

Heavy v New York City Tr. Auth.

2007 NY Slip Op 34102(U)

December 4, 2007

Supreme Court, New York County

Docket Number: 0101159/2007

Judge: Donna Marie Mills

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 21

HEAVY, THOMAS

Plaintiff,

-v-

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

INDEX No. 101159/07

MOTION DATE _____

MOTION SEQ. No. 001

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion to DISMISS.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1, 1A, 4

Answering Affidavits- Exhibits _____ 2

Replying Affidavits _____ 3

CROSS-MOTION: YES NO

Upon the foregoing papers, it is ordered that this motion is decided as follows:

SEE ATTACHED MEMORANDUM DECISION.

FILED
DEC 19 2007
NEW YORK
COUNTY CLERK

Dated: 12/14/07

J. S. C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X

THOMAS HEAVEY,

Plaintiff,

Index No. 101159/2007

-against-

THE CITY OF NEW YORK, NEW YORK CITY
TRANSIT AUTHORITY, EASTERN SCAFFOLDING &
SHORING, INC., CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC., and HOWARD SHAPIRO &
ASSOCIATES,

Defendants.

-----X

MILLS, J.:

Defendant Howard Shapiro & Associates (Shapiro) moves this court for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the verified complaint in its entirety. If deemed appropriate, Shapiro asks this court to treat this motion as one for summary judgment pursuant to CPLR 3211 (c). Plaintiff Thomas Heavey opposes defendant Shapiro's motion.

Defendant the City of New York (the City) cross-moves, pursuant to CPLR 3211 (a) (7), to dismiss the verified complaint and all cross-claims, or in alternative, grant summary judgment in its favor, dismissing the verified complaint and cross-claims. There is no opposition to the City's motion.

FILED
DEC 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

Background

Pursuant to an oral agreement¹, Shapiro was retained by defendant Eastern Scaffolding & Shoring, Inc. (Eastern) to provide engineering services in connection with a construction project at 686 First Avenue, New York, New York (686 First Avenue). On May 26, 2004, Shapiro commenced a scaffolding design project for the 686 First Avenue project. Because of a M15 bus stop adjacent to 686 First Avenue, Shapiro designed, among other things, a sidewalk bridge and walk-thru to allow for bus passengers and pedestrians to traverse between the street and sidewalk at an opening in the scaffolding.

On November 2, 2005, plaintiff Heavey was a passenger on the M15 bus, and while exiting the bus at the stop adjacent to 686 First Avenue, he was hit by the bus' side mirror, allegedly causing serious personal injuries. The complaint alleges that "because of incorrect placement of the scaffolding plaintiff was caused to squeeze into and/or wait for clearing passengers in order to exit bus and due to low rising scaffolding he sustained severe and permanent injuries when hit by the bus mirror." Complaint, ¶ 61. Heavey commenced this action alleging negligence claims against all defendants.

¹ Eastern Scaffolding & Shoring, Inc. and Shapiro had a 15 year relationship. They did not enter into a formal written contract.

Determination and Discussion

Shapiro's Motion to Dismiss

On a motion to dismiss pursuant to CPLR 3211, the court generally accepts the facts alleged in the complaint as true, affords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts alleged fit into a cognizable legal theory. *Morgenthau & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 (1st Dept 2003). However, where bare legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed true or afforded every favorable inference, and the criterion becomes whether plaintiff has a cause of action, not whether he or she has stated one. *Id.*; *O'Donnell, Fox & Gartner, P.C. v R-2000 Corp.*, 198 AD2d 154 (1st Dept 1993).

Defendant Shapiro's motion to dismiss is granted based upon the documentary evidence and affidavits submitted. The documentary evidence and affidavits of Howard and Lawrence Shapiro (Shapiro Affidavits) negate the plaintiff's conclusory allegations that Shapiro was negligent in designing the scaffolding, which attributed to plaintiff's injuries.

In support of its motion, Shapiro submitted the February 11, 2005 plan for the design of scaffolding, including "General Notes," the Sidewalk Bridge and Scaffolding Installation Calculation document prepared by Shapiro for Eastern, and

pictures of 686 First Avenue, showing the scaffolding. It is evident from these documents and the Shapiro Affidavits that Shapiro's design of the scaffolding conformed to the accepted standards and the New York City Building Code. Further, the General Notes of the February 2005 plan specifically state that the engineer is responsible for the design of the scaffolding and not the installation and use, which negates the conclusory allegation that Shapiro could be liable for more than the scaffolding design.

Plaintiff takes issue with the February 2005 plan submitted by Shapiro, arguing that the General Notes are misleading and not indicative of the oral agreement between Shapiro and Eastern. However, it is clear that the February 2005 plan detailed the anticipated work and responsibilities of Shapiro. This is supported by Lawrence Shapiro's affidavit. Further, plaintiff is not party to any agreement between Eastern and Shapiro, and therefore, his argument that this is not indicative of the agreement between Eastern and Shapiro is irrelevant.

Additionally, plaintiff argues that, since there is no signature or seal on the document, the plans submitted as evidence are not the final plans, and they are not the plans that were required to be filed with the New York City Buildings Department. Shapiro asserts that the February 2005 plan is a fair and accurate representation of the plan submitted to the

Buildings Department, not in Shapiro's possession. The court agrees with Shapiro that the fact that the February 2005 plan is not signed or sealed is irrelevant in regard to plaintiff's conclusory allegations, especially in light of Lawrence Shapiro's affidavit that this is the final plan.

Plaintiff also argues that affidavits are not proper documents to rely on when moving to dismiss based upon documentary evidence. Generally, this is a valid argument, when the affidavit does nothing more than assert factual inaccuracies of a plaintiff's allegations. See *Tsimerman v Janoff*, 40 AD3d 242 (1st Dept 2007). Here, however, the Shapiro Affidavits explain the documentary evidence submitted, and give opinions based on Howard and Lawrence's experience in the engineering field in New York State. See *Fenster v Smith*, 39 AD3d 231 (1st Dept 2007); *Standard Charter Bank v Chabbott*, 178 AD2d 112, *supra*. Therefore, the court can rely on them, as well as the other documentary evidence presented.

In opposition to Shapiro's motion, plaintiff's attorney alleges that the plaintiff was confronted with limited space, that the opening of the sidewalk shed may have been located in an incorrect place, and that there was not enough space between the curb at the bus stop and the shed. These allegations amount to no more than conclusions that the design of the scaffolding may have been flawed. Plaintiff's failure to come forward with

evidentiary facts tending to substantiate his conclusory allegations concerning the design of the scaffolding does not successful defend dismissal of the action on the basis of documentary evidence. *Standard Chtd. v D. Chabbott, Inc.*, 178 AD2d 112 (1st Dept 1991).

Shapiro's request for this court to treat this motion to dismiss as a summary judgment motion, pursuant to CPLR 3211 (c), is moot.

The City's Cross Motion to Dismiss

The City's cross motion to dismiss the complaint and any cross-claims is granted, as there is no opposition to its motion.

Accordingly, it is

ORDERED that defendant Howard I. Shapiro & Associates' motion to dismiss is granted, and that the complaint is dismissed against defendant Shapiro with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that defendant the City of New York's motion to dismiss is granted, and that the complaint is dismissed against defendant the City with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 12/4/07

ENTER:

D. Mills
J.S.C.

DONNA M. MILLS, J.S.C.

FILED
DEC 19 2007
NEW YORK
COUNTY CLERK'S OFFICE