

Sharp v Bar Fluid LLC

2023 NY Slip Op 33786(U)

October 16, 2023

Supreme Court, New York County

Docket Number: Index No. 656730/2022

Judge: Suzanne J. Adams

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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. SUZANNE J. ADAMS
Justice

PART 39TR

-----X
FRANK SHARP,
Plaintiff,

INDEX NO. 656730/2022
MOTION DATE N/A
MOTION SEQ. NO. 005

- v -

BAR FLUID LLC, ROBERT FLUET,
Defendant.

**DECISION + ORDER ON
MOTION**

-----X
BAR FLUID LLC, ROBERT FLUET
Plaintiff,

Third-Party
Index No. 595469/2023

-against-

JOSEPH DEMPSEY
Defendant.

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 005) 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is ordered that plaintiff's motion is granted in part as discussed hereinbelow, and defendants/third-party plaintiffs' cross-motion is granted. This action arises out of the agreement between plaintiff, a nightlife promoter, and defendants/third-party plaintiffs, a now-defunct nightclub (known as "The Q") and its primary owner, in connection with the opening, promotion, and managing of The Q. The nightclub opened for business in June 2021, and plaintiff was terminated, purportedly as an at will employee, on May 23, 2022. Plaintiff commenced this action in June 2022, and served the Amended Verified Complaint in October

2022. Defendants' motion to dismiss the complaint was denied by this court by decision and order dated April 10, 2023, and defendants served their Verified Answer with Counterclaims on May 8, 2023. Plaintiff now moves pursuant to CPLR 3211(a)(1) and (7) and 3211(g) to dismiss the counterclaims, and for an award of attorneys' fees and punitive damages. Defendants oppose the motion and cross-move pursuant to CPLR 3025(b) and (c) for leave to amend the Verified Answer with Counterclaims to add additional claims and replead certain other claims. Plaintiff opposes the cross-motion.

Motion to Dismiss Counterclaims

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). CPLR 3211(g)(1) provides in pertinent part that a motion based on 3211(a) “in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in [Civil Rights Law § 76-a(1)(a)], shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law.” CRL § 76-a(1)(a) in turn defines an “action involving public petition and participation” as a claim based upon “(1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.”

The gravamen of plaintiff's motion is that the counterclaims should be dismissed on the grounds that they constitute a SLAPP suit against him, *i.e.*, a "strategic lawsuit against public participation," an unlawful act of retaliation against plaintiff for commencing this action against defendants. CRL § 76-a(1)(a) is New York's anti-SLAPP statute. The recent case cited by both plaintiff and defendants, one of first impression following the 2020 amendments to the anti-SLAPP statute broadening its scope, stated that existing New York case law has defined what constitutes "a matter of public concern," and relied upon it to guide its analysis. *Aristocrat Plastic Surgery P.C. v. Silva*, 206 A.D.3d 26, 29 (1st Dep't 2022). The Appellate Division noted that "[w]hen determining whether content is within 'the sphere of legitimate public concern, allegedly defamatory statements can only be viewed in the context of the writing as a whole' and '[c]ourts must examine [the] content, form, and context' of the statements. Statements falling 'into the realm of mere gossip and prurient interest' are not matters of public concern nor are 'publications directed only to a limited, private audience.' [citations omitted]." The surprisingly lengthy pre-discovery record before the court supports a finding that plaintiff's action does not constitute a matter of public concern, but rather involves a private business and/or employment dispute between parties who were involved in running a private enterprise, *i.e.*, a nightclub, public patronage of which is voluntary and, unlike for example a doctor's office, not a necessity. As such, defendants' counterclaims do not amount to a SLAPP suit and there is no basis to dismiss the counterclaims on such ground. Furthermore, the counterclaims allege sufficient facts to state the claims asserted therein, with the exception of the First Counterclaim for abuse of process. The commencement of an action – presumably including one that has already survived a 3211 motion to dismiss – is not an abuse of process. *See Stroock & Stroock & Lavan v. Beltramini*, 157 A.D.2d 590, 591 (1st Dep't 1990). Thus, dismissal of the First Counterclaim is warranted.

Cross-motion to Amend

Pursuant to CPLR 3025(b), “[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties.” Leave to amend pleadings is generally freely given, absent prejudice and surprise resulting from the delay. *Edenwald Contr. Co. v. City of New York*, 60 N.Y.2d 957, 959 (1983); *Antwerpse Diamantbank N.V. v. Nissel*, 27 A.D.3d 207, 208 (1st Dep’t 2006). The record before the court does not support a finding that plaintiff would be prejudiced by the additional allegations described in defendants’ cross-motion. The court notes there has been no discovery in this matter since its commencement in June 2022.

Accordingly, it is hereby

ORDERED that plaintiff’s motion is granted to the extent that the First Counterclaim of the Verified Answer with Counterclaims is dismissed, and is otherwise denied; and it is further

ORDERED that the cross-motion is granted and defendants shall serve an amended answer with counterclaims, as described in the cross-moving papers, upon plaintiff’s counsel via email within 20 days of the date of this order, and plaintiff shall reply to the amended answer with counterclaims within 20 days from the date of service thereof.

This constitutes the decision and order of the court.



SUZANNE J. ADAMS, J.S.C.

<u>10/16/2023</u> DATE				
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
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