

McInerney v Rosenbluth
2020 NY Slip Op 35198(U)
April 14, 2020
Supreme Court, Nassau County
Docket Number: Index No. 609803/2019
Judge: Arthur M. Diamond
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SUPREME COURT – STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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JEANNETTE MCINERNEY, as Administrator of the
the Estate of LISA M. MICELI, Deceased, and
JEANNETTE MCINERNEY, Individually,

Plaintiffs,

IAS PART: 5
NASSAU COUNTY
INDEX NO.: 609803/2019

-against-

STEPHEN ROSENBLUTH, JENNIFER RUBIN,
and THE OCTOPUS & ANCHOR INC., d/b/a
CARDOON MEDITERRANEAN GRILL,

Defendants.

MOTION SEQ. #: 1
SUBMIT DATE: 02/06/2020

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The following papers having been read on this motion:

Notice of Motion.....1
Opposition.....2
Reply.....3

Defendants Rosenbluth and Rubin move, pursuant to CPLR §3211(a)(1), (a)(7), and (c), to dismiss Plaintiffs’ complaint in its entirety as asserted against them. Plaintiffs have opposed the motion. Based upon the following, the motion is hereby denied in full.

As a preliminary matter, Defendants have requested this Court convert the within motion to a summary judgment motion to be decided pursuant to CPLR §3212. Pursuant to CPLR §3211(c), a court is permitted, in its discretion, to treat a motion to dismiss as a summary judgment motion after adequate notice to the parties. Shayne v. Julien, Schlesinger & Finz, P.C., 110 AD2d 761, 488 NYS2d 66 (2nd Dept., 1985). Additionally, the notice requirement may be dispensed with where the parties have made it unequivocally clear that they are laying bare their proof and deliberately charting a summary judgment course. Imperium Insurance Co. v. Utica First Insurance Co., 130 AD3d 574, 10 NYS3d 898 (Mem) (2nd Dept. 2015). Here, Defendants Rosenbluth and Rubin have not made it clear that they specifically seek summary judgment in their moving papers, having focused their papers on the law pertaining to CPLR §3211(a)(1) and

(a)(7); likewise, in response, Plaintiffs have not sought to oppose the motion on summary judgment grounds and have not provided a competing affidavit in their opposition papers. Thus, given the underlying facts involved in this case, as well as the emphasis in the papers before the Court, the request pursuant to CPLR §3211(c) to convert the motion to a summary judgment one is hereby denied.

The instant action before the Court is brought by the administrator for a decedent who was killed in a motor vehicle accident on August 1, 2017. Both the decedent and the driver of the vehicle involved in the accident had been patrons at the bar/restaurant owned by Defendants Rosenbluth and Rubin, operating their business as Defendant Octopus. According to the moving papers of Defendants Rosenbluth and Rubin, they each own fifty percent (50%) of the business known as Defendant Octopus. Additionally, pursuant to the complaint, both the decedent and the driver of the vehicle involved in the accident had been served alcoholic beverages while visibly intoxicated at the bar/restaurant owned by Defendants Rosenbluth and Rubin and operating as Defendant Octopus.

A motion to dismiss a complaint based on CPLR §3211(a)(1) may be granted only in instances where the documentary evidence utterly refutes Plaintiff's factual allegations conclusively and establishes a defense as a matter of law. Ginsberg Development Co. v. Carbone, 85 AD3d 1110, 926 NYS2d 156 (2nd Dept., 2011). To be considered documentary under the statute, the evidence must be unambiguous, of undisputed authenticity, and its contents be essentially undeniable. Fontanetta v. Doe, 73 AD3d 78, 898 NYS2d 569 (2nd Dept., 2010). Affidavits, deposition testimony, and letters alone are not considered documentary evidence under CPLR §3211(a)(1). Attias v. Costiera, 120 AD3d 1281, 993 NYS2d 59 (2nd Dept., 2014).

A review of the motion by Defendants Rosenbluth and Rubin indicates that the motions as set forth under this section of the statute are unsupported by documentary evidence. The moving Defendants have submitted an affidavit from each of them, limited only to discussing their ownership share in Defendant Octopus, unauthenticated documents in the form of redacted tax returns, and a liquor license for Defendant Octopus. The affidavits themselves cannot be considered documentary, and the absence of authentication as to the remaining documents submitted render the entire submission herein unproductive to their request. Even assuming, arguendo, the Court were to accept the tax returns and liquor license as documentary, these documents themselves are insufficient to dismiss Plaintiffs' entire complaint asserted against

Defendants Rosenbluth and Rubin, given the causes of action sounding in negligence under the Dram Shop Act, respondeat superior, negligent hiring and supervision, and wrongful death. Accordingly the portion of the motion seeking dismissal pursuant to CPLR §3211(a)(1) is hereby denied.

Pursuant to CPLR §3211(a)(7), when reviewing such a motion, the court must afford the pleading a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Reznick v. Bluegreen Resorts Mgmt., Inc., 154 AD3d 891, 62 NYS3d 460 (2nd Dept., 2017). A motion to dismiss made pursuant to CPLR §3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law. Clarke v. Laidlaw Transit, Inc., 125 AD3d 920, 5 NYS3d 138 (2nd Dept., 2015).

As stated in the foregoing, Plaintiffs' have asserted four causes of action against all Defendants. A review of the complaint satisfies for this Court that Plaintiffs have properly stated a cause of action against Defendants Rosenbluth and Rubin under General Obligations Law §11-101 (see Flynn v. Bulldogs Run Corp., 171 AD3d 1136, 100 NYS3d 35 [2nd Dept. 2019]), as well as for respondeat superior (see GIPE v. DBT Xpress, LLC, 150 AD3d 1208, 52 NYS3d 904 [2nd Dept., 2017]), negligent hiring and supervision (see S.C. v. New York City Department of Education, 97 AD3d 518, 949 NYS2d 71 [2nd Dept. 2012]), and wrongful death (see Eberts v. Makarczuk, 52 AD3d 772, 861 NYS2d 731 [2nd Dept., 2008]). Although Defendants Rosenbluth and Rubin attempt to assert that neither of them was responsible for serving the driver who ultimately caused the motor vehicle accident that claimed the life of decedent, at this preliminary stage of the litigation, it cannot be said that neither may be held responsible in this case.

Furthermore, the statements by each Defendant that the responsibility should be solely on Defendant Octopus and cannot attach to them flies in the face of the explicit language of General Obligations Law §11-101. Indeed, seeing as Defendant Octopus is small business with only one location and two shareholders, the idea that neither of them can be held responsible despite the claims of Plaintiffs, is rejected given the broad language of the statute. Thus, the portion of the motion by Defendants Rosenbluth and Rubin pursuant to CPLR §3211(a)(7) is properly denied at this time.

The foregoing should not be construed as a finding by this Court or be deemed to be law of the case that Defendants Rosenbluth and Rubin are liable under any theory asserted by Plaintiffs' at this time; rather, this Court determines only that they could be found liable at the time of trial or in a future motion for summary judgment.

Defendants Rosenbluth and Rubin shall file and serve a copy of the within order with notice of entry upon Plaintiff within thirty (30) days from the date of this order. Thereafter, seeing as Defendants Octopus has only filed an answer to date, Defendants Rosenbluth and Rubin shall file and serve an answer in the within action within sixty (60) days from the date of this order.

The parties shall participate at a preliminary conference by appearing in the lower level of Supreme Court, Nassau County, on September 16, 2020, at 9:30am

This hereby constitutes the decision and order of this Court.

E N T E R

DATED: April 14, 2020

/S/

**HON. ARTHUR M. DIAMOND
J.S.C.**

ENTERED

Apr 16 2020

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**