

Jacobs v Fieldstone Realty, LLC
2016 NY Slip Op 32889(U)
November 27, 2016
Supreme Court, Rockland County
Docket Number: 030230/2016
Judge: Thomas E. Walsh II
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
LYSA GALLAGHER JACOBS and ROBERT W. GALLAGHER,

DECISION AND ORDER

Plaintiffs,

-against-

Index No. 030230/2016

FIELDSTONE REALTY, LLC, GIBALTAR MANAGEMENT
COMPANY, INC. And CARDIOLOGY CONSULTANTS OF
ROCKLAND, P.C.

(Motion # 2)

Defendants.

-----X
Thomas E. Walsh, II, A.J.S.C.

The following papers, numbered 1 to 3, were considered in connection with Defendant GIBALTAR MANAGMENT COMPANY INC.'s (hereinafter GIBALTAR) Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3211(a)(7), dismissing the Complaint and all cross-claims on the grounds that complaint fails to state a cause of action against Defendant GIBALTAR or in the alternative, for an order granting Defendant GIBALTAR Summary Judgment pursuant to Civil Practice Law and Rules § 3212 dismissing the complaint and cross-claims with prejudice on the grounds that there are no triable issues of fact as to the allegations of negligence against Defendant GIBALTAR, together with such other and further relief as the court deems just and proper:

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION OF DAVID R. BEYDA, ESQ./ EXHIBITS (A-D)	1
AFFIRMATION IN OPPOSITION OF HEATHER M. NAPPI, ESQ./EXHIBITS (A-D)	2
REPLY AFFIRMATION OF ROBERT J. GIRONDA, ESQ./EXHIBIT A	3

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

Plaintiffs filed a Summons with Notice on December 28, 2015 through the NYSCEF system. Plaintiff served a Supplemental Summons and Amended Complaint dated March 4, 2016. Issue was joined as to Defendant GIBRALTAR by service of a Verified Answer to Amended Complaint dated June 7, 2016. Counsel for Defendants. The Amended Complaint alleges that Defendant GIBRALTAR owned, operated and managed 12 Liberty Square, Stony Point, New York. Additionally, the Amended Complaint alleges that Defendant GIBRALTAR leased the premises at 12 Liberty Square, Stony Point, New York to Defendant CARDIOLOGY CONSULTANTS OF ROCKLAND, P.C. (hereinafter CCOR). Further, Plaintiff alleged that Defendant GIBRALTAR entered into a contract for snow and ice removal from 12 Liberty Square, Stony Point, New York.

On July 30, 2015, Defendants filed the instant motion to dismiss, arguing that the complaint fails to state a cause of action upon which relief can be granted, and that there is a defense based upon documentary evidence. Defendants moving papers argue that the allegations in Plaintiffs' complaint, even if true, do not rise to the level of stating a cause of action against Defendant GIBRALTAR and also cannot establish a meritorious claim against them. Defendant GIBRALTAR's argument is based on an Affidavit of Scott Zelkowitz, an employee of Defendant, who states that the company had no relationship with the property where the Plaintiff's accident occurred.

Plaintiff and Defendant agreed several times to adjournments of the instant motion, extending the time for Plaintiff to submit opposition papers, with the final letter e-filed on July 28, 2016. Plaintiff's counsel e-filed a letter dated July 28, 2016 in which she stated that the parties agreed to adjourn the instant motion's return date to August 12, 2016, with all opposition papers to be filed by Plaintiff on or before August 2, 2016. Defendant GIBRALTAR notes that Plaintiff's papers were e-filed through the NYSCEF system on August 5, 2016 and are therefore untimely. This Court agrees that the Plaintiff failed to abide by a return date and file by the date set by Plaintiff's counsel or even address the late filing within their opposition

papers. Therefore, Plaintiff's opposition to the instant motion is untimely and will be disregarded by this Court. Nonetheless, the Court did review the opposition papers submitted by Plaintiff and determined that Plaintiff's argument that the instant motion is premature as the discovery process has not begun and that Plaintiff remains unclear as to the owner of the lease for 12 Liberty Square Stony Point, New York has no merit. Determination of a summary judgment motion may be withheld when discovery is incomplete, but there must be a showing that will yield material and relevant evidence. [*Camoa v. Custom Computer Specialists, Inc.*, 44 AD3d 814 (2d Dept 2007)]. Assuming arguendo Plaintiffs' opposition papers were submitted timely, this Court finds that Plaintiffs have failed to demonstrate that discovery in the instant matter will assist in determining the owner and lease of 12 Liberty Square Stony Point, New York.

Plaintiffs additionally oppose the instant motion based on Defendant GIBALTAR's failure to follow the Court's part rules requiring the notification in writing to the undersigned of the desire to file the instant motion and await a determination of this Court. In reply papers Defendant GIBALTAR's counsel apologized to the Court for the failure to comply with the Part Rules, stating he believed they applied to discovery motions. Neither Defendant GIBALTAR or Plaintiffs have been prejudiced by Defendant GIBALTAR's failure to follow the Part Rules. The Court reminds both counsel to refer to the Part Rules before proceeding with additional motions, but does not believe Defendant GIBALTAR's counsel intentionally failed to comply. Therefore, the Defendant GIBALTAR's motion was considered despite the failure to follow the Part Rules.

According to the Affidavit of Scott Zerkowitz, Defendant GIBALTAR does not own, operate or manage the premises located at 12 Liberty Square, Stony Point, New York. Zerkowitz also attests that Defendant GIBALTAR never leased 12 Liberty Square Stony Point, New York or entered into a contract or agreement to remove snow and ice from that location. Additionally, the Zerkowitz Affidavit avers that there is no contract, agreement or relationship

between Defendant FIELDSTONE REALTY, LLC or with Defendant CARDIOLOGY CONSULTANTS OF ROCKLAND, P.C. in relation to 12 Liberty Square Stony Point, New York. The Zelkowitz Affidavit admits a relationship between themselves and Defendant CCOR regarding a property located in West Nyack, New York only.

On a motion to dismiss for failure to state a cause of action [§ 3211(a)(7)], the Court initially must accept the facts alleged in the complaint as true and then determine whether those facts fit within any cognizable legal theory, irrespective of whether the plaintiff will likely prevail on the merits. [*Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 318 (1995); *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *People v. New York City Transit Authority*, 59 N.Y.2d 343, 348 (1983); *Morone v. Morone*, 50 N.Y.2d 481 (1980); *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 274-275 (1977); *Cavanaugh v. Doherty*, 243 A.D.2d 92, 98 (3d Dept. 1989); *Klondike Gold, Inc. v. Richmond Associates*, 103 A.D.2d 821 (2d Dept. 1984)]. The complaint must be given a liberal construction and will be deemed to allege whatever cause of action can be implied by fair and reasonable reading of same. [*Shields v. School of Law of Hofstra University*, 77 A.D.2d 867 (2d Dept. 1980); *Penato v. George*, 52 A.D.2d 939 (2d Dept. 1976)].

On the record before the Court, and in light of the Affidavit of Steven Zelkowitz, even if all of the allegations in the complaint were accepted as true, the complaint fails to state a cause of action against Defendant GIBRALTAR. Further, in light of the fact that Plaintiffs have failed to provide any documentation upon which they based their allegations that Defendant GIBRALTAR owns, leases, controls or entered in to contracts regarding 12 Liberty Square, Stony Point within the Complaint and Amended Complaint are based the Court cannot accept the facts stated in the Complaint. As a result, the complaint is dismissed as to Defendant GIBRALTAR.

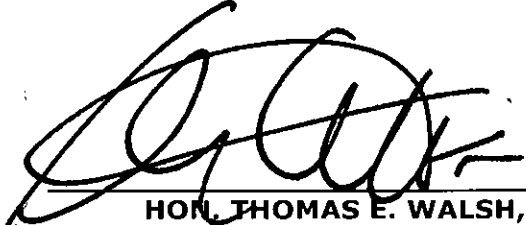
Accordingly, it is hereby

ORDERED that Defendant GIBRALTAR's Notice of Motion to dismiss (Motion #

2) is granted in its entirety and the Complaint filed by Plaintiffs through the NYSCEF system on December 28, 2015 as to Defendant GIBRALTAR only is dismissed.

The foregoing constitutes the Decision and Order of this Court on Motion # 2.

Dated: New City, New York
November 27, 2016



HON. THOMAS E. WALSH, II
Acting Justice of the Supreme Court

TO:

by e-filing -

VALERIE J. CROWN
ATTORNEY AT LAW, P.C.
Attorney for Plaintiffs
(via e-file)

FIELDSTONE REALTY, LLC
Defendant
9 Liberty Square
Stony Point, New York 10980
(via regular mail)

DAVID R. BEYDA
CARTAFALSA, SLATTERY, TURPIN & LENOFF
Attorney for Defendant GIBRALTAR MANAGEMENT COMPANY, INC.
(via e-file)

SARETSKY, KATZ & DRANOFF, L.L.P.
Attorneys for Defendant CARDIOLOGY CONSULTANTS OF ROCKLAND, P.C.
(via e-file)