

Faeder v Wagner

2019 NY Slip Op 30502(U)

February 26, 2019

Supreme Court, New York County

Docket Number: 160561/2016

Judge: Kathryn E. Freed

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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: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

INDEX NO. 160561/2016
MOTION DATE 04/16/2019
MOTION SEQ. NO. 001

DAVID FAEDER,

Plaintiff,

- v -

THOMAS WAGNER, VICEROY CENTRAL PARK, VICEROY
HOTEL GROUP, THE ROOF, NY, LLC, GG RESTAURANTS,
LLC, JOHN DOES 1-5, JOHN DOES 6-10, JOHN DOES 11-15

Defendant.

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23,
24, 25, 26, 27

were read on this motion to/for AMEND CAPTION/PLEADINGS

Upon the foregoing documents, it is ordered that the motion is granted, without opposition.

In this action, grounded in intentional tort and negligence, plaintiff David Faeder, moves
for an order, pursuant to CPLR 3025(b), for leave to amend the summons and complaint to name
as an additional party defendant James Mennie. After a review of the motion papers, as well as
the relevant statues and case law, the motion, which is unopposed, is granted.

This action arises from an alleged assault at a bar known as The Roof, located within the Viceroy
Hotel at 124 West 57th Street, New York, New York. Doc. 1.1 Plaintiff commenced this action
against defendants: THOMAS WAGNER, VICEROY CENTRAL PARK, VICEROY HOTEL
GROUP, THE ROOF, NY, LLC, GG RESTAURANTS, LLC, JOHN DOES 1-5, JOHN DOES 6-
10, JOHN DOES 11-15, on or about December 15, 2016 with the filing of the Summons and
Complaint. Id.

1 Unless otherwise noted, all references are to the documents filed on NYSCEF in this matter.

Plaintiff alleged the named defendants were liable for the damages from the assault. Issue was subsequently joined by the named defendants. Docs. 5, 7, 10.

Plaintiff maintains that, since December 20, 2016, defendant Thomas A. Wagner, III, refused to supply the name of the individual who Wagner maintains was the individual who actually who assaulted plaintiff. Doc. No. 20, ¶ 17. Plaintiff maintains that Wagner's attorney has refused to supply the name of said individual who assaulted plaintiff to date, however he has supplied an affidavit from an alleged co-assailant. Id ¶ 18. Based on Wagner's failure to exchange information on the assailants or to respond to to any discovery order, plaintiff now moves to add the name of an alleged co-assailant, based on the alleged co-assailant's affidavit, exchanged y e-mail on October 5, 2018. Doc. No. 25.

Pursuant to CPLR 3025(b), a party may amend its pleading at any time by leave of court, and leave shall be freely given upon such terms as may be just. It is within the court's discretion whether to permit a party to amend its complaint. *See Peach Parking Corp. v 345 W. 40th Street, LLC*, 43 AD3d 82 (1st Dept 2007). On a motion for leave to amend, a plaintiff need not establish the merit of its proposed new allegations (*see Lucindo v Mancuso*, 49 AD3d 220, 227 [1st Dept 2008]), but must show that the proffered amendment is not palpably insufficient and not clearly devoid of merit. *See Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 (1st Dept 2007); *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 (1st Dept 2010). Here, plaintiff has established that the claims against the additional new defendant have a colorable basis (*see NAB*

Construction Corp. v Metropolitan Transportation Authority, 167 AD2d 301 [1st Dept 1990])
based upon the sworn affidavit of that proposed additional defendant James Mennie. Id. ¶¶ 7, 8, 9.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion for leave to amend the summons and complaint to add as an additional defendant James Mennie, is granted; and it is further,

ORDERED that plaintiff's counsel shall serve a copy of this order with notice of entry upon all parties and upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158) and the Clerks are directed to mark the court's records to reflect the additional party; and it is further,

ORDERED that the supplemental summons and amended verified complaint, in the proposed form annexed to the moving papers as Exhibit A (Doc. No. 21), shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further,

ORDERED that the supplemental summons and amended verified complaint, in the form annexed to the motion papers, shall be served, in accordance with the CPLR, on James Mennie, the newly added defendant in this action, within 30 days after service of a copy of this order with notice of entry; and it is further,

ORDERED that the action shall hereinafter bear the following caption:

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

-----X
DAVID FAEDER,

Plaintiff,

-against-

INDEX NO. 160561/2016

THOMAS WAGNER, VICEROY CENTRAL PARK,
VICEROY HOTEL GROUP, THE ROOF, NY, LLC,
GG RESTAURANTS, LLC, JAMES MENNIE, JOHN
DOES 1-5, JOHN DOES 6-10, JOHN DOES 11-15

Defendants.

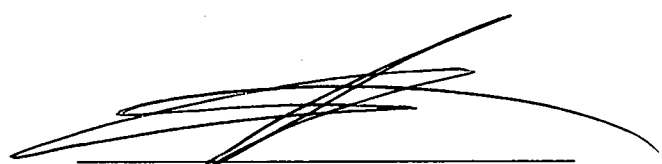
-----X

And it is further,

ORDERED that this constitutes the decision and order of this Court.

2/26/2019

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE