

Lee v Dow Jones & Co., Inc.

2014 NY Slip Op 30535(U)

January 15, 2014

Supreme Court, Bronx County

Docket Number: 303549/13

Judge: Wilma Guzman

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 7**

Index No. 303549/13
Motion Calendar No. 13
Motion Date: 11/13/13

RICHARD C. LEE and ROSEANN LEE,

Plaintiff,

-against-

DOW JONES & COMPANY, INC.

Defendants,

RICHARD C. LEE

Plaintiff

-against-

NEW YORK CITY INDUSTRIAL DEVELOPMENT
AGENCY, HARLEM RIVER YARD VENTURES, INC., and
NEWS AMERICA INCORPORATED

Defendants

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

RICHARD C. LEE and ROSEANN LEE,

Plaintiffs

-against-

PRINCIPAL BUILDING SERVICES, INC.
PRINCIPAL BUILDING SERVICES, LLC.,
PRINCIPAL BUILDING SERVICES II, LLC.,
and PBS HOLDINGS I, INC.,

Defendants

DECISION/ ORDER
Present:
Hon. Wilma Guzman
Justice Supreme Court

Index No. 301522/2011

New York
Index No. (unknown)

Recitation, as required by C.P.L.R. 2219(a), of the papers considered in the review of this motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
Dow Jones Notice of Motion, Affirmation in Support, and Exhibits in Support.....	1
Plaintiff's Affirmation in Opposition and Exhibits.....	2
Reply Affirmation	3

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

Defendant Dow Jones & Company, Inc. moves this Court pursuant to C.P.L.R. 3211(a)(7) to dismiss the plaintiff's complaint on the grounds that the plaintiff's complaint is barred by Workers Compensation Law §§ 11 and 29 based upon the plaintiffs relationship as a "special employee."

Plaintiff opposes the defendants motion and submits a cross-motion to consolidate this action with Index No. 301522/2011 and the Matter pending in New York County, Index No. unknown.¹

Plaintiff commenced this cause of action seeking damages for injuries sustained allegedly during an accident which occurred on June 5, 2010, when he slipped and fell on the premises located at 900 E. 132nd Street, Bronx, NY. Said premises contained the printing facility for the New York Post and the Wall Street Journal, where plaintiff Richard Lee was employed as a clerk handling customer service and billing issues. Plaintiff is currently collecting Workers Compensation form NYP Holdings, Inc.

A motion to dismiss pursuant to C.P.L.R. § 3211(a)(7) requires that the Court favorably view the pleadings to determine whether a valid cause of action exists. Leon v. Martinez, 84 N.Y.2d 83 (1994). On a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the pleading is to be afforded a liberal construction (*see* CPLR § 3026). The court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.(See, Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.2d 972 [1994]; Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 729 N.Y.S.2d 425, 754 N.E.2d 184 [2001]). A CPLR 3211

¹ Transferred from Bronx County (Index No. 302336/13) to New York County pursuant to the June 25, 2013 Order of Justice Lucindo Suarez.

motion should be granted only where “the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted.” Biondi v. Beekman Hill House Apartment Corp., 257 A.D.2d 76 (1st Dept. 1999). Factual claims either inherently incredible or flatly contradicted by documentary evidence are not presumed to be true or accorded favorable inference. Biondi v. Beekman Hill House Apartment Corp., supra, citing Kliebert v. McKoan, 228 A.D.2d 232, lv denied, 89 N.Y.2d 802. However, unless it has been shown that a claimed material fact as pleaded is not a fact at all and there exists no significant dispute regarding it, dismissal is not warranted. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977).

A “special employee” relationship may be found where there is sufficient facts to demonstrate that there is “comprehensive and exclusive daily control over and the direction the manner, details and ultimate result of the employee’s work.” Thompson v. Grumman Aerospace Corporation, 78 N.Y.2d 553 (1991); Faulk v. Rockaway One Company, LLC., 107 A.D3d 475 (1st Dept. 2013); Bharat v. Bronx Lebanon Hospital Center, 106 A.D3d 540 (1st Dept. 2013).

In support of the motion, the defendant submits the affirmation of Kenneth Chiarella, Vice President of Operations for Dow Jones & Company. Mr. Chiarella affirms that prior to January 17, 2011 he was employed by NYP Holdings, Inc. In a similar capacity at the same physical location of 900 East 132nd Street, Bronx, NY. In 2007 the Post’s parent company, News Corp acquired Dow Jones and as such the Post and Dow Jones are sister corporations. The New York Post and the Wall street journal are published at the subject premises. In March 2010, Dow Jones took over control of the facility and all the employees located at the plant. In his capacity as Vice President of Operations, he is in charge of the facility, he (and his team) control the manner and details of the work of the employees, including Richard Lee. Mr. Chiarella further affirms that both the Post and Dow Jones operate out of the same facility, share the same staff, equipment. The personnel and employees are interchangeable and working in concert to publish both the New York Post and the Wall Street Journal. Furthermore, Dow Jones has the authority to terminate the employment of Post employees.

In opposition, plaintiff submits the sworn testimony of non-party witnesses, Michael Chin, George Fitz, Peter Rickards, Kyle Lemma and Thomas Harrigan. This Court notes that the selected

deposition testimony for each non-party witness fails to indicate the title or position of said non-party witness, nor does it indicate the basis of the knowledge to which they testify. As such, it is insufficient to rebut the affirmation of Mr. Chiarella, who affirms his personal knowledge of the relationship between Dow Jones and the New York Post, under the penalty of perjury. Notwithstanding any procedural error, neither affirmation speaks to the supervision, control or direction of the work of plaintiff Lee. As such, the special relationship has been established between plaintiff and Dow Jones & Company, Inc.

Accordingly, it is

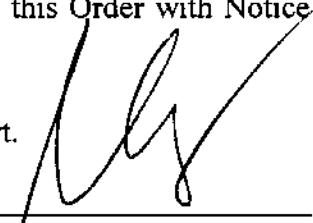
ORDERED that the defendant Dow Jones & Company, Inc.'s motion to dismiss pursuant to C.P.L.R. 3211(a)(7) is hereby granted. It is further

ORDERED that plaintiff's motion to consolidate is denied as moot. It is further

ORDERED that defendant shall serve a copy of this Order with Notice of Entry upon plaintiff within thirty (30) days of entry of this Order.

This constitutes the decision and Order of the Court.

1/15/14
DATE



HON. WILMA GUZMAN
Justice Supreme Court