

Ravallese v JMBD Holdings, LLC

2016 NY Slip Op 33090(U)

June 30, 2016

Supreme Court, New York County

Docket Number: 107877-2009

Judge: George J. Silver

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
CHRISTOPHER RAVALLESE,

Plaintiff,

Index No. 107877-2009

-against-

DECISION/ORDER

Motion Sequence 011

JMED HOLDINGS, LLC, SALVUS SECURITY SERVICES,
INC., EDDIE HUIE, JON CHIRONNA, BRIAN HOOD,
TIM COOK and RPM WORLDWIDE, INC.,

FILED

Defendants.

JUL 01 2016

-----X
HON. GEORGE J. SILVER, J.S.C.

COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Collective Exhibits Annexed, Memorandum of Law.....	<u>1, 2, 3, 4</u>
Answering Affirmation.....	<u>5</u>
Reply Memorandum Law.....	<u>6</u>

In this action arising out of an alleged assault at a nightclub, defendant RPM Worldwide, Inc. (RPM) moves pursuant to CPLR § 3211 [a] [7] to dismiss plaintiff Christopher Ravallese's (plaintiff) amended complaint on the grounds that it fails to state a cause of action against RPM or, in the alternative, that plaintiff's claims against RPM are time-barred. Plaintiff opposes the motion.

By notice of motion dated July 20, 2015 plaintiff moved for leave to amend his complaint to add RPM as a defendant on the ground that RPM had purchased the subject nightclub, Pacha, from co-defendant JMEDI Holdings, LLC. The proposed amended complaint annexed to plaintiff's moving papers asserted three causes of action against RPM sounding in respondeat superior, negligent supervision and negligence. By order dated January 12, 2016 the court granted plaintiff's motion and ordered plaintiff to serve the amended complaint, in the form annexed to the moving papers, upon the parties to the action in accordance with the CPLR. RPM now contends that the amended complaint which it was served with does not contain any allegations against RPM and does not include RPM as a defendant in the caption. Plaintiff, in

opposition, contends that RPM is attacking the wrong version of the amended complaint but plaintiff does not annex the purported correct version of the amended complaint to his opposition papers or offer any explanation as to why RPM was served with a purported amended complaint that did make any allegations against RPM and did not even list it as a defendant in the amended caption. Rather, plaintiff argues that the motion to dismiss must be denied because RPM has not established through conclusive documentary evidence that it had no ownership interest in Pacha and, therefore, no ability to hire or fire the individual co-defendants.

It should go without saying that the court would not have granted plaintiff's prior motion to amend his complaint to add RPM as a defendant if the proposed amended complaint annexed to plaintiff's moving papers did not allege any causes of action against RPM. Moreover, the court would not have ordered plaintiff to serve the proposed amended complaint upon RPM in accordance with the CPLR if the proposed amended complaint was devoid of any allegations against RPM. Since plaintiff does not deny that RPM was not served with the proposed amended complaint that was annexed to his previous moving papers, the court concludes that plaintiff failed to comply with the express terms of the January 12, 2016 order and the court will address the sufficiency of the amended complaint which was served upon RPM.

In determining whether to grant a motion to dismiss based upon a failure to state a cause of action pursuant to CPLR § 3211 [a] [7], the pleading is to be afforded a liberal construction (CPLR § 3026), and the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118 [1st Dept 2002]). Stated another way, the court's role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint (*id.*). It is beyond cavil that an amended complaint that does not contain a single allegation against a party and does not even make reference to a party fails to state a cause of action as to that party.

Alternatively, even if plaintiff had properly served RPM with the amended complaint as ordered in the January 12, 2016 order¹, the amended complaint would still be subject to dismissal because plaintiff's claims against RPM are time-barred. The statute of limitations for negligence and negligent supervision is three years and these claims accrued on the date of the alleged assault, September 6, 2008 (*Smith v Conway Stores, Inc.*, 131 AD3d 1040 [2d Dept 2015]; see also *Pichardo v New York City Dept. of Educ.*, 99 AD3d 606 [1st Dept 2012]). The amended complaint naming RPM as an additional defendant was not commenced until January 12, 2016 when the amended complaint was deemed filed *nunc pro tunc*. RPM, therefore, has established the applicable statute of limitations has run. Once a defendant makes such a showing the plaintiff bears the burden of demonstrating the applicability of the relation back doctrine (*Cintron v Lynn*, 306 AD2d 118 [1st Dept 2003]). CPLR § 203 [b] allows a claim to relate back to the date on which the claim was interposed against the original named defendants if the subsequently named defendant is united in interest with the defendant originally named. The doctrine has three conditions: (1) both claims must arise out of the same conduct, occurrence or transaction; (2) the

¹ RPM's counsel contends that plaintiff's counsel emailed him a copy of the proper amended complaint on May 10, 2016, two weeks after the instant motion to dismiss was served.

new party must be united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the lawsuit that it will not be prejudiced in maintaining a defense on the merits and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against it as well (*Cintron*, 306 AD3d at 120-121). Plaintiff has failed to establish the third element. Plaintiff's motion to add RPM as an additional defendant was based upon plaintiff's counsel's discovery on June 7, 2015 that Pacha, the nightclub where the alleged assault occurred, was owned by RPM. Plaintiff, however, has failed to establish that RPM assumed ownership of Pacha during the applicable limitations period and thus should have known that but for a mistake by plaintiff the action would have been brought against it. Since plaintiff failed to establish the linchpin of the relation back doctrine - notice to RPM within the applicable limitations period (*see Gaspari v Sadeh*, 61 AD3d 405 [1st Dept 2009]), plaintiff's amended complaint against RPM must be dismissed.

In accordance with foregoing, it is hereby

ORDERED that defendant RPM Worldwide, Inc.'s motion to dismiss is granted and the amended complaint against it is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption is amended as follows to reflect the dismissal:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

CHRISTOPHER RAVALLESE,

Plaintiff,

Index No. 107877-2009

-against-

JMED HOLDINGS, LLC, SALVUS SECURITY SERVICES,
INC., EDDIE HUIE, JON CHIRONNA, BRIAN HOOD and
TIM COOK,

Defendants.

-----X

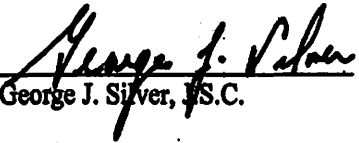
And it is further

ORDERED that all future papers filed with the court are to bear the amended caption; and it is further

ORDERED that movant is to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry; and it is further

ORDERED that the remaining parties are to appear for a conference on September 27, 2016 at 9:30 a.m. in Part 10; room 422 of the courthouse located at 60 Centre Street, New York, New York 10007.

Dated: 6/30/16
New York County


George J. Silver, J.S.C.

GEORGE J. SILVER

FILED
JUL 01 2016
COUNTY CLERK'S OFFICE
NEW YORK