

<b>Nick &amp; Duke LLC v Talla</b>
2016 NY Slip Op 30562(U)
March 31, 2016
Supreme Court, New York County
Docket Number: 155676/15
Judge: Geoffrey D. Wright
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 47

-----X

NICK & DUKE LLC,

Plaintiff,

Index No.: 155676/15

-against-

DECISION/ORDER

DAVID MICHAEL TALLA, GLEN PETER BERNARDI,  
JEFFREY WASSERMAN, NATHAN WASSERMAN,  
SALLY WASSERMAN, JACK WASSERMAN and MJG  
HOLDINGS, LLC,

Defendants.

**Present:**

Hon. Geoffrey D. Wright

-----X Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the  
review of this Motion/Order for motion to dismiss.

PAPERS

NUMBERED

Notice of Motion and Affidavits Annexed.....	_____ 1, 2,3 _____
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	_____ 4 _____
Replying Affidavits.....	_____ 5, 6 _____
Exhibits.....	_____
Other.....Memorandum.....	_____ 7, 8, 9 _____

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

For the purpose of this decision, motion sequence 001, 002, 003 are consolidated for  
disposition.

In sequence 001, Defendants Jeffrey Wasserman, Nathan Wasserman, Jack Wasserman  
("Wasserman") and MJG Holdings LLC (" MJG") move for an Order pursuant to CPLR 3211

(a)(5) and CPLR 214 (2) and/or (4) to dismiss Plaintiff, Nick & Duke LLCs (“Plaintiff”) complaint on the grounds that the action is barred by the 3 year statute of limitations.

In sequence 002, Defendant Sally Wasserman (“Sally Wasserman”) moves to dismiss the complaint pursuant to CPLR 3211(a)(1), (5) and (7) based on (a) documentary evidence; (b) expiration of the applicable statute of limitations; (c) the pleadings fail to state a valid cause of action as a matter of law.

In sequence 003, Defendant Glen Peter Bernardi, (“Bernardi”) moves for an Order pursuant to CPLR 3211 (a)(5) and CPLR 214(4) dismissing the complaint against him on the grounds that (a) the action is barred by the three year statute of limitations and (b) that the pleadings fail to state a cause of action.

#### BACKGROUND

The complaint was brought against MJG, David Michael Talla<sup>1</sup>, Glen Peter Bernardi, Jeff Wasserman, Jack Wasserman, Nathan Wasserman, Sally Wasserman individually, as members of MJG Holdings LLC. In their complaint Plaintiff asserts causes of action against the Defendants: negligence, per se negligence, tortious interference with Plaintiff’s economic advantage of it ownership of its property, invasion of Plaintiff’s interests in the private use and enjoyment of it’s property and malice.

Nick & Duke, LLC (“Plaintiff”) owns the premises which consists of a four-story multiple dwelling with a cellar and two contiguous lots. The 1965 Certificate of Occupancy for the property permits occupancy as an eating and drinking establishment (without restrictions) on the ground floor, 22 bedrooms on the second floor and 23 bedrooms on each of the two upper

---

<sup>1</sup>David Michael Talla has not answered and this Decision and Order does not include him.

floors. On May 31, 2007, MJG via assignment of assumption of net lease acquired a leasehold interest in the property with the intention to operate an adult club with strippers on the ground floor and to develop the adjacent lots. As part of the acquisition, MJG assumed control of the residential portion of the property which housed SRO tenants.

On November 26, 2007, MJG filed an application for a "Certificate of No Harassment" with the New York City's Department of Housing Preservation & Development ("HPD"). The application was processed under the SRO rules of Administrative Code section 27-2093 and the Special West Chelsea District rules of Zoning Resolution sections 93-90 and 98-70. After an extensive evidentiary hearing, the Administrative Law Judge issued a thirty four page decision dated June 24, 2008, citing individual defendants guilty of harassing the SRO tenants. HPD found 21 actions that constituted harassment as defined by section 27-2093(a)(2) of the Administrative Code. As a result of the finding of harassment, the property is burdened with a statutory obligation to cure. The cure as defined by the Zoning Resolution, amounts to a future permanent taking of up to 28 percent of the existing improvements or 20 percent of the total build able square footage of the property, whichever is greater in perpetuity.

#### MOTION SEQUENCE 001, 002, 003

The parties all agree that the Plaintiff's five causes of action are all sounding in tort and subject to a three year statute of limitation. Defendants MJG, Wasserman, Sally Wasserman and Bernardi basically assert an identical argument in support of the motion to dismiss. They argue that Plaintiff is barred from now bringing this case as the SOL began on April 2, 2009, the date HPD denied the application for the certificate of no harassment and adopted the Report and

Recommendation of the Administrative Law Judge dated March 19, 2009. They assert that even if the Court were to believe Plaintiff's claim, that it was not made aware of the initial filing of the application or the subsequent denial, Plaintiff knew as of July 15, 2010 when Eric Davis, Esq., ("Davis") acting as a representative for the Plaintiff attended a DHCR fact finding conference relative to an enforcement case. The fact finding conference was brought by an SRO tenant as a direct result of the HPD finding of harassment. Davis was provided a copy of the findings which referenced the HPD denial and provided notice to Plaintiff. Defendants argue that Plaintiff could have sought legal recourse at that time, if not sooner. They argue that the three-year statute of limitations expired on April 2, 2012, three years after the issuance of the April 2009 Final Determination which imposed the cure requirement and which also made clear that the owner need only effectuate the cure in the future should the owner choose to seek a permit for a material alteration or demolition to the premises. Defendants argue that Plaintiff was damaged, if at all, and its claims accrued when the statutory cure became mandated not when Plaintiff (or its current net lessee) chose to effectuate the cure. There is no obligation to effectuate the cure in any particular period of time, or ever. In fact, the owner need only effectuate the cure in the future should the owner choose to seek a permit for a material alteration or demolition to the premises.

In addition to the SOL argument, made by all Defendants, an additional argument is made by Sally Wasserman and Glen Peter Bernardi in their motions to dismiss. Sally Wasserman argues that she is not a member, officer or owner of MJG and she did not exercise dominion and control over the operations of MJG. In support of her motion, she submits the Certificate of Member and Operating Agreement for MJG which purport to show that she was neither a member, officer nor owner of MJG or Chelsea.

Similarly, Bernardi argues that although he is a member of MJG, the company was formed pursuant to and in accordance with the Limited Liability Act of the State of Delaware. He claims that at all times MJG existed and operated independently from its owners and the only actions the members engaged in association with MJG were those powers enumerated in the operating agreement. In support of his arguments he submits a copy of the operating agreement.

Plaintiff's opposition to the motions is based upon the claim that it was not made aware of the application or the subsequent denial and that it did not sustain damages as a result of that denial until June 1, 2013 when the rent from the ground lease tenant was reduced in the amount of \$20,000 per month.

Plaintiff argues that the first category of damages which took effect on June 1, 2013 is a reduction of the rent it receives from its current tenant as a result of its obligation to construct and forfeit approximately 15,000 square feet of special housing. The second category of damages, the loss of 15,000 square feet has not happened but according to Plaintiff, is imminent. Once it takes effect, Plaintiff argues the property will be permanently diminished by 15,000 square feet which they estimate, equates to approximately \$15,000,000.00 to 30,000,000.00. They argue that although the Judge issued his decision in 2009, there was no resulting losses or damages incurred by Plaintiff at that time and that their losses were not incurred until June 1, 2013 the date of the rent concession. Lastly, they argue that the individual named defendants are liable for their own tortious acts regardless of the separate existence of the corporate shield.

## LEGAL DISCUSSION

CPLR § 3211(a)(5) provides for the dismissal of a cause of action that is time-barred by the applicable statute of limitations. On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (Campaign for Fiscal Equity v State, 86 NY2d 307, 317, 655 N.E.2d 661, 631 N.Y.S.2d 565 [1995]; 219 Broadway Corp. v Alexander's, Inc., 46 NY2d 506, 509, 387 N.E.2d 1205, 414 N.Y.S.2d 889 [1979])). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (EBC I v Goldman, Sachs & Co., 5 NY3d 11,19, 832 N.E.2d 26, 799 N.Y.S.2d 170 [2005]).

To succeed on a motion to dismiss, pursuant to CPLR 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiffs claims (511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152, 773 N.E.2d 496, 746 N.Y.S.2d 131 [2002]; Blonder & Co., Inc. v Citibank, N.A., 28 AD3d 180, 182, 808 N.Y.S.2d 214 [1st Dept 2006]). A motion to dismiss pursuant to CPLR 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiffs factual allegations, conclusively establishing a defense as a matter of law" (McCully v Jersey Partners, Inc., 60 AD3d 562, 562, 876 N.Y.S.2d 27 [1st Dept 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (Leon v Martinez, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d

972 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (Nisari v Ramjohn, 85 AD3d 987, 989, 927 N.Y.S.2d 358 [2d Dept 2011]).

CPLR 214 (4) provides that an action to recover damages for "an injury to property" must be commenced within three years of the accrual of the cause of action. "The Statute of Limitations does not run until there is a legal right to relief" (Kronos, Inc. v AVX Corp., 81 NY2d 90, 94, 612 N.E.2d 289, 595 N.Y.S.2d 931 [1993]), that is, "when all of the facts necessary to the cause of action have occurred." (Aetna Life & Cas. Co. v Nelson, 67 NY2d 169, 175, 492 N.E.2d 386, 501 N.Y.S.2d 313 (1986); Hahn Auto. Warehouse, Inc. v American Zurich Ins. Co., 18 NY3d 765, 770, 967 N.E.2d 1187, 944 N.Y.S.2d 742 (2012)). "As a general proposition, it is upon injury that a legal right to relief arises in a tort action and the Statute of Limitations begins to run." Ackerman v Price Waterhouse, 884 NY2d 535, 541, 644 N.E.2d 1009, 620 N.Y.S.2d 318 (1994) (internal citations omitted); Kronos, Inc., 81 NY2d at 94. Were this an action sounding in contract, AVX would be correct in its insistence that settled law marks accrual from the contractual breach. However, plaintiff's cause of action is one sounding in tort, and, as a general proposition, a tort cause of action cannot accrue until an injury is sustained. (Schmidt v Merchants Desp. Transp. Co., 270 NY 287, 300-301, supra; see generally, Siegel, NY Prac § 40, at 47 [2d ed]). That, rather than the wrongful act of defendant or discovery of the injury by plaintiff, is the relevant date for marking accrual ( Schmidt v Merchants Desp. Transp. Co., supra, at 300). The Statute of Limitations does not run until there is a legal right to relief. Stated another way, accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint (Jacobus v Colgate, 217 NY 235, 245; Roldan

v Allstate Ins. Co., 149 AD2d 20, 26).

After an oral argument and a review of the record, I find that a legal right to relief was available upon the issuance of the April 2009 final determination when the cure obligation became effective. If this court were to adopt the Plaintiff's reasoning, there would be no need for a SOL as a Plaintiff could wait decades to effectuate the mandated cure which is exactly what a SOL is supposed to guard against. Moreover, to the extent Plaintiff argues that they had no knowledge of the application for a certificate of no harassment they certainly knew when they sent Davis as their representative to attend the DHCR fact finding conference. They were well within the time statute of limitations at that time. At that time, if not in April 2009, Plaintiff knew and could have sought legal redress especially since the cure requirement was mandated. The court has considered all of the other arguments and the cases proffered by plaintiff and finds them to be unpersuasive.

Accordingly, it is Ordered that the motion (sequence 001) by Defendants Jeffrey Wasserman, Nathan Wasserman, Jack Wasserman and MJG Holdings LLC for an Order pursuant to CPLR 3211 (a)(5) and CPLR 214 (2) and/or (4) to dismiss Plaintiff, Nick & Duke LLCs ("Plaintiff") complaint on the grounds that the action is barred by the 3 year statute of limitations is granted and the complaint against them is dismissed and, it is further

Ordered that the motion sequence 002 by Defendant Sally Wasserman for an Order pursuant to CPLR 3211(a)(1), (5) and (7) dismissing the complaint based on (a) documentary evidence; (b) expiration of the applicable statute of limitations; (c) failure to state a cause of action is granted and,

It is further Ordered that motion sequence 003, by Defendant Glen Peter Bernardi, for an

Order pursuant to CPLR 3211 (a)(5) and CPLR 214(4) dismissing the complaint against him on the grounds that the action is barred by the three year statute of limitations and that the pleadings fail to state a cause of action is granted and the complaint against him is dismissed.

This constitutes the decision and order of the Court.

Dated: March 31, 2016

  
**GEOFFREY D. WRIGHT**  
**AJSC**

---

JUDGE GEOFFREY D. WRIGHT  
Acting Justice of the Supreme Court