

Abdelrahim v 47-03 Junction Realty Inc.

2019 NY Slip Op 35085(U)

September 23, 2019

Supreme Court, Queens County

Docket Number: Index No. 703535/19

Judge: Timothy J. Dufficy

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

ORIGINAL

FILED
OCT - 3 2019
COUNTY CLERK
QUEENS COUNTY

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X

RADEA ABDELRAHIM,

Plaintiff,

Index No.: 703535/19

-against-

Mot. Date: 9/3/19

47-03 JUNCTION REALTY INC., COLGATE
ENTERPRISE CORP., RONI CONTRACTING
CORP., NEW HO XIN DEVELOPMENT INC.,

Mot. Seq. No. 1

Defendants,

-----X

The following papers numbered were read on this motion by defendant **COLGATE ENTERPRISE CORP (Colgate.)** for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the plaintiff's complaint as against Colgate, namely the second, third, and fourth causes of action.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	EF 6-10
Memorandum of Law in Support.....	EF 12
Affidavits in Opposition-Exhibits.....	EF 13-17
Replying Affidavits-Exhibits.....	EF 18-21

Upon the foregoing papers, it is ordered that the motion by defendant **COLGATE ENTERPRISE CORP (Colgate)** for an order, pursuant to CPLR 3211(a)(1) and (7), dismissing the plaintiff, Raeda Abdelrahim's Complaint as against Colgate, namely the second, third, and fourth causes of action, is granted.

In the underlying action, plaintiff Raeda Abdelrahim maintains that he sustained serious personal injuries, on January 26, 2017, at the premises known as 4703 Junction Boulevard, Flushing, New York (subject premises), when construction material fell from a substantial height and struck him. Plaintiff alleges that moving defendant violated

Labor Law 200 and 241 and section 78 of the Multiple Dwelling Law. Plaintiff also alleges that the subject premises are a class A multiple dwelling, and that moving defendant Colgate was the general contractor at the subject premises.

Defendant Colgate now moves to dismiss the plaintiff's Complaint pursuant to CPLR 3211(a)(1) and (7).

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence ***". In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***" (*Fernandez v Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v Webster Town Center Partnership*, 221 AD2d 248.) "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint" (*Jericho Group, Ltd. v Midtown Development, L.P.*, 32 AD3d 294 [1st Dept 2006][internal citations omitted].) "To some extent, 'documentary evidence' is a 'fuzzy' term, and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010].) However, it is well-established law that affidavits and deposition testimony are not documentary evidence, and deeds and contracts are documentary evidence (*Id.*) "[T]o be considered 'documentary', evidence must be unambiguous and of undisputed authenticity" (*Id.*)(*internal citations omitted.*)

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ***" (*Jacobs v Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept 1999]; *Leon v Martinez*, 84 NY2d 83 [NY 1994]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (*see Stukuls v State of New York*, 42 NY2d 272 [1977]; *Jacobs v Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (*see Rovello v*

Orofino Realty Co., Inc., 40 NY2d 633[NY 1976].) Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (*see Rovello v Orofino Realty Co., Inc.*, *supra*; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159.)

Plaintiff's Labor Law §200 and §241 claims against moving defendant must fail because the plaintiff has failed to allege he was a construction worker working at the premises. Pursuant to Labor Law §200, an owner or contractor has the duty to provide **construction site workers** with a reasonably safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763, 764 [2009]; *Radonic v Independence Garden Owners Corp.*, 67 AD3d 981 [2009]). Under Labor Law § 241(6) all contractors and owners must provide **workers** engaged in "construction, excavation or demolition work" with "reasonable and adequate protection and safety" in areas where such work is being performed. As it is never alleged that plaintiff is a construction site worker, the plaintiff's labor law claims against defendant Colgate cannot stand.

Furthermore, the plaintiff's Multiple Dwelling Law violation claims against moving defendant must fail because the plaintiff fails to allege moving defendant is an owner of the subject premises. Pursuant to Multiple Dwelling Law §78, "every multiple dwelling . . . shall be kept in good repair. The owner shall be responsible for compliance with the provisions of the Code." As it is never alleged that moving defendant is an owner, but rather it is alleged that defendant 47-03 Junction Realty Inc. is an owner and that Colgate is a general contractor, the plaintiff's multiple dwelling law claims against defendant Colgate cannot stand. As such, the Complaint shall be dismissed as against defendant Colgate Enterprise Corp.

Accordingly, it is

ORDERED that the motion by defendant Colgate Enterprise Corp. is granted; and it is further

ORDERED that the plaintiff's Complaint is dismissed **ONLY** as against defendant Colgate Enterprise Corp.

This constitutes the decision and order of the Court.

Dated: Sept. 23, 2019



TIMOTHY J. DUFFICY, J.S.C.

FILED
OCT - 3 2019
COUNTY CLERK
QUEENS COUNTY