Mazzara v Grey Lady
2019 NY Slip Op 32115(U)
July 12, 2019
Supreme Court, New York County
Docket Number: 156974/2017
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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DEVIN MAZZARA,

Plaintiff,

- v -

GREY LADY, GREY LADY EAST, LLC.

Defendants.

---X

INDEX NO. 156974/2017

MOTION DATE

MOTION SEQ. NO. 002; 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72
were read on this motion to/for CHANGE VENUE.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 84, 85, 86, 87, 88, 89, 90, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101
were read on this motion to/for AMEND CAPTION/PLEADINGS.

Plaintiff sustained personal injuries on July 4, 2017, from a slip and fall at defendant Grey Lady, a restaurant at 440 West Lake Drive, in the Hamlet of Montauk, County of Suffolk, State of New York when a wet and slippery condition caused her to slip and fall. Plaintiff brought suit against defendants alleging negligence. Defendants move in Motion Sequence (MS) 2 for a change of venue to Suffolk County pursuant to CPLR §§ 503, 510, and 511(b), and for sanctions pursuant to 2 NYCRR §130-1.1(a) in the amount of $5,000. Plaintiff opposes defendants' motion to change venue and seeks sanctions against defendants' attorneys for their alleged false statements to the court. In MS 3, plaintiff moves pursuant to CPLR 3025 to amend the caption, and defendants cross-moves pursuant CPLR 3212 for summary judgment dismissing the complaint, and for sanctions again. The Decision and Order is as follows:

<u>Venue</u>

On March 6, 2019, defendants served plaintiff with a 'Demand to Change Venue' pursuant to CPLR §§ 503, 510, and 511 (NYSCEF #48 – Demand to Change Venue), which plaintiff rejected. Hence, defendants bring the instant motion in MS 2. Defendants' motion to change venue to Suffolk County is denied.

At the outset, at the oral argument on this motion held on June 19, 2018, defendants concede that they would not prevail on the motion to change venue pursuant to CPLR § 503.

Defendants argue that venue in New York County is improper. In support, defendants provide the affidavit of Grey Lady East, LLC's owner, Ryan Chadwick, who avers that Grey Lady East, LLC's premises and principal place of business has always been 440 West Lake Drive, Montauk, New York, which is in Suffolk County and that only Grey Lady East, LLC owns and operates the premises where the incident occurred (NYSCEF #51 – affidavit of deft's owner – ¶¶7, 10). Chadwick adds that defendant Grey Lady does not own, operate, maintain, or control any portion of the property where the accident occurred (*id.*). A New York State Department of Corporations search confirms that only Grey Lady East, LLC is a registered entity with a service address in Suffolk County (NYSCEF #43 – affirmation of deft's counsel – ¶¶13,14).

On the other hand, plaintiff alleges that defendant Grey Lady's principal office and place of business is located at 77 Delancey Street in the City, County, and State of New York (NYSCEF #53 – affirmation of pltf's counsel – ¶3). Plaintiff claims "defendant Grey Lady's location in Montauk, where the accident occurred, is a mere pop up, an extension owned, controlled, operated and managed by defendant Grey Lady (whose principal office and place of business is located at 77 Delancey Street in New York County)" (*id.*). "The two locations are run by the same three men, they share [the] same name, they share the same logo, they share staff, they share the same executive chef and they share the same social media and promotions" (*id.*). In essence, plaintiff argues that Grey Lady and Grey Lady East are the same entity and "the only evidence defendants have provided to establish the claim that Grey Lady and Grey Lady East, LLC are separate entities is an affidavit by defendants' witness, owner Ryan Chadwick" (*id.*, ¶22).

Plaintiff points out that defendants missed the statutory deadline to motion to change venue, having served the motion approximately one year and six months after defendants served their answer (*id.*, ¶5). Additionally, plaintiff argues that defendants have not made the necessary showing for a discretionary change in venue pursuant to CPLR § 510[3] (*id.*, ¶ 11).

CPLR § 510 provides that "the court, upon motion, may change the place of trial of an action where the county designated for that purpose is not a proper county." A demand to change venue based on the designation of an improper county must be served with the answer or before the answer is served and if not, defendants are "not entitled to change of venue as of right" (*Herrera v R. Conley Inc.*, 52 AD3d 218, 219 [1st Dept 2008]). If the demand to change venue is served after the answer, the defendant's motion is addressed to the court's discretion (*see Pittman v Maher*, 202 AD2d 172, 175 [1st Dept 1994]).

Defendants' demand to change venue was served one year and six months after the answer. In the span of one and a half years, preliminary conferences were held and stipulations were so-ordered. Defendants fail to explain the delay for their demand to change venue.

In any event, defendants argue that this matter should be moved for the convenience of the witnesses. CPLR § 510(3) permits the motion to change venue to promote the convenience of material witnesses and the ends of justice. The evidentiary showing that convenience of witnesses would be served must include "(1) the identity of the proposed witnesses, (2) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced, (3) that the witnesses have been contacted and are available and willing to testify for the movant, (4) the nature of the anticipated testimony, and (5) the manner in which the anticipated testimony is material to the issues raised in the case" (*see Cardona v Aggressive Heating Inc.*, 180 AD2d 572 [1st Dept 1992]).

Defendants make no attempt to demonstrate that a discretionary change of venue would be warranted based on the convenience of witnesses. As plaintiff alleges, defendants have failed to "set forth the identity and availability of any proposed witnesses, the nature and materiality of their anticipated testimony, the manner in which they would be inconvenienced by the designated venue, that the witnesses have been contacted and are available and willing to testify, the nature of the anticipated testimony and the manner in which the anticipated testimony is material to this case" (NYSCEF #53, ¶11). Defendants' argument is undermined by their failure to annex affidavits setting forth how a change of venue would serve the convenience of material witnesses and the ends of justice (*see Villalba v Brady,* 162 AD3d 553 [1st Dept 2018). As such, the motion to change venue pursuant to CPLR § 510 is denied.

Next, defendants argue that this matter should be moved to Suffolk County because it sent a demand to change venue to plaintiff within a reasonable period of time. CPLR § 511(a) requires that a motion for change of venue on the grounds of improper county be made at a reasonable time within the commencement of action and CPLR § 511(b) provides the statutory time limits. Here, the motion to change venue does not comply with the procedural requirements of CPLR § 511 and defendants failed to make any showing justifying their delay in obtaining a venue change. Defendants' demand for change of venue was untimely. Hence, defendants' motion to change venue to Suffolk County pursuant to CPLR §§ 510 and 511 is denied.

Plaintiff's Motion to Amend Complaint

Plaintiff moves for an order pursuant to CPLR 3025 amending the caption to replace defendant Grey Lady with defendant Barnorth Group LLC d/b/a Grey Lady

(NYSCEF #73 – Notice of Motion). Plaintiff alleges that Barnorth Group LLC d/b/a Grey Lady was known only through defendants' affidavits submitted in defendants' motion to change venue.(NYSCEF #74 – Affirmation of pltf's counsel, ¶ 7).

Plaintiff's motion is uncontested and, as it is defendants' affidavits by their owners that inform "Grey Lady is a d/b/a of Barnorth Group, LLC." (NYSCEF #78 – Chadwick Aff ¶5; #79 – McLaughlin Aff ¶4), plaintiff's motion to amend complaint is granted.

Defendant's Cross-Motion to Dismiss

Defendants file a cross-motion requesting "an order pursuant to: (i) CPLR 3212 for summary judgment on behalf of defendant Grey Lady as Grey Lady has no relationship to/with and does not own, operate, and/or control the premises where plaintiff's alleged incident took place; (ii) CPLR 3211(a)(1) to dismiss plaintiff's complaint and any claims submitted against Grey Lady; (iii) CPLR 3211(a)(7) to dismiss plaintiff's complaint and any claims submitted against Grey Lady; . . . (NYSCEF #84 – Notice of Motion).

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]).

In this action, there remains an issue of fact as to the relationship between Grey Lady East LLC and Barnorth Group LLC d/b/a Grey Lady. Defendants claim that only Grey Lady East, LLC is pertinent in this action and that ownership and control of both organizations is independent. Plaintiff, on the other hand, alleges that the defendant entities are "run by the same three men, the two locations share [the] same name, they share the same logo, they share staff, they share the same executive chef and they share the same social media and promotions" (NYSCEF #92 – Affirmation in Opposition to Cross-Motion ¶2).

Based on the pre-discovery record, ownership of the property at issue remains indeterminate since it is unclear whether the defendant entities are the same or independent of one another. As there is a question of fact, summary judgment is improper at this time.

Defendants also fail on their cross-motion to dismiss pursuant to CPLR 3211(a)(1) and 3211(a)(7), because "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Weiner v Lenox Hill Hosp.,* 193 AD2d 380, 381 [1st Dept 1993] [citations omitted]). Here, the same triable issue of fact remains where it is unclear how defendants are related to one another. Plaintiff's complaint clearly manifests a cause of action for negligence regarding her slip and fall at a restaurant name Grey Lady, which is seemingly affiliated with the Grey Lady entity in New York County. As such, it would be premature for the court to grant either the cross-motion for summary judgment or the cross-motion to dismiss the complaint.

Motion for Sanctions in MS 2 and 3

In MS 2, plaintiff requests sanctions be imposed against defendants' attorneys, and in MS 2 and 3, defendants seeks sanctions against plaintiff's attorney.

Pursuant to 2 NYCRR §130-1.1(a), the court may impose sanctions against counsels when their conduct is (1) "completely without merit in law"; (2) "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another"; or (3) "assert[ing] material factual statements that are false" (*see Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]).

Neither party has made the necessary showings to warrant granting their respective motions for sanctions. Both parties' respective motions for sanctions are denied.

Accordingly, it is ORDERED that defendants Grey Lady and Grey Lady East, LLC's motion to change venue to Suffolk County pursuant to CPLR 503, CPLR 510 and CPLR 511 is denied; it is further

ORDERED that defendants, Grey Lady and Grey Lady East, LLC's motion and cross-motion for sanctions pursuant to 2 NYCRR §130-1.1(a) are denied in both motion sequence 002 and 003; it is further

ORDERED that plaintiff, Devin Mazzara's request for sanctions is denied; it is further

ORDERED that plaintiff, Devin Mazzara's motion to amend her complaint to replace defendant Grey Lady with defendant Barnorth Group LLC d/b/a Grey Lady pursuant to CPLR 3025 is granted; it is further

ORDERED that the Clerk of the Court is directed to amend the caption as follows:

---X
DEVIN MAZZARA

Plaintiff,

- v -

GREY LADY EAST, LLC;
BARNORTH GROUP LLC d/b/a GREY LADY
Defendants.
---X

ORDERED that defendants, Grey Lady and Grey Lady East, LLC's cross motion for summary judgment pursuant to CPLR 3212 is denied; and it is further

ORDERED that defendants, Grey Lady and Grey Lady East, LLC's cross motion to dismiss the complaint pursuant to CPLR 3211 is denied.

This constitutes the Decision and Order of the court.

7/12/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[ ] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[X] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE