

COPY

NORTH CAROLINA

FORSYTH COUNTY

LARRY W. WOMBLE,

Plaintiff,

v.

R. KENNETH BABB, Administrator
of the Estate of David Michael
Carmichael, and ZIN'S, INC., d/b/a
6th AND VINE,

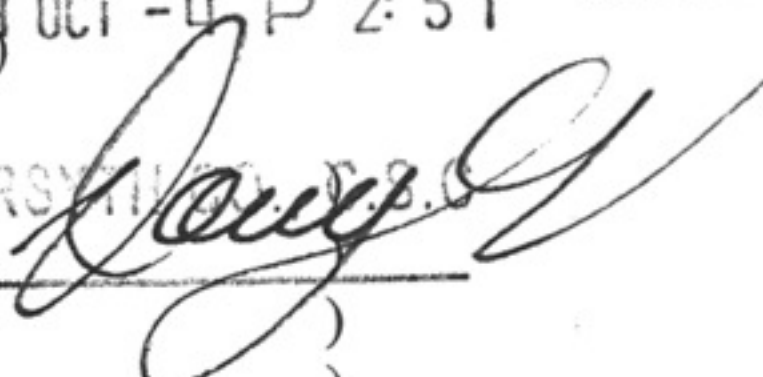
Defendants.

FILED

2013 OCT -4 P 2:57

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

13-CVS-4554

FORSYTH CO. N.C.
BY 

ANSWER OF ZIN'S, INC.

FIRST DEFENSE

The Plaintiff's Complaint fails to state a claim for relief against the Defendant, ZIN'S, INC. d/b/a 6th AND VINE, and is therefore subject to dismissal pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

SECOND DEFENSE AND ANSWER

Further, the Defendant, ZIN'S, INC. d/b/a 6th AND VINE, responds to the correspondingly numbered paragraphs of the Plaintiff's Complaint, and alleges and says as follows:

PARTIES

1. Admitted upon information and belief.
2. Admitted upon information and belief.

3. It is admitted that Zin's, Inc. is and was at all times alleged in the Complaint a Limited Liability Company with its principal place of business at 209 West 6th Street in Winston-Salem, North Carolina. Except as admitted herein, the remaining allegations contained in this paragraph are denied.

FACTUAL BACKGROUND

4. This Defendant incorporates herein by reference its responses to the allegations contained in paragraphs 1 through 3, as fully as if set forth herein.

5. Denied.

6. This Defendant lacks sufficient knowledge and information to form a belief as to the truth or falsity of the allegations contained in this paragraph, and the same are therefore denied.

7. Upon information and belief, the Plaintiff, WOMBLE, crossed the center line and collided head-on with CARMICHAEL. Upon information and belief, CARMICHAEL died at the scene. Upon information and belief, the Plaintiff was transported to WFU Baptist Hospital for treatment. Except as admitted herein, the remaining allegations contained in this paragraph are denied.

8. This Defendant lacks sufficient knowledge and information to form a belief as to the truth or falsity of the allegations contained in this paragraph, and the same are therefore denied.

9. It is specifically denied that CARMICHAEL had "four separate receipts from '6th and Vine'" in his pockets, "dated 12-2-11." It is admitted upon information and belief that the Defendant had three (3) receipts in his pocket from "6th and Vine," none of which showed that the Defendant purchased any alcoholic beverages at 6th and Vine. Except as admitted herein, the remaining allegations contained in this paragraph are denied.

FIRST CLAIM FOR RELIEF: NEGLIGENCE (Carmichael)

10. This Defendant incorporates herein by reference its responses to the allegations contained in paragraphs 1 through 9, as fully as if set forth herein.

11. Upon information and belief, DAVID CARMICHAEL owed the duties to members of the public as required by law. Except as admitted herein, the remaining allegations contained in this paragraph are denied.

12. This Defendant lacks sufficient knowledge and information to form a belief as to the truth or falsity of the allegations contained in this paragraph, and the same are therefore denied.

13. Upon information and belief, the allegations contained in this paragraph are denied.

SECOND CLAIM FOR RELIEF: NEGLIGENCE (Zin's, Inc.)

14. This Defendant incorporates herein by reference its responses to the allegations contained in paragraphs 1 through 13, as fully as if set forth herein.

15. Admitted.

17. It is admitted that 6th AND VINE is a restaurant that is open to the public. It is further admitted that this Defendant serves alcoholic beverages. Except as admitted herein, the remaining allegations contained in this paragraph are denied.

18. Denied.

19. It is admitted that this Defendant has the duties imposed by law. Except as admitted herein, the remaining allegations contained in this paragraph are denied.

20. Denied.

21. Denied.

22. Denied.

23. Denied.

24. Denied.

THIRD CLAIM FOR RELIEF: PUNITIVE DAMAGES (Zin's, Inc.)

25. This Defendant incorporates herein by reference its responses to the allegations contained in paragraphs 1 through 24, as fully as if set forth herein.

26. Denied.

27. Denied.

THIRD DEFENSE

That if this Defendant was negligent, which negligence is again specifically denied, then any negligence of this Defendant was passive and secondary and the active, primary, superseding, intervening and insulating negligence of DAVID CARMICHAEL, as alleged in the Complaint, was the sole proximate cause of the injuries and damages allegedly sustained by the Plaintiff. The active, primary, superseding, intervening and insulating negligence of DAVID CARMICHAEL is therefore pled in bar of any recovery by the Plaintiff against this Defendant.

FOURTH DEFENSE

That if this Defendant was negligent, which negligence is again specifically denied, then the contributory negligence of the Plaintiff, LARRY WOMBLE, was likewise a proximate cause of any injuries or damages allegedly sustained by the Plaintiff. Upon information and belief, the Plaintiff, LARRY WOMBLE, was contributorily negligent in that he failed to keep proper control of his vehicle, failed to keep a proper look out, failed to drive on the right side of the highway in violation of N.C.G.S. § 20-146, drove his motor vehicle recklessly, carelessly, and heedlessly in willful and wanton disregard to the rights and safety of others, drove his car recklessly and without due caution and circumspection and in a manner so as to endanger or be likely to endanger other persons, failed to maintain his own lane of travel, drove his vehicle in a manner that was not reasonable and prudent under the circumstances then existing, failed to take proper precautions to avoid a collision with DAVID CARMICHAEL, although he had an opportunity to do so, operated his motor vehicle while texting in violation of North Carolina law, and was otherwise careless and negligent as will be proven at trial. The contributory negligence of the Plaintiff, LARRY WOMBLE, is therefore pled in bar of any recovery by the Plaintiff against this Defendant.

FIFTH DEFENSE

Plaintiff's claims for punitive damages against this Defendant do not comply with N.C.G.S. § 1D-15, are frivolous and therefore fail to state a claim for relief and should be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Further, the Plaintiff knows or should have known that such claims for punitive damages are frivolous and/or malicious; and by reason thereof, this Defendant is entitled to recover reasonable attorney's fees against the Plaintiff for asserting such claim.

SIXTH DEFENSE

This Defendant asserts as a bar and affirmative defense to Plaintiff's claim for punitive damages, that such damages are unconstitutional and contravene the provisions of the Eighth Amendment to the Constitution of the United States and of Article I, Section 23 or the Constitution of North Carolina, each of which prohibits the imposition of "excess fines;" that an award of punitive damages would contravene the due process provisions of the Fifth Amendment to the Constitution of the United States and the law of the land provisions of Article I, Section 19 of the Constitution of the United States. Further, an award of punitive damages would contravene N.C.G.S. § 4-1, in that punitive damages are an obsolete remnant of the common law of the Eighteenth Century and the assessment of punitive damages, in addition to compensatory damages against this Defendant, is contrary to justice and reason and should be prohibited by the Court. Further, these Defendants are entitled to and preserve the right to demand separate trials on the issues of compensatory damages and punitive damages in accordance with N.C.G.S. Section Chapter 1D. This Defendant preserves and reserves that right until the time of trial.

SEVENTH DEFENSE

The allegations asserted by the Plaintiff that DAVID CARMICHAEL was served and consumed numerous alcoholic beverages at 6th and Vine to the extent that he became extremely intoxicated are not well grounded in fact and are made by the Plaintiff for an improper purpose, such as to harass or cause unnecessary embarrassment to this Defendant and increase the cost of litigation. Such allegations by the Plaintiff were made recklessly and without due investigation and have subjected this Defendant to unnecessary, erroneous and damaging information in the media. Such allegations by the Plaintiff violates Rule 11 of the North Carolina Rules of Civil Procedure. Thus, this Defendant reserves its rights to assert such violations of Rule 11 and to make further Motions before this Court with regard to such behavior by the Plaintiff.

EIGHTH DEFENSE

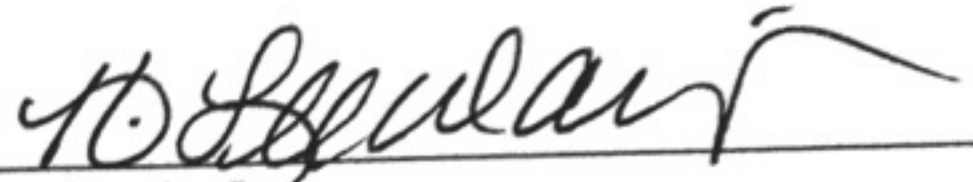
This Defendant incorporates herein by reference any and all affirmative defenses which may be pled by any other party to the full extent that any such affirmative defenses may be applicable to this Defendant.

WHEREFORE, the Defendant, ZIN'S, INC. d/b/a 6th AND VINE, respectfully prays the Court as follows:

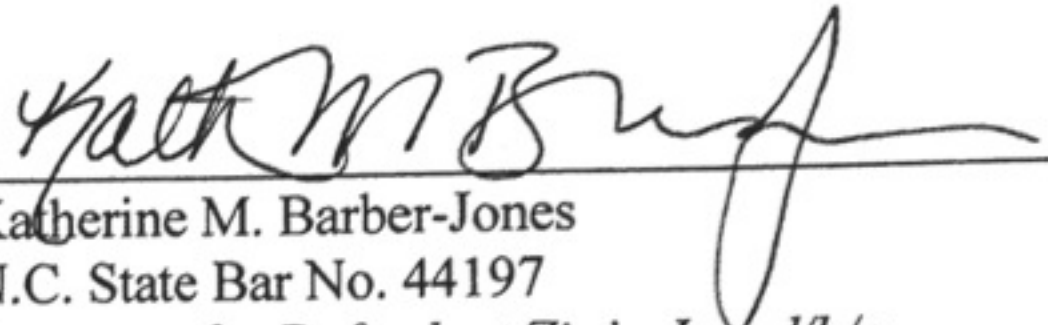
1. That the Plaintiff's Complaint be dismissed against this Defendant with prejudice.
2. That the costs of this action, including a reasonable attorney's fee, be taxed against the Plaintiff or against some party other than this answering Defendant.
3. That if this Defendant is found to be negligent, which negligence has been expressly denied, that the Court find that any negligence of the Co-Defendant, DAVID CARMICHAEL, be determined to be the active, primary, intervening, insulating and superseding negligence which bars the Plaintiff's claim for recovery against this Defendant.
4. That this Defendant reserves and preserves its right to demand separate trials of any claim for compensatory damages and any claim for punitive damages, as allowed by law.
5. For a trial by jury of all issues so triable.
6. That this Defendant reserves and preserves its right to make a Motion for a Change of Venue for the trial of this matter due to excessive publicity and on other grounds as may be shown unto the Court at the appropriate time.

7. For such other and further relief as this Court may deem just and proper.

This the 4th day of October 2013.



H. Lee Davis, Jr.
N.C. State Bar No.: 7683



Katherine M. Barber-Jones
N.C. State Bar No. 44197
*Attorneys for Defendant Zin's, Inc. d/b/a
6th and Vine*

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