

Prado v Theat. Servs., LLC

2009 NY Slip Op 30358(U)

January 30, 2009

Supreme Court, New York County

Docket Number: 100140/08

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Prado

INDEX NO. 100140/08 ①

- v -

Theatrical Services, LLC, et al.

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for dismiss

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

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is disposed in accordance with the attached memorandum decision.

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

FILED
FEB 19 2009
COUNTY CLERK'S OFFICE
NEW YORK

① Court notes motion brought under wrap ends members ps such case was consolidated 111133/07

Dated: 1/30/09

HON. DORIS LING-COHAN

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----x
LUZ MARY PRADO,

Plaintiff,

Index No. 100140/08

-against-

Motion Seq. No. 001

THEATRICAL SERVICES, L.L.C., BLACKBIRD
THEATRICAL SERVICES, L.L.C., BLACKBIRD
THEATRICAL SERVICES, L.L.C. a/k/a BML
BLACKBIRD THEATRICAL SERVICES, RAVEN
BROADCASTING, L.L.C., ROSE GROUP PARK
AVENUE L.L.C., and ROSE GROUP, L.L.C.
Defendants.

DECISION AND ORDER

FILED
FEB 19 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----x
DORIS LING-COHAN, J.:

FACTUAL BACKGROUND

Defendant Theatrical Services, L.L.C. moves to dismiss all claims and cross claims against it, pursuant to CPLR 3211 (a) (1), and (a) (7), or, in the alternative, pursuant to CPLR 3212, for summary judgment in its favor.

This action involves injuries sustained by plaintiff at 583 Park Avenue, New York, New York, on June 4, 2007. Defendant asserts that it did not own, lease, operate, manage, repair, create, maintain, supervise, control or do business at that location on that date, nor did it have any relationship to, or any interest in, any events or activities taking place at that location on the date of the occurrence.

In support of its motion, defendant submitted the affidavit of Steve Winton, the Chief Executive Officer of Broadway Across America, who states that on June 4, 2007, he was employed as the

Chief Executive Officer of the North American Theatrical Division Live Nation. The affiant also states that on June 4, 2007, Theatrical Services, L.L.C. was a subsidiary of Live Nation Worldwide, Inc., and, as Chief Executive Officer, he has knowledge that defendant did not own, lease, operate, manage, repair, create, maintain, supervise, control or do business at the premises known as 583 Park Avenue, New York, New York. He further states that defendant did not have any relationship to, or interest in, any events or activities taking place at that location on that date.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a), 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 within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Further, "[a]llegations consisting of bare legal conclusions . . . are not presumed to be true [and thus not] accorded every favorable inference." *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999) (internal quotation and citation omitted), *aff'd* 94 NY2d 659 (2000). Here, defendant moves to dismiss based on the grounds that there is a defense founded on documentary evidence and that the pleadings fail to state a cause of action, pursuant to CPLR 3211 (a)(1) and

[* 4]
(7).

Pursuant to CPLR 3211 (a) (1), a dismissal is permissible only when the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. *Id.* at 88. To defeat a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (1), the opposing party need only assert facts which "'fit within any cognizable legal theory'." *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188, 188 (1st Dept 1999) (quoting *Leon*, 84 NY2d at 87-88). Further, if any question of fact remains, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 (a) (1) is precluded. *Khayyam v Doyle*, 231 AD2d 475, 476 (1st Dept 1996).

The only documentary evidence submitted by defendant is an affidavit. However, an affidavit is insufficient as documentary evidence to support a motion to dismiss pursuant to CPLR 3211 (a) (1). *Williamson, Picket, Gross, Inc. v Hirschfeld*, 92 AD2d 289, 290 (1st Dept 1983). Thus, the motion to dismiss pursuant to CPLR 3211 (a) (1) must be denied.

As to defendant's motion to dismiss pursuant to CPLR 3211 (a) (7), the complaint clearly states a cause of action for negligence by alleging all the necessary elements. The affidavit submitted by defendant in its initial moving papers is insufficient to sustain the motion to dismiss, pursuant to CPLR 3211 (a) (7), because it fails to establish that defendant may

* 5]
not be held liable.

In the affidavit, the affiant fails to state the type of business entity for which he works, and no business entity under the name appearing in the affidavit has ever been on file with the New York Secretary of State. No explanation is given as to how he acquired his knowledge of defendant, nor does he actually state that he has personal knowledge of the facts he alleges. Simply stated, the affidavit does not provide evidentiary proof that defendant had no relationship with the subject premises at the time of the occurrence.

Defendant attempts to remedy the defects of the initial affidavit by providing a more detailed affidavit by the same affiant in its reply. The reply affidavit addresses the inadequacy arguments proffered by plaintiff in her opposition. However, such affidavit cannot be considered by the court.

The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for the motion. This rule is generally employed in the context of summary judgment motions to prevent a movant from remedying basic deficiencies in its prima facie showing by submitting evidence in reply, thereby shifting to the nonmoving party the burden of demonstrating the existence of a triable issue of fact at a time when that party has neither the obligation nor opportunity to respond.

Kennelly v Mobius Realty Holdings LLC, 33 AD3d 380, 381 (1st Dept 2006) (internal quotations and citations omitted).

Simply stated, a party is not entitled to cure the basic deficiencies of its moving papers by submitting supplemental affidavits in its reply. *Scansarole v Madison Square Garden, L.P.*, 33 AD3d 517, 518 (1st Dept 2006). The affidavit submitted by defendant in its reply attempts to remedy the basic deficiencies of its moving papers and, therefore, the motion must be denied. *Migdol v City of New York et al.*, 291 AD2d 201, 201 (1st Dept 2002).

Since defendant's moving papers are deficient, its alternate request for summary judgment, pursuant to CPLR 3212, is also denied.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant Theatrical Services, L.L.C.'s motion to dismiss the claims and cross claims against it or, in the alternative, for summary judgment is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve upon all parties a copy of this order and notice of entry.

Dated: _____

FILED
 FEB 19 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

_____ *Maris Ling-Cohan, J.S.C.*