

**Cruz v Arnar Purch. Group, Inc.**

2014 NY Slip Op 33637(U)

October 1, 2014

Supreme Court, New York County

Docket Number: 103615/2011

Judge: Doris Ling-Cohan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

EA  
10/2/14  
E

PRESENT: DORIS LING-COHAN  
Justice

PART 36

Cwn  
-v-  
Amnar Purchasing Group, Inc. et al.

INDEX NO. 103615/11  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 004

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for Dismiss  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits (+ memo) | No(s). 1, 2  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 3  
Replying Affidavits (memo) | No(s). 4

Upon the foregoing papers, it is ordered that this motion is to dismiss by defendant  
is denied in accordance with the attached memorandum decision.  
Caribbean Cultural Center African Diaspora Institute

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

**FILED**  
RECEIVED OCT 02 2014  
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Dated: 10/1/14

[Signature], J.S.C.  
**DORIS LING-COHAN**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 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 : IAS PART 36

-----X

Nilda Cruz,

Plaintiff,

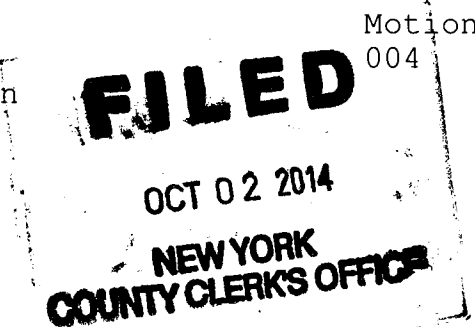
Index  
Number:

-against-

103615/2011

Arnar Purchasing Group, Inc.,  
and East Harlem Pilot Block  
Project a/k/a Taino Towers,  
East Harlem Pilot Block  
"Taino Towers Tenant Association  
of Tower One, Inc." and the  
Caribbean Cultural Center  
African Diaspora Institute  
a/k/a CCCADI,

Motion Seq.:  
004



Defendants.

-----X

**Doris Ling-Cohan, J.:**

Defendant Caribbean Cultural Center African Diaspora  
Institute a/k/a CCCADI (Caribbean Center) moves, pursuant to CPLR  
3211 (a) (7), to dismiss plaintiff's complaint as against it.  
For the reasons set forth below, the motion is denied.

**Underlying Background**

Plaintiff alleges that, on October 30, 2010, at  
approximately 5:30 p.m., she was in the auditorium of a building  
(the Building) located at 240 East 123rd Street, New York, New  
York (bill of particulars, items 1-2). The Building, together  
with three other buildings in the housing project, were owned by  
East Harlem Pilot Block Project a/k/a Taino Towers (East Harlem

Project) (Diaz EBT at 8-9, 14). The Building contains a mixture of commercial and residential spaces, including the Red Carpet Theater (the Theater) on the first and a portion of the second floors (*id.* at 10-11).

Plaintiff asserts that, on October 30, 2010, the Caribbean Center was sponsoring an event at the Theater in the Building that she was going to and that on her arrival, she was directed by its employees "to the stage area that [she] fell off of [and] . . . [that she] sustained . . . injury [due to her fall]" (plaintiff affidavit, ¶ 5). She also alleges that the Caribbean Center owned, operated or controlled the Theater, and therefore was responsible for the condition of the premises (complaint, ¶¶ 41-51, 55-58).

East Harlem Project would hold events in the Theater itself and it would also rent out the Theater to outside groups (Diaz EBT at 15-16, 21). If an outside group was holding an event, it would be responsible for maintenance, security, lighting and access (*id.* at 16, 23, 53-54). East Harlem Project had a security guard at the entrance, but it states that he did not give directions to patrons (*id.* at 25). In her deposition, plaintiff stated that she was directed to the Theater by the security guard at the entrance (plaintiff EBT at 25). She then entered the dimly lit Theater where, while walking toward the seating area, she fell off the one-foot raised stage onto the

floor, causing the injury to her left knee (*id.* at 38, 42-43). Caribbean Center has not presented an affidavit or any other evidence, to show that it lacked control of the Theater at the time of plaintiff's accident.

Before this court is defendant Caribbean Center's motion to dismiss plaintiff's complaint against it, pursuant to CPLR 3211 (a) (7).

#### **Dismissal Standard**

In determining a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord them every possible favorable inference and determine whether the facts as alleged fit within any cognizable legal theory (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Dismissal based upon documentary evidence is appropriate only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; see also *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]).

Allegations that are bare legal conclusions or are inherently incredible or that are flatly contradicted by the documentary evidence are not accorded such favorable inferences and need not be accepted as true (*Biondi v Beekman Hill House*

*Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). Also “[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see also Roni LLC v Arfa*, 18 NY3d 846, 848 [2011]).

### **Premises Liability**

Generally, a landowner or other party in control of property must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003]; *see also Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]). Additionally, a party must be aware of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition or constructive notice of it through the defect’s visibility for a sufficient amount of time prior to the accident to enable a defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

### **Discussion**

The Caribbean Center contends that it has shown that it is entitled to dismissal of plaintiff’s complaint against it, since

it claims it neither owned nor controlled the Theater on the day of plaintiff's accident. While it has presented evidence that East Harlem Project owned the premises (Diaz EBT at 8-9, 14), conspicuous by its absence is any documentary evidence as to the degree of Caribbean Center's control over the premises (see *Gibbs*, 17 AD3d at 254).

Since Caribbean Center is the movant, it must demonstrate that the "'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" (*511 W. 232nd Owners*, 98 NY2d at 152, quoting *Leon 84* at 88). The documentary evidence must "utterly refute the allegations of the complaint", to warrant dismissal (*Montefiore Med. Ctr. v Touchstone Health Partnership, Inc.*, 105 AD3d 589, 589 [1st Dept 2013]). Plaintiff's allegations in her complaint, amplified by the allegations in her affidavit, set forth a cognizable claim of negligence against the Caribbean Center (complaint, ¶¶ 41-51, 55-58; plaintiff affidavit, ¶ 5) and the Caribbean Center's documentary evidence has not conclusively established a defense as a matter of law. "[W]hether [plaintiff] can ultimately establish [her] allegations" is not the proper inquiry, but solely whether, giving every possible favorable inference and accepting her allegations as true, plaintiff has presented a cause of action (*Roni*, 18 NY3d at 848; *African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 211 [1st Dept

2013])). Since plaintiff has met this standard, defendant Caribbean Club's motion must be denied.

**Order**

It is, therefore,

ORDERED that the motion of the Caribbean Cultural Center African Diaspora Institute a/k/a CCCADI to dismiss the plaintiff's complaint as against it is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.

Dated: October 1, 2014

  
Doris Ling-Cohan, J.S.C.

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**FILED**  
OCT 02 2014  
NEW YORK  
COUNTY CLERKS OFFICE