

Andriyevsky v Malhotra

2010 NY Slip Op 31046(U)

April 29, 2010

Sup Ct, NY County

Docket Number: 105401/2008

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

e
43070

Index Number : 112011/2009
ANDRIYEVSKY, PHILIP
 vs.
MALHOTRA, GARY
 SEQUENCE NUMBER : 001
 DISMISS

INDEX NO. _____
 MOTION DATE 4/6/10
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
1-3
4-5
6-7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed memorandum decision + Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):
York - See last page?

decision

FILED
 APR 30 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: 4/29/10

[Signature]
 JANE S. SOLOMON 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: PART 55

-----x
PHILIP ANDRIYEVSKY,

Plaintiff,

-against-

Index No.: 105401/2008
DECISION and ORDER

GARY MALHOTRA, MIDTOWN REALTY, INC.,
ALL SEASON PROTECTION SERVICES, INC.,
and SAL TOMMASINO,
Defendants.

FILED
APR 30 2010
NEW YORK
COUNTY CLERK'S OFFICE

JANE S. SOLOMON, J.:

Plaintiff Philip Andriyevsky (Plaintiff) sued
Defendants Gary Malhotra (Malhotra), Midtown Realty, Inc.
(Midtown), All Season Protection Services, Inc. (All Season), and
Sal Tommasino, for damages resulting from an assault at a night
club. All Season and Tommasino move, pre answer, to dismiss this
action as against them on the ground that it was not timely
commenced.

FACTS

On November 26, 2006, Plaintiff was a patron of Club
Myst, a night club located at 511 West 28th Street, in Manhattan.
Plaintiff claims that he was injured by non-party Daniel Kanfer,
an underage patron of the club, who struck Plaintiff repeatedly
with a glass bottle. Kanfer was subsequently arrested. In a
separate action bearing Index No. 106607/2007, Plaintiff sued
Club Myst and its owner Gotham City Enterprises, LLC for
negligence, a violation of the Dram Shop Act, and negligent
security. In the course of discovery in that action, Plaintiff

learned that Malhotra was a principal of Club Myst and that Midtown owns the property where the club is located. Plaintiff also learned that All Season provided security to Club Myst and that Tomassino is All Season's principal.

Plaintiff commenced this separate action in 2008 against Malhotra and Midtown, alleging the same injuries stemming from the 2007 incident, and pleading the same causes of action as in the case against Club Myst. Notably, no mention of this related action is mentioned on the RJI.

On December 3, 2009, Plaintiff amended his summons and complaint to add All Season and Tomassino (hereinafter referred to as All Season). This motion followed.

DISCUSSION

There is a three year statute of limitations for general negligence causes of action (CPLR 214[5]) and for Dram Shop Act claims (CPLR 214[2]). All Season argues that the statute of limitations expired on November 26, 2009, nine days before they were added as defendants. Plaintiff counters that the relation back doctrine applies and, therefore, the action was timely.

The relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a co-defendant for statute of limitations purposes where all of the following three conditions

are satisfied: "(1) both claims arose out of 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 he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well" (*Buran v. Coupal*, 87 NY2d 173, 178 [1995]). All Season concedes the first prong of the doctrine, but contests the remaining prongs.

Unity of interest between two parties will be found where they "stand or fall together, and [where] the judgment against one will similarly affect the other" (*Valmon v. 4 M&M Corp.*, 291 AD2d 343 [1st dept, 2002]). Moreover, their defenses to the plaintiff's claim must be the same (see, *Raymond v. Melohn Properties, Inc.*, 47 AD3d 504 [1st dept, 2008]).

All Season argues that there is no unity of interest between it and its co-defendants. In support, it submits Tommasino's sworn statement that no one who works for All Season has any ownership interest in Midtown, Malhotra has no ownership interest in All Season, and All Season has no knowledge of Malhotra's or Midtown's finances. Tommasino also notes that Club Myst had its own in-house security personnel and that All Season

"merely supplemented their employees when needed" (Tommasino Affidavit, attached to Reply Affirmation, Ex. A).

Plaintiff's argument that Malhotra is vicariously liable for All Season's actions is based on the concept that the owner of a club, here Myst, is liable for the negligent acts of the security company it retains (Affirmation in Opposition, pg. 12), but that argument is not borne out by the facts here; neither Malhotra nor Midtown retained All Season. There being no unity of interest, the court need not address All Season's further arguments.

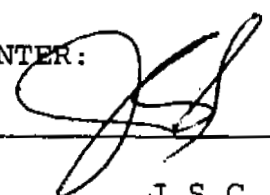
One further point bears noting. Movant did not indicate on the RJJ that this action is related to the earlier filed action and so, the motion was randomly assigned. Under the circumstances, both actions should be heard by one judge.

Accordingly, it hereby is

ORDERED that the motion to dismiss the complaint is granted and the action is severed and dismissed as to defendants All Season Protection Services, Inc., and Sal Tommasino (incorrectly sued as Sal Toommasino), and the Clerk of the Court is directed to enter judgment accordingly with costs and disbursements as taxed upon submission of an appropriate bill of costs; and it further is

ORDERED that the action is continued as to the remaining defendants, and upon being served with a copy hereof, the Clerk of the Trial Support Office is directed to transfer it to Part 2, 71 Thomas Street, Room 205, New York, NY, Justice York, presiding, where the action under index number 116607/2007 is pending.

Dated: April 29, 2010

ENTER: 

J.S.C.

JANE S. SOLOMON

FILED
APR 30 2010
NEW YORK
COUNTY CLERK'S OFFICE