

Ovalle v Central Bar & Grill Jim-Giles Corp.
2013 NY Slip Op 33940(U)
November 26, 2013
Supreme Court, New York County
Docket Number: 105340/09
Judge: Joan A. Madden
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This opinion is uncorrected and not selected for official publication.

FILED

JAN 13 2014

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

EMIL OVALLE,

Plaintiff,

- v -

CENTRAL PARK & GRILL, JIM-GILES CORP.,
THE CENTRAL BAR and 171 HOLDING CORP.,
REICE FINBARR ASSOCIATES INC.,
Defendants.

INDEX NO. : 105340/09

MOTION DATE:

MOTION SEQ. NO.: 007
MOTION CAL. NO.:

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

FILED

PAPERS NUMBERED _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

DEC 19 2013

Answering Affidavits — Exhibits _____

**NEW YORK
COUNTY CLERK'S OFFICE**

Replying Affidavits _____

Cross-Motion: [] Yes [x] No

Defendants Central Bar & Grill ("Central"), Jim-Giles, Corp. ("Jim-Giles"), and the Central Bar move for an order granting renewal and reargument of the court's decision and order dated May 30, 2013 ("the original decision") which precludes defendants from calling non-parties Maurice Parker, Carl Guadalupe and/or Jason Fleming and Joe Rosado from testifying as witnesses at trial based on defendants' failure to comply with discovery. Plaintiff opposes the motion, which is granted to the extent of vacating the order precluding Maurice Parker and Joe Rosado from testifying at trial.

This action arises out of personal injuries allegedly sustained by plaintiff on May 11, 2008, at approximately 3:30 am in front of Central, located at 109 East 9th Street in Manhattan. Jim-Giles owns and operates Central. At his deposition, plaintiff testified that after he exited the bar and walked a distance of two to four cars away, he was struck on the back of his head. According to plaintiff, he lost consciousness and regained it momentarily while he was on the ground trying to protect himself from being hit by three people who he recognized as security personnel from Central. He also testified that he did not have any previous confrontation with

the security personnel that evening.

At his deposition, Barry Feeney ("Feeney"), the manager of the bar, testified that the security guards working at the bar on the night of the incident were Joe Rosado, Maurice Parker, Carl Guadalupe and Jason Fleming. Plaintiff then sought the depositions of these individuals.

While defendants initially maintained that the security guards were employees of Central they later took the position that the security guards were no longer employed by Central and were, instead, hired by Jim-Giles as independent contractors. Defendants failed to comply with various court orders requiring them to provide documentary evidence that would be relevant to the security personnel's employment status vis-a-vis the defendants, including payroll records, proof as to how they were paid.

Plaintiff moved to strike defendants' answer based on defendants' failure to produce the security guards for deposition and its failure to provide documentary evidence regarding the guard's employment status. Defendants opposed the motion. In the original decision, the court ordered that Central provide "documents including but not limited to invoices with respect to its claim that the individuals are employed as security by 'James-Giles Company through Reese Finbar Associates as independent contractors,' and an affidavit on personal knowledge to support these claims." The court further ordered, *inter alia*, that within twenty days defendants produce the security guards for deposition to the extent they have control over them, and that Central provide copies of W-2's or other tax documents it is required to maintain. It further ordered that if defendants failed to comply with the court's order it would be precluded from calling Joe Rosado, Maurice Parker, Carl Guadalupe and Jason Fleming as witnesses at trial.

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992).

"A motion for leave to renew is intended to bring to the court's attention new facts or additional evidence which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore not brought to the court's attention." Tishman Constr. Corp. of New York v. City of New York, 280 AD2d 374, 376 (1st Dept 2001)(citations omitted).

For the reasons below reargument is properly granted and renewal is denied. Upon reargument, the original decision is vacated to the extent it precluded Joe Rosado and Maurice Parker from testifying at trial. Joe Rosado was deposed after he was subpoenaed by plaintiff. As for Maurice Parker, defendants provided an affidavit from Feeney stating that Maurice Parker was employed by Jim-Giles as an independent contractor. While Feeney's statement is based on "information and belief" and otherwise unsubstantiated, I note that plaintiff was given sufficient

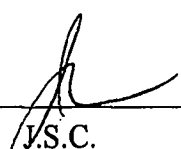
information to subpoena Parker for a deposition. Under these circumstances, defendants should not be precluded from calling Parker as a witness at trial provided that Parker is deposed. The motion to renew, however, is denied as defendants provide no new evidence that they complied with the original decision or other information not before the court at the time of the original decision.

In view of the above, it is

ORDERED that the motion to reargue is granted and, upon reargument, the original order is vacated to the extent (1) it precluded defendants from calling Joe Rosado as a witness at trial and (2) it precluded defendants from calling Maurice Parker as a witness at trial in the event that he is deposed before trial; and it is further

ORDERED that the motion for renewal is denied.

Dated: November 26, 2013



J.S.C.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

CRYSTAL L. BREWER, being duly sworn, deposes and says: that deponent is not a party to this action is over 18 years of age and resides in Kings County.

That on the 4th day of January, 2014, deponent served the within document(s) entitled Order with Notice of Entry upon:

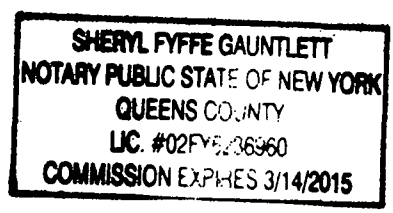
PENA & KAHN, PLLC
Attorneys for Plaintiff Emil Ovalle
1200 Waters Place, Suite M 102
Bronx, New York 10461
(718) 585-6551
F (718) 585-6618

At the address(es) designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

Crystal L. Brewer
CRYSTAL L. BREWER

Sworn to before me this 4th day of January, 2014.

[Signature]
Notary Public



COMMERCIAL	1901
NEW YORK	1901
NEW YORK	1901
NEW YORK	1901

Index No. 105340 Year 2009
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

EMIL OVALLE,

Plaintiff,

-against-

CENTRAL BAR & GRILL, JIM-GILES CORP.,
THE CENTRAL BAR and 171 HOLDING CORP.,
REICE FINBAR ASSOCIATES INC. AND REECE
FINBAR ASSOCIATES, INC.,

Defendants.

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COUNTY CLERK'S OFFICE
NEW YORK

ORDER WITH NOTICE OF ENTRY

LEWIS BRISBOIS BISGAARD & SMITH LLP

Attorneys for Defendants.

Office Address & Tel. No.: 77 Water Street, Suite 2100
New York, New York 10005
(212) 232-1300

Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Signature _____

Print Signer's Name Alecia Walters-Hinds, Esq.

Service of a copy of the within is hereby admitted.

Dated New York, New York
January 9, 2014

Attorney(s) for Defendants-Petitioners

PLEASE TAKE NOTICE

Check Applicable
Box

NOTICE OF ENTRY

that the within is a (certified) true copy of a entered in the office of the clerk of the within named Court on

NOTICE OF SETTLEMENT

that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on , at AM.

INSYNC LITIGATION SUPPORT

JAN - 9 2014