

Sorrentino v Ten's Cabaret

2013 NY Slip Op 32391(U)

October 4, 2013

Sup Ct, New York County

Docket Number: 101389/2010

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: SALIANN SCARPULLA
Justice

PART 19

SORRENTINO, JESSE

INDEX NO. 101389/2010

MOTION DATE 6/26/2013

- V -

TEN'S CABARET

MOTION SEQ. NO. 001

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

ORDERED that plaintiff Jesse Sorrentino's motion is decided per the memorandum decision dated 10/4/13.

This constitutes the Decision and Order of the Court.

RECEIVED
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IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

FILED
OCT 08 2013
NEW YORK
COUNTY CLERK'S OFFICE

DATED: 10/4/13

Saliann Scarpulla
SALIANN SCARPULLA, 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: CIVIL TERM: PART 19

----- X
JESSE SORRENTINO,

Plaintiff,

Index No.: 101389/2010
Submission Date: 6/26/13

- against-

DECISION AND ORDER

TEN'S CABARET,

Defendant.

----- X

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For Defendant:
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Papers considered in review of this motion to strike answer:

Notice of Motion	1
Aff in Support/Exhibits	2
Aff in Opp	3

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HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injury, plaintiff Jesse Sorrentino (“Sorrentino”) moves pursuant to CPLR § 3126 for an order: (a) striking defendants Ten’s Cabaret, Inc. and Nichi Boyer’s (collectively, “defendants”) answer based on spoliation of evidence; (b) precluding defendants from offering evidence on any issues for which they failed to comply with court orders; or (c) striking defendants’ answers or affirmative defenses because they failed to provide a verified bill of particulars.

On February 2, 2010, Sorrentino commenced this action to recover for personal injuries that he sustained at a gentlemen's club owned by Ten's Cabaret, Inc. ("Ten's Cabaret"), located at 35 East 21st Street, New York, NY (the "club"). Sorrentino alleges that he was assaulted outside the club by Nichi Boyer ("Boyer"), one of the club's employees, on July 19, 2009 ("the incident").

Sorrentino asserts two causes of action in his complaint. In the first cause of action, Sorrentino alleges that Ten's Cabaret negligently hired, trained, and supervised employees which caused his injuries. In the second cause of action, Sorrentino alleges that Boyer assaulted and beat him.

On June 20, 2010, Sorrentino served defendants with a first notice to produce, in which he requested the club's surveillance video footage of the incident and witness information. On July 21, 2010, the Court issued a preliminary conference order directing the parties to exchange names and addresses of any witnesses and to complete depositions by October 28, 2010. Subsequently, the parties adjourned two compliance conferences due to Ten's Cabaret's pending bankruptcy proceeding.

The parties next appeared for a compliance conference on March 23, 2011, at which defendants' new counsel appeared. The parties entered into a so-ordered stipulation in which defendants agreed to respond to Sorrentino's discovery demands and to produce Boyer's employment file.

On June 23, 2011, the parties conducted depositions of Sorrentino and Boyer. At his deposition, Sorrentino testified that on the night of the incident, he had a disagreement with one of the club's dancers about the amount of money he owed which led him to be escorted out of the club. After he was escorted out, Sorrentino tried to explain the disagreement to Boyer who appeared to be in charge. Sorrentino testified that he told Boyer "I'm going to stay here until I get my money back." However, Boyer would not let Sorrentino back into the club and told him to leave. Sorrentino testified that after he refused to leave, Boyer hit him twice in the head.

At his deposition, Boyer testified that he is assistant manager at the club, and that the general manager is Steve Steckel ("Steckel"). Boyer testified that he spoke with Sorrentino outside of the club, and that Sorrentino asked if he could go back inside. Boyer told Sorrentino to go home, but Sorrentino insisted on going back inside the club.

According to Boyer, Sorrentino then tried to push his way into the club. When Sorrentino tried to push his way in, Boyer then "pushed him back." At that point, the cashier and the bouncer Arizona came outside, and Boyer decided to go inside. Boyer testified that one of the club's investors Shawn Dunleavy ("Dunleavy") told him to go inside because Sorrentino was "not worth it." Boyer further testified that he never hit Sorrentino, but that he only gave him "a shove."

Boyer testified that the club has a surveillance camera directed at the front door entrance, and Steckel monitored the surveillance cameras from an office inside the club. Boyer explained that the surveillance cameras recorded on a thirty day loop, but that he did not have access to the cameras. Boyer also stated that the club maintained files with the real names of the dancers.

After the depositions, Sorrentino served a second notice to produce on August 25, 2011 seeking the name of Boyer's criminal defense attorney. On October 11, 2011, Sorrentino served a third notice to produce again seeking Boyer's employment file and further information about witnesses to the incident.

Thereafter, the parties appeared for five additional compliance conferences on September 14, 2011, November 30, 2011, February 8, 2012, April 4, 2012, and July 25, 2012. The resulting so-ordered stipulations provided that defendants must produce Boyer's employment file and produce Steckel for a deposition or provide his last known address.

On February 27, 2012, defendants provided a response to Sorrentino's discovery demands. The defendants stated that a search was underway for Boyer's employment file. As to Sorrentino's remaining discovery demands, the defendants objected to them as overbroad and irrelevant.

In the current motion, Sorrentino argues that defendants' answers should be stricken based on their failure to comply with this Court's discovery orders. Sorrentino claims that defendants failed to preserve video footage from the club, produce witness information, or produce Steckel for a deposition. In the alternative, Sorrentino seeks a negative inference charge to be given against the defendants at trial.

In opposition, defendants argue that they have made reasonable efforts to comply with discovery orders. The defendants claim that they have a reasonable excuse for not producing documents and witness information because the club is no longer in operation.

The defendants also claim that they conducted a reasonable search for Steckel. The defendants submit an affidavit from investigator Lewis Finkelstein ("Finkelstein"). Finkelstein states that he first attempted to contact Steckel at the club in late April 2012, but "it became apparent that the number provided was out of service and that the club was out of business." Finkelstein stated "I was able to eventually contact Steckel via email who indicated that the club was closed and that he did not have access to any of its files."

The defendants further oppose Sorrentino's request for documents concerning Boyer's prior arrests and violent behavior. The defendants claim that these documents are not relevant because Boyer did not act within the scope of his employment if he used force against Sorrentino.

Discussion

CPLR § 3126 provides that a court may strike a pleading as a sanction against a party who “refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed.” Although actions should be resolved on the merits when possible, a court may strike an answer only when the moving party makes a clear showing that the failure to comply is willful, contumacious, or in bad faith. *Almonte v. Pichardo*, 105 A.D.3d 687, 688 (1st Dep’t 2013); *Rodriguez v. United Bronx Parents, Inc.*, 70 A.D.3d 492, 492 (1st Dep’t 2010).

Here, Sorrentino demonstrated that Ten’s Cabaret’s failure to comply with court discovery orders was willful and contumacious. Ten’s Cabaret repeatedly refused to comply with numerous orders directing it to provide the names and addresses of employees who may have witnessed the incident, to produce Steckel for a deposition, and to produce Boyer’s employment file.

Boyer testified that several employees were present at the club during the incident including Steckel, the security guard Arizona, the dancer Giovanna, the cashier, as well as the investor Shawn Dunleavy. However, Ten’s Cabaret never produced the names and addresses of these witnesses as ordered by the court. Ten’s Cabaret also never produced a copy of Boyer’s employment file and never produced Steckel for a deposition despite the defendants’ agreement to provide this discovery in five so-ordered stipulations.

Furthermore, Ten's Cabaret failed to produce any of the club's video footage related to the incident. Boyer testified that video cameras were placed throughout the club and at the front door entrance, and that the cameras recorded on a thirty day loop.

Ten's Cabaret has not provided any explanation as to why the video footage from the club is unavailable for production. Although it is unclear whether Ten's Cabaret intentionally disposed of the video footage, I find that it did so negligently which warrants the application of sanctions. Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an incident before the adversary has an opportunity to inspect them. *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 173 (1st Dep't 1997). Given the discrepancies between Sorrentino and Boyer's testimonies surrounding the incident, the video recording is a crucial item of evidence that could have aided in the resolution of factual issues surrounding the incident.

The burden now shifts to the defendants to establish a reasonable excuse for failing to comply with discovery orders. Ten's Cabaret claims that it made reasonable efforts to comply, but that it could not produce documents or witness information because the club is no longer in operation. I find that Ten's Cabaret's excuse is utterly unreasonable. It is clear from the record that the club was still in operation when Sorrentino demanded witness information in July 2010, and when he requested Boyer's employment file in March 2011. At Boyer's deposition in June 2011, he testified that he and Steckel worked

at the club, and that the club was still in business. Ten's Cabaret could have provided witness information and other discovery responses at that time. Instead, Ten's Cabaret did not attempt to provide any discovery responses until the club ceased to operate.

Based on my finding that Ten's Cabaret's failure to comply with this Court's discovery orders was willful and contumacious, I grant Sorrentino's motion to strike Ten's Cabaret's answer. I further order an inquest for damages as to Ten's Cabaret's liability. *Rokina Opt. Co. v. Camera King*, 63 N.Y.2d 728, 730 (1984); *Vierya v. Briggs & Stratton Corp.*, 184 A.D.2d 766, 768 (2d Dep't 1996) (a defendant whose answer is stricken as a result of default admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit plaintiff's conclusion as to damages).

However, I deny Sorrentino's motion to strike Boyer's answer because I find that Boyer made reasonable efforts to comply with court discovery orders by appearing for his deposition. There is also no indication that Boyer had access to the club's employment files or video surveillance tapes in order to produce them, and therefore Ten's Cabaret's default cannot be attributed to him. *Cropper v. Stewart*, 2009 N.Y. Slip. Op. 30595(U) (Sup. Ct., NY County 2009) (finding that default cannot be attributed to remaining defendant who must be permitted to argue the case on the merits).

In accordance with the foregoing, it is

ORDERED that plaintiff Jesse Sorrentino's motion for an order striking defendants Ten's Cabaret, Inc. and Nichi Boyer's answer based on their failure to comply with discovery orders and for spoliation of evidence is granted only as to Ten's Cabaret, Inc., and otherwise denied; and it is further

ORDERED that defendant Ten's Cabaret, Inc.'s answer to the complaint is stricken, and a default judgment is granted to plaintiff Jesse Sorrentino as against Ten's Cabaret, Inc.; and it is further

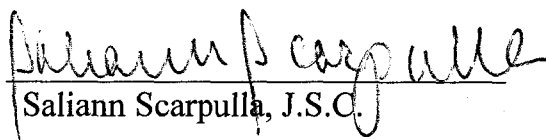
ORDERED that an inquest for damages attributed to Ten's Cabaret shall be held at trial of the main action; and it is further

ORDERED that the Clerk of the Court is directed to enter a judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
October 4, 2013

ENTER:


Saliann Scarpulla, J.S.C.

FILED

OCT 08 2013

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