

Ener v Gabrielli Ford Truck Sales & Serv., Inc.

2011 NY Slip Op 33165(U)

November 3, 2011

Supreme Court, Suffolk County

Docket Number: 10609-10

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

-----x
ORHAN ENER,

CALENDAR DATE: June 29, 2011
MNEMONIC: MG; Mot D

Plaintiff,

PLTF'S/PET'S ATTORNEY:
Wingate, Russotti & Shapiro, Esqs.
420 Lexington Avenue
New York, New York 10170

-against-

GABRIELLI FORD TRUCK SALES & SERVICE, INC.,

DEFT'S/RESP ATTORNEY:
Aaronson Rappaport Feinstein & Deutsche, LLP
600 Third Avenue
New York, New York 10016

Defendant.

-----x
GABRIELLI FORD TRUCK SALES & SERVICE, INC.,

Third-Party Plaintiff,

Andrea G. Sawyers, Esq.
PO Box 9028
3 Huntington Quad
Melville, New York 11747

-against-

FORDSTAR, TELESAT and FUTURE ENTERPRISES,

Telestat, pro se
9210 Corporate Boulevard
Rockville, Maryland 20850

Third Party Defendants.

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Future Enterprises, pro se
74 Washington Avenue
Cliffside Park, New Jersey 07010

Upon the following papers numbered 1 to 40 read on this motion to dismiss and motion for discovery ;
Notice of Motion/Order to Show Cause and supporting papers 1-11; 28-31 ; Notice of Cross-Motion and
supporting papers _____; Answering Affidavits and supporting papers 12-18 ;32-40 ; Replying
Affidavits and supporting papers 19-21 ; Other 22-24;25-27 ; and after hearing counsel in support of
and opposed to the motion it is,

ORDERED that this motion by the third party defendant, Ford Motor Company s/h/a
Fordstar, for dismissal of the third party complaint by defendant/third party plaintiff, Gabrielli
Ford Truck Sales & Service Inc., pursuant to CPLR §3211(a)(1) on documentary evidence
grounds and CPLR §3211(a)(7) for failure to state a cause of action, is granted in its entirety
and the defendant/third party complaint as to the fourth cause of action alleging
indemnification and the seventh cause of action alleging negligence as to third party
defendant, Ford Motor Company s/h/a Fordstar, are dismissed. The action is severed and
continued as to the remaining third party defendants. The plaintiff's motion seeking to compel
depositions is granted to the extent indicated in this decision.

JH

The plaintiff, Orhan Ener, presently living in Turkey, instituted this action for personal injuries allegedly sustained on June 14, 2007 on the premises of the defendant, Gabrielli Ford Truck Sales & Service, Inc., (hereinafter Gabrielli) located at 3200 Horseblock Road in Medford, Suffolk County on Long Island, New York. The plaintiff claims that he is a service technician of electronic (telecommunications) equipment and was employed by Future Enterprises, his own company, which was under contract with Telesat and he was called to do repair work on the satellite communication and satellite dish located on the roof of Gabrielli's premises. This satellite equipment was owned by Ford Motor Company s/h/a Fordstar (hereinafter Ford) and was placed on the roof in accordance with an agreement in 1994 entered into by Ford and Gabrielli which was renewed in 2000 and then restated in an agreement between the parties, dated January 21, 2009, to access Ford's communications network. The plaintiff has alleged that he was required to access the roof of Gabrielli's premises and climbed an iron ladder, fixed to the inside building wall, and proceeded to open a hatch to the roof by a handle on the hatch. The plaintiff then lost his grip on the handle and fell injuring himself. The plaintiff then sued Gabrielli with service of a summons and verified complaint filed on February 2, 2009 alleging a "loose, broken, dangerous and defective handle" on the roof hatch resulting in his fall and injury. Gabrielli thereafter instituted a third party action against the plaintiff's own company Future Enterprises, as a subcontractor, and Telesat, as the contractor, and Ford alleging claims of indemnification and negligence.

Ford now moves, pre-answer, for dismissal of the plaintiff's complaint against it pursuant to CPLR §3211(a)(1) on documentary evidence and §3211(a)(7) for failure to state a cause of action. The defendant/third party plaintiff, Gabrielli, opposes the motion.

For the following reasons, Ford's motion to dismiss is granted in its entirety and Gabrielli's third party complaint against Ford is dismissed in its entirety as alleged in the fourth cause of action for indemnification and in the seventh cause of action alleging Ford's negligence.

As Professor David D. Siegel in New York Practice §258 noted:

"CPLR 3211 merely supplies the procedural expedient for bringing to the court's attention a ground that supports an early dismissal of a cause of action or defense. The merits of the particular ground, and whether it supports the dismissal sought, may involve a vast realm of law, substantive or procedural or both."

Thus, the Court when considering a pre-answer motion to dismiss the complaint pursuant to CPLR §3211 must afford the complaint a liberal construction, accept the facts contained therein as true, accord it the benefit of every favorable inference and merely determine whether the facts alleged raise a cognizable legal theory upon which a recovery may occur. Goldfarb v. Schwartz, 26 AD3d 462, 811 NYS2d 414 (2nd Dept. 2006). Ford moves under CPLR §3211 (a)(1) claiming the documentary evidence supports a dismissal of this action and provides contracts and agreements which were signed by both Ford and Gabrielli in 1994, 2000 and 2009 indicating that Gabrielli was required to indemnify Ford for any injuries and not the other way around. Ford also argues it neither owns, controls, maintains or repairs the premises owned and controlled by Gabrielli and therefore is not liable for the plaintiff's

injuries which were sustained prior to the plaintiff even reaching the roof where its equipment was located.

When considering a motion pursuant to CPLR §3211 (a)(1), a dismissal is warranted only if the documentary evidence submitted in support of the motion by the defendants conclusively establishes a defense to the asserted claims as a matter of law. As with any other CPLR §3211 motion, the complaint is to be liberally construed and the plaintiff is to be afforded the benefit of every possible favorable inference. 511 W. 232nd Owners Corp. v. Junnifer Realty Co., 98 NY2d 144, 746 NYS2d 131 (2002). The documentary evidence must be so compelling and conclusive, such that it resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim. Mazur Bros. Realty LLC v. State of New York, 59 AD3d 401, 873 NYS2d 326 (2nd Dept. 2009); Weston v. Cornell University, 56 AD3d 1074, 868 NYS2d 364 (3rd Dept. 2008); Berger v. Temple Beth-EL of Great Neck, 303 AD2d 346, 756 NYS2d 94 (2nd Dept. 2003).

Ford, in support of the motion to dismiss, has submitted a copy of a contract signed by both parties in January 2009 after the accident and has also provided in its reply papers with the Court's permission the previous agreements between Ford and Gabrielli with regard to the "Fordstar" program, dated April 6, 2000, acknowledging the Fordstar agreement of December 1994 as well as an affidavit by Joseph Dean acknowledging the existence of these agreements between Ford and Gabrielli. This contract as well as the January 2009 agreement specifically provides that Gabrielli "acknowledges that Ford is not the manufacturer of the equipment or a dealer in property of such kind" and that Ford is not liable to Gabrielli or a third party for any damages in connection with "Fordstar or any purchase, use or license of any equipment, computer software and or data furnished under this agreement." Further, within the agreement under paragraph 20(a) of the restated 2009 agreement as well as the original agreement, Gabrielli would "indemnify and hold harmless Ford... from any claims." The Court notes that the plaintiff's claims are for a fall that took place on Gabrielli's premises with a defective roof latch and not while working on Ford equipment or Ford owned merchandise.

In Teal v. Place, 85 AD2d 788, 455 NYS2d 309 (3rd Dept. 1981) the Court stated:

"[t]he first and best rule of construction of every contract, and the only rule we need here, is that, when the terms of a written contract are clear and unambiguous, the intent of the parties must be found therein' (citing Nichols v. Nichols, 306 NY490, 496, 119 N.E.2d 501). Where the intention of the parties is fully determinable from the language employed in the agreement (see 4 Williston, Contracts §600, at p. 280), there is no need to resort to evidence outside the written words to determine their intention. Thus, no question of fact is presented, only a question of law-the interpretation of the March 7, 1980 written contract, and summary judgment was proper (Long Is. R.R. Co. V. Northville Inds. Corp., 41 NY2d 455, 461, 393 NYS2d 925, 362 N.E.2d 558; Mallad Constr. Corp. V. County Fed. Sav. & Loan Assn., 32 NY2d 285, 291, 344 NYS2d 925, 298 N.E.2d 96)"

The Court when considering a motion to dismiss pursuant to CPLR §3211 must afford a liberal construction to the allegations contained within the third party complaint, accept the facts contained therein as true and must accord the benefit of every favorable inference to it and merely determine whether the facts alleged raise a cognizable legal theory upon which a recovery may occur. *Goldfarb v. Schwartz*, *supra*. However, while a pleading's factual allegations are presumed to be true on a motion to dismiss under CPLR §3211, bare legal conclusions and factual claims that are flatly contradicted by the allegations in the case or the evidence are not presumed to be true. *Lutz v. Caracappa*, 35 AD3d 673, 828 NYS2d 426 (2nd Dept. 2006); *Syracuse Orthopedic Specialists, PC v Hootnick*, 16 AD3d 1019, 793 NYS2d 305 (4th Dept. 2004). Thus, allegations in support of the third party claims which are devoid of a factual basis and are vague and conclusory are properly dismissed. See, *Stoianoff v. Gahona*, 248 AD2d 525, 670 NYS2d 204 (2nd Dept. 1998).


Here, in the case at bar, Ford has established that it neither owned, controlled or maintained the premises where the plaintiff fell as attested to by Jeffrey Lynch, the Manager of Dealership Real Estate Operations for Ford, nor is Ford responsible for the roof hatch, the latch, or where or why the plaintiff fell. Ford has demonstrated that it is merely the provider of a communications system i.e. Fordstar which Gabrielli, as an authorized dealer, had on its premises. Gabrielli has not asserted or provided any factual claim to dispute the clear documentary evidence provided Ford to support its claim that Ford is liable for the plaintiff's injuries on Gabrielli's premises. Gabrielli has neither argued that the contract of non-liability and indemnification to Ford from Gabrielli was not valid at the time of the plaintiff's injury or that Ford maintained some presence or control over the premises to overcome the clear evidence produced by Ford. A review of the facts shows the plaintiff's injuries were caused by a defect on a hatch leading to the roof of the premises owned by Gabrielli. The fact that the plaintiff was there to service/repair telecommunications equipment on the roof that was provided or supplied by Ford by contract with Gabrielli does not translate into liability for plaintiff's fall from within the premises due to a defect on the premises, i.e. the roof hatch and latch. A review of the third party complaint indicates that in the fourth cause of action Gabrielli alleges Ford was to procure insurance covering Gabrielli which has been disproved by the contracts provided by Ford and in the seventh cause of action Gabrielli alleges Ford's negligence caused the injury to the plaintiff. The fact that Gabrielli is unable to show either Ford owed a duty of care to the plaintiff or a breach of that duty or caused, contributed to or was responsible for the defective hatch and latch on Gabrielli's premises warrants dismissal.

Accordingly, Ford's pre-answer motion to dismiss the fourth cause of action and the seventh cause of action pursuant to CPLR §3211 (a)(1) and §3211 (a)(7) is granted in its entirety and Gabrielli's third party complaint against Ford is dismissed. The action is severed and continued against the two remaining defendants, Future Enterprises and Telesat.

The plaintiff also moves seeking to compel Gabrielli's appearance at a deposition and to extend his time to file the note of issue. Ford's pre-answer motion extended the delay in discovery in this matter [CPLR §3214(b)] and the plaintiff's motion to compel depositions of the defendants is granted to the extent that this case will be placed on the Court's pre-trial discovery calendar on Wednesday, January 4, 2012 at 10:00 am to resolve all outstanding discovery issues, schedule the remaining depositions of the parties as well as the compliance conference for the completion of discovery and the filing of a note of issue.

The foregoing constitutes the decision of the Court.

Dated: November 3, 2011



J.S.C.