

Baldwin v Heller

2011 NY Slip Op 33551(U)

December 30, 2011

Sup Ct, NY County

Docket Number: 100627/10

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

TYRONE BALDWIN,
Plaintiff,

INDEX NO. 100627/10

- against -

202

DAVID HELLER, HERMINE HELLER, C N
RENOVATION CO., INC.
Defendant.

FILED

JAN 18 2012

C N RENOVATION CO., INC.,
Third-party Plaintiff,
- against -

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GP WAIVE LIGHTING, INC., a/k/a APOLLO
ELECTRIC, INC and APOLLO ELECTRIC, INC.
Third-party Defendants.

The following papers were read on this motion to dismiss by third-party defendant Apollo Electric, Inc and a cross-motion for summary judgment by third-party plaintiff.

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

Answering Affidavits — Exhibits (Memo) _____

Reply Affidavits — Exhibits (Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

Before this Court is a motion by third-party defendant Apollo Electric, Inc. ("Apollo") for an order, pursuant to CPLR 3211 (a)(1) and (7), dismissing the third-party complaint and all cross-claims asserted against it. Defendant/third-party plaintiff CN Renovation Co., Inc. ("Renovations") cross-moves for summary judgment, pursuant to CPLR 3212, on the issue of corporate structure seeking that this Court find as a matter of law that Apollo is the successor corporation to GP Waive Lighting, Inc. ("GP Waive").¹

¹ GP Waive became an inactive, insolvent corporation in September 2009.

BACKGROUND

On June 1, 2007, David Heller and Hermine Heller (together, "the Hellers"), owners of a property located at 25 Bond Street, New York, NY 10012, entered into a contract with Renovations for the renovation of their apartment. On December 19, 2007, Renovations entered into a subcontract with GP Waive to perform electrical work at the Hellers' home ("the Subcontractor Agreement"). Pursuant to the Subcontractor Agreement, GP Waive agreed to indemnify and hold harmless Renovations, and it required GP Waive to maintain a commercial general liability policy naming Renovations as an additional insured.

On September 22, 2008, plaintiff Tyrone Baldwin ("plaintiff") was employed as an electrician's helper at the renovation construction site. On that date, he allegedly sustained injuries when he fell from a ladder and suffered a ruptured left patella tendon. On January 5, 2010, plaintiff commenced an action against the Hellers and Renovations, the general contractor/construction manager at the subject construction site, for negligence and violations of the New York State Labor Law §§ 200, 240(1) and 241(6). Renovations then commenced a third-party action against "GP Waive Lighting, Inc. a/k/a "Apollo Electric, Inc." and Apollo, Electric, Inc. for contractual indemnification and breach of contract for failing to procure insurance naming Renovations as an additional insured. Renovations also alleges that Apollo is the successor corporation to GP Waive.

Apollo now files a motion to dismiss the third-party complaint pursuant to CPLR 3211(a)(1) and (a) (7) because it maintains that it has a defense founded on documentary evidence and that the complaint fails to state a cause of action. Apollo proffers that any third-party claims for common-law indemnification and contribution against Apollo must be dismissed because as plaintiff's employer it is shielded by Workers' Compensation Law § 11 from third-party indemnification or contribution claims unless the plaintiff sustained a "grave injury" or there is a written contract entered into prior to the accident in which it agrees to do so, neither

of which, Apollo states, applies here. More specifically, Apollo asserts, that it is a separate entity from GP Waive and Apollo was not a party to the Subcontractor Agreement entered into between Renovations and GP Waive, the only contract that Renovations has produced. Apollo maintains that it performed electrical work at the site of the accident pursuant to an oral agreement with Renovations and that no written contract between Renovations and Apollo exists. Thus, as a non-party to the Subcontractor Agreement and in light of Workers' Compensation Law § 11, Renovation's claims for indemnification must fail. Moreover, Apollo alleges that Renovations' claim for breach of contract should be dismissed because there was no written agreement between the parties requiring Apollo to procure insurance naming Renovations as an additional insured.

Renovations opposes the motion and cross-moves for summary judgment seeking that this Court find as a matter of law that Apollo is the successor corporation to GP Waive and as such must assume any and all of GP Waive's present and potential future liabilities. Renovations maintains that Apollo is the successor to GP Waive or its alter ego and submits, *inter alia*, the affidavit of Jerzy Wasilewski ("Wasilewski"), president of both Apollo and GP Waive, in support of its contention.

STANDARDS

A. Motion to Dismiss

CPLR 3211 (a) states that:

"[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence; or (7) the pleading fails to state a cause of action"

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). 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" (*id.* at 87-88). Under CPLR 3211(a)(1), dismissal is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.* at 88; *see also Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Kram Knarf, LLC v Djonovic*, 74 AD3d 628, 628 [1st Dept 2010]). Under CPLR 3211(a)(7), 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, dismissal will be denied (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Harris v IG Greenpoint Corp.*, 72 AD3d 608, 609 [1st Dept 2010]).

B. Summary Judgment

"The proponent of a summary judgment motion [pursuant to CPLR 3212] must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Santiago v Filstein*, 35 AD3d 184, 185-86 [1st Dept 2006]). The burden then shifts to the opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 228, 228 [1st Dept 2006]).

DISCUSSION

In support of its motion to dismiss, Apollo submits, *inter alia*, the affidavit of Wasilewski. In his affidavit, Wasilewski asserts that:

"9. Apollo Electric, Inc. is a separate and distinct corporation from GP Waive Lighting, Inc. GP Waive Lighting, Inc. was in the process of being dissolved as a corporation at the time of the plaintiff's accident and had no employees at the location of plaintiff's accident on September 22, 2008.

10. Apollo Electric, Inc. performed electrical work for C N Renovations at 25 Bond Street pursuant to an oral agreement, as there was no written contract between them" (Notice of Motion, exhibit I).

The Court finds that Wasilewski's self-serving affidavit and other documents submitted by Apollo in support of its motion do not constitute documentary evidence that conclusively establish a defense as matter of law warranting dismissal of the third-party complaint (*see Leon*

v *Martinez, supra*). Moreover, Renovations' third-party complaint asserts facts concerning the activity of GP Waive and Apollo which fit within cognizable legal theories (*see Guggenheimer v Ginzburg, supra*). Renovations' cross-motion for summary judgment is denied as premature because Renovations fails to meet its burden of establishing the absence of material issues of fact regarding the corporate structure of Apollo and GP Waive at this time. The Court finds that there are triable issues of fact concerning, among other things, the parties' relationships and whether Apollo and GP Waive are separate entities, which requires that the motions be denied and the parties proceed to discovery.

CONCLUSION

Accordingly it is hereby,

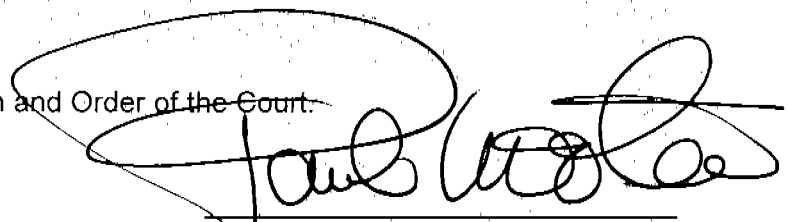
ORDERED that third-party defendant Apollo Electric, Inc.'s motion to dismiss is hereby denied; and it is further,

ORDERED that defendant/third-party plaintiff CN Renovations Co., Inc.'s cross-motion for summary judgement is hereby denied as premature; and it is further,

ORDERED that all parties are directed to appear for a status conference at 60 Centre Street, New York, New York, Room 341, on March 21, 2012 at 11:00 a.m.; and it is further,

ORDERED that third-party defendant Apollo Electric, Inc. shall serve a copy of this order with notice of entry upon all parties.

This constitutes the Decision and Order of the Court.



PAUL WOOTEN J.S.C.

Dated: 12/30/11

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