SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11
Justice

Index Number : 158608/2012
PIKUS, JEFFREY
vs
CHAN, ROBERT K.Y.
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: June 15, 2013

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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JEFFREY PIKUS,

Plaintiff,

INDEX NO. 158608/12

-against-

ROBERT K.Y. CHAN, TOSHI INC., WATER FRONT NY REALTY CORP., WATERFRONT REALTY CORP. D/B/A LA.VENUE, LA. VENUE, and STONE SECURITY SERVICES NEW YORK,

Defendants.

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JOAN A. MADDEN, J.:

In this action for damages for personal injuries, defendants Robert K.Y. Chan and Toshi Inc. move for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint for failure to state a cause of action and failure to join a necessary party.

Plaintiff alleges he attended an event on December 17, 2009, where a security guard was stationed at the entrance. Plaintiff alleges that when he was about to leave, another patron punched him in the face, and after plaintiff asked "why did you hit me," the other patron assaulted and battered him "about the face and nose." The complaint alleges moving defendants Chan and Toshi are the sublessees of the venue and the sponsors of the event.

In support of their pre-answer motion to dismiss, defendants Chan and Toshi assert they neither sponsored the event nor leased the venue, and that the sponsor was another entity, Color Parties, Inc., which is a necessary party to this action. Defendants also assert corporate defendant, Toshi Inc., was "officially dissolved in December 2011," and submit the corporate dissolution filed with the New York Department of State on December 27, 2011. Defendants

argue plaintiff fails to plead any facts that would warrant piercing the corporate veil of Toshi Inc, so as to hold Chan personally liable. Citing Luina v. Katharine Gibbs, 37 AD3d 555 (2nd Dept 2007), defendants further argue that "a single punch from a 3rd party constitutes a 'sudden, unexpected and unforeseeable act' and does not breach any duty of reasonable care," so even taking plaintiff's allegations a true, they do not rise to a cause of action against defendants, as the nature of the alleged assault as described by plaintiff, was unprovoked and unexpected, and a singular incident that would have been "virtually impossible to prevent."

In opposition, plaintiff objects that moving defendants submit no documents or evidentiary proof supporting their allegation that Color Parties, Inc. sponsored the event. Plaintiff argues the Department of State filing submitted by defendants is "enough evidence" to show that Toshi was the alter ego of Chan, as the identical address is listed for both of them, and Chan was the CEO of Toshi. Plaintiff also alleges Chan created the "Toshi brand which is concomitant with entertainment and the arts in NYC," and that Chan uses the name "Toshi" both as a corporate entity and personally. Plaintiff further alleges the Twitter account announcing the party described it as a "toshiparty," and not a Color Parties party, and that Chan uses aliases and corporate forms to "hide behind." Plaintiff seeks limited discovery from Chan on these issues.

Plaintiff further argues the complaint sufficiently alleges a negligence claim, as defendants had a common law duty to maintain the public areas of the event in a reasonable safe condition, which included a duty to maintain security precautions to protect users of the premises against injury caused by the reasonable foreseeable criminal acts of third parties. Moreover, defendants knew or should have known from past experience hosting such events that there was a likelihood of third-party conduct endangering the safety of those using the premises, and despite

such knowledge they failed to take reasonable measures to police the premises during the event, and provide adequate security where patrons consumed alcohol. Plaintiff alleges that by not providing security, there were no security guards to prevent the initial assault or to intervene and prevent the subsequent assault. Plaintiff argues this is not a "single punch" case, but a "series of batteries," and not a random incident occurring without warning, since defendants hosted events on a regular basis, had experience where similar incidents occurred, and as a result were on notice that adequate security was necessary to secure the premises.

Generally, on a CPLR 3211pre-answer motion to dismiss, the court must liberally construe the pleading, "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Nonnon v. City of New York, 9 NY3d 825, 827 (2007) (quoting Leon v. Martinez, 84 NY2d 83, 87-88 [1994]). On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." Leon v. Martinez, supra at 88 (quoting Guggenheimer v. Ginzburg, 43 NY2d 268, 275 [1977]); accord Amaro v. Gani Realty Corp, 60 AD3d 491, 492 (1st Dept 2009); Weiner v. Lazard Freres & Co, 214 AD2d 114, 120 (1st Dept 1998).

Applying the foregoing standards, the court concludes that at this early stage of the litigation, plaintiff's complaint sufficiently alleges negligence claims against defendants Toshi and Chan. Contrary to defendants' assertion, the decision in Luina v. Katharine Gibbs, supra, is not dispositive as a matter of law. Moreover, plaintiff is entitled to discovery before any determination can be made as to the merits of his claim to pierce the corporate veil, and whether

Color Parties, Inc. is a necessary party.

Accordingly, it is

ORDERED that the motion by defendants Robert K.Y. Chan and Toshi Inc. to dismiss the complaint as against them is denied; and it is further

ORDERED that defendants Robert K.Y. Chan and Toshi Inc. shall serve and file answers within 20 days of the date of this decision and order; and it is further

ORDERED that the parties shall appear for a preliminary conference on August 1, 2013 at 9:30 am, in Part 11, Room 351, 60 Centre Street, New York, New York.

DATED: June 19, 2013

ENTER:

J.S.C.