

Zhongjiang Gu v Mews at Roosevelt Owners Corp.
2018 NY Slip Op 33039(U)
October 3, 2018
Supreme Court, Queens County
Docket Number: 705236/2016
Judge: Jr., Rudolph E. Greco
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Hon. Rudolph E. Greco, Jr.
Justice

IAS PART 32

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ZHONGJIANG GU,

Index No. 705236/2016

Plaintiff

Motion Dated: September 27, 2018

Seq. No. 7

Cal. No. 14

- against -

THE MEWS AT ROOSEVELT OWNERS CORP.
and ELITE MANAGEMENT, INC., and JORGE
LANZA,

Defendants.

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THE MEWS AT ROOSEVELT OWNERS CORP.
and ELITE MANAGEMENT, INC.,

Third Party Plaintiffs,

- against -

J. LANZA SERVICES, LLC,

Third Party Defendant.

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The following papers numbered E132 to E174 were read on this motion by plaintiff to strike defendants/third-party plaintiffs' Answer or preclude them from testifying at trial, striking defendant Jorge Lanza and third-party defendant's Answer or preclude them from testifying at trial both for failing to comply with various discovery requests and orders, or compelling defendants/third-party plaintiffs and third-party defendant to proceed with their court ordered depositions, and defendant Jorge Lanza, third-party defendant J. Lanza Services, LLC's cross-motion for an order granting cross-movants leave to file and serve an Amended Answer *nunc pro tunc*, dismissing the Third-Party Complaint and the Complaint against Jorge Lanza, or alternatively to strike the Third-Party Complaint for failing to comply with discovery, or precluding the third-party plaintiffs from offering any evidence at trial.

Notice of Motion, Affirmation, Exhibits.....
Notice of Cross-Motion, Affirmation, Exhibits...
Affirmation in Reply.....
Affirmation in Opposition, Exhibits.....

Papers
Numbered
E132-137
E139-152
E153
E156-158

Affirmation in Opposition to Cross-Motion, Exhibits	E159-165
Supplemental Affirmation in Opposition to Cross-Motion	E166-167
Reply Affirmation.....	E168-1747

Upon the foregoing papers, as well as a conference at the call of the calendar, it is ordered that this motion and cross-motion are determined as follows:

This relatively common negligence action involving a slip-and-fall on snow and ice over two years ago, on January 28, 2016, has deteriorated into a discovery ordeal without any semblance of efforts to cooperate, or to address the substantive nature of the allegations. There have been no less than five discovery related motions and cross-motions, one even shortly following commencement. Of these five applications, two were marked off or withdrawn, two were previously decided and the instant motion/cross-motion is the fifth. The first Order entered April 26, 2018 (on motion sequence 6) granted defendants/third-party plaintiffs' motion to vacate the Note of Issue due to outstanding discovery. The second Order entered May 11, 2018 (on motion sequence 4) addressed motions and cross-motions filed by the parties. Essentially requests for relief were granted to the extent that further discovery was ordered. Unfortunately, and most likely precipitating the necessity of this motion and cross-motion, none of the prior Orders included any consequential language.¹ The court also notes that a Preliminary Conference Order and Compliance Conference Order relative to discovery were issued on or about September 19, 2016 and March 8, 2017 respectively.

Plaintiff now seeks to strike Answers or preclude testimony at trial of defendants/third-party plaintiffs The Mews at Roosevelt Owners Corp. ("The Mews") and Elite Management, Inc. ("Elite"), as well as defendant Jorge Lanza ("Lanza") and third-party defendant J. Lanza Services LLC ("Lanza Services")², and/or compelling The Mews, Elite, Lanza and Lanza Services to comply with their court ordered depositions. By virtue of their cross-motion Lanza and Lanza Services seek leave to file an Amended Answer, to dismiss the complaint against Lanza and third-party complaint against Lanza Services pursuant to CPLR 3211(a)(7), to strike the third-party Complaint for discovery related failures, or to preclude The Mews and Elite from offering any evidence at trial relative again to discovery related failures. The court addresses these requests in a comprehensive fashion.

First, as to Lanza and Lanza Services' request to file an Amended Answer, same is wholly denied. Their proposed Amended Answer is incorrect as it fails to name Lanza individually as a defendant in the main action. Also, this request is unnecessary. All parties were

¹Save the May 11, 2018 Order as to the plaintiff's deposition.

²There is an issue with naming the parties given the inconsistencies in the captions as to the inclusion of Jorge Lanza individually and J. Lanza Services LLC. In some captions, which the court has adopted, Jorge Lanza individually is included in the main action, with J. Lanza Services LLC named as third-party defendant. However, other captions fail to name Jorge Lanza individually in the main action and name him as such as third-party defendant. This was previously noted in the May 11, 2018 Order at FN 1.

put on notice of the issues with the caption of this action by virtue of the May 11, 2018 Order, (see FN2). Upon review of all pleadings filed herein the caption employed by this Court is correct and counsels for the parties simply need to exercise attention and diligence in employing same when submitting papers.

Second, as to Lanza and Lanza Services' motion to dismiss pursuant to 3211(a)(7) same is likewise denied. The court opines that some of the relief requested by these parties is somewhat disingenuous given their own failure to comply with discovery and appear for depositions, especially in light of the pending nature of this action. Nevertheless, on a motion brought pursuant to CPLR 3211(a)(7) the standard is whether the pleading from its four corners states a cause of action, (see *Holmes v Gary Goldberg & Co., Inc.*, 40 AD3d 1033 [2007], *Morad v Morad*, 27 AD3d 626, 627 [2006]; see also *EBCI, Inc. v Goldman Sachs & Co.*, 5 NY3d 11 [2005], *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). It is not whether the proponent of the pleading has a cause of action" (*Sokol v Leader*, 74 AD3d 1180, 1180-81 [2nd Dept. 2010]). "[T]he pleading is to be afforded a liberal construction [see CPLR §3026], and the plaintiff's allegations [therein] are accepted to be true and accorded the benefit of every possible favorable inference," (*Granada Condo. III Assn. v Palomino*, 78 AD3d 996 [2nd Dept. 2010]; see also *Leon v Martinez*, 84 NY2d 83, 87-88 [1994], *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977], *Dee v Rakower*, 112 AD3d 204, 208 [2nd Dept. 2013], *Sokol v Leader*, 74 AD3d 1180, 1181 [2nd Dept. 2010]). Even more so, a plaintiff may rely solely on the complaint and will not be penalized for failing to make an evidentiary showing in support thereof, (see *Rovello v Orofino Realty Corp.* 40 NY2d 633, 635 [1976]).

A court is however, permitted to consider evidentiary material submitted by a defendant in support of a 3211(a)(7) motion without converting same to a motion for summary judgment, (see generally CPLR 3211[c], *Sokol v Leader*, *supra* at 1181-82). In doing so, the question becomes "whether the proponent has a cause of action..." (*Guggenheimer v Ginzburg*, *supra* at 275). Yet, affidavits submitted by the defendant will almost never warrant dismissal unless they 'conclusively establish' that plaintiff has no cause of action, (see *Sokol v Leader*, *supra* [internal citations omitted]; see also *Rovello v Orofino Realty Corp.*, *supra* at 636). The affidavits submitted by defendant in this instance, that of Nicanor Baltazar, Jose Alegria and Jorge Lanza, do not satisfy this high evidentiary standard. Mr. Baltazar's affidavit is not based on his own knowledge, rather he states that he is familiar with this matter by virtue of discussions with board members and an attorney. Mr. Alegria in a confusing fashion indicates that he was not hired, employed or in any way supervised by Lanza, but that Lanza paid him each week after a payroll check was cut to Lanza.³ Lanza's affidavit is entirely self-serving especially in light of his failure to be deposed. Finally, contentions in these affidavits are refuted by at least one affidavit submitted in opposition to the cross-motion. The court notes here that cross-movants' arguments

³It is understood that this payment arrangement may have been precipitated by Mr. Alegria's status, but in the context of this motion and given the outstanding discovery, notably the depositions of The Mews and Lanza who would be best suited to illuminate this issue, it falls short of conclusively establishing entitlement to the relief requested.

against such affidavit only serve to highlight that this matter is highly factual, and involves issues of credibility. Accordingly, and although not pertinent to the instant applications, the court opines that summary judgment in this matter is unlikely.

Lastly, the court addresses all requests relative to discovery granting same to the following extent: it is hereby

ORDERED that should The Mews, Elite, Lanza and Lanza Services not comply with this Court's Order entered May 11, 2018, to the extent they have not already done so, within forty-five (45) days of the date of entry of this Order they shall be precluded from testifying at the time of trial; and it is further

ORDERED that the depositions of The Mews, Lanza and Lanza Services shall be *held* within sixty (60) days of the date of entry of this Order; and it is further

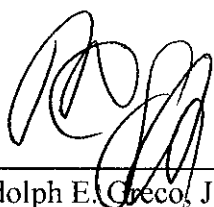
ORDERED that failure to appear for such depositions as indicated above shall result in the non-appearing party's preclusion from offering any testimony at the time of trial; and it is further

ORDERED that plaintiff is granted leave to file a Note of Issue on or before January 3, 2019; and it is further

ORDERED that plaintiff shall serve a copy of this Order with Notice of Entry upon all parties within twenty (20) days of the date of entry hereof, and at the time of filing the Note of Issue upon the County Clerk.

All other requests not specifically addressed herein are denied.

Dated: Oct. 3, 2018



Rudolph E. Greco, Jr.
J.S.C.

