

Muller v Cross Fire & Sec. Co., Inc.

2015 NY Slip Op 31546(U)

July 8, 2015

Supreme Court, Bronx County

Docket Number: 0300697/2014

Judge: Wilma Guzman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 0300697/2014
Motion Calendar No. #16
Motion Date: 04/13/2015

MULLER, ROBIN

Plaintiff,

-against-

DECISION/ ORDER

Present:
Hon. Wilma Guzman
Justice Supreme Court

CROSS FIRE & SECURITY CO., INC.,

Defendant.

Recitation, as required by CPLR 3211(a)(5); CPLR §3212; CPLR§8303-a and 22 NYCRR 130-1(a) of the papers considered in the review of this motion to dismiss:

| <u>Papers</u> | <u>Numbered</u> |
|--|-----------------|
| Notice of Motion, Affirmation in Support, and Exhibits Thereto..... | 1 |
| Affirmations in Opposition, | 2 |
| Reply Affirmation | 3 |

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

Defendant Cross Fire & Security (hereafter "Cross Fire"), pursuant to CPLR 3211(a)(5) and/or CPLR §3212, moves this Court for an order dismissing the action by plaintiff Robin Muller (hereafter "Muller") with prejudice on grounds that defendant Cross Fire is not a proper party to the action and that plaintiff's complaint fails to state a cause of action for which relief can be granted. Defendant further moves this Court, pursuant to CPLR§8303-a and 22 NYCRR 130-1(a), to impose sanctions upon plaintiff and/or her counsel for commencing and maintaining a frivolous lawsuit without merit in law, including costs and/or other appropriate financial sanctions, or other and further relief as to this Court deems just and proper. Plaintiff Robin Muller argues in opposition that defendant Cross Fire's motion is premature in that dismissal of action is not proper before discovery

is afforded the plaintiff and before the consolidation of the action with relation action Robin Muller v. TFPI, INC., DUPONT ASSOCIATES, INC., BLDG MANAGEMENT CO., INC. and FJC SECURITY SERVICES, INC, Index No. 306080/2012; and defendant's defenses do not affirmatively eliminate all questions of fact. Defendant replies that plaintiff only provided unsubstantiated statements without supporting documents in her claims against Cross Fire to connect defendant to the subject extinguisher.

This motion arises from a personal injury sustained by plaintiff on February 8, 2011 when a fire extinguisher and/or its wall mount/hook fell from the wall and struck her head at her workplace inside the premises located at 530 West 135th Street, New York, New York.

In deciding on a motion to dismiss for failure to state a cause of action for which relief can be granted under CPLR §3211(a)(7), factual allegations of the complaint must be deemed to be true, and the plaintiff must be afforded the benefit of all favorable inferences that can be drawn from the complaint. Harris v IG Greenpoint Corp., 72 A.D.3d 608, 609, 900 N.Y.S.2d 44 (1st Dept 2010). Denial of the motion to dismiss is proper if the complaint alleges viable causes of action and if the factual allegations show any cognizable action at law. *See, id.*, at 609. A motion to dismiss based on documentary evidence is warranted only if the documentary evidence submitted conclusively establishes a defense to asserted claims as matter of law. Leon v Martinez, 84 N.Y.2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994) and Robinson v Robinson, 303 A.D.2d 234, 757 N.Y.S.2d 13 (1st Dept 2003). Under CPLR §3212, summary judgment is proper only if there is no material, triable issue of facts. *See, Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 (NY1957).

In the instant case, defendant Cross Fire claims that plaintiff Muller has not demonstrated that Cross Fire is the proper party to sue and therefore, the factual allegations do not show a cognizable action at law. Cross Fire's owner Kevin Maguire's sworn affidavit, dated Dec. 3, 2014, states that Cross Fire is not the right party to the complaint because its contract with BLDG

Management did not give rise to a duty to service and maintain the fire extinguisher alleged to have caused plaintiff's injury. Defendant also submitted a copy of the contract between Cross Fire and BLDG Management and service notes detailing the work done in accordance with the contract. (Ex. D, Def.'s Affirm'n In Support of Motion to Dismiss). Finally, the Defendant submitted depositions of two non-party witnesses stating that they had not heard of defendant Cross Fire Security. Ex. I, Scott Dep. 116:2-3, September 12, 2014 and Ex. J, Shirley Dep. 92:15-16, September 12, 2014. However, Maguire's affidavit does not constitute documentary evidence as a matter of law within the meaning of CPLR §3211(a)(1) because the affidavit does no more than to assert the inaccuracy of plaintiff's allegations. See, Art and Fashion Group Corp. v Cyclops Prod., Inc., 120 AD3d 436, 438 (1st Dept 2014) and Tsimerman v Janoff, 40 AD3d 242 (1st Dept 2007). The submitted contract contains incomplete pages and does not contain any formal signatures, therefore it is sufficient to dispose of defendant's claim even if it may be genuine and the denial of the motion to dismiss is proper. See, Regini v Bd. of Managers of Loft Space Condominium, 107 AD3d 496, 497 (1st Dept 2013). Defendant's service notes also merely reiterate the terms in the contract. Cross Fire's certification to do install, service or maintain security or fire alarm systems does not affirmatively show that the Cross Fire is not certified to handle the subject fire extinguisher. (Ex. A, Department of State's License). The contractual language also raises an issue of triable facts as to whether fire extinguishers are included in the list of items covered by the contract and that the contract did not affirmatively state that fire extinguishers are not contractually covered. Pl.'s Affirm'n In Opp., ¶7. In addition, the non-party witnesses' depositions stating that the witnesses had not heard of defendant Cross Fire Security is not dispositive that defendant does not have any connection to plaintiff's sustained injury and therefore brings up an issue of fact and does not lend weight to a motion to dismiss In the face of documentary evidence insufficient for a motion to dismiss because it does not conclusively resolve all factual issues and that plaintiff's claims fail as a matter of law; because Cross Fire's owner Kevin Maguire himself has yet to be deposed, and because there exists material,

triable issues of fact, denial of motion to dismiss and preclusion of summary judgment are proper to allow discovery in the ordinary course of trial. See, Robinson v Robinson, at 234; Skolnick v Kalimian, 184 A.D.2d 310 (1st Dept 1992); see, Sillman v. Twentieth Century-Fox Film Corp., at 404; see, Belziti v Langford, 105 A.D.3d 649 (1st Dept 2013) and Wilson v Yemen Realty Corp., 74 A.D.3d 544 (1st Dept 2010).

In determining whether sanctions pursuant to CPLR §8303-a and 22 NYCRR 130-1(c) are appropriate, the court looks to the broad pattern of sanctioned litigants' conduct and not just whether the sanctioned litigants' conduct evidenced any merit; and sanctions, at the court's discretion, are appropriate after litigants have the opportunity to be heard. Levy v Carol Mgt. Corp., 260 AD2d 27, 33, 698 N.Y.S.2d 266 (1st Dept 1999) and see, Liapakis v Sullivan, 290 AD2d 393, 394 (1st Dept 2002). The Court's exercise of discretion is dependent on the impact of alleged frivolous conduct, defined pursuant to 22 NYCRR 130-1(c) as without merit; or is undertaken to delay or prolong the litigation or to harass or maliciously injure another; or asserts material factual statements that are false. Id., at 34. In the case at bar, the defendant fails to show that plaintiff's behavior meets the definition of frivolous conduct as defined by 22 NYCRR 130-1(c) or CPLR §8303-a; and sanction against the plaintiff prior to the opportunity to be heard would be premature. Furthermore, sanction upon plaintiff and / or her counsel pursuant to CPLR §8303-a and 22 NYCRR 130-1 for commencing and maintaining a frivolous lawsuit without merit in law, is not proper when discovery is permitted. See, Fern v Brown, Harris, Stevens, Inc., 190 AD2d 515, 53 N.Y.S.2d 19 (1st Dept 1993).

Accordingly, it is

ORDERED that the defendant Cross Fire's motion to dismiss plaintiff's action on grounds that defendant Cross Fire., is not a proper party to the action and that plaintiff's complaint fails to state a cause of action for which relief can be granted is denied; and summary judgment against plaintiff is denied. It is further

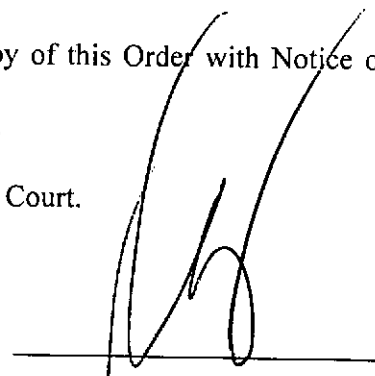
ORDERED that the Clerk of the Court mark the Court file accordingly. It is further

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

This constitutes the decision and Order of the Court.

JUL 08 2015

DATE



HON. WILMA GUZMAN

Justice Supreme Court