

Jafargian v IAC

2010 NY Slip Op 32716(U)

September 24, 2010

Supreme Court, New York County

Docket Number: 111069/08

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA Justice

PART 19

Index Number : 111069/2008

JAFARGIAN, STEVE

VS.

IAC

SEQUENCE NUMBER : 003

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

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

motion and cross-motion are decided in accordance with accompanying memorandum decision.

FILED

OCT 01 2010

COUNTY CLERK'S OFFICE
NEW YORK

This constitutes decision and order of the court

Dated: September 29, 2010

Saliann Scarpulla

SALIANN SCARPULLA 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):

COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
STEVE JAFARGIAN,

Plaintiff,

-against-

IAC, IAC/INTERACTIVECORP, IAC/GEORGETOWN
19TH STREET, LLC, THE GEORGETOWN COMPANY,
LLC, TURNER CONSTRUCTION, TURNER
CONSTRUCTION COMPANY, LANGAN
ENGINEERING AND ENVIRONMENTAL SERVICES,
CONSENTI ASSOCIATES, JOEL M. SILVERMAN
ASSOCIATES, JOEL M. SILVERMAN AND
ASSOCIATES, LLC, and ADAMSON ASSOCIATES,

Defendants.
-----X

Index Number 111069/08
Submission Date 6/16/10
Mot. Seq. No. 003
DECISION & ORDER

FILED

OCT 01 2010

COUNTY CLERK'S OFFICE
NEW YORK

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212-313-3600

For Defendant IAC and Silverman Assoc.:
London Fisher, LLP
By Gregg Minkin, Esq.
59 Maiden Lane
New York, New York 10038
2112-972-1000

For Defendant Turner Constr.:
Brown, Gavalas & Fromm, LLP
By Evan B. Rudnicki, Esq.
335 Lexington Avenue
New York, New York 10017
212-983-8500

Papers considered in review of this motion for summary judgment:

Papers	Numbered
IAC's Notice of Mot. and Affirm in Supp with Exhib. Attached.....	<u>1</u>
IAC's Memo. of Law in Supp.	<u>2</u>
Plaint.'s Notice of Cr-Mot. and Affirm. in Supp and Opp with Exhib. Attached.....	<u>3</u>
Turner's Affirm. in Opp with Exhib. Attached	<u>4</u>
IAC's Reply Affirm. in Further Supp and Opp.....	<u>5</u>

HON SALIANN SCARPULLA, J.:

This case arises out of an alleged construction accident on August 19 and August 26, 2005. Plaintiff Steve Jafargian("Jafargian") alleges that he was injured during the

course of his employment for Urban Foundation/Engineering LLC at a construction site located at 555 West 18th Street, New York, New York (“the premises”), when he tripped and fell over construction debris. Jafargian asserts causes of action against defendants for violating Labor Law §§ 240(1), 241(6) and 200.

Defendants IAC, IAC/Interactivecorp, IAC/Georgetown 19th Street and the Georgetown Company, LLC (herein collectively “IAC/Georgetown”), and Joel M. Silverman Associates and Joel M. Silverman and Associates (collectively herein “Silverman”) move for dismissal under CPLR 3211(a)(7) or, in the alternative, for summary judgment under CPLR 3212.

IAC and Georgetown argue that the premises was owned exclusively by Responsive Realty, LLC, which leased the premises to IAC/Georgetown 19th Street, LLC, which in turn immediately subleased to non-party HTRF Ventures, LLC, which in its turn appointed IAC/Georgetown 19th Street, LLC as its agent. In support of their argument, IAC/Georgetown submits the affidavits of Robin Rasamny, a partner with The Georgetown Company, LLC, and Jason Stewart, Senior Vice President and Chief Administrative Officer of IAC/Interactivecorp, a copy of the lease agreement between Responsive Realty LLC and IAC/Georgetown 19th Street, LLC, a copy of the sublease between IAC/Georgetown 19th Street, LLC and HTRF Ventures, LLC, and the construction agreement between IAC/Georgetown 19th Street, LLC, as agent for HTRF Ventures, LLC, and defendants Turner Construction and Turner Construction Company,

designated construction manager, (herein collectively "Turner"). In their affidavits, Rasamny and Stewart, relying on the primary lease agreement, conclude that neither IAC nor Georgetown defendants had any "ownership interest in the IAC Building Site."

In opposition, Jafargian submits a copy of the recording of the deed, dated March 27, 2004, pursuant to which Responsive Realty, LLC transferred all of its interest in all of the buildings and improvements located above the subject ground leasehold to IAC/Georgetwon19th Street, LLC. The "Real Property Transfer Report" ("RP-5217NYC"), attached to the recording, states that the transfer was a sale of "improvements only," with the sale price of \$1,000,000.00. Jafargian argues that because the duration of the leasehold is no less than seventy-five years and the building over the ground level was sold, IAC/Georgetown was the "owner" at the time of the accident for the purposes of Article 10 of the Labor Law.

Jafargian and Turner also submit print-outs from the Department of Building's website that show that during the relevant time frame, IAC/Georgetown was listed as "owner" on the building permits and violation reports. In reply, IAC/Georgetown responds that it purchased the building simply to raze it in order to make way for new development, and the new building that Jafargian worked to erect when the accident happened reverted back to Responsive Realty, LLC under the lease.

Jafargian and Turner also contend that IAC/Georgetown's motion is premature because the parties have not yet finished the documentary discovery and have not taken any depositions.

Silverman supports its CPLR 3211 and 3212 motion with a copy of the "Construction Consulting Services" memorandum agreement and an affidavit by its President and Managing Member, Joel M. Silverman, who alleges that Silverman was merely a construction consultant with no obligation to supervise work or safety practices, and was thus not subject to either vicarious or direct liability under the relevant provisions of the Labor Law. Jafargian concedes that Silverman may not be held vicariously liable under Labor Law §§ 240(1) and 241(6), but opposes Silverman's motion on the Labor Law § 200 claim, because Jafargian has not had an opportunity to depose Joel Silverman to determine whether Silverman in any way took part in control or direction of the construction work.

Jafargian cross-moves to amend the complaint to add HTRF Ventures, LLC and Georgetown 19th Street Development LLC, the full identity of the entity that contracted with Turner, and for the complaint to relate back to the interposition of claims against IAC/Georgetown pursuant to CPLR 203(b). Jafargian argues that HTRF Ventures, LLC and Georgetown 19th Street Development, LLC stand in unity of interest with IAC/Georgetown as wholly owned subsidiaries. In support of the cross-motion, Jafargian submits uncertified print-outs from the New York Secretary of State, Division of

Corporations, website. IAC/Georgetown oppose the cross-motion, arguing that parent-subsidary relationship is insufficient to establish unity of interest for statute of limitations purposes.

Discussion

The legal standards on motions to dismiss for failure to state a cause of action and for summary judgment differ. When considering a CPLR 3211(a)(7) motion to dismiss based on the pleadings, the “sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law.” *Guggenheimer v Ginzburg*, 43 N.Y.2d 268, 275 (1977). The Court presumes the allegations of the complaint to be true and accords them every favorable inference, except insofar as they consist of bare legal conclusions or are inherently incredible or flatly contradicted by documentary evidence. *Beattie v Brown & Wood*, 243 A.D.2d 395 (1st Dept 1997).

In contrast, under CPLR 3212(b), summary judgment “shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” To warrant a court’s directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. *Epstein v Scally*, 99 A.D.2d 713 (1st Dep’t 1984). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that there is a material

issue of fact for trial. *Indig v Finkelstein*, 23 N.Y.2d 728 (1968); see also *Vogel v Blade Contr. Inc.*, 293 A.D.2d 376, 377 (1st Dep't 2002). Conclusory allegations or denials are insufficient to either warrant or defeat summary judgment. *McGahee v Kennedy*, 48 N.Y.2d 832, 834 (1979).

Under both CPLR 3211 and 3212, the Court retains discretion to stay or deny the motion with leave to renew at the end of all discovery "if the opposing party needs further opportunity to secure affidavits or conduct disclosure or otherwise summon forth evidentiary aid in opposing the motion." Siegel, *New York Practice*, Ch 11, § 281 (4th Ed. 2005); see also CPLR 3211(d) and 3212(f). Where additional discovery promises to provide the court with a more complete record on the basis of which to render judgment, the court should deny the summary judgment motion without prejudice and permit the exchange of requested discovery. See e.g., *Aubrey Equities v SMZH 73rd Assoc.*, 212 A.D.2d 397, 398 (1st Dep't 1995) (citations omitted).

New York Labor Law § 240(1), informally known as "the scaffold law," requires that owners, contractors, and their agents "furnish or erect...scaffolding, hoists, stays. . . and such other devices which shall be so constructed, placed and operated so as to give proper protection" to the construction workers at a worksite. Under Labor Law § 240(1), property fee owners, general contractors, and their respective agents are liable for those types of construction, repair or renovation accidents in which a scaffold or other protective device proves inadequate to shield the injured worker from harm flowing

directly from the application of the force of gravity to an object or person. *See John v Baherstani*, 281 A.D.2d 114 (1st Dep't 2001). Labor Law § 241(6) also imposes a nondelegable duty of reasonable care upon owners of premises and general contractors hired to perform construction work “to provide reasonable and adequate protection and safety to the persons” employed in, or lawfully frequenting, all areas in which construction, excavation, or demolition work is being performed.

The term “owner” under Article 10 of the Labor Law has not been limited to titleholders and has been also held to include an entity with an interest in the property which fulfilled the role of owner by contracting to have the work performed for the property’s benefit. *See Zaher v. Shopwell, Inc.*, 18 A.D.3d 339, 339 (1st Dep’t 2005); *see also Lynch v City of New York*, 209 A.D.2d 590, 591 (2nd Dep’t 1994). “The statute may also apply to a lessee, as agent of the owner, where the lessee had the right or authority to control the work site, even if the lessee did not hire the general contractor.” *Bart v Universal Pictures*, 277 A.D.2d 4, 5 (1st Dep’t 2000) (citations omitted).

There are occasions when the structuring of a real estate transaction is so complex that thorough discovery is required prior to the determination of ownership interest and status for the purposes of Labor Law §§ 240(1) and 241(6). *See Vigliotti v. Executive Land Corp.*, 186 A.D.2d 646, 647 (2nd Dep’t 1992) (finding that a transfer of title as a financing mechanism is not a genuine transfer of ownership and does not relieve the *de facto* owner of vicarious liability); *see also Muro v State of New York*, 19 Misc.3d

1116A, *3 (Ct. Cl. 2008) (denying summary judgment where the owner transferred property, while retaining a possibility of reverter).

After reviewing the conflicting evidence submitted, the Court finds that IAC/Georgetown's motion for summary judgment is premature. Discovery is far from complete. On October 14, 2009, the Court issued a preliminary conference order setting forth the discovery schedule, which included both exchange of documentary discovery and the taking of depositions. The parties have not fully complied with the October 14, 2009 order. In addition, the parties adjourned the two compliance conferences scheduled for April 28, 2010 and August 11, 2010, because of the pending motion.

IAC/Georgetown has submitted no evidence in admissible form regarding IAC/Georgetown's roles and responsibilities at the construction site and the respective level and nature of these defendants' property interests in the premises. Nor has IAC/Georgetown submitted competent evidence to show for whose benefit the construction was initiated. The self-serving, conclusory affidavits IAC/Georgetown submitted are not an adequate substitute for court-ordered depositions and by themselves do not warrant the grant of summary judgment. *See e.g., Vasquez v Gonzalez*, 143 A.D.2d 413, 414 (2nd Dep't 1988).

In addition, IAC/Georgetown has not submitted any evidence in admissible form regarding the ownership composition of the IAC/Georgetown defendants and the corporate relationship between all the relevant parties to the subject real estate

transaction. Without such evidence, the Court cannot determine the issues of ownership and agency, *i.e.*, the right to control or affirmative exercise of control over the subject construction work and safety practices for the purposes of vicarious liability under Article 10 of the Labor Law. Therefore, IAC/Georgetown's motion is denied with leave to renew at the end of all discovery. With respect to Silverman's motion, the motion is granted without opposition on Jafargian's Labor Law §§ 240(1) and 241(6) claims, but denied with leave to renew at the end of all discovery with respect to Labor Law § 200 claim.

Given that the New York courts liberally permit parties to amend their pleadings, especially when, as here, the case has not progressed far in the discovery process, the Court permits Jafargian to amend the complaint to include two additional defendants, HTRF Venture, LLC and Georgetown 19th Street Development, LLC. *See* CPLR 3025(b); *see also* Siegel, *New York Practice*, Ch. 9, § 237 (4th Ed. 2005). However, the determination of the issue of the unity of interest between IAC/Georgetown and the two new parties under CPLR 203(c) for the purposes of the applicable statute of limitations must await the completion of all discovery.

In accordance with the foregoing, it is

ORDERED that the motion by defendants IAC, IAC/Interactivecorp, IAC/Georgetown 19th Street, LLC, the Georgetown Company, LLC to dismiss the

complaint, or in the alternative for summary judgment, is denied in its entirety with leave to renew at the close of all discovery; and it is further

ORDERED that the motion by defendants Joel M. Silverman Associates and Joel M. Silverman and Associates to dismiss the complaint, or in the alternative for summary judgment, is granted to the extent that plaintiff's second and third causes of action, sounded in Labor Law §§ 240(1) and 241(6) respectively, are dismissed as against defendants Joel M. Silverman Associates and Joel M. Silverman and Associates only, and the motion is otherwise denied, with leave to renew at the close of all discovery involving said defendants; and it is further

ORDERED that plaintiff's motion for leave to amend the complaint is granted to the extent that plaintiff is permitted to add HTRF Ventures, LLC and Georgetown 19th Street Development, LLC as defendants, and plaintiff shall file and serve the amended summons and complaint on or before October 20, 2010; defendants HTRF Ventures, LLC and Georgetown 19th Street Development, LLC shall answer the amended complaint or otherwise respond thereto within 30 days from the date of said service; and the motion is otherwise denied with leave to renew at the close of all discovery; and it is further

ORDERED that counsel are directed to appear at a compliance conference on November 24, 2010 at 2:15 p.m. to be held in Room 279, 80 Centre Street, New York, New York; no adjournment of this date is permitted; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon all parties and upon the Clerk of Court (60 Centre St., Basement), who shall enter judgment in accordance with the foregoing and sever and continue the claims which are not dismissed, and who shall amend the Court's records to reflect the addition of HTRF Ventures, LLC and Georgetown 19th Street Development, LLC upon the proof of filing and service of the amended complaint.

This constitutes the decision and order of the Court.

Dated: September²⁴, 2010
New York, New York

ENTER:

Saliann Scarpulla
Hon. Saliann Scarpulla, J.S.C.

FILED
OCT 01 2010
COUNTY CLERK'S OFFICE
NEW YORK