

Kelley v PM Lounge

2010 NY Slip Op 32931(U)

September 29, 2010

Sup Ct, NY County

Docket Number: 118270/06

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

SUZANNE KELLEY and ROSS HENDERSON,

Plaintiffs,

- against -

PM LOUNGE, DOWNTOWN RESTAURANT GROUP, LLC, GORDON ADAMS, THE ESTATE OF WILLIAM GOTTLIEB, GANSEVOORT STREET, LLC, ADAM HOCK, UNIK ERNEST, KYKY CONILLE, DIMITRI (Last Name Unknown), PM OPERATING GROUP, LLC, UKD VENTURES, INC., UKD VENTURES, LLC, PM INDUSTRIES, LLC, and JOHN DOES 1 through 10,

Defendants.

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MOTION DATE _____

MOTION SEQ. NO. ~~4-5-007~~ 7

MOTION CAL. NO. _____

The following papers, numbered 1 to 13, were read on this motion by defendant(s) motion to dismiss the complaint for failure to state a cause of action and lack of personal service, pursuant to CPLR 3211 (motion sequence 004 and 005), and plaintiff's motion to dismiss defendants counterclaims (motion sequence 007).

Notice of Motion — Affidavits, Exhibits, Memoranda

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo)

FILED

OCT 19 2010

PAPERS NUMBERED

1-5

6-10

11-13

Cross-Motion: Yes No

NEW YORK COUNTY CLERK'S OFFICE

Plaintiffs alleged that, beginning at 2:00 A.M. on October 27, 2006, the first Friday morning after moving into their residence at 838 Greenwich Street, the plaintiffs have been frequently disturbed by excessive noise emanating from PM Lounge, a nightclub occupying an adjoining building located at 50 Gansevoort Street. Plaintiffs allege that the noise has rendered their residence "virtually uninhabitable." On December 8, 2006, plaintiffs commenced this action, which was subsequently and timely amended, as of right, to add defendants and seek

additional relief. The amended complaint alleges a single cause of action, for private nuisance, and seeks injunctive relief as well as monetary damages for the loss of their residence, damages for various personal injuries, and economic losses in the form of lost wages and medical fees.

Defendants PM Lounge, Adams, Hock, UKD, UKD Inc, UKD LLC, and PM Industries (collectively, the "Motion sequence four Movants") filed motion sequence four, pre-answer, seeking dismissal, costs, and attorneys' fees pursuant to 1) CPLR 3211(a)(7), for failure to state a cause of action; 2) CPLR 3211(a)(8), for lack of personal jurisdiction; 3) CPLR 3013, for failure to sufficiently specify the transactions or occurrences that are the subject of the complaint; and 4) LLC Law 609(a), which exempts members of a limited liability corporation from liability arising solely by reason of being a member of the LLC. Defendants Gansevoort Street, LLC and the Estate of William Gottlieb (collectively, the "Landlord Defendants") brought motion sequence five pre-answer to dismiss the plaintiffs' complaint pursuant to CPLR 3211(a)(7), for failure to state a cause of action.

Plaintiffs brought motion sequence seven seeking to dismiss Defendants' Downtown Restaurant Group, LLC and PM Operating (hereinafter collectively "Counter-claiming Defendants") counterclaims pursuant to 3211(a)(6), for asserting a counterclaim that cannot be properly interposed; and 3211(a)(7), for failure to state a cause of action.

The Parties

Defendant PM Lounge is the trade name for the nightclub located at 50 Gansevoort Street. The PM Lounge nightclub is wholly owned and operated by defendant PM Operating Group, LLC (hereinafter "PM Operating"). Defendants Gordon Adams and John Does One through Ten are alleged employees of PM Operating. The members of PM Operating are defendants Adam Hock and UKD Ventures, LLC (hereinafter "UKD LLC"), the members of which, in turn, are the three defendants Unik Ernest, Kyky Conille, and "Dimitri" (hereinafter

collectively "UKD").

In addition to being a member of PM Operating, Hock is also a member of Downtown Operating Group, LLC (hereinafter "Downtown"), which is the lessee of the 50 Gansevoort Street property upon which the PM Lounge is located. The lessors of that certain property are defendants Gansevoort Street, LLC and the Estate of William Gottlieb.

The remaining two defendants are PM Industries, LLC (hereinafter "PM Industries") and UKD Ventures, Inc. (hereinafter "UKD Inc"). The address listed with the New York Department of State for PM Industries is 50 Gansevoort Street, the location of the subject nightclub, and the registered address for both UKD Inc and UKD LLC is 864 Broadway, Apt. 4. It is unclear what role, if any, these entities play in the operation of the subject nightclub.

DISCUSSION

CPLR 3211 [a][7] provides:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

7. the pleading fails to state a cause of action

Upon a CPLR 3211 [a][7] motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments" (*Foley v D'Agostino*, supra; *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment" (*Foley v D'Agostino*, supra). "[W]e look to the substance [of the pleading] rather than to the form (*Foley v D'Agostino*, 21 AD2d 60, 65 [1 Dept 1964]). "Such a motion is solely directed to the inquiry of whether or not the pleading, considered as a whole, 'fails to state a cause of action' . . .

[I]looseness and verbosity must be overlooked on such a motion if any cause of action can be spelled out from the four corners of the pleading" (*Foley v D'Agostino*, supra; See Siegel, 38 St John's L Rev).

In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. (*Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 262 A.D.2d 188 [1st Dept. 1999].)

On CPLR 3211 motions, the court affords the pleadings a liberal construction, takes the allegations of the complaint as true, and provides plaintiff the benefit of every possible inference (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). A motion to dismiss for failure to state a cause of action may be granted only where the complaint utterly fails to state any cognizable cause of action (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]). Any evidentiary material submitted by the defendant must show that a fact as claimed by the plaintiff is not a fact at all; otherwise, dismissal will not be granted (*Guggenheimer v Ginzburg*, 43 NY2d 268, 274-275 [1977]).

Motion Sequence Four

Defendants "PM Lounge," Adams, Hock, UKD, UKD Inc, UKD LLC, and PM Industries (collectively, the "motion sequence four Movants") file this motion to dismiss, and for costs and attorneys' fees, seeking dismissal pursuant to; 1) CPLR 3211(a)(7), for failure to state a cause of action; 2) CPLR 3211(a)(8), for lack of personal jurisdiction; 3) CPLR 3013, for failure to sufficiently specify the transactions or occurrences that are the subject of the complaint; and 4) LLC Law 609(a), which exempts members of a limited liability corporation from liability arising solely by reason of being a member of the LLC.¹

Attached to the motion papers as Exhibit "C" is an affidavit sworn by Hock, detailing the

¹The Motion sequence four Movants also move pursuant to CPLR 3016(b), for failure to sufficiently particularize the circumstances of a cause of action based upon fraud or mistake. However, that statute need not be discussed here because it is not directly pertinent to any of Movants' arguments, and is only referenced tangentially to underscore plaintiffs' failure overcome the exemptions provided by NY LLC Law 609(a).

relationship between the various Motion sequence four Movants generally as described hereinabove. The Hock affidavit maintains that PM Lounge is merely a trade name and does not exist as a distinct entity, that neither PM Industries nor UKD Inc conduct any business whatsoever, related to the nightclub or otherwise, and that neither he nor UKD were personally served with the amended complaint.

The motion sequence four movants first argue that none of said Movants were properly served pursuant to CPLR 308, 311, or 311-a, the statutes applicable to service of process on natural persons, corporations, and limited liability companies, respectively.

The motion sequence four movants next argue that plaintiffs failed to state a cause of action against any of the Motion sequence four Movants. PM Lounge does not exist, and neither PM Industries nor UKD Inc were involved in the operation of the nightclub. Adams, Hock, and UKD are sued as natural persons, and the complaint fails to allege facts sufficient to sustain a cognizable claim of private nuisance against each as an individual. Further, UKD, UKD LLC, and Hock are statutorily exempted from liability arising from operation of the subject nightclub. Additionally, the Motion sequence four Movants argue that plaintiffs failed to state a cause of action because their allegation consist of mere legal conclusions.

Lastly, the motion sequence four Movants argue that plaintiffs failed to meet the minimum particularity standard of CPLR 3013 in that the plaintiffs fail to distinguish which alleged acts or omissions were committed by which defendants, and because the plaintiffs' overuse of the disjunctive "and/or" renders the allegations "indecipherable."

Plaintiffs opposed the personal jurisdiction portion of the motion by submitting affidavits of service as an exhibit. The amended complaint was served with a supplemental summons upon PM Lounge by personal service at the 50 Gansevoort address. Service was likewise made, via the "deliver and mail" method at the same 50 Gansevoort address, upon defendants UKD, Hock, and Adams. Plaintiffs effected service upon defendants UKD LLC, UKD Inc, PM

Operating, and PM Industries by service upon the New York Secretary of State.

Plaintiffs oppose the CPLR 3211(a)(7) and 3013 portions of the motion by arguing that all elements of the tort of private nuisance are alleged in the amended complaint. Plaintiffs "properly assert[]" those elements "against all currently known parties who own, operate and/or manage the PM Lounge and who participated in the decisions to operate the nightclub in a tortious [sic] manner" (Plaintiffs' Opp. Memorandum at 11). Further, plaintiffs argue that corporate officers and employees can be held personally liable for their participation in the corporation's tortious conduct, regardless of whether the corporate veil is pierced.

As recently noted by this court in *Kahona Beach LLC v Santa Ana Restaurant Corp.* (2010 NY Slip Op 32347, 7-8 [2010; Kenney, J.]), the elements of the tort of private nuisance are "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (*JP Morgan Chase Bank v Whitmore*, 41 AD3d 433 [2d Dept. 2007], quoting *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 584, 570 [1970]). Aside from the fourth element of establishing property rights, all the other elements are generally left to a jury "unless the evidence is undisputed" (*Kahona Beach LLC*, 2010 NY Slip Op 32347 at 8, quoting *Weinberg v Lombardi*, 217 AD2d 579, 579 [2d Dept. 1995]).

Plaintiff Kelley has averred that she is the sole owner of the subject residence in the verified amended complaint, and all other elements of the private nuisance tort have been generally alleged therein. This matter should, therefore, ostensibly go to a jury as to all motion sequence four defendants.

PM Operating is a limited liability company, however, whose members are statutorily insulated from liability solely because of said status, pursuant to LLC Law 609(a). Therefore, Hock, UKD LLC, and UKD, who are all sued herein merely because of ownership and alleged operation of the subject nightclub, cannot be held liable for the alleged private nuisance, unless

plaintiffs allege tortious acts independent of such ownership status or plaintiffs pierce the corporate veil (see *Nezry v Haven Ave. Owner LLC*, 2010 Slip Op 51506 [Sup Ct, New York County 2010]).

Taking into consideration CPLR 3013, plaintiffs have not made sufficient allegations specifying particular independent tortious actions by Hock, UKD LLC, or UKD. Rather, "the amended complaint contains mere bare-bones allegations" that all the defendants caused the subject noise conditions, "and is completely devoid of any sufficiently particularized support" (*Retropolis, Inc. v 14th Street Development LLC*, 17 AD3d 209, 211 [1st Dept. 2005]). This is insufficient to overcome the limitation of liability outlined in LLC Law 609(a) (see *Retropolis, Id.* at 211).

Plaintiffs have, furthermore, not made any allegations that would argue to pierce the corporate veil. Piercing the veil generally requires a showing that "(1) the owners exercised complete domination of the corporation with respect to the transaction [or occurrence] attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff [through abuse of the privilege of doing business in the corporate form]" (*Morris*, 82 NY2d at 141-42). Such piercing is particularly appropriate, for example, "when the owners use the corporation as a mere device to further their personal rather than the corporate business" (*Morris, Id.* at 141). Plaintiffs have made "neither the[] conclusory statements [alleging domination used to commit fraud or wrong] nor allegations of fact from which these conclusions could be drawn" (*Lichtman v Estrin*, 282 AD2d 326, 329 [1st Dept. 2001]). It is therefore appropriate to dismiss the action as to Hock, UKD LLC, and UKD.

The Court also notes that all the cases presented by the plaintiffs in support of their contention that LLC members can be held liable for the tortious acts of a corporation are irrelevant, as they discuss corporate officers rather than LLC members.

Similarly, the motion to dismiss for failure to state a cause of action as against defendant Gordon Adams must be granted, as plaintiffs have failed to make sufficiently

particularized statements to impose personal liability on the agent of an LLC participating in the conduct of the business of the LLC (see LLC Law 609[a]). Rather, plaintiffs have merely stated that they made phone calls to employee Adams, and alleged generally that each of the defendants "caused and/or allowed music to be played" and "failed and refused to abate" the same (Amend. Compl. ¶¶ 81, 84-86, 88, 103, 116).

Regarding UKD Inc and PM Industries, defendants cite for support *Meyer v Guinta*, (262 AD2d 463, 464 [2d Dept. 1999]), which states that "[b]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action." However, the Court does not believe that the defendants have provided sufficient evidence to prevail on a pre-answer motion. The Hock affidavit states that UKD Inc and PM Industries are unrelated to the subject nightclub and that they have never conducted any business. This begs the question of why these defendants were organized in the first instance. Movants have not provided any documentary evidence as to the purpose of these defendants, and the plaintiffs should therefore have an opportunity to conduct discovery to ascertain whether that purpose involved the nightclub. As UKD Inc and PM Industries have failed to prove their case sufficiently to survive a pre-answer motion to dismiss, that portion of their motion seeking dismissal for failure to state a cause of action must be denied. The Court also notes that LLC Law 609(a) is irrelevant to these two defendants, as there is no evidence that PM Industries or UKD Inc are members of any of the other defendant organizations.

Lastly, this court has previously noted that it "is well settled that a trade name 'has no separate jural existence, and that it can neither sue nor be sued independently of its owner'" (*Leser v Karenkooper.com*, 2008 WL 192099, 2 [Sup Ct, New York County 2008; Kapnick, J.], quoting *Provosty v Lydia E. Hall Hosp.*, 91 AD2d 658, 659 [2d Dept. 1982]). Here, however, the trade name PM Lounge is being sued alongside its owner. There is therefore no reason to dismiss pre-answer as against PM Lounge.

[* 9]

Motion Sequence Five

Defendants Gansevoort Street, LLC and the Estate of William Gottlieb² brought motion sequence five to dismiss the plaintiffs' complaint pursuant to CPLR 3211(a)(7), for failure to state a cause of action. The Court notes that they failed to attach a copy of the amended complaint to their motion and the motion may be incomplete as to form. However, plaintiff raises no objection and plaintiff attaches the amended complaint to their opposition papers.

The Landlord Defendants' argument rests on the fact that they are out of possession landlords and as such an action for nuisance created on their property cannot be attributed to them. Additionally, movants note that Justice Stallman entered an Order after a hearing, in which he found that there had been no Noise Code violations on April 6, 2007. Movants also argue that the elements of the private nuisance tort were not pleaded in the amended complaint. Plaintiffs argue that even out of possession landlords can be liable for private nuisances.

We first note that J. Stallman's Order does not touch on whether a private nuisance existed at the times discussed in the amended complaint, and therefore is not dispositive here. We also note that, as we must construe the complaint liberally even if it is inartfully plead, movants' argument, that the amended complaint lacked the language expressly laying out the elements of private nuisance, is not convincing.

The majority of the cases cited by the plaintiff appear to deal with the type of nuisance that causes a personal injury, rather than the tort of private nuisance. As such, they are irrelevant, as plaintiffs have not made any claims as to negligence. For example, in *State of New York v. Monarch Chemicals, Inc.* (90 AD2d 907 [3d Dept. 1982]) the defendant landlord was sued for the tort of negligent maintenance of a public nuisance, which negligence could be referred back to the landlord's selection of its tenants, which in that case was a chemical

² The plaintiffs amended complaint does not identify Defendant Estate of William Gottlieb as a co-owner of the property leased to the other defendants, (amended complaint para. 11) however, the Landlord Defendants concede this fact in their motion to dismiss (aff of Neil Bander, para. 2).

company that subsequently polluted the property with dangerous chemicals.

Movants have established that they were out of possession landlords. In response, plaintiffs have made no arguments that the amended complaint alleges that the landlords personally made any of the alleged noises that are the subject of the underlying suit, but rather they have relied in their arguments upon negligence standards that are irrelevant to the elements of private nuisance. Reading the complaint in light of CPLR 3013, which requires specificity in pleading, the Court does not believe that plaintiffs have stated a cognizable claim for private nuisance as against the Landlord Defendants, and the motion herein must therefore be granted as to those two parties.

For these reasons and upon the foregoing papers, it is,

ORDERED that the Defendants', Gansevoort Street, LLC and the Estate of William Gottlieb, motion sequence five to dismiss the plaintiffs' complaint pursuant to CPLR 3211(a)(7), for failure to state a cause of action is granted, and the amended complaint is dismissed in its entirety as to said defendants; and it is further,

ORDERED that motion sequence four to dismiss the plaintiffs' complaint pursuant to CPLR 3211(a)(7), for failure to state a cause of action is granted as to defendants Gordon Adams, Adam Hock, Unik Ernest, Kyky Conille, Dimitri (last name unknown), and UKD Ventures, LLC, and the amended complaint is dismissed in its entirety as to said defendants; and it is further,

ORDERED, that motion sequence four to dismiss plaintiffs' complaint pursuant to CPLR 3211(a)(7), for failure to state a cause of action is denied as to defendants PM Lounge, UKD Ventures, Inc., and PM Industries, LLC; and it is further,

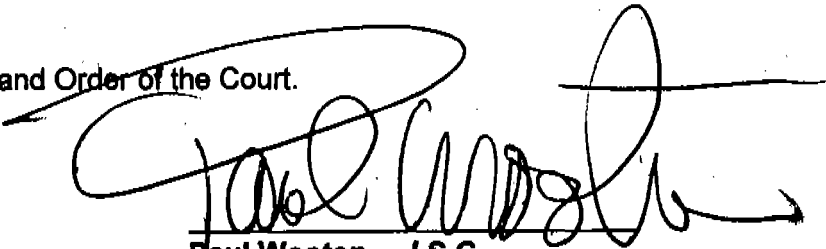
ORDERED, that the issue of whether the remaining defendants in motion sequence four were properly served to acquire jurisdiction pursuant to CPLR 3211(a)(8), is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee, or

another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further,

ORDERED that the remaining issues of motion sequence four regarding defendants' motion to dismiss, and plaintiffs' motion sequence seven seeking to dismiss Counter-Claiming Defendants' claims are stayed and held in abeyance, pursuant to CPLR 2201 pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR § 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further,

ORDERED that a copy of this order with notice of entry shall be served on the Special Referee Clerk of the Motion Support Office (Room 119) to arrange a date for the reference to a special referee; and it is further,

This constitutes the Decision and Order of the Court.


Paul Wooten J.S.C.

Dated: September 29, 2010

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

FILED
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