

**Cabrera v Parthenon Holdings, LLC**

2014 NY Slip Op 30532(U)

January 6, 2014

Supreme Court, Bronx County

Docket Number: 300993/2012

Judge: Sharon A.M. Aarons

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK**  
**COUNTY OF BRONX** Part 24

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Alberto Cabrera,

Plaintiff,

**Index No. 300993/2012**

-against-

**Decision and Order**

Parthenon Holdings, LLC, and G.C. Technical  
Construction Corp.

Defendant(s).

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Hon. Sharon A. M. Aarons:

Defendants Parthenon Holdings, LLC (Parthenon) and G.C. Technical Construction Corp. (GC) move for an order pursuant to CPLR 3211 (a) (1) dismissing the complaint, and for an award of sanctions. Plaintiff submits written opposition. The motion is denied.

The complaint dated January 30, 2012, alleges that plaintiff was injured at 21-60 33<sup>rd</sup> Street, Astoria, in the City of New York, during the course of construction when he fell from a scaffold, on December 1, 2011. The complaint further alleges that both Parthenon and GC were the owners and general contractors for the construction at 21-60 33<sup>rd</sup> Street. Defendants maintain that in fact the plaintiff was an employee of First Management Corp., and that he was injured at 1076 Teller Avenue, Bronx, New York, where he is employed as a building superintendent, when he fell on steps while removing trash on December 1, 2011.

In support of the motion, defendants submit the summons, complaint, verified answer and verified bill of particulars; a certified copy of a New York City Fire Department ambulance call report, dated December 1, 2011, reflecting that the plaintiff was assisted at 1076 Teller Avenue, and that plaintiff stated he fell down steps at that location; an uncertified copy of a Workers'

Compensation Board Employee Claim Form C-3, dated December 2, 2011, purporting to bear the signature of plaintiff Alberto Cabrera, and indicating that the incident for which benefits were sought was a fall on steps at 1076 Teller Avenue; an uncertified copy of the plaintiff's Lincoln Hospital records; an uncertified copy of a Workers' Compensation Board Employee Claim Form C-3, dated December 25, 2012, purporting to bear the signature of plaintiff's Workers' Compensation counsel, and indicating now that the incident for which benefits were sought was a fall from a scaffold at 21-60 33<sup>rd</sup> Street in Astoria; a copy of a contract between Parthenon and non-party CC Technical Contracting Corp. (CC) indicating that Parthenon is the owner and CC the contractor for construction at 21-60 33<sup>rd</sup> Street in Astoria; an uncertified monthly management statement for December 2011 for Teller Avenue Associates; and various letters from defendants' counsel to plaintiff's counsel demanding termination of this action. According to the defendants, these documents establish beyond question that plaintiff was injured at Teller Avenue, and that this action was fraudulently commenced.

In opposition, plaintiff submits his affidavit in which he states that he was injured at 21-68 33<sup>rd</sup> Avenue in Astoria, while employed by CC; that he was transferred after the accident to the Bronx at the request of Alfred Barrios Martinez, Parthenon's construction supervisor; that the false claim was in fact manufactured by the defendants; and that the signature on the earlier Worker's Compensation Form C3 is not his.

A motion to dismiss based on documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, resolves all factual issues as a matter of law, and conclusively disposes of the claims at issue. (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 774 N.E.2d 1190, 746 N.Y.S.2d 858 [2002]; *Rodeo Family Enters., LLC*

*v Matte*, 99 AD3d 781, 782, 952 N.Y.S.2d 581 [2d Dept. 2012].) To be considered "documentary evidence" within the meaning of CPLR 3211(a)(1), the evidence must be unambiguous and of undisputed authenticity. Judicial records, as well as documents reflecting out-of-court transactions, such as mortgages, deeds, leases and contracts, which in context are "essentially undeniable," qualify as "documentary evidence" in the proper case. (*Fontanetta v. John Doe 1*, 73 A.D.3d 78, 898 N.Y.S.2d 569 [2d Dept. 2010].)

At the outset, the Court notes that its function on this motion is not to determine issues of credibility, nor even to resolve whether any purported issues of fact are bona fide. "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38, 827 N.Y.S.2d 231 [2d Dept. 2006]). Rather, here, the Court's function is to determine if the documentary evidence bars maintenance of this action. In that regard, first, it must be noted that the documents submitted are not the kind which will ordinarily support dismissal under CPLR 3211 (a) (2), such as a deed. In addition, it must be noted that the documents submitted by the defendants are largely uncertified or unauthenticated. Moreover, even if these documents had been authenticated, each side is, in essence, charging the other side with fraud. Even documents reflecting out-of-court transactions, such as deeds or leases, will not support granting a motion to dismiss under CPLR 3211 (a) (2) when their authenticity is called into question. (*Yeshiva Chasdei Torah v Dell Equity, LLC*, 90 AD3d 746, 746-747, 935 N.Y.S.2d 33 [2d Dept. 2011] [a satisfaction of mortgage was not "unambiguous and of undisputed authenticity," as two different versions of it were produced, one indicating that the mortgage principal was \$ 40,000 and the other indicating that

the mortgage principal was \$ 400,000]; *Fontanetta v John Doe 1*, 73 AD3d 78, 86, 898 N.Y.S.2d 569).

For example, in a dispute between landlord and tenant concerning the size of the space leased to the tenant, where the parties disputed the authenticity of the purported documentary evidence, with each party claiming that their copy of the lease was the authentic one, defendant's motion pursuant to CPLR 3211(a)(1) to dismiss the complaint was denied. (*Yue Fung USA Enters., Inc. v. Novelty Crystal Corp.*, 105 A.D.3d 840, 963 N.Y.S.2d 678 [2d Dept. 2013].) Here, similarly, the authenticity of the documents on which the defendants rely is not established as essentially undeniable.

For the foregoing reasons, an award of sanctions is not appropriate at this time.

The motion is denied.

Dated: January 6, 2014

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