

Hernandex v 2075-2081 Wallace Ave. Owners Corp.
2011 NY Slip Op 33958(U)
August 22, 2011
Supreme Court, Bronx County
Docket Number: 301466/2011
Judge: Mary Ann Brighanti-Hughes
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AUG 25 2011

**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM- PART 15**

Present: Honorable Mary Ann Brigantti-Hughes

HIRAM HERNANDEZ and MIGDALIA
HERNANDEZ,

Plaintiffs,

-against-

2075-2081 WALLACE AVENUE OWNERS
CORP. and METRO MANAGEMENT AND
DEVELOPMENT, INC.,

Defendants.

DECISION/ORDER

Index No.:301466/2011

The following papers numbered 1 to 6 read on this Motion noticed on **April 25, 2011** and duly
submitted on the Motion Calendar of _____ of Part IA15.

<u>Papers Submitted</u>	<u>Numbered</u>
Defs. Motion, Affirmation & Exhibits	1, 2, 3
Pl. Affirmation in Opposition ¹	4
Defs. Reply Affirmation, Exhibits	5,6

In an action for damages for personal injuries arising from an alleged work-related accident, defendant 2075-2081 Wallace Avenue Owners Corp. (hereinafter "Defendant") moves to dismiss the complaint of plaintiffs Hiram Hernandez and Migdalia Hernandez (hereinafter collectively referred to as "Plaintiffs") pursuant to *CPLR* 3211(a)(7) for failure to state a cause of action, as the action is barred by Workers' Compensation Law §§11, 29. Plaintiffs oppose.

I. Factual History

Plaintiff Hiram alleges that he sustained personal injuries as a result of a labor-related

¹Plaintiff's improper "sur-reply" was not considered by the Court.

accident on or about March 26, 2010. The complaint includes a loss of consortium claim on behalf of his wife, Plaintiff Migdalia Hernandez. Defendant's moving papers include an affidavit of Gertrude B. Tejado, president of the Board of Directors of Defendant. Ms. Tejado states that Defendant owns the cooperative buildings located at 2075, 2077, 2079, and 2081 Wallace Avenue, Bronx. At pertinent times, Plaintiff was a porter working for Defendant, and had been so employed at the premises for approximately 25 years. At the time of the accident, Plaintiff was working in the vestibule of 2079 Wallace Avenue, scraping plastering. He allegedly sustained an injury while performing this work, which was an activity he had done in the past for the building and within the scope of his regular duties. He filed for, and received Workers' Compensation benefits as a result of this accident.

In support of its motion, Defendant includes the following "documentary" evidence:

(1) C-669 Notice to Chair of Carrier's Action on Claim for Benefits which stated that workers' compensation benefits to Plaintiff had begun, in the amount of \$366.93 per week;

(2) C-2 Employer's Report of Work-Related Injury/Illness which reported Plaintiff's 3/26/2010 fall;

(3) An October 12, 2010 Workers' Compensation Board decision that found Plaintiff had a work-related injury and awarded payments for 27.4 weeks from March 27, 2010 through October 6, 2010 at a rate of \$495.27 per week; and

(4) A January 11, 2011 Workers' Compensation Board decision that directs payments of \$495.27 for 13.4 weeks from October 6, 2010 through January 7, 2011, and to continue payments at \$325.00.

The above are documents retained by Defendant's office in the "regular course of business" according to the Tejado Affidavit.

In opposition, Plaintiffs only submit an affirmation of counsel, which is insufficient because he has no personal knowledge of the underlying facts and transactions. (*Feratovic v. Lun Wah, Inc.*, 284 A.D.2d 368 [2nd Dept. 2001]). Nevertheless, Plaintiffs' opposition challenges the documents attached to the Tejado Affidavit. Plaintiffs' counsel argues that these documents are unsworn and constitute inadmissible hearsay and therefore should not be considered.

Substantively, Plaintiffs' counsel disputes the Tejado affidavit, and asserts that the work performed by Plaintiff was outside the scope of his employment duties as defined by his collective bargaining agreement, and as alleged in paragraphs 39-40 and 56 of the Complaint. Accordingly, Plaintiff alleges that the complaint states a cause of action because at the time of the accident "he was called upon to perform duties that were beyond the scope of and outside of his employment duties and, therefore, he was not an employee against whom a workers' compensation bar should be applied."

It appears, therefore, Plaintiff Hiram's position is that (1) he should not be considered an "employee" of the moving Defendant, since the injury-producing activity was outside the scope of, and therefore not in the course of his employment, and (2) without affirmatively denying the allegations made in the moving papers, he disputes whether he ever applied for, and receives or has received Workers' Compensation Benefits from Defendants' Workers' Compensation Insurance Carrier as a result of this accident.

II. Standard of Review

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action. *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118 (1st Dept. 2002). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained. *See Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 (1st Dept. 1990); *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 (1st Dept. 1997)(on a motion for dismissal for failure to state a cause of action, the court

must accept factual allegations as true). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see, CPLR* §3026). 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 into any cognizable legal theory”. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The motion should be denied if, from the pleading’s four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law. *McGill v. Parker*, 179 A.D.2d 98 (1st Dept. 1992).

Factual allegations normally presumed to be true on a motion pursuant to *CPLR* 3211 (a)(7) may properly be negated by affidavits and documentary evidence. *Wilhemlina Models, Inc. v. Fleisher*, 19 A.D.3d 267 (1st Dept. 2005). Evidentiary material may be considered on a motion to dismiss for failure to state a cause of action to remedy defects in a complaint. *Beyer v. DaimlerChrysler Corp.*, 286 A.D.2d 103 (2nd Dept. 2001). On a motion to dismiss for failure to state a cause of action, any deficiency on the part of the complaint because of detailed pleadings of the facts and circumstances relied upon may be cured by details supplied in the affidavits submitted by plaintiff, resort to which is proper for the limited purpose of sustaining a pleading against a motion under *CPLR* 3211(a)(7). *Ackerman v. Vertical Club Corp.*, 94 A.D.2d 665 (1st Dept. 1983).

To that end, it is well-settled that a defense based upon documentary evidence can succeed if the documents submitted resolve all of the factual issues as a matter of law (*Gephardt v. Morgan Guaranty Trust Co. of NY*, 191 A.D.2d 229 [1st Dept], appeal denied 82 N.Y.2d 656 [1993]). A motion to dismiss a complaint pursuant to *CPLR* 3211(a)(1) is inappropriate if the documents do not “definitively dispose of the claim” (*Devlin v. Video Services Acquisition*, 188 A.D.2d 370, 370 [1st Dept 1992], quoting *Demas v. 325 West End Ave. Corp.*, 127 A.D.2d 476, 477 [1st Dept 1987]). To warrant dismissal, a defense grounded on documentary evidence must be a complete one, leaving no genuine triable issues of fact (*Expocorp v. Hyatt Management Corp. of NY*, 134 A.D.2d 234 [2d Dept 1987]).

Although the court has discretion, under *CPLR* 3211(c) to go beyond the face of the complaint by treating the motion as though it were one for summary judgment, the court must first give the parties notice of its intention to so treat the motion (*Mihlovan v. Grozavu*, 72

N.Y.2d 506, 508 [1988]; *Four Seasons Hotels, Ltd. v. Vinnik*, 127 A.D.2d 310, 311 [1st Dept 1987]). There are three exceptions to the requirement of notice: (1) If the action involves no issues of fact, but only issues of law fully appreciated and argued by both sides, such as in an action for a declaratory judgment; (2) when a request for CPLR 3211(c) treatment is specifically made by both sides; and (3) when both sides make it unequivocally clear that they are laying bare their proof and deliberately charting a summary judgment course (*Four Seasons*, 127 A.D.2d at 320-321). Documentary evidence, proved or conceded to be authentic, may be considered by the court for fact finding purposes prior to joinder of issue (*Id.* at 318).

In this matter, no advance notice has been provided by the Court that it will treat the instant motion as one for summary judgment. In addition, none of the exceptions to the notice requirement are evident, as only Defendant has requested summary judgment “conversion”, and both sides have not made it unequivocally clear that they are “laying bare” their proofs. Accordingly, this motion will be determined pursuant to *CPLR* 3211.

III. Analysis

Plaintiffs’ counsel affirmation does not specifically dispute whether Plaintiff Hiram applied for and received Workers’ Compensation Benefits as a result of this incident. Instead, Plaintiff declares that the annexed documents are unsworn and therefore constitute inadmissible hearsay. The Court disagrees, and finds the above documents establish the existence of workers’ compensation coverage. Plaintiff’s application for benefits and receipt of those benefits. The records submitted were admissible in that they were properly authenticated by the Tejado affidavit, who affied that the forms were retained by Defendant in the regular course of business. As the records are properly before the court, it follows that Plaintiff, himself, sought to be classified as an “employee” of Defendant in order to receive Workers’ Compensation Benefits, therefore he cannot in good faith now argue that Defendant was not his employer at relevant times.

Indeed, since a workers' compensation award was made “it necessarily follows that the [Worker's] Compensation Board determined that an employer-employee relationship obtained,

and further, that the accident in which the plaintiff was injured arose out of and in the course of [the plaintiff's] employment” *Torre v. Schmucker*, 275 A.D.2d 365 (2nd Dept. 2000), citing (*French v. Shaft*, 154 A.D.2d 336, (2nd Dept. 1989). Since Plaintiff Hiram accepted benefits under the Workers' Compensation Law, he cannot now collaterally attack the award in an action at law and assert that the accident in which he was injured did not occur in the course of his employment (see, *French v. Shaft*, *supra*; *Lunsford v. Schaffner*, 184 A.D.2d 625, (2nd Dept. 1992). See also *Cunningham v. State*, 60 N.Y.2d 248 (1983).

When a worker is injured or killed in the course of employment, *Workers' Compensation Law* §§11 and 29(6) make compensation benefits the employer's exclusive liability to the employee or survivors. *Billy v. Consolidated Machine Tool Corp.*, 51 N.Y.2d 152 (1980); except as to injuries intentionally inflicted, *Jones v. State*, 33 N.Y.2d 275 (1973). Section 10, Par. 1 of Workers' Compensation Law provides that “every employer shall...secure compensation for his employees to pay or provide compensation for their disability or death from injury arising out of and in the course of the employment...” Thus, the Workers' Compensation Law provides the exclusive remedy for an employee who seeks damages for unintentional injuries which he incurs in the course of employment (see Workers' Compensation Law §§ 10, 11, 29; *Reich v. Manhattan Boiler & Equip. Corp.*, 91 N.Y.2d 772 [1998]. The exceptions to this general rule listed under the Workers' Compensation Law, are (1) the employer did not maintain coverage as required by Workers' Compensation Law §§ 10 and 50; (2) the injuries resulted from an intentional tort perpetrated by, or at the direction of, an employer, such intentional act being more than gross negligence or reckless conduct; or (3) citing to *Dole v. Dow Chemical Co.* (30 N.Y.2d 143, 152 [1972]), the employee's suit is for grave injury (see *Minkowitz, Practice Commentaries*, McKinney's Cons Laws of NY, Book 64, Workers' Compensation Law § 11, at 445–447). None of the above exceptions are alleged in Plaintiffs' complaint.

Plaintiffs' claims against Defendant are barred by Workers' Compensation Law §§11 and 29. The documentary evidence submitted in support of the motion “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff[s]' claim” *West 64th Street, LLC v. Axis U.S. Ins.*, 63 A.D.3d 471 (1st Dept. 2009). The First Department recognized that the court is not required “to accept at face value every conclusory, patently unsupportable assertion of fact”

found in the complaint, but could consider documentary evidence, proved or conceded to be authentic. *Id.*, citing *Four Seasons Hotels v. Vinnik*, 127 A.D.2d 310, 318 (1st Dept. 1987).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that defendant 2075-2081 Wallace Avenue Owners Corp.'s motion to dismiss the complaint pursuant to *CPLR* 3211 is hereby GRANTED, and it is further,

ORDERED, that Plaintiffs' complaint against defendant 2075-2081 Wallace Avenue Owners Corp. only is hereby DISMISSED WITH PREJUDICE.

The above constitutes the Decision and Order of this Court.

Dated: August 22 2011



MARY ANN BRIGHANTI-HUGHES, J.S.C.