

Torres v Love Lane Mews, LLC
2011 NY Slip Op 33857(U)
June 30, 2011
Sup Ct, Bronx County
Docket Number: 308396/08
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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HILARION TORRES,

Plaintiff,

-against-

LOVE LANE MEWS, LLC, LOVE LANE POOH, LLC,
and RED HOOK CONSTRUCTION GROUP-I, LLC,

Defendants.

-----X
LOVE LANE MEWS, LLC, LOVE LANE POOH, LLC,

Third-Party Plaintiffs,

-against-

GALAXY GENERAL CONTRACTING CORP.,

Third-Party Defendant.

-----X

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of motion, as indicated below:

Papers

Numbered

Notice of Motion/Order to Show Cause and Exhibits Annexed-----	1
Answering Affidavit and Exhibits-----	2
Reply Affidavit and Exhibits-----	3

Upon the foregoing papers the Decision and Order on this motion is as follows:

Third-party defendant, GALAXY GENERAL CONTRACTING, hereinafter "Galaxy", moves for an order dismissing the third-party complaint brought by the defendants, LOVE LANE MEWS, LLC, LOVE LANE POOH, LLC, hereinafter, "Love Lane", in the underlying action. The motion is denied for the reasons as set forth below.

In the underlying action, plaintiff, an employee of Galaxy, is seeking monetary damages for injuries he allegedly sustained on July 23, 2008, when a brick fell from the roof of the adjacent building, striking plaintiff on his head and shoulder.

The third-party complaint alleges breach of contract, contractual indemnification, common law indemnification and contribution from Galaxy.

The crux of Galaxy's argument for dismissal of the third-party action is its assertion that they were not negligent nor in anyway responsible for the happening of the accident that caused plaintiff's injuries. To substantiate its claim Galaxy submits, as Exhibit '3' in their moving papers, an unsigned 'Injury/Accident Report' apparently written by Joe Repole, a supervisor employed by Galaxy and present at the site when the accident occurred. In the Affirmation in Opposition to Galaxy's motion, defendant Love Lane contends that Galaxy's reliance on the unsigned Injury/Accident Report is misplaced as the Report is not only inadmissible but wholly inadequate as a basis for granting dismissal of all claims as against Galaxy. Defendant Love Lane further objects to the consideration of the Report as they have "...no knowledge how this information was obtained or by whom.

In response to defendant Love Lane's Affirmation in Opposition, Galaxy submitted a Reply Affirmation in which they annex, as Exhibit '1', the Affidavit of Joe Repole. Mr. Repole states, in relevant part, that he was the supervisor who was present on the day of plaintiff's accident and that he prepared the Accident/Injury Report annexed to Galaxy's moving papers as Exhibit '3'.

It is well settled that a movant cannot submit a Reply Affirmation to correct deficiencies in their moving papers. Galaxy's submission of Mr. Repole's Affidavit attesting to the authenticity of the unsigned accident report in Galaxy's Notice of Motion does not cure the inadmissibility of the accident report and any argument connected with the accident report will not be considered by this Court. *Ritt v. Lenox Hill Hospital*, 182 A.D.2d 560, 582 N.Y.S.2d 712, (1st Dept. 1992)(Court rejected defendant's reply papers which contained a medical affidavit

designed to cure the conclusory affidavit submitted with its initial motion). Generally arguments proffered for the first time within reply papers shall not be considered by the court. *Wal-Mart Stores, Inc., v. United States Fidelity and Guaranty Company*, 11 A.D.3d 300, 784 N.Y.S.2d 25 (1st Dept. 2004); *Migdol v. City of New York*, 291 A.D.2d 201, 737 N.Y.S.2d 78 (1st Dept. 2002). This is because the purpose of reply papers is to address the arguments made by the opponent in response to movant's motion and the opponent generally has no opportunity to respond to any newly raised arguments absent leave of court. A review of the aforementioned authorities indicates that, the prohibition is meant to address situations where the reply papers seek to introduce new evidence to cure deficiencies in the moving papers. *Lumbermen Mutual Casualty Company v. Morse Shoe Company*, 218 A.D.2d 624, 630 N.Y.S.2d 1003 (1st Dept. 1995) (Court rejected defendant's reply papers which included two new documents provided to support a new assertion not previously made in initial motion.) In *Sanford v. 27-29 W. 181st Street Association Inc.*, 300 A.D.2d 250, 753 N.Y.S.2d 49 (1st Dept. 2002), the Court reiterated that the law regarding reply papers excludes only those replies where the proponent of summary judgment seeks to "remedy a fundamental deficiency in the moving papers by submitting evidentiary material with the reply".

Therefore, in light of the above, third-party defendant's motion to dismiss the third-party complaint is denied.

This constitutes the decision and order of the Court.

DATED: June 30, 2011



SHARON A.M. AARONS, J.S.C.