Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

HAGOP A. PARTAMIAN, Individually and as Administrator of the Estate of ARMAN PARTAMIAN, Deceased

Plaintiff,

-against-

HENRIK SUCONICK, ALEX N. STUCKI, DANIEL M. WECH, ADAM C. BROWNSTEIN DEVIN MCCLAIN, MARK G. BOISE, JOHN DOES STUDENTS and SCOTT R. KIPPHUT and SCOTT N. HILTS d/b/a KIPPHUT & HILTS ENTERPRISES,

Defendants.

Index Number: 26069 2009

Motion Date: November 23, 2011

Motion Cal. Numbers: 11 & 12

Motion Seq. No.: 4 & 5

The Order dated April 20, 2012 is withdrawn and the following is substituted in its place

The following papers numbered 1 to 45 read on this motion by defendant Henrik Suconick (Suconick) for summary judgment dismissing the complaint and all cross claims asserted against him; and, by separate notice of motion, defendant Daniel M. Wech (Wech) moves for summary judgment dismissing the complaint and all cross claims insofar as asserted against him; and on this cross motion by defendant Alex N. Stucki (Stucki) to consolidate for a joint trial the instant action with a companion action in this county entitled *Partamian v Brayer* (index No. 4817/2011), for an order pursuant to CPLR 1007 permitting him to commence a third-party action against Karen Uhl Enterprises d/b/a The Statesman and/or The Statesmen, and for an order directing that depositions in the third-party action and the consolidated action be held within 60 days after the date of said order.

Papers
Numbered

Mot.Seq.# 4	Notice of Motion - Affidavits - Exhibits	1 - 4
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Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

Decedent was a 19 year old student attending SUNY Geneseo located in Livingston County, New York. Decedent had been invited to pledge the Orange Knights, better known as the PIGS, an unincorporated association. During a gathering on February 28, 2009, at the premises leased by the PIGS, decedent, along with two other pledges, was allegedly encouraged and instructed to consume excessive amounts of hard alcohol and beer provided by the PIGS. After decedent passed out, he was taken to a bedroom and left unattended, overnight. Decedent died during the night as a result of acute alcohol poisoning. Plaintiff, decedent's father, individually and as administrator of decedent's estate, commenced this wrongful death and survival action against several members of the PIGS, alleging, inter alia, that defendants were negligent in encouraging and directing decedent to consume inordinate amounts of alcohol and against Scott R. Kipphut and Scott N. Hilts d/b/a Kipphut & Hilts Enterprises, owners and lessors of the premises.

The separate motions by Suconick and Wech for summary judgment dismissing the complaint insofar as asserted against them are denied. Suconick and Wech move for

summary judgment dismissing plaintiff's negligence claims and all cross-claims arguing that they were not physically present for the events which transpired on February 28, 2009 resulting in decedent's death. Plaintiff opposes on the ground, inter alia, that these defendants may he held liable under the theory of concerted action. Liability under a concerted action theory rests upon the principle that "[all] those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him" (*see Bichler v Eli Lilly & Co.*, 55 NY2d 571, 580-581 [1982], quoting Prosser, Torts § 46, at 2 92 [4th ed]; *Rodriguez v City of New York*, 35 AD3d 702 [2006]; *Weldon v Rivera*, 301 AD2d 934 [2003]; *see also* Restatement [Second] of Torts § 876). Under this theory, one who does not directly cause an injury may be jointly and severally liable for said injury (*id.*).

Based upon a careful consideration of all the papers submitted, particularly the deposition testimonies, and the legal arguments of counsels, the court finds that there are numerous issues of fact, at least, as to whether there was a common purpose, an agreement, or an understanding among the members of the PIGS, what was involved in the pledging process and the alleged hazing activities, and the extent of the role and/or involvement of Suconick and Wech in the pledging and/or alleged hazing process. In addition, a motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Glick & Dolleck v. Tri-Pac Export Corp., 22 NY2d 439, 441 [1968]; Lopez v. Beltre, 59 AD3d 683 [2009]; Baker v. D.J. Stapleton, Inc., 43 AD3d 839 [2007]).*

In view of the foregoing, Suconick's and Wech's respective motions for summary judgment dismissing the complaint and all cross claims asserted against them are denied.

Initially, the court notes that Stucki's denomination of his motion as a "cross motion" was incorrect because a cross motion can only be made for relief against a moving party (CPLR 2215). As such, the cross motion should have been filed as a separate notice of motion for summary judgment since it was not made against the moving parties, that is, Suconick and Wech (*see Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986, 987-988 [2005]). Despite this procedural irregularity, and given the absence of prejudice in light of the fact that all parties responded to the cross motion, the court will entertain the cross motion.

The branch of Stucki's cross motion to consolidate the instant action with a related action in Supreme Court, Queens County entitled *Partamian v Brayer* (Index No. 4817/2011) is granted (CPLR 602[a]). Where, as here, the actions arise from the same incident and the allegations of negligence against the defendant in the second action are indistinguishable from those asserted against the defendants in the first action, consolidation is appropriate in

the interest of judicial economy and to avoid the possibility of inconsistent verdicts (*see e.g. Fashion Tanning Co. v D'Errico & Farhart Agency*, 105 AD2d 1034, 1035 [1984]; *L. G. J. K. Realty Corp. v Hartford Fire Ins. Co.*, 48 AD2d 670 [1975]).

Accordingly, Action #1 Index No. 26069/2009 and Action #2 Index No. 4817/2011 are consolidated for all purposes under Index No. 26069/2009. Additionally, the consolidated action is marked off the trial calendar to allow the parties to conduct discovery subject to restoration pursuant to CPLR 3404.

Upon being served with a copy of this order with notice of entry, The Clerk of the Supreme Court shall combine all of the papers filed in the actions consolidated under Index No. 26069/2009.

It is noted that at the deposition of defendant, Henrik Sukonnik, s/h/a Henrik Suconick, the attorneys for all parties stipulated to amending the caption of this action to reflect the correct spelling of the defendant's name. However, the caption was NOT amended so as to delete the name of any other defendant.

Accordingly, the caption of the actions combined is amended to reflect the consolidation and the stipulation of the parties and shall be as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

HAGOP A. PARTAMIAN, Individually and as Administrator of the Estate of ARMAN PARTAMIAN, Deceased

Index No. 26069/2009

Plaintiff

-against-

HENRIK SUKONNIK, ALEX N. STUCKI, DANIEL M. WECH, ADAM C. BROWNSTEIN DEVIN MCCLAIN, MARK G. BOISE, JOHN DOES STUDENTS, SCOTT R. KIPPHUT and SCOTT N. HILTS d/b/a KIPPHUT & HILTS ENTERPRISES and KEVIN BRAYER a/k/a KEVIN BRAER

Defendant

Defendant Stucki shall serve a copy of this order with notice of entry upon all parties to the actions consolidated and The Clerk of the Supreme Court, Queens County.

Upon being served with a copy of this order with Notice of Entry, the Clerk of the Supreme Court shall combine all of the papers filed in the actions consolidated under Index No. 26069/2009.

Stucki is further directed to serve upon counsel for defendant Kevin Brayer (Brayer), within 30 days of entry of this order, all previously exchanged discovery in Action #1 including copies of all deposition transcripts and all pleadings. Moreover, since the Note of Issue in Action #1 was filed on April 27, 2011 and it is not due to be filed in Action #2 until January 25, 2013, Brayer's time to move for summary judgment is not limited by the 120 days applicable to the parties in Action #1. Nevertheless, since the Note of Issue in the consolidated action is not stricken, and restoration is subject to CPLR 3404 and because it is impossible to determine what, if any, discovery remains outstanding in Action #2, any motion for summary judgment made by Brayer shall be made as soon as possible and upon good cause shown..

The branch of Stucki's cross motion for an order seeking permission to commence a third-party action against Karen UH Enterprises d/b/a The Statesman and/or The Statesmen (The Statesman), is denied. Generally, a defendant may freely initiate a third-party action against a third-party defendant at any time after serving an answer to the complaint (see CPLR 1007). However, Judge Ritholtz' Order, clearly set forth in the Compliance Conference Order, states that a third-party action shall be commenced promptly upon discovery of the identity of the proposed third-party defendant, but not more than 30 days after completion of depositions, unless for good cause shown. Given that Stucki has been a defendant in this action since its inception; knew the identity of the proposed third-party defendant, The Statesman; and that plaintiff commenced an action against The Statesman but never served the complaint in that action; and further, depositions were completed on or about May, 2011, Stucki has failed to show "good cause" for delaying, until the eve of trial, his application to commence a third-party action against The Statesman.

A copy of this order is being mailed to the attorneys for all parties in both actions.

Dated: April 23 , 2012

J.S.C.