Stafford v Go Airborne, LLC
2017 NY Slip Op 33456(U)
September 19, 2017
Supreme Court, Nassau County
Docket Number: Index No. 601344/17
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X	**TRIAL/IAS PART 13**
DANIEL STAFFORD,	
Plaintiff,	**INDEX # 601344/17**
-against-	
	Mot. Seq. 1
	Mot. Date 6.30.17
GO AIRBORNE, LLC, GO AIRBORNE, LLC d/b/a BOUNCE! TRAMPOLINE SPORTS, 4 B'S REALTY III MICHAEL DRIVE, LLC, BTS FRANCHISES, LLC and BTS BRANDS, LLC,	**Submit Date 8.31.17**
Defendants.	
----------X	

The following papers were read on this motion: E File Docs Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed	11
Answering Affidavits (Affirmations)	20
Reply Affidavit	21

Defendant Go Airborne, LLC. d/b/a Bounce! Trampoline Sports (Go Airborne) moves pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss all claims and cross-claim as asserted against it on the grounds that plaintiff and co-defendants have failed to state a cause of action against it.

This is a personal injury action, which was commenced on or about February 15, 2017. On or about March 2, 2017, plaintiff filed and served a supplemental summons and amended verified complaint. Issue was joined with defendant 4 B's Realty III Michael Drive LLC. (4 B's Realty). Defendant BTS Franchises, LLC and BTS Brands have not appeared in this action as of the making of the motion.

Plaintiff alleges in his amended complaint that he was on the defendants' premises, 310 Michael Drive, Syosset, New York, when he sustained injury while on a trampoline. As to ownership, the amended complaint alleges that Go Airborne and the remaining defendants owned, operated, managed, maintained, possessed, supervised and controlled premises located at

310 Michael Drive, Syosset, County of Nassau, State of New York. In addition, the complaint asserts that Go Airborne and the remaining defendants managed, controlled and supervised all activities on said property.

Plaintiff alleges that Go Airborne was negligent by permitting a dangerous condition to exist on the premises, by insufficiently supervising and attending the subject trampoline, and was negligent in the hiring, training and retention of its personnel. Plaintiff also asserts that defendants were negligent in failing to keep the premises in a reasonably safe condition and failing to supervise patrons using the trampolines.

In support of this motion is an affidavit from Michael Gross, the managing member of Go Airborne which is located at 612 Corporate Way, Valley Cottage, New York. Mr. Gross states that on February 15, 2014 it did not maintain a principal place of business or office at 310 Michael Drive in Syosset, New York. Nor did they own, possess, supervise, repair, manage, maintain, control and/or inspect or have any responsibility for the premises or facility at the Syosset location. They did not provide, nor were they responsible to provide, any equipment for the premises or facility located at 310 Michael Drive in Syosset. He further states that Go Airborne did not supervise, nor was it responsible to supervise, any activities at that location. Go Airborne did not have any employees, nor were they responsible for, having employees at the location. It did not hire, retain and/or train, nor was it responsible for hiring, training or retaining, any personnel at the aforesaid location. In summary, Mr. Gross states that the LLC had no involvement nor was it located at the aforesaid premises; it was not responsible for inspecting the trampoline; it did not have any contract, lease or agreement with 4B's Realty, nor any requirement that it list 4B's Realty as an additional insured on any insurance policy maintained by Go Airborne.

In opposition, counsel for plaintiff states that Mr. Gross' affidavit contains only conclusory assertions. No deposition has taken place with respect to these issues. At the conclusion of discovery, if warranted, a motion for summary judgment could be made.

In reply, the moving defendant argues that the allegations of the complaint are conclusively refuted by the affidavit of Mr. Gross. Further, CPLR 3211(c) permits the court to treat a motion to dismiss as one for summary judgment upon providing adequate notice to the parties.

"On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Siracusa v. Sager,* 105 AD3d 937 [2d Dept 2013] [quoting *Breytman v. Olinville Realty, LLC,* 54 AD3d 703, 703–704 [2d Dept 2008]]).

> A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a) (7) (*see* CPLR 3211 [c]). If the court considers evidentiary material, the criterion then becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg,* 43 NY2d [268] at 275). Yet, affidavits submitted by a defendant "will almost never warrant dismissal under CPLR 3211 unless they 'establish conclusively that [the plaintiff] has no cause of action'" (*Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008], quoting *Rovello v Orofino Realty Co.*, 40 NY2d at 636 [emphasis and alterations of original quotation omitted]). Indeed, a motion to dismiss pursuant to CPLR 3211(a) (7) must be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Guggenheimer v Ginzburg*, 43 NY2d at 275).

(*Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

A successful CPLR Section 3211 motion can result in the dismissal of a complaint without addressing the substantive merits of the claims or defenses while a successful CPLR Section 3212 motion awards judgment to the moving party on the merits as a matter of law. (*See Hendrickson v. Philbor Motors, Inc.* 102 AD3d 251 [2d Dept 2012]).

Discovery has not been commenced in this action. The affidavit of Michael Gross consists of a host of conclusory statements. Such an affidavit is insufficient to establish that the plaintiff has no cause of action against the moving defendant. All of the facts and information with respect to the allegations of ownership, operations and management are within the exclusive control of defendant Go Airborne. Plaintiff is entitled obtain discovery and question a representative of the moving defendant. The appropriate time for moving defendant to make an application to test whether this plaintiff has a viable claim that can withstand a summary judgment motion is after discovery is completed. Moreover, whether the plaintiff can ultimately prevail on his factual allegations does not figure into the determination of whether this negligence claim should be dismissed for failure to state a cause of action. (*See Miglino v Bally Total Fitness of Greater New York, Inc.* 92 AD3d 148, 158 [2d Dept 2011] [affirmed on procedural grounds 20 NY3d 342 [2013]).

Further, to succeed on a motion to dismiss based on documentary evidence under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," thereby definitively disposing of the opposing party's claims (*Leon v Martinez,* 84 NY2d 83, 88 [1994]; *see also Fischbach & Moore v Howell Co.*, 240 AD2d 157 [1st Dept 1997]). Here, the moving defendant failed to offer documentary evidence that satisfy this meet this criteria.

For all the foregoing reasons, the motion is **denied** and it is hereby

ORDERED, that all parties shall appear at a **preliminary conference** at the supreme courthouse, 100 Supreme Court Drive, Mineola, N.Y., lower level, on **October 16, 2017 at 9:30 a.m.** No adjournments of this conference will be permitted absent the permission of or order of this court. All parties are forewarned that failure to attend the conference may result in judgment by default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
September 19, 2017

ENTER

HON. JEFFREY S. BROWN
J.S.C.

ENTERED

SEP 20 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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