

**Lorenzo v Great Performances/Artists as
Waitresses, Inc.**

2020 NY Slip Op 30831(U)

March 16, 2020

Supreme Court, New York County

Docket Number: 161170/2013

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46

-----X

HECTOR LORENZO,

Index No. 161170/2013

Plaintiff

- against -

DECISION AND ORDER

GREAT PERFORMANCES/ARTISTS AS
WAITRESSES, INC., DELAWARE NORTH
COMPANIES, INCORPORATED, GREAT
EXPECTATIONS CATERING LLC, CPS 5 LLC,
CPS 1 REALTY LP, PLAZA ACCESSORY OWNER
LP, FHR (NYC) LLC, FAIRMONT HOTELS &
RESORTS (US) INC. d/b/a FAIRMONT
RAFFLES HOLDINGS INTERNATIONAL,
HAMPSHIRE HOTELS MANAGEMENT, LLC, EL
AD US HOLDING, INC. d/b/a EL-AD GROUP,
ELAD PROPERTIES, LLC, EL-AD PROPERTIES
NY LLC, SAHARA PLAZA LLC, SAHARA PLAZA
II INC., SAHARA HAMPSHIRE HOTEL
MANAGEMENT CO. II INC., SAHARA
HAMPSHIRE HOTEL MANAGEMENT LLC, and
KINGDOM HOLDING COMPANY,

Defendants

-----X
-----X

GREAT EXPECTATIONS CATERING, LLC,
and CPS 5, LLC,

Third Party Plaintiffs

- against -

JOHN YAHARA, NICOLE YAHARA THOBANI, and
ALY THOBANI,

Third Party Defendants

-----X
-----X

DELAWARE NORTH COMPANIES, INCORPORATED;

Second Third Party Plaintiff

- against -

JOHN YAHARA, NICOLE YAHARA THOBANI, and
ALY THOBANI,

Second Third Party Defendants

-----x
-----x

FHR (NYC) LLC, FAIRMONT HOTELS &
RESORTS (U.S.) INC. d/b/a FAIRMONT
RAFFLES HOLDINGS INTERNATIONAL, and
FRHI HOTELS & RESORTS (U.S.) INC. d/b/a
FAIRMONT RAFFLES HOLDINGS
INTERNATIONAL,

Third Third Party Plaintiffs

- against -

JOHN YAHARA, NICOLE YAHARA THOBANI, and
ALY THOBANI,

Third Third Party Defendants

-----x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff seeks damages for severe head trauma when he was punched in the face while attending a wedding at the Plaza Hotel in New York County. Plaintiff, a wedding guest, alleges that third party defendant John Yahara, another wedding guest, committed the assault and battery, but does not sue Yahara. Instead, plaintiff broadly claims that the negligence of all defendants that carried out the wedding celebration, in failing

to train their staff and to supervise, manage, operate, and adequately control the Plaza Hotel premises, caused the assault and battery. More specifically, he claims that defendants served alcohol to intoxicated wedding guests, failed to exercise adequate control over wedding guests, and failed to remove intoxicated wedding guests from the premises, amounting to a violation of the Dram Shop Act, N.Y. Gen. Oblig. Law § 11-101, as well as negligence.

Defendant-second third party plaintiff Delaware North Companies, Incorporated, a provider of food and hospitality services, includes among its subsidiaries defendant Great Expectations Catering LLC, which manages, supervises, and owns 50% of defendant CPS 5 LLC. CPS 5 in turn carries out the catering operations, including booking events and serving food and drinks at event venues. Delaware North Companies moves for summary judgment dismissing the complaint and cross-claims against Delaware North Companies, contending that neither these connections nor any other evidence indicates that Delaware North Companies contributed to Yahara's intoxication and eventual assault and battery of plaintiff. C.P.L.R. § 3212(b). Plaintiff cross-moves to file a Supplemental Summons and Second Amended Complaint to add claims against Delaware North Companies SportService, Inc., and DNC New York Catering, Inc., two

additional subsidiaries of Delaware North Companies. C.P.L.R. §§ 1002(b), 3025(b).

II. DELAWARE NORTH COMPANIES' MOTION FOR SUMMARY JUDGMENT

A. Summary Judgment Standards

To obtain summary judgment, Delaware North Companies must make a prima facie showing of entitlement to judgment as a matter of law through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016); Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012). If Delaware North Companies satisfies this standard, the burden shifts to plaintiff and co-defendants to rebut that prima facie showing by producing evidence, in admissible form, sufficient to require a trial of material factual issues. De Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016); Nomura Asset Capital Corp. v. Cadwalader Wickersham & Taft LLP, 26 N.Y.3d at 49; Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004).

In evaluating the evidence for purposes of Delaware North Companies' motion, the court construes the evidence in the light most favorable to plaintiff and co-defendants. Stonehill Capital Mgt. LLC v. Bank of the W., 28 N.Y.3d 439, 448 (2016); De Lourdes

Torres v. Jones, 26 N.Y.3d at 763; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 475 (2013); Vega v. Restani Constr. Corp., 18 N.Y.3d at 503. If Delaware North Companies fails to meet its initial burden, the court must deny summary judgment despite any insufficiency in the opposition. Voss v. Netherlands Ins. Co., 22 N.Y.3d at 734; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005).

B. Plaintiff's Claim for Violation of the Dram Shop Act

The Dram Shop Act, N.Y. Gen. Oblig. Law § 11-101(1), provides that:

Any person who shall be injured in person, property, means of support, or otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.

To be free from liability under this statute, Delaware North Companies must establish either that it was uninvolved in serving alcohol to Yahara when he was visibly intoxicated or that there was no reasonable or practical connection between its actions or omissions and the assault and battery of plaintiff. Kaufman v. Quickway, Inc., 14 N.Y.3d 907, 909 (2010); Ricaurte v. Inwood Beer Garden & Bistro Inc., 165 A.D.3d 586, 586 (1st Dep't 2018);

Carver v. P.J. Carney's, 103 A.D.3d 447, 448 (1st Dep't 2013);
Coffey v. Esparra, 88 A.D.3d 621, 621-22 (1st Dep't 2011).

Delaware North Companies claims that it was uninvolved in serving alcohol to Yahara because it was wholly uninvolved in the service of alcohol at the Plaza Hotel. Delaware North Companies relies on the depositions of Vincent Palumbo, a manager of defendant CPS 5, and Nicholas Liberto, Vice President of Finance for proposed defendant Delaware North Companies Sportservice.

Palumbo testified that defendants Great Expectations Catering and Great Performances were the entities responsible for all alcohol service operations, Aff. of Marylou K. Roshia Ex. E, at 93-95; that Great Performances trained bartenders and wait staff to identify intoxication, id. at 86; and that CPS 5 developed the alcohol service policy and held the liquor licenses for service of alcohol at the Plaza Hotel. Id. at 89-90, Exs. 3-4. He further testified that CPS 5 independently operated the day-to-day business of catering, bartending, and providing champagne and wine to wedding guests and that Delaware North Companies was responsible only for accounting and financial reporting. Id. at 352-54.

Liberto, whom Delaware North Companies produced as its witness, similarly testified that Delaware North Companies neither served alcohol nor bore responsibility for personnel providing these services at the Plaza Hotel. Roshia Aff. Ex. F,

at 129. While acknowledging that Delaware North Companies maintained express internal alcohol service policies and the capability to provide training on identifying intoxicated individuals, Liberto testified that Delaware North Companies implemented those policies and training at premises other than the Plaza Hotel and under other operating agreements. Id. at 128-29. Liberto corroborated Palumbo's testimony that Great Expectations Catering was responsible for hiring and training the employees who served food and drinks at events at the Plaza Hotel. Id. at 33-36.

These witnesses' combined testimony establishes that Delaware North Companies was not responsible for serving alcohol at events at the Plaza Hotel, satisfying Delaware North Companies' initial burden to establish that Delaware North Companies did not serve alcohol to a visibly intoxicated person there. Coffey v. Esparra, 88 A.D.3d at 621; Zamore v. Bar None Holding Co., LLC, 73 A.D.3d 601, 602 (1st Dep't 2010); Murphy v. Chaos, 26 A.D.3d 231, 231 (1st Dep't 2004); McGlynn v. St. Andrew Apostle Church, 304 A.D.2d 372, 373 (1st Dep't 2003). See Cohen v. Bread & Butter Entertainment LLC, 73 A.D.3d 600, 600 (1st Dep't 2010); McGovern v. 4299 Katonah Inc., 5 A.D.3d 239, 240 (1st Dep't 2004). Plaintiff offers no evidence that Delaware North Companies served alcohol to Yahara while he was visibly

intoxicated, but claims that the evidence Delaware North Companies relies on to establish its defense is inadmissible.

While Delaware North Companies' Exhibit G, the Operating Agreement among CPS 5, Great Expectations Catering, and proposed defendant DNC New York Catering, and Exhibit H, the lease between the landlord Plaza Accessory Owner LP and CPS 5, are unauthenticated, these contracts are unnecessary to its defense established by the two witnesses' testimony. While plaintiff also points out that Liberto's deposition transcript is unsigned, his failure to sign the certified transcript does not render it inadmissible, particularly when plaintiff does not question its authenticity. C.P.L.R. § 3116(a); Singh v. New York City Hous. Auth., 177 A.D.3d 475, 475 (1st Dep't 2019). Once plaintiff, as he acknowledges, forwarded Liberto's certified deposition transcript to Liberto for his signature, either plaintiff or the party for which Liberto appeared, Delaware North Companies, may rely on the transcript, whether or not the witness signed it. Tsao v. Chung Chao v. Chao, 161 A.D.3d 564, 564 (1st Dep't 2018); Shackman v. 400 E. 85th St. Realty Corp., 161 A.D.3d 438, 438 (1st Dep't 2018); Luna v. CEC Entertainment, Inc., 159 A.D.3d 445, 446 (1st Dep't 2018); Safir v. Saggio Rest., Inc., 151 A.D.3d 543, 543 (1st Dep't 2017).

Finally, plaintiff urges that the court deny Delaware North Companies summary judgment because further disclosure is

necessary. Under C.P.L.R. § 3212(f), however, plaintiff must show that depositions of Delaware North Companies or of other witnesses or other outstanding disclosure may lead to evidence necessary to oppose defendant's motion and that that evidence is exclusively within other parties' knowledge and control. River Park Assoc. (1972) L.P. v. Richman Plaza Garage Corp., 178 A.D.3d 422, 423 (1st Dep't 2019); Santana v. Danco Inc., 115 A.D.3d 560, 560 (1st Dep't 2014); Harlem Real Estate LLC v. New York City Economic Dev. Corp., 82 A.D.3d 562, 563 (1st Dep't 2011); Kent v. 534 E. 11th St., 80 A.D.3d 106, 114 (1st Dep't 2010). Plaintiff must support such a contention with more than "mere hope or conjecture." River Park Assoc. (1972) L.P. v. Richman Plaza Garage Corp., 178 A.D.3d at 423; Barnes-Joseph v. Smith, 73 A.D.3d 494, 495 (1st Dep't 2010). See Singh v. New York City Hous. Auth., 177 A.D.3d at 476; State of N.Y. ex rel Perkins v. Cooke Ctr. for Learning & Dev., Inc., 164 A.D.3d 445, 446 (1st Dep't 2018); Tavarez v. Castillo Herrasme, 140 A.D.3d 453, 454 (1st Dep't (2016)); Kent v. 534 E. 11th St., 80 A.D.3d at 114.

Plaintiff nowhere articulates what he believes he will find through further disclosure. To the extent that he insists Delaware North Companies maintained control over the operations of its subsidiary Great Expectations Catering and CPS 5, which Great Expectations Catering co-owned, through quarterly meetings, he fails to identify any witness who attended such meetings and

knows whether Delaware North Companies participated in discussions about alcohol service. He similarly fails to identify any documents that would show such discussions, like minutes of the meetings. Finally, he fails to explain why, in the over six years of this litigation, he has not demanded the deposition of such a witness or demanded such documents he now insists are so critical. River Park Assoc. (1972) L.P. v. Richman Plaza Garage Corp., 178 A.D.3d at 423; Abe v. New York Univ., 169 A.D.3d 445, 448 (1st Dep't 2019). See Hamilton v. National Amusements, Inc., 177 A.D.3d 449, 450 (1st Dep't 2019). By failing to specify any evidence that further disclosure might reveal to provide him grounds to oppose Delaware North Companies' motion, plaintiff offers nothing more than speculation that disclosure might defeat summary judgment.

Consequently, the lack of disclosure, like plaintiff's other attempts to oppose Delaware North Companies' motion, is not a basis to deny summary judgment. Because Delaware North Companies establishes that it did not serve alcohol to Yahara while he was visibly intoxicated, and plaintiff has failed to raise a factual issue to rebut its prima facie showing, it is entitled to summary judgment dismissing plaintiff's claim under the Dram Shop Act. N.Y. Gen. Oblig. Law § 11-101(1); Coffey v. Esparra, 88 A.D.3d at 621-22; Zamore v. Bar None Holding Co., LLC, 73 A.D.3d at 602; Murphy v. Chaos, 26 A.D.3d at 231; McGlynn v. St. Andrew Apostle

Church, 304 A.D.2d at 373. See Ricaurte v. Inwood Beer Garden & Bistro Inc., 165 A.D.3d at 586.

C. Plaintiff's Claim for Negligence and Co-Defendants' Cross-Claims

Because Delaware North Companies similarly establishes that it neither retained control over the Plaza Hotel premises nor was involved with the service of alcohol at those premises, it owed plaintiff no duty of care to prevent Yahara's assault and battery. Ballo v. AIMCO 2252-2258 ACP, LLC, 155 A.D.3d 582, 583 (1st Dep't 2017); Carver v. P.J. Carney's, 103 A.D.3d at 448; McGovern v. 4299 Katonah Inc., 5 A.D.3d at 240; McGlynn v. St. Andrew Apostle Church, 304 A.D.2d 372, 373 (1st Dep't 2003). See Ricaurte v. Inwood Beer Garden & Bistro Inc., 165 A.D.3d at 586. Delaware North Companies demonstrates that its role was limited to accounting and financial reporting.

Plaintiff mounts no further opposition to dismissal of his negligence claim than in opposition to dismissal of his Dram Shop Act claim against Delaware North Companies. Co-defendants do not oppose dismissal of their cross-claims for indemnification and contribution, which would require a showing of Delaware North Companies' culpable conduct. Canty v. 133 E. 79th St., LLC, 167 A.D.3d 548, 549 (1st Dep't 2018); Rubino v. 330 Madison Co., LLC, 150 A.D.3d 603, 604 (1st Dep't 2017); Wilk v. Columbia Univ., 150 A.D.3d 502, 503-504 (1st Dep't 2017); Scekic v. SL Green Realty Corp., 132 A.D.3d 563, 565-66 (1st Dep't 2015). Nor do any co-

defendants show any contractual claim. Canty v. 133 E. 79th St., LLC, 167 A.D.3d at 549-50; Nicholson v. Sabey Data Ctr. Props., LLC, 160 A.D.3d 587, 587 (1st Dep't 2018); Galue v. Independence 270 Madison LLC, 119 A.D.3d 403, 403 (1st Dep't 2014); Echevarria v. 158th St. Riverside Dr. Hous. Co., Inc., 113 A.D.3d 500, 502 (1st Dep't 2014). As discussed above, Delaware North Companies has established that it retained no control over the Plaza Hotel premises and was uninvolved with the service of alcohol at those premises, notwithstanding the exclusion of its Exhibits G-H from the record, and therefore is entitled to summary judgment dismissing plaintiff's negligence claim and all cross-claims. Ballo v. AIMCO 2252-2258 ACP, LLC, 155 A.D.3d at 583; Carver v. P.J. Carney's, 103 A.D.3d at 448; McGovern v. 4299 Katonah Inc., 5 A.D.3d at 240; McGlynn v. St. Andrew Apostle Church, 304 A.D.2d at 373. See Ricaurte v. Inwood Beer Garden & Bistro Inc., 165 A.D.3d at 586.

III. PLAINTIFF'S CROSS-MOTION TO JOIN DEFENDANTS AND AMEND HIS COMPLAINT

Plaintiff cross-moves to file a Supplemental Summons and Second Amended Complaint to add claims against Delaware North Companies SportService, Inc., and DNC New York Catering, Inc. C.P.L.R. §§ 1002(b), 3025(b). Plaintiff claims that, despite the expiration of the applicable statute of limitations, C.P.L.R. § 214(2) and (5), these entities may be added as defendants because they knew or should have known they were intended defendants.

A. Plaintiff's Use of a Cross-Motion

Plaintiff's cross-motion to join proposed defendants is not a cognizable cross-motion because it seeks no relief from defendant Delaware North Companies, the moving party, as required by C.P.L.R. § 2215. Plaintiff's use of a cross-motion to seek relief against parties other than Delaware North Companies is basis alone to deny the cross-motion. Hennessey-Diaz v. City of New York, 146 A.D.3d 419, 420 (1st Dep't 2017); Asiedu v. Lieberman, 142 A.D.3d 858, 858 (1st Dep't 2016); Genger v. Genger, 120 A.D.3d 1102, 1103 (1st Dep't 2014); Kershaw v. Hospital for Special Surgery, 114 A.D.3d 75, 88 (1st Dep't 2013).

B. Merits of the Relief Sought

Assuming that plaintiff separately moved for the relief he seeks, the court would grant him leave to join defendants and amend his complaint if he demonstrates a right to relief against the proposed defendants, Bossung v. Rebaco Realy Holding Co., N.V., 169 A.D.3d 538, 538 (1st Dep't 2019); Kellogg v. All Sts. Hous Dev. Fund Co., Inc., 146 A.D.3d 615, 617 (1st Dep't 2017); Stewart Tenants Corp. v. Square Indus., 269 A.D.2d 246, 248 (1st Dep't 2000), and the amendments do not surprise or otherwise prejudice the opposing parties. C.P.L.R. § 3025(b); Davis v. South Nassau Communities Hosp., 26 N.Y.3d 563, 580 (2015); Kimso Apts., LLC v. Gandhi, 24 N.Y.3d 403, 411 (2014); Global Liberty Ins. Co. v. Tyrell, 172 A.D.3d 499, 500 (1st Dep't 2019); Y.A. v.

Conair Corp., 154 A.D.3d 611, 612 (1st Dep't 2017). The court must deny proposed amendments that lack merit. Davis v. South Nassau Communities Hosp., 26 N.Y.3d at 580; Thomas Crimmins Contr. Co. v. City of New York, 74 N.Y.2d 166, 170 (1989); Cafe Lughnasa Inc. v. A&R Kalimian, 176 A.D.3d 533, 523 (1st Dep't 2019); Brook v. Peconic Bay Med. Ctr., 176 A.D.3d 468, 469 (1st Dep't 2019).

Plaintiff seeks to interpose the same claims for violation of the Dram Shop Act and negligence against the proposed defendants. The applicable statute of limitations of three years bars these new claims. C.P.L.R. § 214(2) and(5). Only if the original complaint gave the proposed defendants notice of the transactions or occurrences underlying the new claims, and the proposed defendants will not be unduly prejudiced, may plaintiff's motion to add defendants in the second amended complaint be treated as interposed at the time of the original complaint. C.P.L.R. § 203(f); U.S. Bank N.A. v. DLJ Mtge. Capital, Inc., 33 N.Y.3d 84, 90 (2019); Buran v. Coupal, 87 N.Y.2d 173, 178 (1995); Ramirez v. Elias-Tejada, 168 A.D.3d 401, 402 (1st Dep't 2019); O'Halloran v. Metropolitan Transp. Auth., 154 A.D.3d 83, 86 (1st Dep't 2017).

Plaintiff filed an amended complaint in January 2014, alleging claims for violation of the Dram Shop Act and negligence against Delaware North Companies. Plaintiff insists that the

proposed defendants received notice of these claims and knew the claims were intended to be against the proposed defendants because they are subsidiaries of Delaware North Companies, but does not even attempt to show how their status as subsidiaries gave them notice of the amended complaint, let alone that its claims were against them. C.P.L.R. § 215(3); Bossung v. Rebaco Realty Holding Co., N.V., 169 A.D.3d at 538; Torati v. Hodak, 147 A.D.3d 502, 503 (1st Dep't 2017); Casa de Meadows Inc. (Cayman Is.) v. Zaman, 76 A.D.3d 917, 920 (1st Dep't 2010). See U.S. Bank N.A. v. DLJ Mtge. Capital, Inc., 33 N.Y.3d at 90; Buran v. Coupal, 87 N.Y.2d at 178. Plaintiff likewise fails to show that either of these subsidiaries bore any responsibility for alcohol service, so that they might expect they were the intended targets of plaintiff's claims, or, even if the claims were still within the statute of limitations, the claims are any more meritorious against the two subsidiaries than against Delaware North Companies itself.

Plaintiff attempts to excuse the untimeliness of his claims by explaining that he only learned about the proposed defendants' potential contribution to plaintiff's injury after the statute of limitations had expired, yet he continued to delay, cross-moving to add them only in response to Delaware North Companies' motion for summary judgment. In fact, by the time plaintiff served his cross-motion to add proposed defendants, plaintiff had known

about them for approximately five years, long after the statute of limitations had run. See Sutton Apts. Corp. v. Bradhurst Dev. LLC, 160 A.D.3d 508, 509-10 (1st Dep't 2018). Even if the proposed defendants knew about this action, this delay gave them further grounds to assume that they were not the intended targets. Therefore plaintiff's claims against the proposed defendants do not relate back to the amended complaint's filing date and are barred by the three year statute of limitations.

IV. CONCLUSION

For all the reasons explained above, the court grants the motion by defendant Delaware North Companies, Incorporated, for summary judgment dismissing plaintiff's claims for violation of New York General Obligations Law § 11-101 and negligence and all cross-claims against this defendant, C.P.L.R. § 3212(b), and denies plaintiff's cross-motion to join defendants and amend his amended complaint. C.P.L.R. §§ 1002(b), 3025(b). This decision constitutes the court's order and judgment of dismissal in favor of defendant Delaware North Companies, Incorporated.

DATED: March 16, 2020



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.