

Lizama v Port Auth. of N.Y. & N.J.

2016 NY Slip Op 31795(U)

September 28, 2016

Supreme Court, New York County

Docket Number: 161433/2015

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

JUAN LIZAMA AND HILDA LIZAMA,
Plaintiff,
-against-

INDEX NO. 161433/2015
MOTION DATE 08/24/2016
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
1 WORLD TRADE CENTER LLC, WTC TOWER 1 LLC,
SILVERSTEIN PROPERTIES, INC., THE DURST
ORGANIZATION, INC., DURST 1 WTC LLC, DURST
MANAGEMENT AND DEVELOPMENT LLC,
TISHMAN CONSTRUCTION CORPORATION,
BENSON INDUSTRIES INC., EMECH SOLUTIONS, INC.,
TRACEL LTD., AND TRACTEL INC.,**
Defendants.

The following papers, numbered 1 to 6 were read on this motion to dismiss.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 5</u>
Replying Affidavits _____	<u>6</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants' motion to dismiss, to treat this motion as one for summary judgment and for summary judgment, is denied.

Plaintiffs commenced this action on November 6, 2015, to recover for psychological injuries sustained by Plaintiff Juan Lizama when the scaffold he was working on malfunctioned, leaving him suspended 68 stories above ground at One World Trade Center a/k/a the Freedom Tower (herein "the property"). (Mot. Ex. A). The Complaint asserts causes of action for negligence and Labor Law violations.

Defendants, The Durst Organization, Inc. (herein "Defendant Durst Organization"), Durst Management and Development LLC (herein "Defendant Durst Management") (collectively herein "The Durst Defendants), and Silverstein Properties, Inc. (herein "Defendant Silverstein") (collectively herein "the Moving Defendants" or "Movants") now move for an Order (1) dismissing the Complaint as against them pursuant to CPLR §3211(a)(7); (2) treating this motion as one for summary judgment

pursuant to CPLR §3211(c) and dismissing the Complaint against the movants; and (3) awarding the movants summary judgment pursuant to CPLR §3212.

A motion to dismiss may be treated as one for summary judgment by the court “...after adequate notice to the parties has been given.” (CPLR §3211(c)). It is error for the court to treat a motion made pursuant to CPLR §3211(a)(7) as a summary judgment motion, even though a defendant’s motion seeks summary judgment pursuant to CPLR §3211(c) as alternative relief, where there is no notice given as required by CPLR §3211(c), and no indication that the Plaintiff joins the Defendant in “deliberately charting a summary judgment course.” (Brathwaite v. Frankel, 98 A.D.3d 444, 949 N.Y.S.2d 678 [1st Dept. 2012]).

As there is nothing on the record to indicate that the required notice was given, nor any evidence that the Plaintiff concedes to the motion to dismiss being converted to one for summary judgment, that relief is denied. The motion will proceed as a motion to dismiss pursuant to CPLR §3211(a)(7).

In order to dismiss a complaint for failure to state a cause of action there can be no legally cognizable theory that could be drawn from the complaint. The question is whether the complaint gives rise to a cognizable cause of action. The test of the sufficiency of a complaint is whether liberally construed it states in some recognizable form a cause of action known to the law (Union Brokerage, inc., v. Dover Insurance Company, 97 A.D. 2d 732, 468 N.Y.S.2d 885 [1st Dept., 1983]). 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 (Quinones v. Schaap, 91 A.D. 3d 739, 937 N.Y.S.2d 262 [2nd Dept., 2012]).

In support of their motion, movants provide affidavits from (1) Mr. Michael J. Rhee, for the Durst Defendants (Mot. Exhs. C & D), and (2) Mr. Jonathan W. Knipe for Defendant Silverstein (Mot. Exh. D).

Mr. Rhee’s affidavit states that the Durst Defendants are not associated with the property, and were not at the time of the incident. The Durst Defendants did not exercise any type of supervision or control over any of the work at the property at the time of the incident. They did not have an ownership or management interest, nor did they maintain or manage the property. (Mot. Exhs. C & D).

Mr. Knipe’s affidavit also states that Defendant Silverstein was not in contract with any entity for the property, had no duty to oversee the property, and no obligation with regard to the property at the time of the incident. There was a limited time period, however, 2003 to 2006, during which Defendant Silverstein’s affiliates maintained a ninety-nine year lease interest on the property. Mr. Knipe goes on to state that since 2006 Defendant Silverstein has not been directly involved in the development of the

property. (Mot. Exh. E).

Movants argue that these affidavits conclusively establish that they did not own, manage, operate or maintain the property at the time of the incident, or that they supervised or controlled any work that may have been in progress at that time. Movants contend that there is no documentary evidence available that would establish their lack of ownership or involvement, so there would be nothing to produce when discovery took place.

Movants contend that a motion under CPLR §3211(a)(7) may be used to dismiss a complaint in one of two ways. The first being where the Plaintiff has not stated a claim cognizable at law. The second being, although a cognizable cause of action has been stated, the action may be disposed for failure of a Plaintiff to assert a material allegation necessary to support the cause of action. (Basis Yield Alpha Fund [Master] v. Goldman Sachs Group, Inc., et al., 115 A.D.3d 128, 980 N.Y.S.2d 21 [1st Dept. 2014]). When a Defendant submits documentary evidence in support of the latter... “the standard morphs from whether the plaintiff stated a cause of action to whether it has one.” (Id.) For these reasons, movants contend that dismissal is warranted.

Plaintiff opposes the motion.

While movants are correct in stating that a defendant may submit evidence to support its motion to dismiss in attacking a well-pleaded cognizable claim (see Basis Yield, Supra), the Court of Appeals has also consistently held that “evidence in an affidavit used by a defendant to attack the sufficiency of a pleading ‘will seldom if ever warrant the relief [the defendant] seeks unless [such evidence establish(es)] conclusively that plaintiff has no cause of action.’” (Id., citing Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 357 N.E.2d 970, 389 N.Y.S.2d 314 [1976]). “[I]f the defendant’s evidence establishes that the plaintiff has no cause of action (i.e., that a well-pleaded cognizable claim is flatly rejected by the documentary evidence), dismissal would be appropriate.” (Basis Yield, Supra, see also Constructamax, Inc., v. Dodge Chamberlin Luzine Weber, Associates Architects, LLP, 109 A.D.3d 574, 971 N.Y.S.2d 48 [2nd Dept. 2013]). “[U]nless a motion to dismiss is converted by the court to a motion for summary judgment, [a plaintiff] will not be penalized because he has not made an evidentiary showing in support of his complaint. (Rovello, Supra).

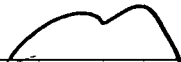
A review of the Complaint shows that Plaintiff has stated causes of action against the movants. The movants have only provided self-serving affidavits, declaring that they, in no way, were tied to the property at the time of Plaintiff’s incident. This does not conclusively establish, with documentary evidence, that the movants are entitled to dismissal of the Complaint against them.

For the foregoing reasons, the movants’ motion is denied in its entirety.

ACCORDINGLY, it is ORDERED, that Defendants' The Durst Organization, Inc., Durst Management and Development LLC, and Silverstein Properties, Inc.'s motion to dismiss pursuant to CPLR §3211, and alternatively treat this motion as a motion for summary judgment pursuant to CPLR §3212, is denied.

ENTER:

Dated: September 28, 2016



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE