

Gasperino v Rica Enters. Ltd.

2008 NY Slip Op 30243(U)

January 23, 2008

Supreme Court, New York County

Docket Number: 0103203/2006

Judge: Richard F. Braun

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PRESENT: **HON. RICHARD F. BRAUN**

PART 23

Index Number : 103203/2006

GASPERINO, GLENN

VS.

RICA ENTERPRISES LTD., et al

SEQUENCE NUMBER : # 002

DISMISS

Justice

INDEX NO. 103203-04

MOTION DATE 1/3/2008

MOTION SEQ. NO. #002

MOTION CAL. NO. _____

read on this motion to/for Summary judgment

PAPERS NUMBERED

#

2, 3, 4

5, 6, 7

Amended

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is granted to the extent of awarding defendant, summary judgment against the complainant and the cross claim by defendant RICA Enterprises Ltd, and allow, the claim against Employer and it is further ORDERED that the Clerk is directed to enter judgment accordingly, and the remaining claims are severed and shall continue.

This constitutes the decision and order of the Court. See separate Opinion

FILED

JAN 29 2008

NEW YORK COUNTY CLERK'S OFFICE

Dated: New York, New York, January 27, 2008

ENTER

[Signature]

J.S.C.

Check one:

FINAL DISPOSITION

NON-FINAL DISPOSITION

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23**

----- X
GLENN GASPERINO,

Plaintiff,

-against-

RICA ENTERPRISES LTD., B'LOW, INC.,
EXPLORER INVESTIGATION AGENCY, INC.
and JEFFREY GROSS,

Defendants.
-----X

Index No. 103203/06

OPINION

FILED
JAN 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

RICHARD F. BRAUN, J.:

In this action, one cause of action is asserted against defendant Explorer Investigation Agency, Inc. (Explorer): negligence. Explorer moves for summary judgment dismissing the summons and complaint. In the reply papers, Explorer for the first time moves for dismissal of any and all cross claims and counterclaims (there are no counterclaims), but defendants Rica Enterprises Ltd. (Rica) and B'Low, Inc. (B'Low) had already discussed (for some reason) dismissal of their cross claims in the opposition papers, and thus those defendants were not prejudiced by the request being raised for the first time in the reply. However, defendant Jeffrey Gross (Gross), was prejudiced, and as to that defendant, the request will not be considered (*see Givoldi, Inc. v United Parcel Serv.*, 286 AD2d 220 [1st Dept 2001]).

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 382 [2005]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Plaintiff opposes the motion because it was not supported by an affidavit. However, transcripts of depositions can be used in support of a summary judgment motion (see *Torres v City of New York*, 32 AD3d 347, 349 [1st Dept 2006]).

Plaintiff contends that Explorer's motion is defective for failure to comply with "22 NYCRR 130-1.1A." There is no such provision. If plaintiff means 22 NYCRR 130-1.1-a (a), his contention is conclusory. He has not stated what the failure is. What paper(s) is he referring to? Which copy of a paper(s) was not signed: the copy served on plaintiff or on the other defendants, the copy filed with the Clerk, or the one submitted to the court? The originals submitted to the court were all signed.

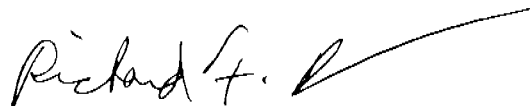
To be held liable to plaintiff, Explorer had to have a duty to him (*532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 289 [2001]). Plaintiff was not a third-party beneficiary of the contract between Explorer and Rica (see *California, State of, Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000]; *Anokye v 240 E. 175th St. Hous. Dev. Fund Corp.*, 16 AD3d 287, 288 [1st Dept 2005]). Paragraph 4 of the addendum, which amended paragraph 6 of the contract, expressly provided that no third-party beneficiary rights were created. Nor was any special duty conferred upon plaintiff. The bouncer had a duty under paragraph 2 of the addendum, which amended paragraph 4 of the contract, to report unruly actions by patrons to the manager or supervisor. Neither plaintiff nor the non-moving defendants showed that the bouncer did not do so. At most, the bouncer was guilty of nonfeasance, which did not make Explorer liable to plaintiff (cf. *Lee v Chelsea Piers*, 11 AD3d 257 [1st Dept 2004] [where there was evidence that a defendant affirmatively acted to stop the fights, there were questions of fact as to whether the defendant took on a duty to act and

breached it)). Therefore, Explorer has demonstrated that it is not liable to plaintiff as a matter of law. Plaintiff, Rica, B'Low and Gross have not shown that there are any questions of fact that require a trial as to the complaint against Explorer.

Paragraph 4 of the addendum provides that Explorer would indemnify Rica for personal injuries caused by the negligence of Explorer or its employees. Explorer has made a prima facie showing that it was not negligent, and defendants Rica and B'Low have not demonstrated that there is a question of fact pertaining to the cross claims against Explorer. Thus, Explorer is not liable on any of Rica and B'Low's cross claims for contractual indemnification, or common law contribution or indemnification.

Therefore, the motion by Explorer has been granted by this court's separate decision and order to the following extent. Summary judgment has been granted to Explorer dismissing the complaint, and cross claims against Explorer by defendants Rica and B'Low.

Dated: New York, New York
January 23, 2008



RICHARD F. BRAUN, J.S.C.

FILED
JAN 29 2008
NEW YORK
COUNTY CLERKS OFFICE