

**Mucciolo v Azure Nightclub, Inc.**

2008 NY Slip Op 30168(U)

January 14, 2008

Supreme Court, New York County

Docket Number: 0101426/2007

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE  
*Justice*

PART 10

Mucciolo, Laurie

INDEX NO.

101426/07

MOTION DATE

- v -

MOTION SEQ. NO.

001

Azura Nightclub

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPEERS NUMBERED  
**FILED**  
JAN 22 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

In the reply defendants Mueland + Marcus have withdrawn that part of the motion pertaining to personal jurisdiction  
**SO ORDERED**

JUDITH J. GISCHE, J.S.C.

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.**

and prelim conference is scheduled for 2/2/08 @ 9:30 am in Pat 10

Dated: Jan 14, 2008

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10**

-----x

Laurie Mucciolo,

Plaintiff

-against-

Azure Nightclub, Inc., Margaret Millard  
a/k/a Peggy Millard, David Homayoun  
Marvisi a/k/a David Marvisi a/k/a  
Homayoun David Marvisi, a/k/a  
Homayoun Marzivi, John Catsimatidis,  
M&T Real Estate Inc., Louis Palermo and  
M&T Real Estate Trust,

Defendants.

-----x

**Decision/Order**

Index No.:

Seq. No. :

Present:

Hon. Judith J. Gische  
J.S.C.

**FILED**  
JAN 22 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Millard, Marvisi n/m [\$3212] w/CAN affirm, MM, DM affid, exhs . . . . .	1
Pltf's opp w/DSB affirm, exhs . . . . .	2
Catsimatidis and Palermo opp w/ NCK affirm . . . . .	3
Millard, Marvisi reply w/SHR affirm . . . . .	4

*Upon the foregoing papers the court's decision is as follows:*

*GISCHE, J.;*

This is an action by plaintiff to recover monetary damages for personal injuries she allegedly sustained at "Plaid," an establishment owned by defendant Azure Nightclub, Inc. ("Azure"). Defendants Margaret Millard and David Marvisi are alleged to be officers or principals of Azure. Millard and Marvisi contend that the claims against

them personally should be dismissed and now move for the grant of summary judgment on that issue.

Millard and Marvisi had initially sought the dismissal of this action based upon improper service. However, at oral argument they withdrew that branch of their motion. This action was commenced on January 30, 2007, with the filing of the summons and verified complaint. To the extent that there is any remaining claim by defendants that because they were not served within 120 days of the filing of the summons and complaint, this action was not timely commenced, that branch of their motion is denied. Having withdrawn their claim of lack of personal jurisdiction which was based upon improper service, the court now decides that this action was timely commenced because an action is deemed commenced upon the filing of the summons and complaint and the (previously disputed) service of the complaint was made within the requisite time set forth in CPLR § 306.

Since issue has been joined, but the note of issue has not yet been filed, the motion is properly before the court and will be decided on the merits. CPLR 3212; Brill v. City of New York, 2 N.Y. 3d 648 (2004).

### **Arguments**

Plaintiff contends that while she was at Plaid, a night club owned by Azure and located in the building owned by John Catsimatidis and Louis Palermo ("landlord") she tripped and fell, sustaining personal injuries. The accident occurred on February 13<sup>th</sup> - 14<sup>th</sup>, 2004. Defendant Millard denies that she has an ownership interest in Azure or that she is an officer. She claims that she is nothing more than a salaried employee

[\* 4 ]

(general manager). Defendant Marvisi contends that although he is the sole shareholder and officer (president) of Azure, he has observed corporate formalities and therefor there is no reason to impose personal liability upon him.

Plaintiff opposes Millard and Marvisi's motion, solely on the basis that discovery has not been conducted in this action, and therefore she lacks any information as to whether Millard is merely an employee, as alleged. Further, plaintiff claims that both defendants "controlled" the premises, but provides only the affirmation of her lawyer to support this claim. The landlord presents similar arguments to those of plaintiff, arguing that summary judgment is premature because at this stage, it is unclear whether either of the moving defendants "control" the club

### **Discussion**

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Where it appears that facts essential to justify opposition may exist but cannot then be stated, the court may deny a motion for summary judgment. R.C.S. Farmers Markets Corp. Best Section End v. Great Amer. Ins. Co., 56 N.Y.2d 918, 920-921

[\* 5 ]  
(1982).

Millard has provided her sworn affidavit that she is simply an employee of Azure and Marvisi admits he is an officer of Azure. Plaintiff, in opposition, has not presented any disputed issues of fact for trial, therefore the moving defendants are entitled to summary judgment dismissing the claims against them. Although the landlord separately contends that discovery has not been had in this action, for the same reason his opposition to this motion is ineffectual.

The law permits the incorporation of a business for the very purpose of escaping personal liability. Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp., 296 A.D.2d 103 (1<sup>st</sup> Dept 2002). In certain situations, a court may pierce the corporate veil where the (a) owner exercised complete dominion over the corporation; (b) such dominion was utilized to cause a wrong against the plaintiff; (c) under capitalization of the corporation; and (d) personal use of corporate funds, shuttling such funds in and out of the corporation. Hyland Meat Co., Inc. v. Tsagarakis, 202 A.D.2d 552 (2<sup>nd</sup> Dept 1994).

Plaintiff has not stated any facts tending to show that either of the individually named defendants were present at the time of her accident, or personally did anything negligent. Indeed she has not provided any affidavit regarding how her accident happened. Though plaintiff urges the court to apply the legal principle of *respondent superior*, and upon doing so deny the motion for summary judgment, this legal principle does not strengthen her opposition, but actually bolsters defendants' motion.

Under the legal principle of respondeat superior, an employer is liable for the

acts of its employees, provided the acts were within the scope of their employment. Riviello v. Caldron, 47 N.Y.2d (1<sup>st</sup> Dept 2001). Thus, if plaintiff can prove any of Azure's employees were negligent, then Azure could be accountable to her under this legal doctrine for damages. Employees do not become personally liable under this doctrine unless they were personally liable. Plaintiff, however, in opposition to defendants' motion only relies upon the affirmation of her lawyer who does not have personal knowledge. Even considering the statements made in the affirmation, and examining the complaint, plaintiff has not stated any facts tending to show that either Millard or Marvisi were negligent.

Plaintiff also contends that the corporate veil should be pierced based upon her attorney's affirmation that Mr. Marvisi has disregarded the corporate form. Mr. Marvisi has provided his sworn affidavit in support of the motion, claiming that he has complied with corporate formalities. Although challenging this claims, plaintiff cannot defeat the motion by simply relying on her bare-boned lawyer's affirmation. To defeat a motion for summary judgment a party must lay bare its proof. Shadowy semblances of issues will not suffice. Likewise, although the landlord contends that discovery may reveal that plaintiff's claims are true, a party cannot have the determination of a summary judgment motion postponed upon the mere speculation and hope that discovery will reveal facts supporting a cause of action or defense. Romeo v. City of New York, 261 A.D.2d 379, 689 (2<sup>nd</sup> Dept 1999).

Since the moving defendants have met their burden of proof on this motion, but plaintiff (nor the landlord) has not come forward with any factual disputes that require

[\*7]  
the trial of her claims against them, defendants Millard and Marvisi are entitled to summary judgment dismissing the complaint against them in their individual capacities.

**Conclusion**

Defendants' motion for summary judgment is hereby granted and

*It is hereby*

**ORDERED** that the clerk shall enter judgment against plaintiff and in favor of defendants Margaret Millard a/k/a Peggy Millard and David Homayoun Marvisi a/k/a David Marvisi a/k/a Homayoun David Marvisi, a/k/a Homayoun Marzivi individually severing and dismissing the plaintiff's claims against those defendants, individually; and it is further

**ORDERED** that the preliminary conference in this case is hereby scheduled for **February 21, 2008** at 9:30 a.m. in Part 10 at 80 Centre Street, Room 122; and it is further

**ORDERED** that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

**ORDERED** that this constitutes the decision and order of the court.

Dated: New York, New York  
January 14, 2008

So Ordered:

Hon. Judith J. Gische

**FILED**  
JAN 22 2008

NEW YORK  
CLERK'S OFFICE