

**Kozik v Sherland & Farrington, Inc.**

2013 NY Slip Op 34234(U)

November 26, 2013

Supreme Court, Nassau County

Docket Number: 600793-13

Judge: Jerome C. Murphy

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SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU

**PRESENT:**

**HON. JEROME C. MURPHY,**  
**Justice.**

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**HALINA KOZIK,**

**Plaintiff,**

- against -

**SHERLAND & FARRINGTON, INC. and**  
**SPECTOR GROUP HOME, LLC,**

**Defendants.**

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**TRIAL/IAS PART 24**

**Index No.: 600793-13**

**Motion Date: 9/6/13**

**Sequence No.: 001**

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**DECISION AND ORDER**

The following papers were read on this motion:

Notice of Motion, Memorandum of Law, Affirmation, Affidavit and Exhibits..... 1

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PRELIMINARY STATEMENT

Defendant, Spector Group Home, LLC, brings this application for an order, pursuant to CPLR §3211(a)(1) and (7), dismissing the complaint against it for failure to state a cause of action and based upon documentary evidence. No opposition has been submitted by plaintiff or co-defendant.

BACKGROUND

Plaintiff is an employee of Pall Corporation, at 25 Harbor Park Drive, Port Washington, New York, who allegedly fell on a defect in the floor on April 5, 2010. In her complaint at ¶ 7 she alleges that while her employer owned the premises, it was “operated, managed, maintained, controlled, inspected, designed, installed, assembled, constructed and supervised by defendants Sherland & Farrington, Inc. and Spector Group, LLC.” ¶ 8 alleges that defendants were obligated to perform those services so as to maintain the premises in a reasonably safe condition, “. . . and specifically with regard to the design and installation of flooring that created an unreasonable risk of slipping and or tripping hazards upon the premises.”

Spector Group Home, LLC (“Spector”) moves under CPLR § 3211(a)(1) and § 3211 (a)(7) to dismiss on the ground that the complaint fails to state a cause of action against them,

[\* 2]

and that their defense is based upon documentary evidence. They allege that the complaint inadequately specifies any wrongdoing on the part of Spector, and that they had no part in the design, construction, inspection, repair or maintenance of the Pall premises.

Defendant Spector submits an affirmation of counsel and an affidavit from Marc Spector, the sole member of the LLC. He states that the company is engaged in the interior decoration business dealing with residential homes; that it has never performed work at the subject premises; and has no contractual or other relationship with Pall or plaintiff. Plaintiff has not submitted any evidence to the contrary so as to reflect performance of work by this defendant.

## DISCUSSION

### 3211 (a)(1)

CPLR § 3211 (a)(1) provides as follows:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence;

In order to succeed in a claim based upon documentary evidence, “. . . the defendant must establish that the documentary evidence which form the basis of the defense be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff’s claim.” (*Symbol Technologies, Inc. v. Deloitte & Touche, LLP*, 69 A.D.3d 191, 194 [2d Dept. 2009]); (*DiGiacomo v. Levine*, 2010 WL 3583424 (N.Y.A.D. 2d Dept.)).

### 3211 (a)(7)

When determining a motion to dismiss for failure to state cause of action, the pleadings must be afforded a liberal construction, facts as alleged in the complaint are accepted as true, and the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory (*Uzzle v. Nunzie Court Homeowners Ass’, Inc.* 55 A.D.3d 723 [2d Dept. 2008]). A pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment; the question is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from all the averments (*Brinkley v. Casablanco*, 80 A.D.2d 815 [1<sup>st</sup> Dept.

[\* 3]  
1981)).

An affidavit is not the type of documentary evidence which totally refutes the allegations of the complaint. In this case, defendant seeks to prove a negative, that is, that there was no work performed by them at the premises at which plaintiff claims to have been injured. The motion to dismiss under CPLR § 3211(a)(1) is denied.

In a motion under CPLR § 3211(a)(7), the Court is required to grant wide latitude in the interpretation of a complaint. While plaintiff has not specifically stated the nature of the claimed defect or dangerous condition which Spector allegedly created, the complaint is adequate to state a cause of action, and defendant would be entitled to an explication of the claim by way of a bill of particulars.

Defendant has, however, submitted evidence in the form of an affidavit which could properly be considered the basis of a motion for summary judgment under CPLR §3212 (CPLR § 3211[c]). In this case defendant has specifically alleged that it had no relationship to Pall Corporation or to the premises at which plaintiff claims to be injured. Plaintiff has thereby charted a summary judgment course, to which plaintiff has not raised a triable issue of fact (*Fontanetta v. Doe*, 73 A.D.3d 78, 88 [2d Dept. 2010]).

When presented with a motion for summary judgment, the function of a court is “not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact.” (*Quinn v. Krumland*, 179 A.D.2d 448, 449 - 450 [1<sup>st</sup> Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (*Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue (*Moskowitz v. Garlock*, 23 A.D.2d 94 [3d Dept. 1965]); (*Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept. 1965]). However, where a party is otherwise entitled to judgment as a matter of law, an opposing party may not simply raise a feigned issue of fact to defeat the claim. To be “material issue of fact” it “must be genuine, bona fide and substantial to require a trial.” (*Leumi Financial Corp. v. Richter*, 24 A.D.2d 855 [1<sup>st</sup> Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party (*Weill v. Garfield*, 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party (*Tortorello v. Carlin*, 260 A.D.2d 201, 206 [1<sup>st</sup> Dept. 2003]). On a motion to dismiss, 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 within any cognizable legal theory’ ” (*Braddock v. Braddock*, 2009 WL 23307 [N.Y.A.D. 1<sup>st</sup> Dept. 2009]), (citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 - 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney’s affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

In this case, plaintiff has failed to respond with any evidence which would controvert defendant’s assertion that they have had absolutely no involvement at the premises at which she was injured. Plaintiff has failed, therefore, to raise a triable factual issue. Defendant Spector Home Group, LLC’s motion is treated as one for summary judgment and is granted. The complaint against them by plaintiff is dismissed with prejudice.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York  
November 26, 2013

ENTER:

  
JEROME C. MURPHY  
J.S.C.

**ENTERED**

DEC 03 2013

NASSAU COUNTY  
COUNTY CLERK'S OFFICE