

**McDaniel v 1460 Second Ave. Rest. Group, LLC**

2013 NY Slip Op 30127(U)

January 18, 2013

Supreme Court, New York County

Docket Number: 106837/09

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----x  
ALISON MCDANIEL

Plaintiff,

Index No.106837/09

-against-

**DECISION/ORDER**

1460 SECOND AVENUE RESTAURANT GROUP,  
LLC, ET AL

Defendants.

**FILED**

JAN 25 2013

-----x  
HON. CYNTHIA S. KERN, J.S.C.

NEW YORK

Recitation, as required by CPLR 2219(a), of the papers considered in the county of ~~NEW YORK~~ **ALBANY** for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	_____
Answering Affidavits to Cross-Motion.....	<u>3</u>
Replying Affidavits.....	_____
Exhibits.....	_____

Plaintiff commenced this gender discrimination and retaliation lawsuit based on events which occurred when she was an employee of the Southern Hospitality Restaurant (the "Restaurant"), owned and operated by 1460 Second Avenue Restaurant Group, LLC ("1460 Restaurant") and various other defendants. Defendant Justin Timberlake ("Timberlake") has brought the present motion to dismiss the complaint on the ground that he is not the owner of the Restaurant and was not properly served, to quash plaintiff's subpoena to Barry Klarberg, Timberlake's manager and for sanctions. Plaintiff has brought a cross motion to enforce the

subpoena and for attorney's fees on the motion. For the reasons stated below, the motion to quash the subpoena and for sanctions is denied, the cross motion to enforce the subpoena is granted although the request for attorney's fees is denied and the motion to dismiss for lack of personal jurisdiction is adjourned for a conference until after the subpoena is complied with and the remainder of the motion to dismiss is denied.

The relevant facts are as follows. Plaintiff is a former employee of the Restaurant. She brought the present action complaining of a hostile work environment at the Restaurant. She alleged that she was treated in an unfair and sexist manner by upper management, was yelled at and assaulted. After writing a letter of complaint, she was fired. She does not allege that Timberlake was involved in any of these events. She commenced the present action in 2009 alleging various violations of New York's Human Rights Law and intentional and negligent infliction of emotional distress. She named Timberlake as a defendant and alleged in her complaint that he was a member, shareholder or owner of 1460 Restaurant. She served him in the action by leaving the pleadings at the Restaurant.

Defendant Timberlake has never answered the complaint in this action. In November 2010, plaintiff moved for a default judgment against Timberlake and another defendant who had not answered. In response to this motion, defendant Eytan Sugarman, who is the majority owner of 1460 Restaurant, filed an affidavit that Timberlake was not an owner of 1460 Restaurant and had never been an owner or employee of 1460 Restaurant. He also stated that Timberlake did not use the Restaurant location as a usual place of abode or business address. In opposition to the motion, plaintiff introduced evidence showing Timberlake's involvement in the Restaurant, including the restaurant's internet website which identified Timberlake as "our partner", a New

York Times article which states that the Restaurant is owned by “Justin Timberlake” and a press release and other internet articles indicating Timberlake’s involvement with the Restaurant. The court denied plaintiff’s motion for a default judgment on the ground that the materials submitted by plaintiff did not establish that Timberlake had a relationship with the property or the entity which renders service on him at the Restaurant proper. However, the court held that the matter “may be revisited if discovery uncovers evidence warranting another outcome.” The court did not order that a traverse hearing be held to determine whether personal jurisdiction was acquired over Timberlake pursuant to the service at the Restaurant. On August 20, 2012, plaintiff issued a subpoena duces tecum and ad testificandum to Barry Klarberg, who is Timberlake’s manger.

Defendant Timberlake initially argues that the complaint should be dismissed against him pursuant to CPLR 3211 on the ground that he is not the owner of the Restaurant. In making this motion, he does not specify whether he is seeking to dismiss the complaint pursuant to CPLR 3211 (a)(1), a defense founded upon documentary evidence or whether he is seeking to dismiss the complaint pursuant to CPLR 3211 (a) (7), that the pleading fails to state a cause of action. As will be explained more fully below, his motion to dismiss is denied on both grounds at the present time.

To succeed on a motion to dismiss based on CPLR 3211 (a)(1), the documentary evidence that is submitted must conclusively establish a “defense to the asserted claims as a matter of law.” *511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144, 150 (2002). A motion to dismiss based on documentary evidence “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *McCully v Jersey Partners, Inc.*, 60 A.D.3d 562 (1st Dept 2009).

On a motion to dismiss a complaint for failure to state a claim pursuant to CPLR section 3211 (a)(7), the court's role is to decide whether "accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the fact stated.." *Campaign For Fiscal Equity v State of New York*, 86 N.Y.2d 307, 318 (1995). The court must accept "each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of facts." 219 *Broadway Corp. v Alexander's Inc.*, 46 N.Y.2d 506 (1979). While affidavits may be considered on a motion to dismiss, unless the motion has been converted by the court to a motion for summary judgment, the affidavits will not be considered to determine whether there is evidentiary support for a properly pleaded claim but will only be accepted from a plaintiff for the limited purpose of remedying pleading defects in the complaint. *Nonnon v City of New York*, 9 N.Y.3d 825, 827 (2007); *Rovello v Orofino Realty Co.*, 40 N.Y.2d 633 (1976). "Affidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 unless they 'establish conclusively that petitioner has no claim or cause of action.'" *Lawrence v Graubard Miller*, 11 N.Y.3d 588, 595 (2008). "CPLR 3211 allows plaintiff to submit affidavits, but it does not oblige him to do so on penalty of dismissal as is the case under CPLR 3212 when defendant has made an evidentiary showing that refutes the pleaded case of action. If plaintiff chooses to stand on his pleadings alone, confident that its allegations are sufficient to state all the necessary elements of a cognizable cause of action, he is at liberty to do so and, unless the motion to dismiss is converted by the court to a motion for summary judgment, he will not be penalized because he has not made an evidentiary showing in support of his complaint." *Rovello*, 40 N.Y.2d at 635-636.

In the present case, to the extent that Timberlake is seeking to dismiss the complaint on the ground the documentary evidence establishes that plaintiff does not have a cause of action as a matter of law, the motion is denied. The only documentary evidence which defendant has submitted in support of his motion, as opposed to affidavits and depositions which are not documentary evidence, is an unsigned copy of the 1460 Restaurant operating agreement. Plaintiff's allegation that Timberlake has an ownership interest in the restaurant is not flatly contradicted by this documentary evidence. As a result, Timberlake is not entitled to dismissal of the complaint on the ground of a defense based on documentary evidence.

Timberlake is also not entitled to dismissal of the action on the ground that the pleading fails to state a cause of action. To support his motion to dismiss, Timberlake primarily relies on his own affidavit stating that he does not have an ownership interest in the Restaurant, the affidavit of Sugarman that he does not have any such interest and deposition testimony of various witnesses. However, the issue on a motion to dismiss is not whether plaintiff can withstand a summary judgment motion or whether plaintiff has submitted evidentiary material in support of the pleaded claims, but whether standing on the pleading alone, plaintiff has stated all the necessary elements of a cognizable cause of action. Because plaintiff has clearly alleged that Timberlake does have an ownership interest in the Restaurant, which would create a basis for liability as against him, she is not to be penalized based on a failure to make an evidentiary showing in support of the allegation in her complaint that he is the owner. Moreover, the court is not going to convert the motion to a motion for summary judgment at this time while the subpoena directed to Timberlake's manager still has not been complied with as plaintiff is entitled to have this discovery to determine whether there is any evidentiary basis to oppose a

summary judgment motion by Timberlake.

Timberlake has also made a motion to dismiss the complaint for lack of personal jurisdiction. He argues that since he is not an owner of the Restaurant, service of the pleadings on him at the Restaurant does not establish jurisdiction over him. Since Justice Solomon has already held in her previous decision denying plaintiff's motion for a default judgment that the matter of whether or not there is jurisdiction over Timberlake "may be revisited if discovery uncovers evidence warranting another outcome" and she did not dismiss the complaint when she denied the motion for a default judgment, it would be inappropriate to order a traverse hearing on the issue of whether service on the Restaurant was sufficient to acquire jurisdiction over Timberlake before plaintiff has obtained compliance with the subpoena issued to Timberlake's manager since compliance with the subpoena may uncover some evidence with respect to whether Timberlake has an ownership interest in the Restaurant. Based on the foregoing, the parties are directed to contact the court to schedule a conference on this case after there has been compliance with the subpoena to schedule a traverse hearing on this matter or to make a determination whether this motion to dismiss should be converted into a motion for summary judgment or whether there should be an evidentiary hearing pursuant to CPLR 3211 (c) on the issue of whether Timberlake has any ownership interest in the Restaurant.

Timberlake has also made a motion to quash the subpoena served on his business manager and plaintiff has made a cross motion to enforce the subpoena. For all of the reasons already stated in the decision, the court finds that the subpoena should not be quashed and should be complied with so that plaintiff can have discovery on the issue of whether Timberlake has an ownership interest in the Restaurant before a determination is made on any aspect of

Timberlake's motion to dismiss. Klarberg should respond to the document requests contained in the subpoena within thirty days from the date of this decision and the parties should mutually agree on a date for the deposition to take place within the next sixty days.

Based on the foregoing, the motion to dismiss is granted solely to the extent that the parties are directed to contact the part clerk for part 55 after the subpoena is complied with to schedule a conference to determine what are the next steps which should be taken with respect to the present motion and whether a hearing should be scheduled. The motion to quash the subpoena is denied and the cross motion to enforce the subpoena is granted, the request for sanctions is denied as without basis and the cross motion for attorney's fees is denied. This constitutes the decision and order of the court.

Dated: 1/18/13

  
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J.S.C.

**FILED**

JAN 25 2013

NEW YORK  
COUNTY CLERK'S OFFICE