

<b>Martorella v 150 Centerville Holding, LLC</b>
2011 NY Slip Op 33813(U)
August 2, 2011
Sup Ct, Queens County
Docket Number: 14413/09
Judge: Denis J. Butler
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable DENIS J. BUTLER IAS PART 12  
Justice

-----x  
LUCILLE MARTORELLA,

Plaintiff,

-against-

150 CENTERVILLE HOLDING, LLC,  
TADCO CONSTRUCTION CORPORATION,  
150 CENTERVILLE, LLC AND  
101-28 99<sup>th</sup> REALTY CORP.,

Defendants.

Index No.: 14413/09

Motion Date:  
August 2, 2011

Cal. No.: 13  
Seq. No.: 9

-----x

The following papers numbered 1 to 15 read on this motion by defendants, 101-28 99<sup>th</sup> Realty, LLC sued herein as 101-28 99<sup>th</sup> Realty Corp. and 150 Centerville Holding, LLC, to restore a prior motion to the motion calendar and, upon restoration, to dismiss the plaintiff's complaint.

PAPERS  
NUMBERED

Notice of Motion, Affirmation, Exhibits..... 1-9  
Affirmation in Opposition, Exhibits..... 10-14  
Reply Affirmation..... 15

Upon the foregoing papers the motion is determined as follows:

Although moving defendants, 101-28 99<sup>th</sup> Realty, LLC sued herein as 101-28 99<sup>th</sup> Realty Corp. ("Realty Corp.") and 150 Centerville Holding, LLC ("Holding, LLC") seek to "restore the defendants prior motion and matter to the motion calendar pursuant to 22 NYCRR §208.14", the Court recognizes this motion to properly seek renewal of the prior motion, pursuant to CPLR

§2221(e), and will determine such motion accordingly.

On or about September 16, 2009, defendants, Realty Corp. and Holding, LLC, served a timely cross-motion seeking dismissal of plaintiff's complaint against them (Ex. B). The initial motion, brought by plaintiff for a default judgment against the co-defendants, and a cross-motion thereto, were set for a hearing on November 12, 2009, and, on consent, plaintiff's motion for default was adjourned numerous times for reasons both practical and legal, including global settlement. Movants' cross-motion followed the adjournments granted on plaintiff's said motion for default.

On September 7, 2010, no defendants having appeared at the call of the calendar, plaintiff's motion for default judgment was granted on default, and moving-defendants' cross-motion was marked off the motion calendar, as a result of such non-appearances (Ex. F). Defendants, Realty Corp. and Holding, LLC, now move for an order, pursuant to CPLR §2221(e), granting leave to renew their prior cross-motion and, upon renewal, granting dismissal of plaintiff's complaint as against movants.

Pursuant to CPLR §2221(e), a motion for leave to renew shall be based upon new facts not offered on the prior motion, or a change in the law since the prior determination, along with a reasonable excuse as to why that information was not submitted in opposition to the prior motion (see, JPMorgan Chase Bank N.A. v. Malarkey, 65 A.D.3d 718 [3 Dept. 2009]).

However, "although renewal motions generally should be based on newly discovered facts that could not be offered on the previous motion, ... courts have discretion to relax this requirement and to grant such motion in the interest of justice" (see, Mejia v. Nanni, 307 A.D.2d 870, 871 [1 Dept. 2003]; Sirico v. F.G.G. Productions, Inc., 71 A.D.3d 429 [1 Dept. 2010]; Mattis v. Keen, 54 A.D.3d 610 [1 Dept. 2008]). Defendants, Realty Corp. and Holding, LLC, have proffered a justifiable excuse for having failed to timely submit movants' cross-motion and facts in support which, although not "newly discovered", were not determined on the prior motion. Even if movants' current motion cannot be said to fall precisely within the category of "renewal", pursuant to CPLR §2221(e), the Court is within its discretion to grant a decision on that basis where movants' papers "clarified certain facts" with relation to the relief requested herein (see, Sheridan v. Very, Ltd., 56 A.D.3d 305, 306 [1 Dept. 2008]). Further, the strong public policy favoring determination of matters on the merits warrants the granting of this motion (see, Rodney v. New York Pyrotechnic Products Co.,

Inc., 112 A.D.2d 410 [2 Dept. 1985]).

As such, defendant, Realty Corp. and Holding, LLC's motion for leave to renew their prior cross-motion seeking dismissal of the complaint is granted and, upon renewal, that cross-motion is denied.

In this action to recover damages for personal injuries sustained by plaintiff as the result of a sidewalk accident outside the premises known as 150-20 Centerville Street (or "Centerville Street"), Queens, New York on December 12, 2007, moving-defendants contend that they did not "own, lease, maintain or manage" those premises on the date of accident and, as such, are entitled to dismissal of the action against them, pursuant to CPLR §3211(a)(1), based on a defense founded upon documentary evidence, and CPLR §3211(a)(7), in that the complaint fails to state a cause of action against movants. In support of their motion, moving-defendants submitted the affidavit of Mario Faulisi, dated September 8, 2009 (Ex. B of Ex. B), in which Mr. Faulisi states he is the owner of the moving defendants and neither moving defendant "owned, leased, maintained, operated or managed the property located at 150-20 Centerville Street, Queens, New York on December 12, 2007". Moving-defendants contend that summary judgment should therefore be granted dismissing the complaint against them based upon this "documentary evidence".

Plaintiff opposes said motion, alleging that there exist herein questions of fact which would deny summary judgment on behalf of moving-defendants.

A motion made pursuant to CPLR §3211(a)(1) warrants dismissal only if the evidence submitted utterly refutes, and conclusively establishes a defense to, the asserted claims as a matter of law (see, Goshen v. Mutual Life Ins. Co., 98 N.Y.2d 314 [2002]). For the evidence to be considered "documentary" under that statute, such evidence must be of undisputed authenticity, unambiguous and undeniable (see, Kopelowitz & Co., Inc. v. Mann, 83 A.D.3d 793 [2 Dept. 2011]). Defendants' evidence submitted herein, solely in the form of deposition testimony of the owner of the defendant companies, fails to conclusively establish a defense to the asserted claims as a matter of law. Mr. Faulisi's allegation that the moving-defendants have no relationship with "150-20 Centerville Street" is not sufficiently clear and unambiguous in light of the ongoing controversy herein concerning the possibility that the subject premises consists of two street addresses, i.e., "150-20 Centerville Street" and "150-24 Centerville Street".

On a motion to dismiss pursuant to CPLR §3211(a)(7), the pleading is to be afforded a liberal construction (see, Leon v. Martinez, 84 N.Y.2d 83 [1994]) and the plaintiff is to be accorded the benefit of every possible inference (see, Cueto v. Hamilton Plaza Co., Inc., 67 A.D.3d 722 [2 Dept. 2009]). Initially, the sole criterion to dismiss a complaint is whether the pleading, and the factual allegations contained within its four corners, manifests any cause of action cognizable at law (see, Gaidon v. Guardian Life Ins. Co. Of America, 94 N.Y.2d 330 [1999]). The Court must find plaintiff's complaint to be legally sufficient if it finds that plaintiff is entitled to recovery upon any reasonable view of the stated facts (see, Hoag v. Chancellor, Inc., 246 A.D.2d 224 [1 Dept. 1998]). In this matter, moving-defendants have failed to offer any admissible evidence, beyond the aforementioned deposition testimony of Mr. Faulisi, that the complaint does not allege a cause of action cognizable at law.

Accordingly, defendant, Realty Corp. and Holding, LLC's motion seeking dismissal of plaintiff's complaint, pursuant to CPLR §3211(a)(1) and (7), is hereby denied.

This Constitutes the Decision and Order of the Court.

Dated: August , 2011

-----  
Denis J. Butler, J.S.C.