

Picillo v IMG Worldwide, Inc.
2008 NY Slip Op 30780(U)
March 14, 2008
Supreme Court, New York County
Docket Number: 0117589/2006
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. PAUL GEORGE FEINMAN PART 52

Justice

JUSTIN Q. PICILLO

INDEX NO. 117589/06

MOTION DATE _____

- v -

IMG WORLDWIDE, INC, et al.

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for Dismiss

Notice of Motion/Petition — Affidavits — Exhibits
Answering Affidavits — Exhibits (Memo)
Replying Affidavits (Reply Memo)

FILED
MAR 19 2008

PAPERS NUMBERED

1
2
3

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ORDERED that this motion (~~partially~~) is ~~granted~~ (granted) (granted in part and denied in part) in accordance with the annexed decision and order (~~and order~~); and it is further

ORDERED that the parties shall appear by counsel on _____ at _____ for: a Compliance Conference in the DCM Courtroom, Room 103, 80 Centre Street; a Compliance Conference in the Part 52 Courtroom, Room 289, 80 Centre Street; Early Settlement Conference, Room 103, 80 Centre Street; Mediation I, Room 106, 80 Centre Street; for trial in Part 40, Room 242, 60 Centre Street; and it is further)

ORDERED that the movant shall serve a copy of this decision and order (~~decision, order and judgment~~) on all parties with notice of its entry and upon the Clerk of the Court, 60 Centre St., Basement; the Trial Support, 60 Centre St., Room 158; and the DCM Clerk, 80 Centre Street, Room 102.

Dated: 3/14/08

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 DO NOT POST REFERENCE
 TRANSFER TO NON-CITY PART; CITY NO LONGER A PARTY OR NOT REPRESENTED BY CORPORATION COUNSEL

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X

JUSTIN PICILLO,

Plaintiff,

Index Number 117589/2006

against

Mot. Seq. No. 002

IMG WORLDWIDE, INC. IMG FASHION, 7TH ON
SIXTH, INC., OLYMPUS AMERICA, INC., BRYANT
PARK RESTORATION CORPORATION, THE CITY OF
NEW YORK, NEW YORK CITY DEPARTMENT OF
TRANSPORTATION, NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION, and
THE NEW YORK CITY POLICE DEPARTMENT,

DECISION AND ORDER

Defendants.

-----X

For Plaintiff:

Robert J. Epstein, Esq.
One Whitehall Street, 17th Floor
New York, NY 10004
(212) 240-9470

For Defendants : IMG Worldwide, IMG Fashion, 7th on Sixth, Inc.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP
By: Joseph A. D'Avanzo, Esq.
3 Gannett Drive
White Plains, NY 10604
(914) 323-7000

Counsel for other parties did not submit papers.

Papers considered in review of this motion to dismiss:	
Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Plaintiff's Opposition to Notice of Motion	2
Reply to Opposition of Motion to Dismiss.....	3

FILED
MAR 19 2008
NEW YORK
COUNTY CLERK'S OFFICE

PAUL G. FEINMAN, J.:

Defendant IMG Worldwide, Inc. moves pursuant to CPLR 3211(a) (1), (7), and (8) to dismiss the complaint and all cross-claims against it, IMG Fashion, and 7th on Sixth, Inc. Plaintiff opposes the motion. The other defendants did not appear on the motion. For the reasons set forth below, the motion is granted in part and denied in part.

Factual Allegations

Plaintiff Justin Picillo alleges that on August 28, 2005, he sustained severe personal

injuries as the result of being thrown from the motorcycle on which he was traveling after it hit a defect in the roadway at Bryant Park.(Not. of Mot., Ex. A, Ver. Compl.). Plaintiff alleges that defendants breached their duty to maintain Bryant Park in a reasonably safe condition (Not. of Mot., Ex. A, Ver. Compl. ¶¶ 87-89). Plaintiff also claims that defendants should be found liable for Labor Law violations.

Sometime in August 2004, International Merchandising Corporation (IMC) d/b/a 7th on Sixth, was granted a permit by Bryant Park Restoration Corporation for the purposes of holding events of multiple fashion shows, sponsor activities and related ancillary activities in Bryant Park on the following dates: September 8-15, 2004, February 2005, and September 2005.¹ This series of activities, in part, is referred to as Fashion Week (Not. of Mot., Ex. D).

According to John Raleigh, IMG's Assistant Secretary, IMC, is a wholly-owned subsidiary of IMG (Not. of Mot., Ex. C, [hereinafter Raleigh Aff.] ¶ 2). He avers that IMG was not involved in the September 2005 Fashion Week that allegedly caused plaintiff's accident. Specifically, he contends that, IMG did not stage, organize, sponsor, promote, direct, supervise or control any of the events that took place in Bryant Park during the September 2005 Fashion Week (Raleigh Aff. ¶ 5). He also states that, IMG Fashion was not in existence at the time of plaintiff's motorcycle accident² (Raleigh Aff. ¶ 6). According to Mr. Raleigh, the name "IMG Fashion" was not filed

¹ The actual dates for the February 2005 and September 2005 Fashion Week were not provided in this agreement, although the agreement indicated that 7th on Sixth must propose the actual dates in writing, which will then be subject to the approval of Bryant Park (Not. of Mot., Ex. D).

² According to the Assumed Name Certificate issued by New York Department of State, IMG, as of December 22, 2006, does business under the assumed name of "IMG Fashion" (Not. of Mot., Ex. E).

with the New York Secretary of State until December 22, 2006 (Raleigh Aff. ¶ 6). He further avers that, IMG did not use the name "IMG Fashion" in connection with its business prior to December 22, 2006 (Raleigh Aff. ¶ 6, 7).

John Raleigh, IMG's Assistant Secretary, is also the Senior Vice President and Assistant Secretary of IMC. According to Mr. Raleigh, it was IMC, d/b/a 7th on Sixth, not IMG, that organized and staged the September 2005 Fashion Week as shown on the agreement (Raleigh Aff. ¶ 5; Not. of Mot., Ex. D). In Mr. Raleigh's affidavit, he states that IMG does not own an entity known as 7th of Sixth, *Inc.*, and that to his knowledge, an entity bearing that name sold its assets to IMC in 2001 and is no longer in business³ (Raleigh Aff. ¶ 9).

IMG contends that it is not an appropriate defendant in this action. On March 14, 2007, defendant IMG notified plaintiff that the incorrect parties were named as defendants in the lawsuit, and without admitting liability, offered plaintiff the opportunity to substitute the correct party (Not. of Mot., Ex. G). IMG specifically stated that if plaintiff seeks to sue the producer of the September 2005 Fashion Week, that IMG would stipulate to accept an amended complaint, naming IMC as a defendant and dropping IMG, IMG Fashion, and 7th on Sixth as defendants (Not. of Mot., Ex. G). Plaintiff refused IMG's offer, and on April 25, 2007, commenced a second action, naming IMC as a defendant (Not. of Mot., Ex. H, Ver. Compl; Aff. in Opp. to Not. of Mot., Ex. C). On May 10, 2007, after plaintiff had commenced the second action, defendant IMG again requested plaintiff to discontinue the initial action against IMG, IMG Fashion, and 7th on

³ According to the Assumed Name Certificate issued by New York Department of State, IMC, as of July 17, 2001, does business under the assumed name of "7th on Sixth," a division of IMC (Not. of Mot., Ex. F).

Sixth, Inc. (Not. of Mot., Ex. I). Plaintiff refused to discontinue the earlier action, naming IMG as a defendant.

IMG now moves on three grounds for dismissal of the complaint and all cross-claims as against it, IMG Fashion, and 7th on Sixth, Inc. First, IMG seeks dismissal of the action based on documentary evidence to establish that there is no colorable claim against IMG, IMG Fashion, or 7th on Sixth, Inc. (CPLR 3211 [a] [1]). Second, IMG seeks dismissal on the ground that the New York Labor Law violations alleged by plaintiff fail to state a cause of action (CPLR 3211 [a] [7]). Third, IMG seeks to have the complaint dismissed as against 7th on Sixth, Inc. for plaintiff's alleged failure to serve process on this defendant, and to serve it within one hundred twenty days of the filing of the summons and complaint in the action (CPLR 3211 [a] [8]; CPLR 306-b).

Legal Analysis

Generally, on a motion to dismiss brought pursuant to CPLR 3211, the court must "accept the facts as alleged in the complaint as true, and accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Morgenthau & Latham v Bank of N.Y. Co., Inc.*, 305 AD2d 74, 78, *lv denied* 100 NY2d 512 [2003], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *see also, Bishop v Maurer*, 33 AD3d 497, 498 [1st Dept. 2006]). The court, however, is not required to accept factual allegations, or accord favorable inferences, where the factual assertions are clearly contradicted by documentary evidence or where the legal conclusions are unsupportable based upon the undisputed facts (*Igarashi v Higashi*, 289 AD2d 128 [1st Dept. 2001]; *Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept. 2003]; *Blondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept. 1999], *aff'd* 94 NY2d 659, [2001]).

On a motion to dismiss pursuant to CPLR 3211 (a) (1), dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Leon v Martinez*, 84 NY2d at 87-88). The defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that plaintiff's claims fail as a matter of law (*Robinson v Robinson*, 303 AD2d at 235; *Fortis Fin. Servs, LLC., v Fimat Futures USA, Inc.*, 290 AD2d 383 [1st Dept. 2002]).

Generally, liability for a dangerous or defective condition on property is hinged upon establishing ownership, control or special use of the property (*Turrisi v Ponderosa, Inc.*, 179 AD2d 956, 957 [3rd Dept. 1992]; *see also, Kiselis v Speculator Chamber of Commerce*, 234 AD2d 677, 678 [3rd Dept. 1996]).

In this case, IMG has not produced documentary evidence sufficient to establish that it did not organize, direct, supervise or control any of the events that took place in Bryant Park during the September 2005 Fashion Week. Plaintiff offers materials from IMG's website and other affiliated websites as evidence that IMG was involved in the production of the September 2005 Fashion Week⁴ (Aff. in Opp. to Not. of Mot., Ex.F-Q). According to IMG's web site, IMG Worldwide published a statement on September 23, 2005, concerning the Fashion Week event that took place in September 2005. The article entitled "Did You Know? A summary of things you might not know about IMG's global activities," states that "IMG Fashion's 7th on Sixth organized the very successful Olympus Fashion Week Spring 2006 collections in New York City earlier this month." (Aff. in Opp. to Not. of Mot., Ex.G). Plaintiff argues that this statement is IMG's own admission

⁴ None of the defendants have objected to the accuracy of the content of the plaintiff's downloading of the defendant's websites.

that IMG Fashion was in existence prior to the date of plaintiff's accident (Aff. in Opp. to Not. of

Mot.). Further, plaintiff offers as proof of IMG's involvement, a statement posted on IMG's website from IMG and 7th on Sixth concerning the September 2005 Fashion Week at Bryant Park,

which advised interested persons to "please feel free to contact us with questions: 7th on Sixth/IMG." The statement also included IMG and 7th on Sixth's contact information, including address, telephone number, and email address (Aff. in Opp. to Not. of Mot., Ex.I).

Plaintiff produces a statement on IMG's and 7th on Sixth's website, which indicates that, 7th on Sixth was created in 1993 to accomplish several purposes, including organizing, centralizing, and modernizing the American Collections (Aff. in Opp. to Not. of Mot., Ex. H, J, K). This same web page also contains a statement indicating that IMG acquired 7th on Sixth in July 2001 from the Council of Fashion Designers of America (Aff. in Opp. to Not. of Mot., Ex. H). Finally, plaintiff produces a web page advertisement in which IMG requests that, anyone interested in events and opportunities with either IMG Fashion or 7th on Sixth, contact its Director of Special Projects (Aff. in Opp. to Not. of Mot., Ex.Q).

The materials produced by plaintiff in opposition to IMG's motion to dismiss present significant contradictions to IMG's contentions that it was not involved in the production of the event that allegedly caused plaintiff's injuries. IMG's contention that it was IMC alone that was responsible for the events of Fashion Week, as indicated by its contract with Bryant Park, has been sufficiently refuted to permit plaintiff an opportunity to have the defendants answer and move the case forward into the discovery phase. While the initial agreement was entered into by Bryant Park and IMC, IMG's own statement on its website credits the success of the September 2005 Fashion Week in Bryant Park to "IMG Fashion's 7th on Sixth."

Furthermore, as indicated in the materials produced by plaintiff, IMG, as the parent company of IMC, has considerable and significant ties to the activities of IMC. IMG fails to meet its burden, since the documentary evidence it submits does not conclusively resolve all of the factual issues in the case, including its own potential liability. Thus, its motion to dismiss based on documentary evidence is denied.

As to IMG's second basis for dismissal of plaintiff's complaint. It is well-settled that, in assessing a motion to dismiss under CPLR 3211 (a) (7) for failure to state a cause upon which relief may be granted, any facts in the complaint must be accepted as true and construed in the light most favorable to the plaintiff (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Bovino v Village of Wappingers Falls*, 215 AD2d 619, 620 [2d Dept. 1995]). The court must consider the factual allegations in plaintiff's complaint to determine whether plaintiff can succeed upon any reasonable understanding of the facts (*Manfro v McGivney*, 11 A.D.3d 662, 663 [2d Dept. 2004]).

When evidentiary material is considered, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Rovello v Orofino Realty Co.* 40 NY2d at 636; *Rappaport v International Playtex Corp.*, 43 AD2d 393, 394-395 [3rd Dept. 1974]). Dismissal of plaintiff's complaint should not be granted unless it can be shown that no significant dispute exists (*Guggenheimer v Ginzburg*, 40 NY2d at 275; *Rappaport*, 43 AD2d at 394-395).

Labor Law § 200 codifies the common law duty of an owner or employer to provide employees with a safe place to work (*Jock v Flen*, 80 NY2d 965, 967 [1992]; *Yearke v Zarcone*, 57 AD2d 457, 459 [4th Dept.], *lv denied* 43 NY2d 643[1977]). This includes providing reasonable and

adequate protection for the lives, health, and safety of employees (Lab. Law § 200 [1]). To establish liability under Labor Law § 240 (1), a plaintiff must demonstrate a violation of the statute, and that the violation was the proximate cause of plaintiff's injuries (*Blake v Neighborhood Hous. Servs of N.Y. City, Inc.*, 1 NY3d 280, 287 [2003]).

The legislative history and precedent of the court demonstrate that the primary purpose of New York's Labor Law §§ 200, 240, and 241 was the protection of workers (*Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 577 [1990]). In order to invoke the protections of the Labor Law and to come within the class of persons for whom liability is imposed against contractors, owners and their agents, "a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure, and that he was hired by someone, be it owner contractor or their agent" (*Whelen v Warwick Val. Civic & Social Club*, 47 NY2d 970, 971 [1979]).

In this case, plaintiff was a motorist traveling on the alleged defective roadway during the September 2005 Fashion Week. Plaintiff was not an "employee" within the meaning of the statute, nor does he fall within the class of persons sought to be protected by the legislature when it enacted the statute. Therefore, the statute is inapplicable in this case, and IMG's motion to dismiss under CPLR 3211 (a) (7) is granted as to plaintiff's third cause of action only. This court need not reach plaintiff's contention that the defendants converted the park into a construction site, and is therefore, liable under provisions of New York's Labor Law.

IMG's third ground for dismissal is predicated upon CPLR 3211(a) (8) and CPLR 306-b for failure to serve process on defendant 7th on Sixth. It moves pursuant to CPLR 3211 (a) (8) to asserting that the court lacks personal jurisdiction over the defendant, since it was not personally served in the action in compliance with CPLR 306-b. Service of process must be made on the

defendant within one hundred twenty days after the filing of the summons and complaint (CPLR 306-b). Where service is not made upon a defendant in this time period, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon a showing of good cause or in the interest of justice, the court may extend the time for answer (CPLR 306-b).

In this case, according to the court file, the complaint was filed with the County Clerk on November 24, 2006. Plaintiff submits an affidavit of service of the summons and complaint on defendant 7th on Sixth, Inc. (Aff. in Opp. to Not. of Mot., Ex. R). According to the affidavit, service of process on defendant 7th on Sixth, Inc. was effected on February 2, 2007 (Aff. in Opp. to Not. of Mot., Ex. R), thus it service was made within the one hundred twenty day period required by statute. Plaintiff's attorney, Mr. Epstein, avers that he personally delivered a true copy of the summons and complaint to this defendant via Ms. Erica Booze, an individual who represented herself as a legal assistant in the legal department at the defendant IMG, IMG Fashion and 7th on Sixth's place of business located at 420 West 45th Street, New York, New York⁵ (Aff. in Opp. to Not. of Mot., Ex. R). Mr. Epstein further states that the receptionist witnessed the service of process, and in fact, was the individual who produced Ms. Booze as a person authorized to accept service on behalf of IMG, IMG Fashion, and 7th on Sixth. (Aff. in Opp. to Not. of Mot., Ex. R). Ms. Booze signed, initialed, and dated her acceptance of service of process for each of the these three defendants (Aff. in Opp. to Not. of Mot., Ex. R).

Where personal service is made on a defendant, neither CPLR 306-b or CPLR 311(personal service upon a corporation) require a copy of the summons and complaint to be filed

⁵ Defendants IMG, IMG Fashion and 7th on Sixth all maintain an office and place of business at 420 West 45th Street, New York, NY (Not. of Mot., Ex. A, Ver. Compl. ¶ 5, 10, 17).

with the County Clerk's office to give effect, or to otherwise complete service of process.

Therefore, this court finds that plaintiff's affidavit of service serves as adequate proof that service of process was proper on defendant 7th on Sixth. The court understands that IMG's position is that 7th on Sixth, Inc. no longer exists, and that 7th on Sixth is the assumed name of IMG's wholly-owned subsidiary, IMC. Nonetheless, the affidavit of service shows that all necessary parties were served. Accordingly,

ORDERED that the branch of the motion to dismiss brought pursuant to CPLR 3211 (a) (1) is denied; and it is further

ORDERED that the branch of the motion to dismiss brought pursuant to CPLR 3211 (a) (7) is granted to the extent of dismissing all of the plaintiff's causes of action premised on Labor Law §§ 200, 240 and 241 and the Clerk of Court shall, upon proof of service of notice entry of this order, enter judgment accordingly; and it is further

ORDERED that the remainder of the complaint is severed and continued under this index number; and it is further

ORDERED that the branch of the motion to dismiss brought pursuant to CPLR 3211 (a) (8) and CPLR 306-b is denied.

ORDERED that the moving defendants are to serve an answer in the time allotted by the CPLR and shall do so electronically along with a request to convert this action "e-filing"; and it is further

ORDERED that to the extent that if the plaintiff has not yet complied with the court's 2/21/08 order directing him to provide the Differentiated Case Management (DCM) Clerk with a Bill of Particulars in order for a case scheduling order to issue, then the DCM Clerk shall set this


matter down for a preliminary conference forthwith; and it is further

ORDERED that the movant shall, within fifteen days of entry of this order, serve a copy of this decision and order on all parties, the DCM Clerk (80 Centre St., Rm. 102), the Trial Support Office (60 Centre, Rm. 158) and the Clerk of Court (60 Centre St., Bsmt.) with notice of entry; and it is further

ORDERED that movant shall serve on all parties, the DCM Clerk, the Trial Support Office, the Clerk of Court and the Motion Support Office (60 Centre, Rm. 119) a copy of the duplicate original of the decision and order of Justice Deborah Kaplan's dated October 31, 2007 which appears not to have been scanned by motion support and/or entered as disposed by the case management system.

This constitutes the decision and order of the court.

Dated: March 14, 2008
New York, New York



J.S.C.

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