

Sapra v Ten's Cabaret, Inc.

2009 NY Slip Op 30332(U)

February 9, 2009

Supreme Court, New York County

Docket Number: 100118/08

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

~~AND~~ ANU] Safra, et ano.

Plaintiff,

- v -

Tor's Cabaret, Inc, et
al

Defendant.

INDEX NO.: 100118/08

MOTION DATE:

MOTION SEQ. NO.: 001

MOTION CAL. NO.:

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is decided
in accordance with the answered Memorandum Decision &
Order.

FILED
FEB 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: February 18, 2009

J.S.C.

Check one: [] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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ANUJ SAPRA and ARTI SAPRA,

Plaintiff,

Index No. 100118/2008

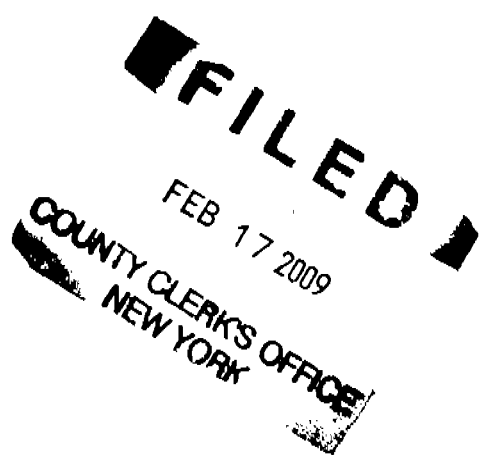
-against-

TEN'S CABARET, INC. d/b/a CLUB 9 ½,
CHRISTOPHER REDA, LF GRAMERCY PROPERTY
CO., LLC, and JOHN DOES 1-10,
SO NAMED AS THEIR IDENTITIES HAVE
YET TO BE ESTABLISHED,

Defendants.

-----X

JOAN MADDEN, J.:



In this personal injury action, defendants Ten's Cabaret, Inc. d/b/a Club 9 ½ ("Ten's") and Christopher Reda ("Reda") move to dismiss the complaint against them pursuant to CPLR 3211 (a) (7) and 3211 (a) (1). Plaintiffs oppose the motion or, in the alternative, request that the court grant them leave to replead as against Reda pursuant to CPLR 3211 (e). Defendant LF Gramercy Property Co., Inc. ("Gramercy") also opposes the motion. For the reasons set forth below, the motion to dismiss is granted as to Reda and denied as to Ten's.

Background

The following facts are based on the allegations in the complaint which for the purposes of this motion must be accepted as true. This action arises out of personal injuries sustained by the plaintiffs on the evening of January 8, 2005, at Ten's, a nightclub and lounge located at 33-39 East 21st street in Manhattan, a building owned by Gramercy. The complaint alleges that two of Ten's patrons, Mohammed Abdul-Shakoor ("Shakoor") and Mohammed Asif ("Asif") chased

plaintiffs directly in front of Ten's down a street and beat plaintiffs with a metal baseball bat.

Plaintiffs allege that on the evening of the incident, they were attending a party for a friend at Ten's when Shakoor grabbed plaintiff Arti Sapra ("Arti") and asked her to dance. When Arti refused, Shakoor became angry and her brother, plaintiff Anuj Sapra ("Anuj") came to Arti's assistance. As Anuj approached Shakoor, Asif joined Shakoor and both men struck Anuj and pushed him onto a couch. Ten's security lifted Anuj off the couch and removed Anuj, Shakoor and Asif from the dance floor. Ten's security restrained Anuj in front of the club while security led Shakoor and Asif to another area. Shakoor then appeared outside of Ten's with a metal baseball bat while security restrained Anuj. Security informed Shakoor that he could not bring the bat into the club and Shakoor got into an automobile and drove off.

When security released Anuj, Shakoor and Asif appeared and chased Anuj and Arti down the street where they were attacked with the metal baseball bat. Anuj was struck on the head, face and arms and sustained serious and life threatening injuries. Arti sustained injuries to her arm. Subsequent to the attack, the assailants were arrested and prosecuted.

The complaint alleges that both Shakoor and Asif were intoxicated as a result of the alcoholic beverages they were served at Ten's on the night of the incident, that the defendants knew or should have known that the men were intoxicated, that both were under the age of 21, and that by reason of their intoxication they caused the plaintiffs to suffer their injuries. The complaint alleges that Reda is a principal of Ten's and that he failed to exercise reasonable care to protect plaintiffs, who were patrons of Ten's, from foreseeable injuries caused by other patrons, and in particular Shakoor and Asif.

On January 4, 2008, plaintiffs commenced this action asserting claims based on

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defendants' alleged violation of New York General Obligations Law ("GOL") §11-101, for serving alcohol to visibly intoxicated patrons and GOL §11-100, for serving alcohol to patrons under 21 years of age, and for common law negligence. Defendants did not answer the complaint, but instead made this motion to dismiss it for failure to state a cause of action and based on documentary evidence.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court is limited to ascertaining whether the pleading states any cause of action and not whether there is evidentiary support for the complaint. Guggenheimer v. Ginzburg, 43NY2d 268 (1977). The complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Id.; Morone v. Morone, 50 NY2d 481 (1980).

At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference" Morgenthau & Latham v. Bank of New York Company, Inc., 305 AD2d 74, 78 (1st Dept 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999), aff'd, 94 NY2d 659 (2000). In such cases, "the criterion becomes 'whether the proponent has a cause of action, not whether he has stated one.'" Id., quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275. However, dismissal based on documentary evidence may result "only where 'it has been shown that a material fact as claimed by the pleader...is not a fact at all and ... no significant dispute exists regarding it.'" Acquista v. New York Life Ins. Co., 285 AD2d 73, 76 (1st Dept 2001), quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275. Affidavits and other evidence submitted by plaintiff may be considered for the

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limited purpose of remedying any defects in the complaint and thus preserving inartfully pleaded, but potentially meritorious claims. Rovello v Orofino Realty Co., Inc., 40 NY2d 633 (1976)

The first issue that this motion presents is whether Reda can be held personally liable for the injuries sustained to the plaintiffs. In his affidavit, Reda states that at the time of the incident he was not employed by Ten's and was not an owner of Ten's. He states that from January 2004 to December 2004, he was an employee of Ten's and in that position he performed services related to event planning including organizing a semi-weekly party at Ten's called 9 ½. According to Reda, at the end of 2004, the then owner of Ten's, Paul Coppa ("Coppa"), severed his relationship with him over financial differences.

Reda states that he became the owner of Ten's in April of 2006, which was more than a year after the incident. At that time, according to Reda, Ten's was purchased from Coppa by CDR Acquisition LLC ("CDR"), a limited liability company of which Reda was the managing member. In support of his statements, Reda attaches a copy of the purchase agreement between Coppa and CDR. Reda argues that as the managing member of a limited liability company he is not subject to personal liability and thus, even if he owned Ten's at the time of the incident, he cannot be held liable to plaintiffs.

Plaintiffs counter that there are factual issues as to Reda's relationship to Ten's at the time of the incident. In support of this position, plaintiffs submit an excerpt from the transcript of Reda's deposition in an unrelated action against Ten's (Zambrano v. Bobola; Index No.105536/06). In contrast to Reda's statement in his affidavit that he ended his employment at Ten's in 2004, in the Zambrano action, Reda testified that he was employed by Ten's in June 2005. Plaintiffs also submit a copy of the complaint in an action by Coppa against Reda which

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arose out of the April 2006 purchase of Ten's by CDR (Coppa v. Creda, LLC; Index No. 600713/07)¹.

The above evidence is insufficient to provide a basis for a cause of action against Reda. First, even assuming that Reda was an employee of Ten's at the time of the incident, he cannot be held liable for plaintiffs' injuries as there are no allegations in the complaint that Reda committed any tortious acts. Mendez v. City of New York, 259 AD2d 441, 442 (1st Dept. 1999). Next, even assuming arguendo that there were factual issues regarding Reda's ownership of Ten's at the time of the incident, Reda cannot be held individually liable based on his status as a member of CDR. See Matias v. Mondo Properties, LLC, 43 AD3d 367, 368 (1st Dept. 2007); Retropolis, Inc. v. 14th Street Development LLC, 17 AD3d 209, 210 (1st Dept. 2005); See also New York's Limited Liability Company Law §609 (a). An individual member of a limited liability company may be held liable only when such individual participates in the commission of a tort. Rothstein v. Equity Ventures, LLC, 299 AD2d 472, 474 (2d Dept 2002). Here, as indicated above, the complaint is devoid of allegations that Reda had such a role in the incident resulting in plaintiffs' injuries. Accordingly, Reda's motion to dismiss the complaint against him must be granted. Moreover, plaintiffs' request to replead must be denied as the proposed amendment, as described by plaintiffs, would not provide a basis for liability against Reda.

The next issue is whether the complaint states a cause of action against Ten's. Ten's argues that the complaint fails to state a prima facie case of negligence against it since plaintiffs' injuries were sustained as the result of a sudden, unforeseeable and unexpected assault outside of

¹It is unclear how or if the complaint in Coppa v. Creda, LLC contradicts Reda's statements in his affidavit regarding CDR's purchase of Ten's from Coppa.

the premises. See Woolard v. New Mohegan Diner, 258 AD2d 578 (2d Dept 1999); Lindskog v. Southland Restaurant, Inc., 160 AD2d 842(2d Dept 1990); Ryan v. Big Z Corp., 210 AD2d 649 (3d Dept 1994). Ten's position is unavailing since when viewed in a light most favorably to the plaintiffs, the allegations in the complaint are sufficient to state a cause of action for negligence as they describe an altercation that escalated over time and not a sudden unexpected assault. See Ash v. Fern, 295 AD2d 869 (denying defendants motion for summary judgment on common law negligence claim where the record showed that the confrontation escalated over a time period of ten or fifteen minutes and several warnings were given by defendant's employees). In addition, unlike the cases relied on by Ten's, in this action no discovery has been conducted, so that Ten's motion to dismiss is premature.

Moreover, although the injuries to plaintiffs were sustained outside the premises, the complaint alleges that the altercation leading to the injuries began at the premises and resumed in front of the premises shortly after the parties involved in the altercation were removed from the premises by Ten's employees, and this sequence of events as delineated in the complaint is sufficient to state a negligence cause of action. Compare D'Amico v. Christie, 71 NY2d 76, 88-89 (1987)(dismissing claims against employer where injuries were caused by intoxicated employee who was involved in a car accident after he was terminated from his employment and ordered to leave the workplace). Accordingly, dismissal of the negligence claim is not warranted.

Ten's also argues that the claims under General Obligations Law section 11-101 and 11-100, known as New York's Dram Shop Law, should be dismissed for failure to state a case of action. Section 11-101 makes a defendant who "unlawfully" sells alcohol to another person liable for injuries resulting from that person's intoxication. Under Alcohol Beverage and Control

Act § 65 (2), it is unlawful to provide an alcoholic beverage to a person who is visibly intoxicated. Section 11-100 makes a defendant who sells alcohol to a minor liable for injuries resulting from that person's intoxication. Under Alcohol Beverage and Control Act § 65 (1), it is unlawful to provide alcohol to any person, actually or apparently, under the age of twenty-one years. Here, as the complaint contains sufficient factual allegations that, if proven true, potentially support these claims, Ten's motion to dismiss the Dram Shop Act claims must be denied.

Conclusion

In view of the above, it is

ORDERED that the motion to dismiss by defendant Christopher Reda is granted and the complaint against him is dismissed; and it is further

ORDERED that the plaintiffs' request that the court to grant leave to replead as against defendant Reda is denied; and it is further

ORDERED that the action shall continue against defendant Ten's Cabaret; and it is further

ORDERED that Ten's Cabaret shall answer the complaint within 30 days of this decision and order; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference in Part 11, room 351, 60 Centre Street, New York, NY on March 26, 2009 at 9:30 am.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

Dated February 17, 2009

FILED
FEB 17 2009
COUNTY CLERK'S OFFICE
NEW YORK
J.S.C.