

Sklifas v Juliet Supperclub

2015 NY Slip Op 32059(U)

June 15, 2015

Supreme Court, New York County

Docket Number: 102400/11

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

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6/19/15
E

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 102400/2011
SKLIFAS, ATHANASIOS

INDEX NO. _____

vs
JULIET SUPPERCLUB

MOTION DATE _____

Sequence Number : 008
DISMISS ACTION

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

is decided in accordance with the annexed decision.

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

RECEIVED
JUN 19 2015
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NYS SUPREME COURT - CIVIL

FILED
JUN 19 2015
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/19/15

09K, 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 55

-----X
ATHANASIOS SKLIFAS,

Plaintiff,

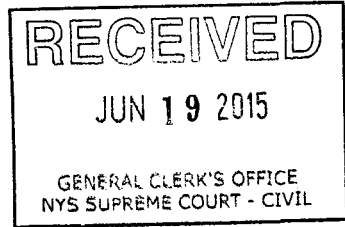
Index No. 102400/11

-against-

DECISION/ORDER

JULIET SUPPERCLUB, WEST 21ST STREET
PROPERTIES, LLC, JOHN BAKSHI, 539 JB
ENTERPRISES, LTD., FORTUNATAS GREX
INTERNATIONAL, INC., DMITRY SHEYKHAMETOV,
VINCENT MICELI, JOHN and JANE DOES 1-10
(fictitious names) and ABC CORPORATIONS 1-10
(fictitious entities),

Defendants.



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

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion :

Papers

FILED

Numbered

Notice of Motion and Affidavits Annexed.....	JUN 19 2015	1,2
Affidavits in Opposition.....		3,4
Replying Affidavits.....		5,6
Exhibits.....		7

**NEW YORK
COUNTY CLERK'S OFFICE**

Plaintiff Athanasios Sklifas commenced the instant action to recover for personal injuries he allegedly sustained when he was assaulted while he was a patron in the Juliet Supperclubs nightclub. Defendant John Bakhshi ("Bakhshi") now moves for an Order pursuant to CPLR §§ 3211(a)(1) and (7) dismissing the complaint. Defendant Vincent Miceli ("Miceli") separately moves for an Order pursuant to CPLR §§ 3211 and 3212 dismissing the complaint. Both motions are consolidated for disposition. For the reasons set forth below, both motions are denied.

The relevant facts are as follows. On or about December 29, 2010, plaintiff was a patron at the premises known as the Juliet Supperclub (“the Club”), located at 539 West 21st Street, New York, New York (the “subject premises”). While at the subject premises, plaintiff was allegedly assaulted by an intoxicated patron and suffered injuries (the “incident”). Thereafter, plaintiff commenced the instant action against the Club and, and *inter alia*, Bakhshi and Miceli alleging that said defendants were the owners and/or managing agents of the Club and that they were negligent in their ownership, operation, maintenance and control of the subject premises.

The court first turns to Miceli’s motion for an Order dismissing the complaint. As an initial matter, Miceli’s motion for an Order pursuant to CPLR § 3211 dismissing the complaint based on documentary evidence is denied. In order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff’s claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

In the instant action, Miceli’s motion for an Order pursuant to CPLR § 3211 dismissing the complaint is denied as the documentary evidence provided by Miceli fails to definitively dispose of plaintiff’s claims. In support of his motion to dismiss, Miceli provides his affidavit in which he affirms that he did not own the subject premises nor did he operate, maintain or control the subject premises. Rather, Miceli affirms that he was merely an officer and a shareholder of Fortunatas Grex International, Inc. (“Fortunatas”), a corporation that purchased a 50% interest in 539 JB Enterprises, Ltd. (“539”), the alleged owner of the Club. Additionally,

Miceli provides a Subscription Agreement dated January 2009 pursuant to which Fortunatas offered to purchase the 50% interest in 539, which was signed by defendant Miceli as Secretary of Fortunatas. However, neither the Subscription Agreement nor Miceli's affidavit definitively dispose of plaintiff's claims. As an initial matter, Miceli's affidavit is insufficient to dispose of plaintiff's claims as it is well-settled that an affidavit will not be considered on a motion pursuant to CPLR § 3211 to determine whether there is evidentiary support for a properly pleaded claim. *See Nonnon v. City of New York*, 9 N.Y.3d 825, 827 (2007); *Rovello v Orofino Realty Co.*, 40 N.Y.2d 633 (1976). Additionally, the Subscription Agreement does not dispose of plaintiff's claims as it does not establish that Miceli is not an individual owner of the Club or the subject premises.

Miceli's motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint is also denied. Pursuant to CPLR § 3212(a), "[a]ny party may move for summary judgment in any action, *after issue has been joined...*" Here, Miceli's motion for summary judgment must be denied as it is undisputed that he has not answered in this action and thus, his motion for summary judgment is premature.

The court next turns to Bakhshi's motion for an Order dismissing the complaint. As an initial matter, Bakhshi's motion for an Order pursuant to CPLR § 3211(a)(7) dismissing the complaint on the ground it fails to state a claim for negligence against Bakhshi is denied. On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v.*

Raum, 164 A.D.2d 809 (1st Dept. 1990). “Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to ‘whether it states in some recognizable form any cause of action known to our law.’” *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). To sufficiently plead a claim for negligence, a plaintiff must allege (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. *See Solomon by Solomon v. City of New York*, 66 N.Y.2d 1026 (1985). The complaint alleges that Bakhshi was the owner of the Club and the subject premises on the date of the incident, thereby owing plaintiff, a patron of the Club, a duty of care; that said duty was breached on the ground that Bakhshi was negligent in his ownership, operation, maintenance and control of the Club and the subject premises; and that said negligence was the cause of the incident. Thus, as plaintiff has sufficiently stated a claim for negligence against Bakhshi, Bakhshi’s motion to dismiss the complaint pursuant to CPLR § 3211(a)(7) must be denied.

Bakhshi’s assertion that his motion to dismiss the complaint on the ground that it fails to state a claim for negligence should be granted based on the complaint’s failure to “state that [plaintiff] came into contact with Defendant Bakhshi” or that “Defendant Bakshi was present at the premises on the night of the alleged incident” is without merit. It is well-settled that an owner of an establishment has a duty to the patrons of his establishment to maintain said establishment in a reasonably safe manner and to prevent harm to those on his property, even harm emanating from the conduct of third persons on the premises to the extent such harm is foreseeable under the circumstances. *See D’Amico v. Christie*, 71 N.Y.2d 76 (1987). Thus, the fact that Bakhshi was not at the subject premises and that he did not come into contact with

plaintiff on the date of the incident is immaterial.

Additionally, Bakhshi's motion for an Order pursuant to CPLR § 3211(a)(1) dismissing the complaint on the ground that he did not own, operate, maintain or control the subject premises on the date of the incident is denied. In support of his motion, Bakhshi provides his affidavit in which he affirms that that he did not own the subject premises and that he did not control or manage the day-to-day activities of the subject premises on the date of the incident. Additionally, Bakhshi provides a Contract of Sale which he asserts establishes that he sold all of his shares in defendant 539, the alleged owner of the Club, to defendant Fortunatas on December 16, 2010, thirteen days prior to the incident. However, neither Bakhshi's affidavit nor the Contract of Sale definitively dispose of plaintiff's claims. As an initial matter, Bakhshi's affidavit is insufficient to dispose of plaintiff's claims as it is well-settled that an affidavit will not be considered on a motion pursuant to CPLR § 3211 to determine whether there is evidentiary support for a properly pleaded claim. *See Nonnon*, 9 N.Y.3d 825; *see also Rovello*, 40 N.Y.2d 633. Additionally, the Contract of Sale does not dispose of plaintiff's claim as it does not establish that Bakhshi is not an individual owner of the Club or the subject premises.

To the extent Bakhshi seeks to remedy the evidentiary deficiency of his motion by providing the court with (1) the Subscription Agreement also provided by Miceli; and (2) the minutes of a special meeting of the directors and shareholders of 539 in November 19, 2010 at which Bakhshi was allegedly removed as President of 539, removed from having signature authority on 539's bank accounts and removed from being in charge of the day to day operations of 539, he may not do so. As an initial matter, this court has already explained that the Subscription Agreement does not dispose of plaintiff's claim as it does not establish that Bakhshi

