

**Fazal v Kahen**

2009 NY Slip Op 32891(U)

December 7, 2009

Supreme Court, New York County

Docket Number: 109959/06

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN

PART 7

Justice

MOHAMMAD FAZAL and MERCEDITA FAZAL,

INDEX NO. 109959/06

Plaintiff,

- v -

MOTION DATE 5/28/09

MOTION SEQ. NO. 002

ALBERT KAHEN, EIFFEL MANAGEMENT, INC.,  
ALEXIS DEVELOPMENT CORP., and  
MENALLI & CO., INC.,

MOTION CAL. NO. 34

Defendants.

(And a third-party action).

The following papers, numbered 1 to 8 were read on this motion and cross motion

Notice of Motion— Affidavit—Affirmation—Exhibits  
A-E

Notice of Cross Motion—Affirmation — Exhibits A-P

Reply Affirmation; Reply Affirmation

**FILED**  
DEC 10 2009 PAPERS NUMBERED  
NEW YORK COUNTY CLERK'S OFFICE  
1-3  
4-6  
7, 8

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order.

MICHAEL D. STALLMAN

Dated: 12/7/09  
New York, New York

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7

-----x  
MOHAMMAD FAZAL and MERCEDITA FAZAL,

Plaintiffs,

Index No.  
109959/06

-against-

Motion Sequence No.  
002

ALBERT KAHEN, EIFFEL MANAGEMENT, INC.,  
ALEXIS DEVELOPMENT CORP., and  
MENALLI & CO., INC.,

**Decision and Order**

Defendants.

-----x  
ALBERT KAHEN, ALEXIS DEVELOPMENT INC., and  
EIFFEL MANAGEMENT, INC.,

Third-Party Plaintiffs,

-against-

M & Z CONSTRUCTION COMPANY,

Third-Party Defendants.  
-----x

**FILED**  
**DEC 10 2009**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**

**HON. MICHAEL D. STALLMAN, J.:**

In this action to recover monetary damages for an alleged workplace injury, defendant Albert Kahen (Kahen) moves, pursuant to CPLR 3211 (a) (1) or (a) (7), to dismiss the action or alternatively, for summary judgment (CPLR 3212) dismissing the action as to him.

Plaintiffs cross-move for summary judgment on their Labor Law § 240 (1) claim, as well as dismissal of the third-party

complaint.

For the reasons stated below, the motion and cross motion are denied.

### **Background**

Plaintiff Mohammad Fazal (Fazal), a partner in third-party defendant M & Z Construction Company (M&Z), alleges that on June 12, 2006, he was injured while taping sheet rock at 8607-8613 Range Street, Queens Village, Queens, New York (the construction site). According to Fazal, the accident at issue occurred when he went outside of one of the buildings being renovated to get more tape. Plaintiffs assert that Fazal fell eight feet off a makeshift wooden plank with no railings, which was being used as a walkway across a below-ground driveway. Fazal testified that there were no scaffolds or ladders on the site, and that he placed the wooden plank across the below-ground driveway at the instruction of Kahen, who he alleges to be an owner of the building.

Plaintiffs allege that, as the result of Fazal's fall, he suffered a fractured left calcaneous and a fractured left talus.

According to Kahen, defendant Alexis Development Corp. (Alexis) became the owner of the property on December 30, 2004, and the deed documenting that transfer was recorded on February 11, 2005. In March 2006, Alexis planned to build on the property and retained third-party defendant M&Z to provide labor and

material at the site. Kahen asserts that, under the contract between the parties, comprehensive general liability (CGL) insurance was required to be purchased, such that Alexis was to be named as an additional insured under M&Z's CGL policy. Kahen contends that, although a certificate of insurance was issued confirming that adequate CGL insurance existed, with Alexis named as an additional insured, and that Alexis relied on that certificate, no such insurance existed.

Kahen further contends that he is a principal of Alexis, and in any transaction with Fazal and M&Z, he was at all times acting in his official capacity as the principal of the corporation, and that, therefore, he cannot be held personally liable in this action.

Plaintiffs commenced this action with a verified complaint, dated July 18, 2006, alleging that plaintiffs were entitled to monetary damages from Kahen and Alexis, as well as from Eiffel Management, Inc. (Eiffel), Menalli & Co., Inc. (Menalli), and Hendrix Management Corp., as the result of defendants' negligence and violations of the Labor Law, as well as for loss of consortium.

In their verified answer, Kahen, Alexis, Eiffel, and Menalli set forth their affirmative defenses as well as a counterclaim.<sup>1</sup>

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<sup>1</sup> Defendants counterclaimed that Fazal should recover from his own insurance carrier for any of his injuries.

This was followed by a third-party complaint, initiated by Kahen, Alexis, and Eiffel against M&Z, seeking contribution and indemnification (common-law and contractual), as well as damages for M&Z's failure to procure the required insurance.

### Discussion

Kahen first moves to dismiss plaintiffs' complaint, pursuant to CPLR 3211 (a) (1) and (a) (7), in that he asserts that the documents he signed were in his capacity as a principal of Alexis and not individually.

#### *Documentary Evidence*

"In deciding a motion to dismiss, the factual allegations in the complaint must be deemed true." *Internationale Nerderlanden (U.S.) Capital Corp. v Bankers Trust Co.*, 261 AD2d 117, 121 (1<sup>st</sup> Dept 1999).

"Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Ladenburg Thalmann & Co. v Tim's Amusements*, 275 AD2d 243, 246 (1st Dept 2000); see also *Leon v Martinez*, 84 NY2d 83 (1994); *Connor v Pier Sixty, LLC*, 23 Misc 3d 435 (Sup Ct, NY County 2009).

However, pursuant to CPLR 3211 (e), a motion to dismiss pursuant to CPLR 3211 (a) (1) must be raised either in a pre-joinder motion or in a defendant's answer. See *Masada Universal Corp. v Goodman Sys. Co.*, 121 AD2d 518 (2d Dept 1986); see also

*Genger v Genger*, 21 Misc 3d 1132(A), NY Slip Op 52325(U) (Sup Ct, NY County 2008); *Bennett v King of Tech., Ny, Inc.*, 8 Misc 3d 1005(A), NY Slip Op 50935 (U) (Sup Ct, Kings County 2005).<sup>2</sup> Defendant Kahen is not able to raise this issue as a basis for affirmative relief (i.e., dismissal) on this summary judgment motion.

As respects Kahen, there is no question that his December 19, 2006 answer was served upon plaintiffs. Although that answer contains six affirmative defenses,<sup>3</sup> none alleges that documentary evidence provides a defense to plaintiffs' complaint. Although defendants have alleged that Kahen "had no connection with the premises where and when the alleged incident occurred," such statement does not preserve a defense founded upon documentary evidence.

Therefore, by filing an answer prior to making the instant motion and not preserving the "documentary evidence" defense in that answer, Kahen has waived his right to any such relief.

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<sup>2</sup>The relevant portion of CPLR 3211 (e) states: "At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a). ... any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading."

<sup>3</sup>There are two affirmative defenses labeled "as and for a fifth affirmative defense." The total number of affirmative defenses is actually six.

Even had he not waived the defense, however, Kahen would not be entitled to dismissal of plaintiffs' complaint based upon documentary evidence. Although it is clear from the proffered documents that Alexis was the owner of the property on which Fazal allegedly fell (see Notice of Motion, Exhs. A & B), the contract within which M&Z was engaged states that "Albert Kahen" is the "customer." Kahen, who signed the contract engaging M&Z to perform work, does not indicate anywhere that he is signing on behalf of Alexis. See Notice of Cross Motion, Exh. I.

Because a cause of action will be dismissed under CPLR 3211 (a) (1) only upon conclusive documentary evidence, and it is not conclusive from the proffered documents that Kahen was acting on behalf of Alexis, that portion of Kahen's motion would have been denied, even if it had not been untimely made.

#### *Failure to State a Claim*

Kahan also seeks dismissal of the plaintiffs' complaint, under CPLR 3211 (a) (7), for failure to state a claim. Unlike the defense relying upon documentary evidence, a motion based upon a failure to state a claim may be made subsequent to the filing of an answer, whether or not a defendant has alleged it as an affirmative defense. See CPLR 3211 (e). In any event, in response to plaintiffs' complaint, Kahen alleges as his second affirmative defense that plaintiffs fail to state a cause of action. See Notice of Cross Motion, Exh. C.

In determining whether a defendant is entitled to such dismissal, the pleadings are afforded a liberal construction, and the plaintiff is given every possible favorable inference. See *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002). A court's inquiry is only to determine whether the facts as alleged fall within any cognizable theory. See *Leon v Martinez*, 84 NY2d at 83.

In the instant motion, Kahen contends that there is no legally cognizable theory under which he could be held liable to plaintiffs for any monetary damages. Plaintiffs, however, assert that Kahen held himself out to be the general contractor on the construction project on which Fazal was allegedly injured.

If it is found that Kahen was the general contractor on the construction project, he would be in a category of persons subject to liability. Therefore, that portion of Kahen's motion that seeks dismissal of plaintiffs' complaint is denied.

#### *Summary Judgment*

To obtain summary judgment, a movant must establish entitlement to a judgment in its favor as a matter of law. See *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). "[I]t must clearly appear that no material and triable issue of fact is presented" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; see also *Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]), because summary judgment is a drastic remedy that should not be invoked

where there is any doubt as to the existence of a triable issue or when the issue is even arguable. See *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Kahen moves for summary judgment dismissing plaintiffs' complaint,<sup>4</sup> while plaintiffs cross-move for summary judgment: (1) on their Labor Law § 240 (1) claim; and (2) dismissing the third-party complaint.

Kahen contends that any actions that he took on the construction site, and any documents he signed, were in his role as principal of Alexis, and not in his individual capacity. To that end, he has proffered his own affidavit, as well as official recordings of property transfers and tax records. However, in his affidavit, Fazal attests that Kahen never said that he was acting on behalf of Alexis. See Notice of Cross Motion, Fazal Affidavit, ¶¶ 4-6.

There are material questions of fact as to whether Kahen was personally acting as a general contractor on the construction site or was acting in his official capacity as a principal of Alexis. Therefore, that portion of Kahen's motion that seeks summary judgment dismissing the complaint as against him is

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<sup>4</sup>Although in his papers, Kahen makes some assertions regarding the entitlement to summary judgment of some of the other defendants in this action, no other defendants moved this court for relief. Since no notice was given to plaintiffs as respects these other defendants, this court will not address these issues.

denied.

Plaintiffs seek summary judgment on their Labor Law § 240 (1) claim.

Under Labor Law § 240 (1), owners, general contractors, and their agents who fail to provide or erect the safety devices necessary to give proper protection to a worker involved in the erection, demolition, repair, alteration, painting, cleaning or pointing of a building or structure are absolutely liable when that worker sustains injuries proximately caused by that failure. See *Rocovich v Consolidated Edison Co.*, 78 NY2d 509 (1991); see also *Rizzo v Hellman Elec. Corp.*, 281 AD2d 258 (1st Dept 2001).

[T]he purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves, [and the] strict liability provision 'is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed.'

*Panek v County of Albany*, 99 NY2d 452, 457 (2003), quoting *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 559 (1993) (other internal citations omitted).

Fazal contends that, just prior to when his accident occurred, he was walking across a wooden plank being used as a makeshift walkway across a below-ground driveway. According to Fazal, he had placed the plank where he did weeks prior, at the instruction of Kahan, so that he could get from one house to another on the site. See *Fazal Examination Before Trial (EBT)*, at 18. Additionally, Fazal attested in his affidavit that Kahan

had seen the plank after it was placed, and that there were neither safety devices nor ladders, scaffolds or any other type of devices afforded to allow him access to the middle house. See Fazal Affidavit, ¶¶ 7, 9, 10.

Plaintiffs allege that the plank wobbled and Fazal fell off, resulting in his injuries. Kahen, Alexis, and Eiffel oppose plaintiffs' cross motion because they contend that Fazal was the sole proximate cause of his own injuries. According to Kahen, Alexis, and Eiffel, Fazal should have walked around the site to get to the middle house, and not walked on the wooden plank that he himself placed across the below-ground driveway. In his EBT, Kahen testifies first that he never saw the plank before the accident, and then says that he does not remember. See Kahen EBT, at 26-28, 60.

It is the plaintiff's burden to "demonstrate that the statute was violated, and that the violation proximately caused his/her injuries." *Gallagher v New York Post*, 55 AD3d 488, 489 (1<sup>st</sup> Dept 2008). Where the injured worker's own actions were the sole cause of his or her accident, however, Labor Law § 240 (1) does not apply. Recalcitrance on the part of the worker is not required. The issue to be addressed, rather, is whether the worker was solely to blame for his or her injuries. See *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 (2003).

Where "adequate safety devices are made available to the

worker, but the worker does not use, or misuses, them, there is no liability." *Gallagher v New York Post*, 55 AD3d at 490; see also *Robinson v East Med. Ctr., LP*, 6 NY3d 550 (2006). A plaintiff is expected to employ a "normal and logical response" to the situation. See *Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 (2005).

In the instant situation, there are material questions of fact as to whether Kahen or anyone else from Alexis was in any way involved with Fazal's decision to place the wooden plank across the below-ground driveway or whether Kahen was even aware of its existence. Because Fazal has, therefore, not met his burden that defendants violated Labor Law § 240 (1), that portion of plaintiffs' cross motion that seeks summary judgment on their Labor Law § 240 (1) claim is denied.

Plaintiffs further seek dismissal of the third-party action. Fazal asserts that he is a partner in M&Z, which is also alleged in the third-party answer. See Notice of Cross Motion, Exh. E. In its third-party answer, M&Z was represented by separate counsel. Despite being served with the instant motion and cross motion papers, M&Z has not responded. Without the participation of M&Z in this motion sequence, any decision and order rendered by this court could be revisited by M&Z at a later date, thereby giving M&Z more than one bite at the apple. Therefore, in the interests of judicial economy, that portion of plaintiffs' cross

motion that seeks dismissal of the third-party action is denied without prejudice. Moreover, plaintiff has not demonstrated how, under these circumstances it has standing to seek dismissal of a third party claim or how the third party claim could cause it prejudice.

**Order**

Accordingly, it is hereby

ORDERED that Albert Kahen's motion is denied; and it is further

ORDERED that the portion of plaintiffs' cross motion that seeks summary judgment on their Labor Law § 240 (1) claim is denied; and it is further

ORDERED that the portion of plaintiffs' cross motion that seeks dismissal of the third-party action is denied without prejudice.

Dated: December 7, 2009

New York, NY

**FILED**  
DEC 10 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

ENTER:



J.S.C.