), "Another action pending between the same parties for the same cause of action" mandates dismissal of the second action. They contend that dismissal against Crobar is mandated because it is already named as a defendant in Action No. 1, entitled Antoinette Bryan and Angelita Dunkley v. Crobar, Neal R. Schwartz and RN Realty, LLC, wherein Crobar is a named defendant in an action commenced by the plaintiffs herein, seeking the same relief as they seek herein, allegedly as a result of the same incident giving rise to the within action.

Plaintiffs assert that a motion for consolidation of the two actions involving Antoinette Bryan and Angelita Dunkley is still pending. They assert that the Court must be made aware that a motion for consolidation of Action No. 1 commenced in Supreme Court, Queens County captioned Antoinette Bryan and Angelita Dunkley v. Crobar, Neal R. Schwartz and RN Realty, LLC, Index No. 16373/06 and the above captioned matter is still pending.

Plaintiffs assert that the lawsuits arise from the same transaction and occurrence and involve common questions of law or fact and state that the motion for consolidation was marked fully submitted on October 17, 2007 before the Hon. Allan B. Weiss.

Pursuant to CPLR 3211(a)(4), a party may move to dismiss on the ground that: "there is another action pending between the same parties for the same cause of action in a court of any state of the United States; the court need not dismiss upon this ground but may make such order as justice requires."

The Court notes that on November 13, 2007 Judge Weiss rendered a decision on the consolidation motion which decision stated in relevant part: "the branch of the motion to consolidate this action with a second action pending under Index No. 11279/07 is denied without prejudice and with leave to renew after the determination of the defendants' motion to dismiss the complaint presently pending in the second action."

The Court finds that there is another action pending between the plaintiffs and Crobar for the same cause of action. Plaintiffs initially commenced in Supreme Court, Queens County an action captioned Antoinette Bryan and Angelita Dunkley v. Crobar, Neal R. Schwartz and RN Realty, LLC, Index No. 16373/06. ("Action 1"). Plaintiffs thereafter commenced the instant action in Supreme Court, Queens County, (Action 2"). As both cases arise out of the same incident, for the same cause of action for defendant Crobar, the instant action shall be dismissed against defendant Crobar.

That branch of defendants' motion for an Order pursuant to CPLR 3212(a) granting summary judgment and dismissing the action in its entirety against the individual defendants in that the undisputed evidence demonstrates the absence of any factual or legal basis to support the claims asserted by plaintiffs as against the individual defendants is hereby denied as moot as to the individual defendants Barilich and Fortis as the Court lacks personal jurisdiction. With respect to the individual defendant Dunston, plaintiff has had no opportunity to conduct discovery regarding this defendant. Since it is undisputed that the parties have not completed discovery, the motion for summary judgment against defendant Dunston is denied without prejudice as it is premature.

Accordingly, that branch of defendants' motion for an Order pursuant to CPLR 3212(a) granting summary judgment and dismissing the action in its entirety against the individual defendants is hereby denied.

This constitutes the decision and Order of the Court.

Dated: January 7, 2008

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Howard G. Lane, J.S.C.