

DeMarco v 7th Ave. Rest. & Lounge, LLC

2008 NY Slip Op 31637(U)

June 9, 2008

Supreme Court, New York County

Docket Number: 0103795/2007

Judge: Doris Ling-Cohan

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

HON. DORIS LING-COHAN

PRESENT: _____
Justice

PART 36

Jennifer De Marco

INDEX NO. 103795/07

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

7th Ave Restaurants et al.
Lange

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

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

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *to dismiss by defendants Sugerman & Kaplan is granted in accordance with the attached memorandum decision.*

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

FILED

JUN 16 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/9/08

[Signature]
HON. DORIS LING-COHAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----x
Jennifer DeMarco,

Plaintiff,

Index No. 103795/07

-against-

Motion Seq. No.: 001

7th Avenue Restaurant & Lounge, LLC d/b/a
and/or Suede d/b/a and/or Club Suede,
Eytan T. Sugarman, Ronald Kaplan,
Aghoma Corp., Carlos Galvis and
Hannelore Galvis,

Defendants.

FILED
JUN 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

Doris Ling-Cohan, J.:

In this negligence action, defendants Eytan T. Sugarman (Sugarman) and Ronald Kaplan (Kaplan), who are both managing members and corporate officers of the corporate co-defendant 7th Avenue Restaurant & Lounge, LLC (7th Avenue Restaurant), a night club, move pursuant to CPLR 3211 and 3212, for an order dismissing the complaint against them and granting them summary judgment. The 3211 portions of the motion are premised upon: (1) CPLR 3211 (a) (5), as being time-barred because the amended complaint, which was served more than 20 days after service of the initial complaint without leave of the court, was untimely; (2) CPLR 3211 (a) (7), for failure to state a cause of action against Sugarman and Kaplan for the purported negligence of the 7th Avenue Restaurant; and (3) CPLR 3211 (a) (8), for lack of personal jurisdiction based on improper service.

Procedural Facts

The cause of action arose from an incident that occurred on March 20, 2004, in the 7th Avenue Restaurant where plaintiff tripped or slipped and fell. An affidavit of service attached to the original summons and complaint, dated March 19, 2007, reflects that the

summons and complaint was served by mail on that same date upon the defendants 7th Avenue Restaurant, Carlos Galvis, Hannelore Galvis, Club Suede and Suede. The mailing address for all such defendants was the same, that being 161 West 23rd Street, the address where the premises of the corporate defendant 7th Avenue Restaurant was located. An additional affidavit, dated March 23, 2007, reflects that on March 21, 2007 the defendant 7th Avenue Restaurant was also served via the Secretary of State pursuant to Limited Liability Company Law section 303. The verified complaint alleges that the defendants owned, managed, controlled, maintained and performed repairs on the premises and had actual and constructive notice of the hazardous and dangerous condition and that they also caused and created the hazardous and dangerous condition which resulted in plaintiff's injury.

Additional affidavits of service in the court file and motion papers reflect that an amended summons and verified complaint, dated June 20, 2007, was subsequently served on some of the same defendants served with the original summons and complaint, as well as on three additional defendants added to the new caption of the amended summons and verified complaint. The newly named defendants were Sugarman, Kaplan and the Aghoma Corp. Those affidavits of service reflect that the amended verified complaint was served on 7th Avenue Restaurant through the Secretary of State on June 21, 2007, and upon both Carlos Galvis and Hannelore Galvis on June 23, 2007 at apartment 4R of 161 West 23rd Street.

The amended verified complaints that were served upon both Sugarman and Kaplan were served at the same location, identified as 305 W. 72nd Street Apt 11A, New York, New York.¹ The affidavit of service for Kaplan is inconsistent and defective on its face. [See Exh. F, Notice

¹In their affidavits, both Sugarman and Kaplan deny residing in 305 W. 72nd Street, Apt 11A.

of Motion]. While it states that Kaplan was served at the 305 West 72nd Street address on June 29, 2007 at 7:45 a.m. by serving his copy of the summons and complaint upon a person of suitable age and discretion, that person allegedly being a doorman, it then provides that a copy of the amended complaint was mailed, not to the 305 West 72nd Street address pursuant to CPLR 308 (2), but to a totally different address, that being 55 West 26th Street, New York, New York. Sugarman was thereafter allegedly served on July 2, 2007 at 11:16 a.m. by affixing a copy of his summons and complaint to the door of apartment 11A after two prior attempts at service on June 23, 2007 at 6:05 p.m. and June 29 at 8:45 a.m.. Aghoma Corporation was served with a copy of the amended summons and verified complaint through the Secretary of State on June 21, 2007.

A verified answer responsive to the original summons and complaint from the defendants Carlos and Hannalore Galvis, dated July 12, 2007, was served upon plaintiff and defendant 7th Avenue Restaurant. A verified answer from the defendants 7th Avenue Restaurant, Club Suede, Suede, Sugarman and Kaplan, which was dated September 10, 2007 and which was responsive to both the original summons and complaint and the amended summons and complaint, was served by mail on that same date upon the plaintiff, defendants Carlos and Hannelore Galvis, and defendant Aghoma Corp.

CPLR 3211 (a) (5) and 3025 (a)

CPLR 3211 (a) (5) provides, among other things, that a cause of action may be dismissed because of the statute of limitations. CPLR 3025 (a) provides that a party may amend his pleading once without leave of the court under the following three circumstances: (1) within 20 days after service of the initial summons and complaint; (2) before the period to respond to the summons and complaint expires (*see* CPLR 320); or (3) within 20 days after service of a

pleading in response to the summons and complaint. CPLR 320 requires a defendant to appear within 30 days if he/she was served pursuant to CPLR 308 (2), (3), (4) or (5). Similarly, CPLR 1003, entitled "Nonjoinder and misjoinder of parties," provides that parties can be added once without leave of the court under three circumstances, those being: (1) within 20 days of service of the original summons; (2) before the expiration of the responding time (30 days); or (3) within 20 days of service of the responsive pleading.

Here, the responsive pleadings which might have extended the time for plaintiff to amend her complaint without leave of the court might have been either Carlos and Hannelore Galvis's July 12, 2007 answer or 7th Avenue Restaurant, Club Suede, Suede, Sugarman and Kaplan's September 10, 2007 answer. However, a simple time line reveals that the plaintiff's amended complaint was neither served pursuant to CPLR 3025 (a) and CPLR 1003, before the permissible statutory time periods expired under the first two categories of those statutes, nor after the permissible statutory time period for serving an amended pleading under the third category had commenced.

The time line further shows that the three-year statute of limitations for commencing a negligence action would have expired pursuant to CPLR 214 on March 20, 2007, a date one day after the original summons was served and more than three months before the amended summons and complaint were served without leave of the court on Sugarman, Kaplan and Aghoma Corp.

There are very limited situations which allow amendment to the pleadings subsequent to the running of the statute of limitations (*Martes v Brenner*, NYLJ, March 27, 2008, at 26, col 3 [Civ Ct, New York County 2008, Mendez, J.]). Unless the amended summons and complaint adding new defendants can somehow be related back to the original summons and complaint

alleging negligence, there can be no cause of action against the new defendants due to the expiration of the three-year statute of limitations (*Tricoche v Warner Amex Satellite Entertainment Company*, 48 AD3d 671 [2nd Dept, 2008]). Here, if Sugarman, Kaplan and Aghoma Corp. were not served in a timely manner before the expiration of the three year statute of limitations, and if there is no basis for relating the amended complaint back to the original complaint, that portion of the movants's CPLR 3211 (a) (5) motion should be granted.

CPLR 3211 (a) (7)

Sugarman and Kaplan argue that there is no cause of action against them personally. Plaintiff, however, argues that she should be able to pierce the corporate veil, thus relating the amended summons and complaint back to the original summons and complaint. Leave to amend to add a corporation's principal has been granted where there is a showing for a need to pierce the corporate veil (*Matias v Rebecca's Bakery*, 19 AD3d 156, 157 [1st Dept 2005]). In order to pierce the corporate veil, it must be shown that the owners exercised complete dominion and control of the corporation and that the exercise of such dominion and control was used to commit a fraud or wrong which resulted in injury to the plaintiff (*Matter of Morris v New York State Department of Taxation and Finance*, 82 NY2d 135, 141 [1993]). Absent such a showing, a corporate officer will not be held liable for the negligence of a corporation simply because of his/her official position within the corporate structure (*Bernstein v Starrett City*, 303 AD2d 530, 532 [2nd Dept 2003]). The only evidence proffered by plaintiff for piercing the corporate veil is two statements found in paragraphs four and five of the affirmation in opposition which state that the night club was operated under a different name violating the Secretary of State's guidelines, and that 7th Avenue Restaurant's own insurer allegedly indicated that settlement negotiations

have been frustrated due “Sugarman’s and Kaplan’s lack of cooperation” in that matter.

The Court of Appeals has endorsed use of the *Brock* test in determining the applicability of the CPLR 203 (b) relation back rule interposing a claim against a defendant united in interest (*Mondello v New York Blood Center-Greater New York Blood Program*, 80 NY2d 219 [1992]).

The Appellate Division in *Brock v Bua*, (83 AD2d 61 ...) gave the rule a three-prong specificity, patterned largely after the Federal “relation back” test codified in rule 15 (c) of the Federal Rules of Civil Procedure [citations omitted]. The *Brock* test examines whether (1) both claims arose out of the same conduct, transaction or occurrence; (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement; and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff in originally failing to identify all the proper parties, the action would have been brought against the additional party united in interest as well [citation omitted]. All three features must be met for the statutory relation back remedy to be operative

(*id.* at 226; *Brock v Bua*, 83AD2d 61, 68-71 [2nd Dept1981]). Applying the rationale of the *Brock* test, there is a basis for relating the amended complaint back to the original complaint. However, a review of the entire record before this court, more specifically, the allegations in both the complaint and the amended complaint as well as the referenced statements in plaintiff’s affirmation in opposition, does not reveal any material basis for piercing the corporate veil so as to support a cause of action against Sugarman and Kaplan.

For these reasons, as a matter of fact and law, though that portion of the movants’ motion to dismiss pursuant to CPLR 3211 (a) (5) can not be granted under the *Brock* test, that portion of the motion under CPLR 3211 (a) (7) should be granted. It follows that as there is no basis for a cause of action against Sugarman and Kaplan, individually, that portion of their motion seeking

summary judgment should also be granted.²

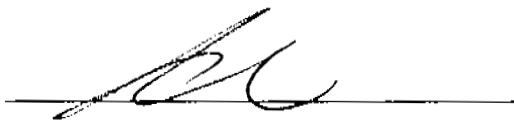
Accordingly, it is

ORDERED that the motion for summary judgment is granted and the complaint is hereby severed and dismissed as against Sugarman, Kaplan and Aghoma Corp., and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue.

Dated:

6/9/08



Hon. Doris Ling-Cohan, J.S.C .

G:\Supreme Court\Summary Judgment\Demarco.7th ave rest.wpd

FILED
JUN 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

² That portion of the motion brought pursuant CPLR 3211 (a) (8), lack of personal jurisdiction is moot, as this action is being dismissed pursuant to CPLR 3211(a)(7)