

Delgrange v Madison Immobilier, LLC
2013 NY Slip Op 33973(U)
October 18, 2013
Supreme Court, New York County
Docket Number: 151651/2013
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon Joce A. Madden
Justice

PART 11

Index Number : 151651/2013
DELGRANGE, PHILIPPE
vs.
MADISON IMMOBILIER, LLC
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

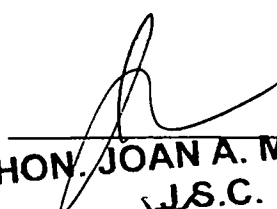
Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the
attached Memorandum Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: October 18, 2013


HON. JOAN A. MADDEN J.S.C.
J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
PHILIPPE DELGRANGE,

Plaintiff,

INDEX NO. 151651/13

-against-

MADISON IMMOBILIER, LLC, ROBERT CAVALLI,
INC., ROBERT CAVALLI, USA, INC., JEAN-PIERRE
LEHMAN, ART FASHION CORP., JOHN DOES 1-25,

Defendants.

-----X
JOAN A. MADDEN, J.:

Defendants Roberto Cavalli, Inc., Robert Cavalli, USA, Inc. and Art Fashion Corp (“Art Fashion”). move pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint against them. Plaintiff Philippe Delgrange (“Delgrange”) opposes the motion only to the extent that Art Fashion seeks to dismiss the complaint against it. On April 30, 2013, while this motion was pending, the parties entered into a stipulation discontinuing the action as against defendants Roberto Cavalli, Inc. and Robert Cavalli, USA. Thus, the only remaining motion is Art Fashion’s motion to dismiss which, for the reasons below, is granted.

This action arises out of certain construction work performed at 25 East 63rd Street, New York, NY, known as 711 Madison Avenue (“the Building”) beginning on or about December 2012, which resulted in the release of asbestos in the air and caused the New York City Department of Environmental Protection (“DEP”) to shut down the project by order dated February 7, 2013, but work was subsequently permitted to proceed when asbestos abatement was completed on February 19, 2013. Delgrange is a residential tenant in the Building and asserts that he was exposed to asbestos as the result of defendants’ allegedly negligent, reckless and dangerous conduct.

Madison Immobilier, LLC ("Madison"), which is a New York limited liability company, owns the Building, and Jean-Pierre Lehman ("Lehman") is Madison's Chief Executive and the sole owner of the two members that own Madison. Art Fashion has leased space in the Building since 1999, and in December 2010, it entered into a new lease agreement with Madison to expand the size of its retail store to include space formerly leased by Delgrange.

The Amended Verified Complaint alleges that the work at issue involves extensive renovation and demolition work to convert the Space from a restaurant and apartment into a retail store. It is further alleged the certain DOB permits were required to perform the work, including an application to change to Certificate of Occupancy, and that the application for such change of the occupancy was denied, but that a permit was granted with respect to certain demolition work. In addition, it is alleged that as part of the process of obtaining permits defendants were required to obtain the services of a certified asbestos inspector, file an Asbestos Assessment Report ("ACP-5") and other plans and reports with DOB. It is alleged "on information and belief" that on or about December 19, 2012, defendants caused to be filed a ACP-5 which falsely stated the area of the Building affected by the work was free of asbestos containing material, and that on or about January 4, 2013, defendants began the demolition work without following proper procedures to protect the building tenants from asbestos exposure. It is also alleged that Lehman was directly involved in the project including but not limited to directing that the demolition and construction continue, without filing the appropriate documents, and that he knew or should have known and/or recklessly disregarded that there was asbestos on the premises.

The Verified Amended Complaint next alleges that on February 5, 2013, an inspector from DEP visited the Building and inspected the area where the demolition work was being

performed and issued a stop work order on or about February 7, 2013, which is annexed to the complaint. The stop work order requires that for work to resume, an amended ACP-5 must be submitted and approved by DEP and that the ACP-5 be accompanied by an official laboratory bulk sample result(s). It is alleged “upon information and belief” that the work is continuing in the Space despite the stop work order issued by DEP.

The Verified Amended Complaint asserts causes of action for (1) an injunction enjoining defendants from proceeding with the work until such time as the Stop Work Order has been lifted and the asbestos properly abated, (2) interference with plaintiff’s rights of quiet enjoyment of his apartment and nuisance for which plaintiff seeks compensatory and punitive damages, (3) negligence for which plaintiff seeks compensatory and punitive damages, and (4) breach of the warranty of habitability for which plaintiff seeks a rent abatement.

Art Fashion moves to dismiss, arguing that under the terms of a lease modification and extension agreement with Madison dated December 22, 2010 (“the Lease Modification”) it does not take possession of the Space until the construction work at issue is complete. Moreover, Art Fashion asserts that under the Lease Modification, Madison is wholly responsible for the construction work required to convert the Space to a retail space, including the obtaining of approvals from the City of New York Department of Buildings.

In opposition, Delgrange argues that the documentary evidence does not conclusively establish that Art Fashion is free from liability for the condition of the Building. In particular, he argues that the Lease Modification is more than two years old and cannot reveal anything about what actually took place in January and February 2013, when it is alleged that defendants exposed him to asbestos. He also that the Lease Modification contemplates that Art Fashion might undertake additional construction work in the Space and that without discovery it is

impossible to know whether Art Fashion has had any role in the work performed at the Building during the relevant period. Delgrange also points out that Art Fashion had certain rights under the Lease including to review and comment on construction plans and drawings. See Lease Modification, Exh. D1., para. 10(b).

In reply, Art Fashion argues that the Lease establishes that it was not in possession of the Space at the time of Delgrange's alleged exposure to asbestos, and is still not in possession of the premises. Moreover, Art Fashion asserts that its rights under the Lease are irrelevant as they arise during Phase II which has not begun yet. In any event, plaintiff has failed to make any specific allegations against Art Fashion indicating that it is in any way involved in the construction work at issue, and the documentary evidence relied on by Delgrange including the stop work order shows that Art Fashion was not involved in any way with the construction.

. On a motion pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the complaint must be interpreted in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference" Morgenthau & Latham v. Bank of New York Company, Inc., 305 AD2d 74, 78 (1st Dept 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999), aff'd, 94 NY2d 659 (2000). In such cases, "the criterion becomes 'whether the proponent has a cause of action, not whether he has stated one.'" Id., quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275. A dismissal based on documentary evidence may result "only where 'it has been shown that a material fact as claimed by the pleader...is not a fact at all and ... no significant dispute exists regarding it.'" Acquista v.

New York Life Ins. Co., 285 AD2d 73, 76 (1st Dept 2001), quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275.

Here, Art Fashion is entitled to dismissal based on documentary evidence as the Lease Modification establishes that Art Fashion did not participate in the construction process which gave rise to the events underlying the complaint and that Art Fashion is not to take possession of the Space until after construction is completed. Moreover, that Art Fashion retained some rights to review the plans with respect to a slab floor is insufficient to provide a basis for its liability, particularly as the review process is to occur after the time period at issue in this action.

Accordingly, it is

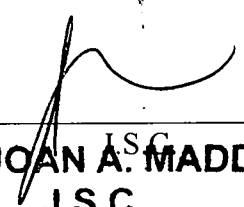
ORDERED that the motion to dismiss by defendant Art Fashion Corp. is granted and all claims against Art Fashion Corp. are dismissed, and the Clerk is directed to enter judgment accordingly in favor of Art Fashion Corp.; and it is further

ORDERED that the caption is amended to reflect the dismissal of the claims against defendant Art Fashion Corp; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that counsel for defendant Art Fashion Corp shall serve a copy of this order with notice of entry upon the County Clerk (room 141B) and the Clerk of the Trial Support Office (room 158), who are directed to mark the court records to reflect the change in caption herein.

Dated: October 18, 2013


HON. JOAN A. MADDEN
J.S.C.