

Yoy v Orient-Express Prop. Inc.

2014 NY Slip Op 32893(U)

November 6, 2014

Supreme Court, New York County

Docket Number: 155625/14

Judge: Donna M. Mills

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

ANGEL YOY,

**INDEX NO.
155625/14**

Plaintiff,

- against -

**ORIENT-EXPRESS PROPERTIES INC., ORIENT-
EXPRESS HOTELS, LTD, '21' CLUB, INC., and
BEYER BLINDER, BELLE, ARCHITECTS AND
PLANNERS, LLP,**

DECISION/ORDER

Defendants.

DONNA M. MILLS, J:

In this personal injury case, defendants Orient-Express Hotels, Inc. ("OEP"), Orient-Express Hotels, LTD ("Hotels Ltd") move for an Order dismissing all causes of action against them pursuant to CPLR § 3211(a)(1),(2), (7) and (8). Defendant '21' Club Inc. ("21 Club"), seeks dismissal of all causes of action against it pursuant to CPLR § 3211(a)(1) and (7).

Plaintiff, Angel Yoy commenced this action seeking, inter alia, to recover for serious personal injuries he sustained on August 17, 2011 at the premises located at 17 West 52nd Street, New York, New York 10019, which premises were allegedly owned, operated, maintained, managed, and controlled by OEP and Hotels Ltd. Plaintiff alleges the injuries were sustained during the course of his employment with a restaurant known as the 21 Club when he was struck by falling ceiling material and debris at the premises. At the time of his alleged accident, plaintiff was instructed to clean debris out of a walk-in refrigerator on the cellar level of the premises. Following the incident, plaintiff applied for and received workers' compensation benefits from his employer, 21 Club. Plaintiff brings causes of action against moving defendants sounding in negligence and violations of Labor

Law §§ 200, 240(1) and 241(6).

It is well established that the exclusive remedy available to an employee injured in the course of his employment by either a fellow worker or by his or her employer is to file a claim for Workers Compensation benefits (*see*, Workers Compensation Law § 10,11, 29; *Reich v. Manhattan Boiler & Equip. Corp.*, 91 N.Y.2d 772 [1998]). It is undisputed that plaintiff received workers' compensation benefits from his employer, 21 Club, which continued through May, 2013 when plaintiff, as claimant, agreed to a Workers' Compensation Law § 32 lump sum payment. Accordingly, the causes of action as against 21 Club are barred by Workers' Compensation Law § 10.

Defendant OEP is named in the instant litigation as the alleged owner of the 21 Club. OEP asks this court to dismiss the action against it because the affidavits of Bryan McGuire and David Williams, establishes that the 21 Club was not an agent of OEP. The affidavits further contend that OEP was not involved in the decision to dismantle the walk-in refrigerator, which serves as the basis of the instant claim, nor did OEP operate, maintain, manage and control the restaurant known as 21 Club.

Defendant Hotels Ltd. is also named in the instant litigation as the owner and operator of the subject premises where plaintiff was allegedly injured. Hotels Ltd. provides an affidavit from Martin O'Grady, its Vice-President, wherein he asserts that this Court does not have jurisdiction over it because it is a foreign corporation that was not properly served, and that it does not have a presence in New York. Hotels Ltd. also rely on an affidavit from Elizabeth Agudelo, the Financial Controller of the 21 Club. Ms. Agudelo asserts that neither Hotels Ltd. nor OEP were involved in the decision to dismantle the walk-in refrigerator or any decisions related to when and how the dismantling would be

completed. Ms. Agudelo further maintains that only the 21 Club was responsible for the operation, maintenance, management, and control of the restaurant known as the 21 Club or the premises where it was located, and that at no time did the moving defendants have a duty to repair or inspect the premises where the 21 Club was located.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law [,] a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law (see *Goshen v Mutual Life Ins. Co. of N. Y.*, 98 NY2d 314, 326 [2002]). Put differently, the documentary evidence must "resolv[e] all factual issues as a matter of law and conclusively dispose of the plaintiff's claim" (*Paramount Transp. Sys., Inc. v Lasertone Corp.*, 76 AD3d 519, 520 [2010]).

Here, Hotels Ltd and OEP both argue that they did not control or operate the premise at issue, and that the plaintiff failed to state a cause of action. The contentions of the movants that they did not control or operate the premise at issue and therefore not responsible for the plaintiff's accident is misplaced. On a motion to dismiss the pleading is to be liberally construed, and this Court's determination in that regard, is limited to whether the plaintiff properly and sufficiently stated causes of action. Upon such review this Court finds that the plaintiff stated causes of action sounding in negligence, as well as pursuant to the different Labor Law sections referred therein.

This Court also finds that it has jurisdiction over Hotels Ltd. Plaintiff annexed an Affidavit of Service on Hotels Ltd's main headquarters in Bermuda on October 7, 2014, which falls within the statutory time period for proper service. In addition, the plaintiff possesses sufficient proof to show that facts may exist which show that the Court does have long-arm jurisdiction over Hotels Ltd. Although discovery has not yet taken place in this matter, the plaintiff possesses documents which show that Hotels Ltd held itself out as the actual owner of the 21 Club restaurant in marketing and promotional material, as well as in an official 10-K Form filing.

Accordingly, it is

ORDERED that the motion of defendant 21 Club, Inc. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion by defendants Orient-Express Properties Inc. and Orient-Express Hotels Ltd. to dismiss the complaint is denied in its entirety; and it is further

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

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre Street, on January 9, 2015, at 10:00 AM.

Dated:

11/6/14

So Ordered



Donna M. Mills, J.S.C.

DONNA M. MILLS, J.S.C.