

Pennbus Realities, LLC v H Eighth Ave. Assoc. LLC
2011 NY Slip Op 34230(U)
February 23, 2011
Supreme Court, New York County
Docket Number: 108277/10
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

PENNBUS REALTIES, LLC,
Plaintiff,

-against-

H EIGHTH AVENUE ASSOCIATES LLC,
HERSHA HOSPITALITY TRUST, McSAM
HOTEL GROUP LLC, GATEWAY DEMOLITION
CORP. and RONNIE MOSKOWITZ,
Defendants.

Index No. 108277/10

DECISION & ORDER

FILED

FEB 25 2011

MARTIN SHULMAN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Defendant McSam Hotel Group LLC ("McSam" or "movant") moves to dismiss the complaint and all cross-claims for indemnification and contribution pursuant to CPLR 3211(a)(1) and (7), on the grounds that documentary evidence disposes of the claim against it and the complaint fails to state a cause of action. Plaintiff Pennbus Realities LLC ("Pennbus" or "plaintiff") and co-defendants Gateway Demolition Corp. and Ronnie Moskowitz (collectively "Gateway") oppose the motion.

The complaint asserts a cause of action against the above-named defendants for negligence based upon damage to real property plaintiff owns located at 575 Eighth Avenue ("575") in Manhattan. Presumably, one or more co-defendants has asserted cross-claims against McSam for indemnification and/or contribution, though no copy of the pertinent answer(s) is attached to the moving papers. Plaintiff alleges the damage to 575 was caused by demolition work performed by Gateway at 585 Eighth Avenue ("585"), a neighboring property owned by defendant H Eighth Avenue Associates LLC ("HEAA").

With respect to the movant, the complaint alleges that McSam owned, operated and/or maintained 585. As documentary evidence, movant submits a copy of the deed for 585, indicating that HEAA has owned 585 since June 28, 2006. McSam also notes that plaintiff is aware that HEAA owns 585 as a result of a prior related action entitled *Pennbus Realties, LLC v. H Eighth Avenue Associates LLC, et al* (NY County Index No. 116376/06).

Plaintiff responds that the court cannot look beyond the complaint's allegations, which must be deemed true, and discovery is needed. Pennbus also attaches various New York City Department of Buildings ("DOB") records and newspaper articles indicating McSam and/or its principal, Sam Chang ("Chang"), have an ownership interest in 585.

Gateway opposes McSam's motion to dismiss based upon its counsel's personal knowledge obtained from deposing Chang in another litigation, wherein counsel learned of certain relationships between McSam and/or Chang and co-defendants HEAA and Hersha Hospitality Trust. Counsel notes that Chang's affidavit in support of this motion omits "any claim that [McSam] is not a general or limited partner or has no ownership interest in either [HEAA] or Hersha Hospitality Trust." Halber Aff. in Opp. at ¶3. Gateway concurs in plaintiff's view that discovery is needed to determine McSam's relationship, if any, to the demolition project at issue here.

Under CPLR 3211(a)(1) a defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that plaintiff's claims fail as a matter of law. *Fortis Fin. Servs., LLC v. Fimat Futures USA, Inc.*, 290 AD2d 383 (1st Dept 2002); *Bronxville Knolls, Inc. v Webster Town Ctr. P'ship*, 221 AD2d 248

(1st Dept 1995)("In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR 3211[a][1], the documents relied upon must definitively dispose of plaintiff's claim").

On this record, McSam fails to meet the standard of certainty required by CPLR 3211(a)(1) and its motion to dismiss the complaint against it based upon documentary evidence must be denied. Here, the documentary evidence is not as definitive as McSam suggests. While the deed establishes that McSam does not own 585, it does not negate Pennbus' allegations that McSam operated or maintained 585 or otherwise was involved in the demolition project at 585 alleged to have caused damage to 575.

For this, McSam relies, not upon documentary evidence, but upon the terse denials in Chang's supporting affidavit.¹ However, on a motion to dismiss for failure to state a cause of action, the pleading is afforded a liberal construction. The court "accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Here, accepting the truth of the complaint's allegations, Pennbus states a cause of action against McSam. The court agrees that discovery is needed to determine if McSam is a proper party to this action. Accordingly, it is

ORDERED that defendant McSam Hotel Group LLC's motion to dismiss the complaint against it is denied; and it is further

¹ Chang avers that he is a member of McSam and that McSam has never owned, leased, operated, controlled or maintained 585, nor did it ever furnish any labor, equipment or materials in connection with the demolition work, or retain any person or entity to perform the demolition work on its behalf.

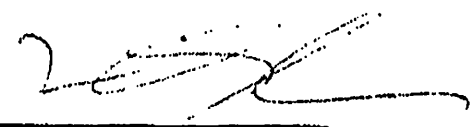
ORDERED that McSam shall file and serve an answer to the complaint within 20 days of service of a copy of this order with notice of entry.

Counsel for the parties are directed to appear for a preliminary conference on March 22, 2011 at 2:15 p.m. at 60 Centre Street, Room 325, New York, New York.

Plaintiff's counsel is directed to notify all other appearing parties and third-parties of the conference date forthwith.

The foregoing constitutes this Court's Decision and Order. Courtesy copies of this Decision and Order have been sent to counsel for plaintiff, McSam and Gateway.

Dated: New York, New York
February 23, 2011



Hon. Martin Shulman, J.S.C.

FILED
FEB 25 2011
NEW YORK
COUNTY CLERK'S OFFICE