

Celentano v Boo Realty, LLC
2017 NY Slip Op 30401(U)
January 9, 2017
Supreme Court, Bronx County
Docket Number: 301773/2016
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X **Index No. 301773/2016**

Jeanine Celentano,
Plaintiff,

-against-

DECISION and ORDER

Boo Realty, LLC and Jo Lu
Real Properties Corp.,

Present:

Defendants.

Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant's motion to dismiss the complaint.

<u>Papers Submitted</u>	<u>Numbered</u>
Amended Notice of Motion, Affirmation & Exhibits	1
Affirmation in Opposition & Exhibits	2
Reply Affirmation	3

In this action, plaintiff alleges causes of action against defendants for negligence as a result of injuries she allegedly sustained when she was struck by falling debris from the ceiling in the bathroom of her apartment located at 90 Vark Street, Yonkers, NY. In her complaint, plaintiff alleges that both defendants owned, managed, controlled and maintained the subject premises and that both had notice of the alleged dangerous condition.

Defendants now move for an order dismissing the complaint, pursuant to CPLR §§ 3211(a)(1) and (a)(7), against Jo Lu Real Properties Corp. ("Jo Lu") and, upon dismissal, to change venue of the action to Westchester County pursuant to CPLR §§ 510(1), (3) and 511, as of right and for the convenience of the witnesses.

Defendants contend that dismissal of the complaint as against defendant Jo Lu is warranted because Jo Lu did not own, manage, use or control the premises at any time. Defendants also contend that, upon dismissal, this matter should be transferred to Westchester County because venue is based solely upon Jo Lu's residence in Bronx County, Boo maintains its principal office in Westchester County, the accident occurred in Westchester County where

plaintiff resided at the time she filed her complaint, and the only witnesses to the accident are all located in Westchester County.

In support of the motion, defendants submitted, *inter alia*, the affidavit of Elisabeth Razza with attached documents, a copy of the deed to the subject premises, a copy of a lease between Boo Realty LLC (“Boo”) and Nicholas Rivera and plaintiff Jeanine Celentano, and copies of documents obtained from the New York Department of State (“DOS”) website. In her affidavit, Razza states the following: She is a member of Boo. On October 29, 1997, Boo purchased the subject premises and has continuously owned the premises since that date. Boo has also continuously been responsible for all management, maintenance, use and control of the subject premises since the date of purchase. Boo was incorporated in Westchester County and maintains a principal office in Yonkers, NY. At no time has Jo Lu ever owned, managed, controlled, used and/or occupied the subject premises. Jo Lu is a name used for insurance purposes only. Jo Lu has a principal office in Bronx County.

The Bargain and Sale Deed indicates that the subject premises was transferred from Gene W. Wilson General Contractor Inc. to Boo on October 29, 1997. The lease lists Boo as the landlord and Nicholas Rivera and Jeanine Celentano as the tenants of the subject premises. A DOS entity information printout indicates that Boo was formed in the county of Westchester, NY, and that mail process is accepted at “c/o Joan Razza, 172 East 206th Street, Bronx, NY 10458.” No principal executive office address is indicated. A DOS entity information printout indicates that Jo Lu was formed in Westchester, NY, its Chief Executive Officer is Joan Razza, and its principal executive office is located at 172 East 206th Street, Bronx, NY.

In opposition to defendants’ motion, plaintiff submitted, *inter alia*, her affidavit and the DOS printouts for Boo and Jo Lu. In her affidavit, plaintiff states the following: To her knowledge, Jo Lu “is one of the companies involved in the management, maintenance and control of the premises known as 90 Vark Street, Yonkers, New York.”

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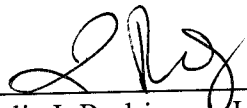
On a motion to dismiss pursuant to CPLR §3211(a)(1) and (a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). However, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration.” *See Maas v. Cornell*, 94 N.Y.2d 87, 91, 699 N.Y.S.2d 716 (1999). Dismissal is warranted only if the documentary evidence submitted utterly refutes plaintiff’s factual allegations and conclusively establishes a defense to the asserted claims as a matter of law. *See Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858 (2002); *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 270 (1st Dept. 2004). Affidavits submitted by a defendant to attack the sufficiency of a pleading “will seldom if ever warrant the relief he seeks unless . . . the affidavits establish conclusively that plaintiff has no cause of action.” *See Rovello v. Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 636, 389 N.Y.S.2d 314 (1976).

Here, while the deed and lease indicate that Boo owned the subject premises at the time of the accident, these documents are insufficient to establish that Jo Lu did not control, use, manage or maintain the subject premises at that time. Notably, the DOS printout for Jo Lu indicates that Joan Razza is its Chief Executive Officer and, in her affidavit, Razza states that she is also a member of Boo. Also, the DOS mail process address for both Jo Lu and Boo is that of Razza in Bronx, NY. Further, while in her affidavit Razza states that the name Jo Lu is used for “insurance purposes only,” she fails to explain why this is so. As such, defendants have failed to conclusively establish a defense, refute plaintiff’s factual allegations or establish that plaintiff has no cause of action against Jo Lu. Given this finding, defendants’ contention that there is no legal basis for venue in Bronx County lacks merit. Nor have defendants established that change of venue to Westchester County is proper based upon the convenience of the witnesses. Notably, defendants have not adequately set forth the names and addresses of witnesses who would be inconvenienced by a venue change, their expected testimony, or how they

would be inconvenienced by having to testify in Bronx County as opposed to Westchester County. *See Maynard v. Elrond Realty Corp.*, 170 A.D.2d 401, 566 N.Y.S.2d 286 (1st Dept. 1991).

Based upon the foregoing, defendants' motion is **denied** in its entirety.

Dated: Bronx, New York
January 9, 2017



Hon. Julia I. Rodriguez, J.S.C.