

Flores v Akam Assoc., Inc.

2011 NY Slip Op 33752(U)

February 24, 2011

Sup Ct, Queens County

Docket Number: 14460/08

Judge: Janice A. Taylor

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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ALDO FLORES, ANGELICA GARCIA and Index No.:14460/08
ZEFERINO AGUILAR, Motion Date: 1/4/11
Plaintiff(s), Motion Cal. No.: 8
- against - Motion Seq. No: 3

AKAM ASSOCIATES, INC., 685 WEST END
AVENUE CORP. and KRA ASSOCIATES,
Defendant(s).

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AKAM ASSOCIATES, INC., 685 WEST END AVENUE Third-Party
CORP., Index No.:350604/09
Third-Party Plaintiffs,

- against -

KAY WATERPROOFING,
Third-Party Defendants.

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KRA ASSOCIATES, INC., Second
Third-Party
Index No.:350604/09
Second Third-Party Plaintiffs,

- against -

K RESTORATION & ROOFING CORP., f/k/a KAY
WATERPROOFING CORP. and KAY WATERPROOFING
CORP.,
Second Third-Party Defendants.

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The following papers numbered 1 - 15 read on this motion by the
plaintiffs for an order granting leave to renew their prior motion
for an order striking the affirmative defense of release and
payment asserted by the defendants.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits-Service.....	5 - 7
Affirmation in Opposition-Exhibits-Service.....	8 - 10
Affirmation in Opposition-Exhibits-Service.....	11 - 13
Reply Affirmation-Service.....	14 - 15

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

This is an action for personal injuries sustained by plaintiffs Aldo Flores and Zeferino Aguilar on November 21, 2007 when they were injured while working at the premises located at 685 West End Avenue in the City, County and State of New York. This action was commenced on June 11, 2008 by the filing of a summons and complaint. Defendant KRA Associates, Inc., s/h/a KRA Associates, joined issue by service of a verified answer dated September 4, 2008. Defendants Akam Associates and 685 West End Owners Corp. joined issue by service of a verified answer dated September 15, 2008. Defendants each included the affirmative defense of release and payment in their respective answers. By order dated August 19, 2010, this court denied plaintiffs' motion for an order striking the affirmative defense of release and payment in the defendants' answers for plaintiffs' failure to include the certification required by Court Rule 130-1.1(a).

With this motion, plaintiffs seek leave to renew their prior motion for an order striking the affirmative defense of release and payment in the defendants' answers. CPLR §2221[e] mandates that a motion for leave to renew must be supported by new or additional facts not offered on the prior motion that would change the prior determination (See, CPLR §2221). As the plaintiffs have now included the certification required by Court Rule 130-1.1(a), their motion seeking leave to renew is granted.

Upon renewal, this court will now consider plaintiffs' motion, pursuant to CPLR §3211 for an order striking the affirmative defense of release and payment in the defendants' answers. It is well-settled that a motion made pursuant to CPLR §3211(b), can only be granted if the allegations contained in the affirmative defense, do not manifest any cause of action cognizable at law. In furtherance of this task, the court liberally construes the defense, accepts as true the facts alleged, and accords the defendants the benefit of every possible favorable inference (See, *Butler v. Cantinella*, 58 AD3d 145 [2d Dept. 2008]). If there is any doubt as to the availability of the defense, the defense should not

be dismissed (See, *Federici, et al. v Metropolis Night Club, Inc.*, 48 Ad3d 741 [2d Dept. 2008]).

In support of this motion, plaintiffs submit, *inter alia*, the previously submitted motion and responsive papers, their attorney's affirmation, the pleadings, the Verified Bill of Particulars, a copies of the subject releases and the affidavits of plaintiffs Aldo Flores ("Flores") and Zeferino Aguilar ("Aguilar"). Plaintiffs assert that the subject releases must be invalidated because they were secured in violation of Workers Compensation Law §32 and were secured by fraud, duress, overreaching and illegality.

Workers' Compensation Law §32, generally prevents an individual from completely waiving his or her right to receive workers compensation (See, Workers' Compensation Law §32). A review of the subject releases, signed by plaintiffs Flores and Aguilar in November, 2007 and December, 2007, respectively, reveals that, upon signing the document and in consideration of payment received from the defendants, plaintiff Flores and Aguilar waived their respective right to commence an action against the defendants. However, as the releases also state that the sum received by plaintiffs Flores and Aguilar may be supplemented by payments from workers' compensation, company-covered insurance or disability insurance, the releases do not require plaintiffs Flores and Aguilar to waive their right to seek workers' compensation. Moreover, it is uncontested that, on May 7, 2008 and September 6, 2008, respectively, plaintiffs Flores and Aguilar actually applied for workers' compensation. It is clear that Workers' Compensation §32 does not render the subject releases invalid. Accordingly, that portion of the instant motion which seeks dismissal of the defendants' affirmative defenses of release and payment, pursuant to Workers' Compensation §32, is hereby denied.

Plaintiffs also seek to dismiss the defendants' affirmative defenses of release and payment due to the alleged fraud, overreaching, duress and illegality by the defendants. In his affirmation, plaintiffs' attorney asserts that neither plaintiffs Flores nor Aguilar is sufficiently fluent in the English language that they could have read and properly understood the release. In further support of this assertion, plaintiffs Flores and Aguilar submit their own affidavits, both written in English, in which both plaintiffs assert that the affidavits were translated to them from Spanish to English and that the translation is accurate. However, plaintiffs have failed to include an affidavit from the person or persons who actually translated these affidavits on the plaintiffs' behalf. The only other document which purports to detail the underlying facts of this action is the submitted affirmation of plaintiffs' attorney. As plaintiffs' attorney has no personal knowledge of the facts, this affirmation is insufficient to meet plaintiffs' burden of proving that dismissal of the affirmative

defenses is warranted (See, *Becker v. Elm Air Conditioning Corp.* [2d Dept 1999]); *Arriaga v. Michael Laub Co.*, 233 AD2d 244 [1st. Dept. 1996]). Thus, this court cannot consider the information contained in these affidavits or in the submitted affirmation in order to make a determination as to whether the releases were signed due to the fraud, overreaching, duress and illegality of the defendants.

Accordingly, that portion of the instant motion which seeks dismissal of the defendants' affirmative defenses of release and payment due to the allegedly fraudulent, overreaching or illegal behavior of the defendants is denied with leave to renew upon submission of an affidavit of the person or persons who translated the affidavits submitted by plaintiffs Aldo Flores and Zeferino Aguilar.

Dated: February 24, 2011

JANICE A. TAYLOR, J. S. C.

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