

Stevens v Le Reve LLC
2020 NY Slip Op 33204(U)
September 30, 2020
Supreme Court, New York County
Docket Number: 158974/2019
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

-----X
RONDU STEVENS,

Plaintiff,

- v -

LE REVE LLC, NEW YORK CITY POLICE DEPARTMENT,
POLICE OFFICER JOHN DOE, POLICE OFFICER JOHN
DOE, POLICE OFFICER JOHN DOE, POLICE OFFICER
JOHN DOE, YAHYA TACNEAU

Defendant.

INDEX NO. 158974/2019
MOTION DATE N/A
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for DISMISSAL

This is an action to recover for injuries allegedly sustained by plaintiff on September 15, 2018, when he asked to leave Le Reve Restaurant. Nuvo¹ and Yahya Tacneau move this court to dismiss the complaint as against them for improper service. Plaintiff opposes the instant motion and cross moves to amend the caption to add Nuvo. For the reasons set forth below Nuvo and Yahya Tacneau’s motion is granted in part and plaintiff’s cross motion is granted in part.

CPLR 306-b, provides in relevant part, that a plaintiff must serve its summons with notice on the defendants “within one hundred twenty days after the commencement of the action.” If service is not made within 120 days of commencement, the court, upon motion, shall dismiss the action, unless the plaintiff shows that the time for service should be extended upon “good cause” or “in the interest of justice.” *Id.*

¹ Nuvo is not a named defendant in this action, however filed an answer to the complaint. As Nuvo is not a named defendant the Court cannot dismiss the complaint as against it since one does not exist.

Under the interest of justice prong of CPLR 306-b, the Court of Appeals has instructed that a court "may consider [plaintiff's] diligence, or lack thereof, along with any other relevant factor . . . , including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" (*Henneberry v Borstein*, 91 AD3d 493, 496 [1st Dept 2012] citing *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104-106).

Here, plaintiff annexes one affidavit of service that does not identify the individual or entity attempting to be served. Moreover, the plaintiff does not establish that service was attempted at Tacneau's residence nor is an affidavit of service annexed for the purported mailing of the summons and complaint. During oral argument, it was undisputed that the statute of limitations has already expired. Plaintiff has not cross-moved to extend the time to serve Tacneau. Accordingly, the complaint as against Yahya Tacneau is dismissed.

With respect the plaintiff's cross motion to amend the caption to add individual police officers, that portion of plaintiff's cross motion is denied.

It is well established that a party seeking to invoke the *relation back* doctrine must establish that: first, the claims arose out of the same conduct, transactions, or occurrence; second, that the new party is united in interest with the original defendant, and will not suffer prejudice due to lack of notice; third, that 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 him as well (*Buran v Coupal*, 87 NY2d 173, 178, [1995] internal citations omitted). Moreover, a movant seeking to apply the relation-back doctrine to a later identified "John Doe" defendant, pursuant to CPLR § 1024, also has the burden of establishing that diligent efforts were made to ascertain the unknown party's identity prior to the expiration of the statute of

limitations. See *Diaz v City of New York*, 160 AD3d 457, 457 [1st Dept 2018]; *Holmes v City of New York*, 132 AD3d 952, 954 [2nd Dept 2015].

Here, plaintiff has failed to allege any mistake in identifying the parties or diligent efforts made to ascertain the identities of the officers within the applicable statute of limitations.

Notwithstanding that it is undisputed that plaintiff was aware of the identity of at least one officer he seeks to add to this action prior to the expiration of the statute of limitations, plaintiff has failed to articulate any reason for the delay in the instant motion (*Crawford v City of NY*, 129 AD3d 554, 555 [1st Dept 2015]). As to the state law claims which had already run prior to plaintiff's awareness of the identities of the officers, plaintiff failed to establish that any diligent efforts were made prior to the statute running to identify those officers (*Diaz* 160 AD3d at 457).

The motion to amend to add Nuvo is granted, as this appears to be a technical correction, and no opposition has been provided. Accordingly, it is hereby

ORDERED defendant's, Yahya Tacneau, motion to dismiss the complaint is granted; and it is further

ORDERED the portion of plaintiff's cross motion to amend the caption to add individual officers is denied; and it is further

ORDERED plaintiff's cross motion to amend the caption to include Manhattan Nuvo LLC d/b/a Le Reve Restaurant and Lounge and remove La Reve as a named defendant is granted without opposition. The action shall bear the following caption

RONDU STEVENS,

Plaintiff,

-against-


MANHATTAN NUVO LLC D/B/A
LE REVE RESTAURANT AND LOUNGE,
POLICE OFFICER JOHN DOES 1 through 4,

and THE CITY OF NEW YORK,

Defendants.

And it is further

ORDERED that plaintiff shall serve MANHATTAN NUVO LLC D/B/A LE REVE RESTAURANT AND LOUNGE with the amended summons and complaint within 30 days of this order, and an answer or other response shall be served within 20 days of such service.

9/30/2020			
DATE		LYLE E. FRANK, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSAL	HON. LYLE E. FRANK J.S.C.
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE	