

**Martinez v New York State Urban Dev. Corp.**

2017 NY Slip Op 32182(U)

September 7, 2017

Supreme Court, Bronx County

Docket Number: 302752/2016

Judge: Robert T. Johnson

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 12

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CELESTINO MARTINEZ

Plaintiff,

-against-

NEW YORK STATE URBAN DEVELOPMENT CORP.,  
EMPIRE STATE DEVELOPMENT CORPORATION,  
ATLANTIC YARDS NOMINEE SUB A, LLC, AYDC  
INTERIM DEVELOPER, LLC, AYDC REGIONAL  
DEVELOPMENT COMPANY, LLC, ATLANTIC  
YARDS REGIONAL DEVELOPMENT COMPANY, LLC,  
PACIFIC PARK 550 VANDERBILT, LLC, PLAZA  
CONSTRUCTION LLC, CIVETTA-COUSINS JV, L.L.C.,

Defendants.

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DECISION AND ORDER

Index No. 302752/2016

The following papers, numbered 1-4 were considered on the motion to dismiss and the motion to change venue:

PAPERS

NUMBERED

Notice of Motion and annexed Exhibits and Affidavits .....	1, 2
Answering Affidavits and Exhibits.....	3
Reply Affirmation.....	4

Upon the foregoing papers, the motion to dismiss and the motion to change venue are consolidated for disposition purposes only.

Plaintiff commenced this action to recover damages for injuries he allegedly sustained on April 18, 2016, while performing work at the premises located at 550 Vanderbilt Avenue, Brooklyn, New York (the “Project”). Plaintiff claims that he was injured when he tripped on the corner of the duct hole cover and fell onto the end of the toilet pipe connection on the eighth

floor of the Project. Plaintiff asserts causes of action for negligence, and violations of the Labor Law.

Defendant Civetta-Cousins JV (“defendant Civetta-Cousins”) now moves for an order to dismiss, pursuant to CPLR §3211(a)(1) and (7), on the grounds that plaintiff’s complaint fails to state a cause of action against defendant Civetta-Cousins as it did not own, lease, operate, manage, maintain, control, and/or supervise the premises and defendant Civetta-Cousins did not act as the construction manager or the general contractor in connection with the construction as of the date of that accident, as established by documentary evidence.

In opposition, plaintiff contends that defendant Civetta-Cousins was a construction supervisor and a foundation contractor at the Project and as such, he has sufficiently stated a cause of action against defendant Civetta-Cousins. Plaintiff further avers that none of the documentary evidence submitted by defendant Civetta-Cousins prove that it is “conclusively absolved from liability.” Plaintiff maintains that the factual assertions presented by defendant Civetta-Cousins to dismiss the action are premature as discovery has not yet commenced, no depositions have been held, and no documents exchanged between the parties.

Defendants New York State Urban Development Corp., Empire State Development Corporation, Atlantic Yards Nominee Sub A, LLC, AYDC Interim Developer, LLC, AYDC Regional Development Company, LLC, Atlantic Yards Regional Development Complany, LLC, Pacific Park 550 Vanderbilt, LLC, and Plaza Construction LLC (collectively “Defendants”), move for an order, pursuant to CPLR §5101(1), changing the venue of the action from Bronx County to Kings County on the grounds that neither plaintiff nor Defendants reside in Bronx County, the alleged accident did not occur in Bronx County, and plaintiff has named an improper defendant residing in Bronx County for the sole purpose of placing venue in Bronx County. Defendants served their answer on October 21, 2016 and their Demand to Change Venue on October 28, 2016. Plaintiff did not respond to Defendants’ Demand to Change Venue.

Plaintiff opposes the Defendants’ motion to change venue maintaining that defendant Civetta-Cousins is a proper defendant and therefore, Bronx County is the proper venue for the action.

In considering a motion to dismiss pursuant to CPLR 3211(a)(7), this Court must determine whether the facts as alleged fit within any cognizable legal theory (*Rovello v. Orofino Realty Co. Inc.*, 40 NY2d 633 [1976]). However, bare legal conclusions as well as factual claims contradicted by the record are not entitled to any such consideration (*Mayer v. Sanders*, 264 AD2d 827 [2<sup>nd</sup> Dept 1999]). The factual allegations presented by plaintiff are insufficient to state a cause of action for negligence and Labor Law violations against defendant Civetta-Cousins. In his complaint, plaintiff merely asserts conclusory claims that defendant Civetta-Cousins is the owner, lessee, lessor of the premises located at 550 Vanderbilt Avenue, Brooklyn, New York, and that defendant Civetta-Cousins was acting as the construction manager, general contractor, managing agent of the Project. The record plainly contradicts plaintiff's allegation.

Pursuant to CPLR 3211(a)(1), a complaint may be dismissed "only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). To constitute "documentary evidence," the document "must be unambiguous, authentic and undeniable" (*Granada Condominium III Ass'n v Palomino*, 78 AD3d 996, 996-97 [2d Dept. 2010]). Here, the documentary evidence, *inter alia*, Defendants' answer, and the contract between defendant Civetta-Cousins and Plaza Construction LLC, conclusively demonstrates that defendant Civetta-Cousins was neither the owner, tenant, construction manager nor the general contractor. The documentary evidence further establishes that defendant Civetta-Cousins was a subcontractor contracted to perform excavation and foundation work, which was not related to any work performed by plaintiff on the eighth floor of the Project, and did not supervise, direct or control plaintiff's work on the date of the accident. Accordingly, defendant Civetta-Cousins' motion to dismiss is granted.

Whereas here, Defendants have established that the venue selected was improper, and plaintiff's sole basis for placing venue in Bronx County was based upon defendant Civetta-Cousins' principal place of business, the motion to change venue should be granted (*Rivera v. Jensen*, supra). Failure of plaintiff to respond to defendant's demand to change venue supports a transfer of the case to the venue designated by Defendants (*Lynch v. Cyprus Sash & Door Co., Inc.*, 272 AD2d 260 [1<sup>st</sup> Dept. 2000]).

Accordingly, it is hereby ORDERED, that defendant Civetta-Cousins' motion to dismiss all claims against it is granted; and it is further

ORDERED, that plaintiff's complaint against defendant Civetta-Cousins is dismissed; and it is further

ORDERED, that Defendants' motion to change venue is granted; and it is further

ORDERED, that Defendants shall serve the plaintiff with a copy of this Order with notice of entry and serve the Clerk of the Supreme Court, Bronx County, within 30 days; and it is further

ORDERED, upon payment of the appropriate fee, if any, the Bronx County Clerk shall transfer the entire file to the Kings County Clerk.

This reflects the decision and order of this court.

**Dated: September 7, 2017**



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**Robert T. Johnson, J.S.C.**