

**Scognamiglio v City of New York**

2024 NY Slip Op 32258(U)

June 13, 2024

Supreme Court, New York County

Docket Number: Index No. 159187/2023

Judge: Jeanine R. Johnson

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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. JEANINE R. JOHNSON PART 52-M**

*Justice*

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NIELLO SCOGNAMIGLIO, KATHLEEN SCOGNAMIGLIO,  
Plaintiff,

INDEX NO. 159187/2023

MOTION DATE 12/18/2023

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, BREAKSTONE REALTY  
CORP., CAFE CHINA GROUP PLLC D/B/A CAFE CHINA,  
61 WEST 37TH STREET, LLC, RICK'S CABARET  
INTERNATIONAL INC. D/B/A VIVID CABARET NEW  
YORK, CONSOLIDATED EDISON COMPANY OF NEW  
YORK, INC., CERCONE EXTERIOR RESTORATION  
CORP. D/B/A CERCONE EXTERIOR RESTORATION

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and oral argument held on 04/10/2024, Defendant–Rick’s Cabaret International Inc. d/b/a Vivid Cabaret New York’s (hereinafter “Defendant–Rick’s Cabaret”) motion for summary judgment and dismissal pursuant to CPLR §§3212; 3211(e), (a)(7) and (a)(8) is denied.

To succeed on a CPLR §3212 motion for summary judgment, the moving party must make a prima facie showing of entitlement to summary judgment as a matter of law by demonstrating the absence of any material issues of fact. *See generally Friends of Thayer Lake LLC v. Brown*, 27 N.Y.3d 1039 (2016). *Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824 (2014); CPLR §3212(b). “If the moving party makes out a prima facie showing, the burden then shifts to the non-moving party to establish the existence of material issues of fact which preclude judgment as a matter of law.” *Jacobsen*, 22 N.Y.3d at 833. If there are no

material, triable issues of fact, summary judgment must be granted. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957).

Defendant–Rick’s Cabaret argues that summary judgment is required as a matter of law because it did not cause or create the injurious condition. Plaintiff contends that summary judgment should not be granted because further discovery is necessary. “A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence, and the plaintiff must show facts essential to justify opposition to the motion that may emerge upon further discovery.” *Bailey v. New York City Tr. Auth.*, 270 A.D.2d 156, 157. In its opposition, Plaintiff asserts that an Examination Before Trial (“EBT”) of Defendant–Rick’s Cabaret is necessary to determine whether Defendant–Rick’s Cabaret is the correct entity to sue in this matter. Process was served upon the general manager of Vivid Cabaret, Mr. Jean Luc Santin, and he states in his affidavit that Vivid Cabaret is not owned by the entity ‘Rick’s Cabaret International Inc. d/b/a Vivid Cabaret New York.’ Process was served at 61 W 37<sup>th</sup> Street, New York, NY, the same address as the accident site in this matter. This Court finds that Defendant–Rick’s Cabaret did not meet its prima facie burden and Plaintiff has shown an evidentiary basis to justify that relevant evidence may emerge upon further discovery. Thus, this Court denies Defendant’s motion for summary judgment in its entirety.

On a motion to dismiss pursuant to CPLR 3211 (a)(7) for failure to state a cause of action the pleading is to be “afforded a liberal construction”. *Leon v Martinez*, 84 NY2d 83, 87 (1994). Allegations comprising bare legal conclusions are not entitled to the same consideration. *See Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137 (2017) quoting *Simkin v Blank*, 19 NY3d 46 (2012). However, this Court is required to “determine only whether the facts alleged fit

within any cognizable legal theory.” *Bernberg v Health Mgmt. Sys.*, 303 AD2d 348, \*3 (2d Dept 2003).

Defendant–Rick’s Cabaret argues that Plaintiff failed to state a cause of action because Defendant–Rick’s Cabaret did not own, operate or control the area where the accident took place. Plaintiff contends that it served Defendant-Rick's Cabaret located at 61 West 37<sup>th</sup> Street, which is the location where the accident took place. This Court finds that Plaintiff’s sufficiently stated a cause of action against Defendant–Rick’s Cabaret by pleading that Plaintiff tripped and fell on an unlit, raised, broken, non-flush wooden platform ramp and sustained multiple injuries on the sidewalk in front of and between 59 and 61 West 37<sup>th</sup> Street. Thus, Defendant’s motion to dismiss is denied.

On a motion to dismiss for lack of personal jurisdiction pursuant to CPLR 3211(a)(8), dismissal is appropriate when the court lacks jurisdiction over a defendant. *See Manfredo v. 100-106 LLC*, 224 A.D.3d 626 (1st Dep’t). Under CPLR 302(a)(1), “proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted.” *James v. iFinex Inc.*, 185 A.D.3d 22, 29 (1st Dep’t 2020). Additionally, under CPLR 311(a), service must be effectuated properly by delivering the summons to a director, managing or general agent of the corporation. *See generally Yang v. Knights Genesis Group*, 223 A.D.3d 639 (1st Dep’t 2024).

Defendant argues that this Court lacks personal jurisdiction and the matter must be dismissed against it pursuant to CPLR 3211 (a)(8) because the entity, ‘Rick’s Cabaret International Inc. d/b/a Vivid Cabaret New York’, is not a registered and cognizable entity in the State of New York. Defendant contends that “a trade name is not a jurial entity amenable to

suit.” *Quoting Honeyman v. Curiosity Works, Inc.*, 120 A.D.3d 1302,1303 (2d Dep’t 2014).

Additionally, Defendant argues that service was not effectuated properly since process was served upon the general manager of Vivid Cabaret, Mr. Jean Luc who stated in his affidavit that he is not an agent of Defendant-Rick's Cabaret. As previously stated, process was served at the same address as the accident site in this matter.

This Court finds Defendant–Rick’s Cabaret’s arguments to be unpersuasive. Defendant–Rick’s Cabaret’s own affiant admitted to being the manager of a similarly named place of business at the same location of the accident - ergo, dismissal at this early stage is an extreme and inappropriate remedy. Moreover, under CPLR 305(c), at any time, in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service of a summons to be amended if a substantial right of a party against whom the summons issued is not prejudiced. *See Tsoumpas 1105 Lexington Equities, LLC v. 1109 Lexington Avenue LLC*, 189 A.D.3d 524 (1st Dep’t 2020). Thus, Defendant’s motion to dismiss for lack of personal jurisdiction is denied.

Accordingly it is hereby,

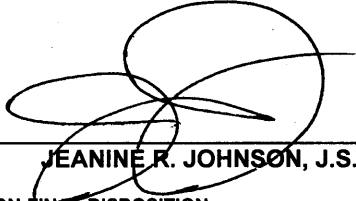
ORDERED that Defendant, Rick’s Cabaret International Inc. d/b/a Vivid Cabaret New York’s motion for summary judgment is denied with leave to renew; and it is further

ORDERED that Defendant, Rick’s Cabaret International Inc. d/b/a Vivid Cabaret New York’s motion for dismissal for failure to state of cause action is denied in its entirety; and it is further

ORDERED that Defendant, Rick's Cabaret International Inc. d/b/a Vivid Cabaret New York's motion for dismissal based upon lack of personal jurisdiction is denied.

This constitutes the Decision and Order of the Court.

6/13/2024  
DATE

  
JEANINE R. JOHNSON, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE