Allen v Montauk Props., LLC
2018 NY Slip Op 30609(U)
March 30, 2018
Supreme Court, Suffolk County
Docket Number: 03009/2016
Judge: William B. Rebolini

[* 1]

Short Form Order

COPY

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Diane Allen,

Plaintiff,

-against-

Montauk Properties, LLC, Anthony Dalto T/A Turnpike Plaza and I Fix Screens NYC, LLC,

Defendants.

Index No.: 03009/2016

Motion Sequence No.: 002; MOTD
Motion Date: 8/18/17
Submitted: 11/29/17

Motion Sequence No.: 003; MOTD
Motion Date: 10/25/17
Submitted: 11/29/17

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Attorney for Defendants
Montauk Properties, LLC,
Anthony Dalto T/A and Turnpike Plaza:

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Clerk of the Court

Upon the following numbered papers 1 to 575 read on this application by defendant I Fix Screens NYC, LLC, for an Order consolidating this action with a related action, on consent, and for an Order dismissing plaintiff's Labor Law claims and for an Order dismissing the complaint as against defendant I Fix Screens NYC, LLC pursuant to CPLR 3211 (a)(7), or in the alternative, for dismissal pursuant to CPLR 3211 (c) (Motion Sequence 002); Notice of Motion and supporting papers 1 to 548; Answering Affidavits and supporting papers 549-555; Replying Affidavits and supporting papers 556 to 575; and upon the numbered papers 1 to 318 read on this application by defendants Montauk Properties, LLC and Anthony Dalto T/A Turnpike Plaza, for an Order consolidating this action with a related action, on consent, and for an Order dismissing plaintiff's Labor Law claims pursuant to CPLR 3211 (c) (Motion Sequence 003); Notice of Motion and supporting papers 1 to 301; Answering Affidavits and supporting papers 302 to 312; Replying Affidavits and supporting papers 313 to 318 , which motions are consolidated for disposition; it is

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ORDERED that the motions by defendants to consolidate this action with the action commenced by plaintiff against 1 Fix Screens, LLC and 1 Fix LCD, LLC under index number 619711/2016, are granted, on consent; and it is further

ORDERED that the actions are consolidated into a single action bearing index number 3009/2016 and the caption shall be amended to reflect such consolidation accordingly:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
----------X
Diane Allen,

Plaintiff,

- against — Index No. 3009/2016

Montauk Properties, LLC, Anthony Dalto
T/A Turnpike Plaza, I Fix Screens NYC, LLC,
I Fix Screens, LLC and I Fix LCD, LLC

Defendants.
----------X
I Fix Screens, LLC and I Fix LCD, LLC,

Third-Party Plaintiffs,

-against-

PETER ALLEN,

Third-Party Defendant.
----------X

; and it is further

ORDERED that the motion by defendant I Fix Screens NYC, LLC to dismiss plaintiff's Labor Law claims pursuant to CPLR 3211 (a)(7) is granted; and it is further

ORDERED that the motion by defendant I Fix Screens NYC, LLC to dismiss the complaint as against it pursuant to CPLR 3211 (a)(7) is denied; and it is further

ORDERED that the motion by defendant I Fix Screens NYC, LLC to dismiss plaintiff's Labor Law claims pursuant to CPLR 3211 (c) is denied as academic; and it is further

ORDERED, that the motion by defendants Montauk Properties, LLC and Anthony Dalto T/A Turnpike Plaza to dismiss plaintiff's Labor Law claims pursuant to CPLR 3211 (c) is denied.

The plaintiff commenced this action for personal injuries by the filing of a summons and verified complaint on July 28, 2014. The complaint alleges negligence and violations of Labor Law sections 200, 240 (1), and 241 (6) against the defendants arising from the plaintiff's fall from a construction ramp at a storefront located at 3205 Middle Country Road, Lake Grove, New York. Plaintiff commenced a parallel action entitled Diane Allen v. I Fix Screens, LLC and I Fix LCD, LLC under index number 619711/2016 for the same injuries, arising from the same accident. On February 15, 2017, all parties to the actions entered into a stipulation to consolidate the two actions. Based upon the above, consolidation is warranted (*see* CPLR 602; ***Scotto v. Kodsi***, 102 AD3d 947, 958 NYS2d 740 [2d Dept 2013]; ***Best Price Jewelers.Com Inc. v. Internet Data Storage & Systems, Inc.***, 51 AD3d 839, 840, 857 NYS2d 731 [2d Dept 2008]; ***Romandetti v. County of Orange,*** 289 A.D.2d 386, 734 N.Y.S.2d 629 [2d Dept. 2001]; ***McIver v. Canning***, 204 A.D.2d 698, 612 N.Y.S.2d 248 [2d Dept. 1994]).

In addition, defendants I Fix Screens NYC, LLC ("I Fix") and defendants Montauk Properties, LLC and Anthony Dalto T/A Turnpike Plaza ("Montauk Defendants"), move to dismiss the plaintiff's Labor Law claims pursuant to CPLR 3211 (c). Defendant I Fix also moves to dismiss the Labor Law claims pursuant to CPLR 3211 (a)(7) and to dismiss the action against I Fix Screens NYC, LLC on the grounds that defendant I Fix has no connection to the plaintiffs, the co-defendants, or the property where the plaintiff was allegedly injured. In support of its motion to dismiss, defendant I Fix submits a copy of the pleadings in both actions, its discovery demands, plaintiff's verified bill of particulars, plaintiff's discovery responses, and an affidavit of Robert Rapoport, the manager of I Fix Screens NYC, LLC. The Montauk Defendants similarly submit the pleadings, their discovery demands, plaintiff's verified bill of particulars, and plaintiff's discovery responses in support of their motion to dismiss the Labor Law claims pursuant to CPLR 3211 (c). Plaintiff opposes both motions to dismiss.

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 as true all facts as alleged in the pleading, accord the pleader the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (***V. Groppa Pools, Inc. v Massello,*** 106 AD3d 722, 964 NYS2d 563 [2d Dept 2013]). Thus, the standard is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (***Guggenheimer v. Ginzburg***, 43 NY2d 268, 275, 401 NYS2d 182 [1977]). A motion to dismiss the complaint for failure to state a cause of action may be made at any time, even during trial (***Stolarski v Family Servs. of Westchester, Inc.,*** 110 AD3d 980, 982, 973 NYS2d 725 [2d Dept 2013]).

Defendant I Fix argues that the plaintiff's Labor Law claims should be dismissed due to the statements made in her verified bill of particulars that she was not employed on the date of the accident, that she was not "working/on the job" at the time of the incident, and otherwise stated that she was not employed. These statements made by plaintiff are 'informal judicial admissions' contained within the plaintiff's verified bill of particulars (***Matter of Liquidation of Union Indem. Ins. Co. of NY***, 89 NY2d 94, 103 [1996]). An informal judicial admission is not conclusive, but is evidence of the facts admitted (***Wenger v. DMR Realty Management, Inc.***, 90 AD3d 647 [2d Dept.

2011]). However, the nature of a cause of action is to be determined by the allegation of the complaint (*see* ***Marsala v. Weinraub***, 208 AD2d 689, 617 NYS2d 809 [2d Dept. 1994]). "A bill of particulars is a limited device designed to amplify a pleading by providing greater detail as to the substance of the allegations, and what the party making them intends to prove. The purpose of a bill of particulars is to provide the adverse party with a general statement, as opposed to evidentiary material...[a] bill of particulars is directly tied with the party's burden of proof" (***Id.*** at 697, 617 NYS2d at 814-15; *see also* ***Linker v. County of Westchester***, 214 AD2d 652, 625 NYS2d 289 [2d Dept. 1985]).

A pedestrian who is injured at or around a construction site is not entitled to assert claims under sections 200, 240 (1) and 241 (6) of the Labor Law because such an individual "is not a member of the class of persons intended to be protected by those provisions of the Labor Law"(*see* ***Morales v. 569 Myrtle Ave., LLC***, 17 AD3d 418, 420, 793 NYS2d 145, 147 [2d Dept. 2005]; *see also* ***Mordkofsky v. V.C.V. Development Corp.***, 76 NY2d 573, 577, 561 NYS2d 892 [1990]("the Legislature's principal objective and purpose underlying [sections 200, 240 and 241 of the Labor Law] was to provide for the health and safety of employees"). Moreover, the Labor Laws do not apply to those who are considered volunteers at a work site (*see* ***Whelan v. Warwick Valley Civic and Social Club***, 47 NY2d 970, 419 NYS2d 959 [1979]). Only workers at the site are afforded the protections under the Labor Laws and claims brought by others must be dismissed (***Mordkofsky v. V.C.V. Development Corp.***, 76 NY2d 573, 561 NYS2d 892 [1990]).

Therefore, as the plaintiff's verified bill of particulars amplified the facts regarding the plaintiff's claims under sections 200, 240 (1) and 241 (6) of the Labor Laws, which facts as alleged by plaintiff the Court must accept as true on a motion to dismiss, plaintiff's Labor Law claims as against Defendant I Fix are dismissed in light of the admission by plaintiff that she was not employed at the time of the incident (*see, e.g.,* ***Maher v. Yoon***, 297 AD2d 361, 746 NYS2d 493 [2d Dept. 2002]). Based upon plaintiff's own admissions, which have not been controverted here, no dispute exists that plaintiff was not employed at the time of the incident and thus, she "is not a member of the class of persons intended to be protected by those provisions of the Labor Law" (***Morales v. 569 Myrtle Ave., LLC***, 17 AD3d 418, 420, 793 NYS2d 145, 147 [2d Dept. 2005]). Thus, dismissal of the Labor Law claims against defendant I Fix is warranted pursuant to CPLR 3211 (a)(7).

Regarding the motion to dismiss the action as against defendant I Fix Screens NYC, LLC, defendant submits the affidavit of Robert Rapoport, the manager of defendant I Fix. Mr. Rapoport represents that defendant I Fix has no involvement or relationship to the accident site and that no representatives or employees of I Fix have been to the accident site. Mr. Rapoport, moreover asserts that I Fix was incorporated a year after plaintiff's accident. Plaintiff, through her attorney, avers that I Fix has several locations and uses four LLC monikers including defendant I Fix Screens NYC, LLC. Indeed, plaintiff's second action being consolidated herein names I Fix Screens, LLC and I Fix LCD, LLC as party defendants. While the Court can consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a)(7), affidavits "will almost never warrant dismissal under CPLR 3211 unless they "establish conclusively that [the plaintiff] has no cause of action" (***Sokol v. Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept. 2010] quoting ***Lawrence v. Graubard Miller***, 11 NY3d 588, 595 [2008]). A "motion to dismiss pursuant to CPLR 3211 (a)(7) must be denied 'unless it can be 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 268, 275, 401 NYS2d 182 [1977]). Based upon the pleadings and the submissions before the Court, a dispute exists as to whether defendant I Fix is a proper party defendant.

The Montauk Defendants also move to dismiss plaintiff's Labor Law claims pursuant only to CPLR 3211 (c). Defendant I Fix moves to dismiss the Labor Law claims pursuant to CPLR 3211 (c) in the alternative. CPLR 3211 (c) provides that "[u]pon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as one for summary judgment" (CPLR 3211 (c)). The Second Department has ruled that conversion under CPLR 3211 (c) is unwarranted in the absence of notice to the parties and where the parties have not made "it 'unequivocally clear' that they were 'laying bare their proof' and 'deliberately charting a summary judgment course'"(***Hutchison v. Kings County Hospital Center***, 139 AD3d 673, 675-76, 32 NYS3d 210 [2d Dept 2016] citing ***Sokol v. Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). Here, no such statements have been made by the parties in their submissions before the Court on the motions pursuant to CPLR 3211 (c) and thus, the Court declines to exercise its discretion in this regard. Moreover, as to the Montauk Defendants, they did not move to dismiss the Labor Law claims under any of the grounds available under 3211 (a) in order for the Court to consider their 3211 (c) motion.

Accordingly, the motions to consolidate are granted, on consent, the motion by defendant I Fix Screens NYC, LLC to dismiss plaintiff's claims under the Labor Law pursuant to CPLR 3211 (a)(7) is granted, the motion by defendant I Fix Screens NYC, LLC to dismiss the complaint as against it pursuant to CPLR 3211 (a)(7) is denied, the motion by defendant I Fix Screens NYC, LLC to dismiss plaintiff's Labor Law claims pursuant to CPLR 3211 (c) is denied as academic, and the motion by defendants Montauk Properties, LLC and Anthony Dalto T/A Turnpike Plaza to dismiss plaintiff's Labor Law claims pursuant to CPLR 3211 (c) is denied.

Dated: 3/30/2018

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**