

Halpern v Pick a Bagel BPC, LLC

2008 NY Slip Op 31992(U)

July 14, 2008

Supreme Court, New York County

Docket Number: 0101470/2007

Judge: Carol R. Edmead

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

PRESENT: HON CAROL EDMEAD
Justice

PART 35

Halpern, Derek

INDEX NO. 101470/07

MOTION DATE 6/11/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Pick A Bagel

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

In accordance with the annexed Memorandum Decision, it is hereby

ORDERED that the branch of the motion by defendants BPC Site 25 Associates, LLC and Board of Managers of BPC Site 25 Associates, LLC pursuant to CPLR 3211(a)(7) to dismiss the complaint and all cross-claims asserted against them, is granted solely as to BPC Site 25 Associates;

ORDERED that the branch of the motion by defendants BPC Site 25 Associates, LLC and Board of Managers of BPC Site 25 Associates, LLC pursuant to CPLR 3211(a)(7) to dismiss the complaint and all cross-claims asserted against them is denied as to the Board of Managers of BPC Site 25 Associates, LLC, without prejudice; and it is further

ORDERED that the branch of the motion by defendants BPC Site 25 Associates, LLC and Board of Managers of BPC Site 25 Associates, LLC seeking to convert their CPLR 3211(a)(7) motion into one for summary judgment pursuant to CPLR 3211(c), and pursuant to CPLR 3212 for summary judgment, is moot as to BPC Site 25 Associates, LLC and denied as to Board of Managers of BPC Site 25 Associates, LLC; and it is further

ORDERED that defendant BPC Site 25 Associates, LLC shall serve a copy of this order upon all parties within 20 days of entry; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference on August 19, 2008, 2:15 p.m.

Dated: This constitutes the decision and order of the Court.

7/14/08

HON CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

PAPERS NUMBERED

FILED

JUL 15 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

-----X
DEREK NATHAN HALPERN, an Infant under the age
of 14 years, by his Father and Natural Guardian, JASON
D. HALPERN and JASON D. HALPERN, Individually,

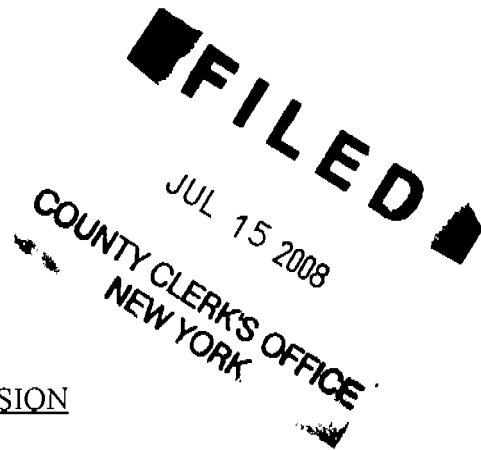
Plaintiffs,

Index No. 101470-2007

-against-

PICK A BAGEL BPC, LLC., 200 BAGEL, LLC d/b/a
“PICK A BAGEL”, LILI’S BPC NOODLE & GRILL
SHOP, LLC., LILI’S B.P.C. 25, LLC. d/b/a “LILI’S
NOODLE SHOP GRILL”, GS SITE 25 RETAIL, LLC.,
BPC SITE 25 ASSOCIATES, LLC., BOARD OF
MANAGERS OF BPC SITE 25 ASSOCIATES, LLC.,

Defendants.



-----X
MEMORANDUM DECISION

In this personal injury action, defendants BPC Site 25 Associates, LLC (“BPC Site 25”) and Board of Managers of BPC Site 25 Associates, LLC (the “Board”) (collectively “defendants”) move pursuant to CPLR 3211(a)(7) to dismiss the complaint and all cross-claims asserted against them on the ground that the defendants were improperly named as parties to this action, or in the alternative, to convert this motion into one for summary judgment pursuant to CPLR 3211(c), and pursuant to CPLR 3212 for summary judgment on the basis that defendants owed no legal duty to plaintiff, Derck Nathan Halpern (the “infant plaintiff”).

This action was commenced by plaintiff, an infant, by his father and natural guardian, Jason D. Halpern, who also sues in his individual capacity (collectively, “plaintiffs”). In their complaint, plaintiffs allege that on October 19, 2006, the infant plaintiff was present at “Pick a Bagel” located at 102 North End Avenue, New York, New York (the “subject property”), when a

table suddenly tipped over and fell on him. Plaintiffs allege that both BPC Site 25 and the Board were negligent in the ownership, maintenance, repair, operation, management and/or control of the subject property and location.

Motion to Dismiss

Defendants contend that on October 6, 2006, prior to the date of the incident, BPC Site 25 executed an Assignment and Assumption of Retail Sublease dated October 6, 2006 as to the accident location (the "2006 Assignment"). As a result of such Assignment, the Board was no longer under the management or control of BPC Site 25. Thus, as of the date of the incident, neither BPC Site 25 nor the Board owned, leased, maintained, operated, managed or controlled the accident location. BPC Site and the Board are not proper parties to this action because they owe no legal duty to plaintiffs. In support of their motion, defendants submit an affidavit of Rachel Harari, Esq. ("Ms. Harari"), an Associate General Counsel with First New York Partners Management, LLC ("First New York Partners").

According to Ms. Harari, Battery Park City Authority ("BPCA"), "as the fee owner of those certain premises known as Battery Park City, leased a portion of the premises (the "Site 25 Premises") to BPC Site 25, as Tenant" pursuant to a Ground Lease dated November 18, 1998. BPC Site 25, as Sub-Landlord, "subleased a portion of the Site 25 Premises to FC Battery Park Associates, LLC, as Sub-tenant" pursuant to a "Retail Sublease dated November 18, 1998," and "subleased another portion of the Site 25 Premises to BPC Hotel, LLC, as Sub-Tenant" pursuant to a "Hotel Sublease dated November 18, 2008." FC Battery Park Associates, LLC and BPC Hotel, LLC are each condominium unit owners of BPC Site 25 Condominium Association, Inc. ("BPC Condo Association"). The BPC Condo Association duly elected the Board.

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FC Battery Park Associates, LLC was the unit owner of the retail premises (“Retail Premises”) of which the Subject Premises are a part, and BPC Hotel, LLC was the unit owner of the hotel premises (“Hotel Premises”).

Pursuant to an Assignment and Assumption dated October 13, 2000, BPC Site 25's interest under the Ground Lease was assigned back to BPCA. As of such date, BPC Site 25 ceased to have any interest in any part of the Site 25 Premises.

Pursuant to the 2006 Assignment, FC Battery Park Associates, LLC assigned all of its interest in the Retail Premises to defendant GS Site 25 Retail, LLC. Further, by virtue of an Assignment and Assumption of Hotel Sublease, dated October 6, 2006, BPC Hotel, LLC assigned all of its interests in the Hotel Premises to defendant GS Site 25 Hotel, LLC.

Thus, once FC Battery Park Associates, LLC assigned its interests in the Retail Premises to GS Site 25 Retail LLC, and BPC Hotel, LLC assigned its interest in the Hotel Premises to GS Site 25 Hotel, LLC, the condominium entity, BPC Site 25 Condo Association no longer held any interest in any of the Site 25 premises and the Board resigned and is no longer in existence.

Moreover, in defendant GS Site 25 Retail, LLC's answer to plaintiffs' complaint, GS Site 25 admits that on October 19, 2006, it owned the subject property. GS Site 25 Retail, LLC also admits that it leased the subject premises to defendant Lili's B.P.C. 25 Inc. GS Site 25's admission corroborates Ms. Harari's affidavit, and further establishes that neither BPC Site 25 nor the Board had any connection to the subject premises on October 19, 2006.

Therefore, since defendants did not own, maintain, repair, operate, manage or control the subject property on the date of the plaintiff's accident, the defendants owed plaintiffs no duty of care. And, absent a duty of care, there is no breach of such duty, and thus, no liability.

Opposition

In opposition, plaintiffs argue that their initial investigation indicated that the defendants owned, leased, or had some other relationship to the subject property. Additionally, defendants' motion is based on an affidavit by an attorney with no personal knowledge of the facts. It appears from Ms. Harari's affidavit that the relationship between the various entities who hold, or have held, interest in the subject property, is so extremely convoluted, that accepting the affidavit at face value would be improper from an evidentiary standpoint. There is no evidence in admissible form to support defendants' motion.

Reply

In reply, defendants point out that defendant GS Site 25 admits that it owned the subject property and leased it to non-moving defendant Lili's B.P.C. 25 Inc. Plaintiffs' assertion that defendants have "some other relationship to" the subject property should be rejected as unreasonable conjecture. Further, the motion is supported by the Assignment and Assumption of Retail Sublease, dated October 6, 2006, which demonstrates that defendants had no connection to the subject property on the date of the incident.

Analysis

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton*

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Manufacturing Co., Inc. v Blumberg, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). On a motion to dismiss made pursuant to CPLR § 3211, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]).

However, in those circumstances where the bare legal conclusions and factual allegations are “flatly contradicted by documentary evidence,” they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *aff’d* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996]), and the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993]). On a motion to dismiss pursuant to CPLR §3211(a)(7), where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]). The court may consider any

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evidence in support of or in opposition to the motion to dismiss (CPLR 3211(c); Siegel, N.Y. Prac. § 257 [4th ed] [affidavits, depositions, documentary proof, admissions, letters, and any other papers or proof having evidentiary impact in a particular situation may be considered on motion to dismiss regardless of ground]).

Although defendants' motion is supported by an affidavit of an attorney, defendants' motion is also supported by additional documents. Following the affidavit of Ms. Harari are (1) the Recording and Endorsement Cover Page pertaining to an "Assignment of Lease" between FC Battery Park Associates, LLC and GS Site 25 and (2) the "Assignment and Assumption of Retail Sublease" between FC Battery Park Associates, LLC and GS Site 25. The Court notes that the Recording and Endorsement Cover Page pertains to the Assignment and is dated October 6, 2006, 13 days prior to the infant plaintiff's accident, and concerns the subject premises.

It is uncontested that defendant BPC Site 25 was once the lessee of the subject premises. However, according to the third WHEREAS clause of the 2006 Assignment, BPC Site 25 assigned the "Retail Unit" to FC Battery Park Associates, LLC and BPCA succeeded to the interests of BPC Site 25 as landlord of the Retail Unit. According to the same 2006 Assignment, FC Battery Park Associates assigned all of its rights under the Retail Lease to defendant GS Site 25. Although the 2006 Assignment does not expressly identify the property thereunder as "102 North End Avenue," the Recording and Endorsement Cover Page related to said 2006 Assignment clearly identifies the subject property as 102 North End Avenue.

Also submitted in support of defendants' motion is the answer from defendant GS Site 25 Retail, LLC, wherein it admits that it was the owner and lessor of the subject premises at the time of the alleged incident.

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Upon review of the extrinsic evidence, this Court concludes that the essential facts have been negated beyond substantial question by the evidentiary matter submitted (*see Biondi v Beekman Hill House Apartment Corp.*, 257 AD2d 76, *supra*). The 2006 Assignment and Recording and Endorsement Cover Page, coupled with the answer of defendant GS Site 25, clearly contradict the bare legal conclusions and factual allegations in plaintiffs' complaint. As such, BPC Site 25 is entitled to dismissal of the complaint as asserted against it.

In light of the above, the Court does not reach the branch of defendants' motion seeking to convert their application from a CPLR 3211 dismissal to one for summary judgment.

With respect to the Board, however, said documents fail to support the statements made by Ms. Harari concerning said Board. In this regard, Ms. Harari states that FC Battery Park Associates, LLC and BPC Hotel, LLC are each condominium unit owners of the BPC Condo Association, and duly elected the Board. Ms. Harari also states that once FC Battery Park Associates, LLC assigned its interests in the Retail Premises to GS Site 25 Retail LLC, and BPC Hotel, LLC assigned its interest in the Hotel Premises to GS Site 25 Hotel, LLC, the condominium entity, BPC Site 25 Condo Association no longer held any interest in any of the Site 25 premises *and the Board resigned and is no longer in existence*. The documents in support of defendants' motion are silent as to the Board. Thus, having failed to submit any documentary support regarding the Board, defendants failed to establish that the complaint fails to state a cause of action against the Board.

The Court notes that since defendants' motion to dismiss the action was made on an affidavit and exhibits, the Court is entitled to treat defendants' motion as a motion for summary judgment pursuant to CPLR 3211(c). However, given that defendants' contentions regarding the Board requires further substantiation, judgment would not be warranted (*see Firestone v First Dist. Dental*

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Soc., 24 AD2d 268, 265 NYS2d 525 [1st Dept 1965] [where adjudication declaring and enforcing plaintiff's alleged rights depends upon the substantiation of material allegations which purport to be in bona fide dispute, summary judgment should not have been granted]). The submissions are wholly inadequate to support a basis for summary judgment in favor of the Board.

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by defendants BPC Site 25 Associates, LLC and Board of Managers of BPC Site 25 Associates, LLC pursuant to CPLR 3211(a)(7) to dismiss the complaint and all cross-claims asserted against them, is granted solely as to BPC Site 25 Associates;

ORDERED that the branch of the motion by defendants BPC Site 25 Associates, LLC and Board of Managers of BPC Site 25 Associates, LLC pursuant to CPLR 3211(a)(7) to dismiss the complaint and all cross-claims asserted against them is denied as to the Board of Managers of BPC Site 25 Associates, LLC, without prejudice; and it is further

ORDERED that the branch of the motion by defendants BPC Site 25 Associates, LLC and Board of Managers of BPC Site 25 Associates, LLC seeking to convert their CPLR 3211(a)(7) motion into one for summary judgment pursuant to CPLR 3211(c), and pursuant to CPLR 3212 for

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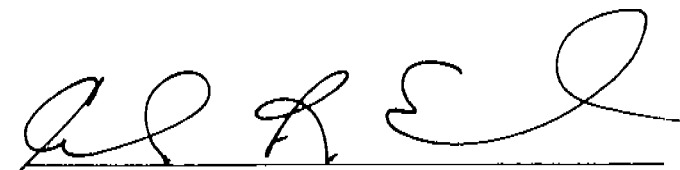
summary judgment, is moot as to BPC Site 25 Associates, LLC and denied as to Board of Managers of BPC Site 25 Associates, LLC; and it is further

ORDERED that defendant BPC Site 25 Associates, LLC shall serve a copy of this order upon all parties within 20 days of entry; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference on August 19, 2008, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated: July 14, 2008



Hon. Carol Robinson Edmead, J.S.C.

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