

Ortiz v City of Beacon
2018 NY Slip Op 33866(U)
May 17, 2018
Supreme Court, Dutchess County
Docket Number: 52762/2017
Judge: Christi J. Acker
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To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS**

-----X
GERARDO A. ORTIZ,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 52762/2017

CITY OF BEACON, THE CITY OF BEACON
HOUSING AUTHORITY, ON THE SQUARE
APARTMENTS, INC., and THE LINDLEY
TODD, LLC,

Defendants.
-----X

The following papers, numbered 1 to 13, were read on Defendant CITY OF BEACON HOUSING AUTHORITY'S motion pursuant to CPLR 3211(a)(1) and (7) to dismiss all claims against said Defendant, including all claims asserted by other Defendants:

Notice of Motion-Affirmation of Stuart Diamond, Esq.-Exhibits A-H	1-10
Affirmation in Opposition of Courtney J. Campbell, Esq.-	
Exhibit 1	11-12
Reply Affirmation of Stuart Diamond, Esq.	13

Plaintiff GERARDO A. ORTIZ (hereinafter "Plaintiff") commenced this personal injury action on or about October 30, 2017¹ against Defendants claiming that he was injured on or about October 18, 2016, when the ceiling collapsed inside the bathroom of Apartment 5 at 207 Main Street, Beacon, New York. Plaintiff's Amended Complaint at ¶¶ 20, 48, 49, Diamond Affirmation,

¹ An Amended Summons and Complaint was filed on or about November 22, 2017.

Exhibit A. Plaintiff further alleges that the “negligent, wanton, reckless and careless acts of the defendants, their agents, servants and/or employees were a cause of the accident and resultant injuries.” *Id.* at ¶50. Plaintiff alleges that Defendant City of Beacon Housing Authority (hereinafter “Housing Authority”) was the owner, lessor, lessee and/or that it maintained, managed, controlled and/or operated the subject premises. *Id.* at ¶¶20-26.

In support of its motion, Defendant Housing Authority submits the Affirmation of Stuart Diamond, the affidavit of Veronica Schetter, Assistant Director of Defendant Housing Authority (hereinafter “Schetter Affidavit”) and numerous exhibits. The Schetter Affidavit references, and purports to authenticate, the following exhibits annexed to the Diamond Affirmation:

1. Exhibit B – May 2005 lease between Plaintiff Ortiz and Defendant On the Square Apartments, Inc.
2. Exhibit C – June 2016 lease addendum between Plaintiff Ortiz and Defendant On the Square Apartments, Inc.
3. Exhibit D – A deed dated February 11, 1981 in which the City of Beacon conveyed title to 201-211 Main Street, Beacon, New York to Ronald J. Piccone and Neil Gallagher.
4. Exhibit E – A deed dated August 22, 1982 in which Ronald J. Piccone and Neil Gallagher transferred ownership of 201-211 Main Street, Beacon, New York to Ronald J. Piccone.
5. Exhibit G - An e-mail from Mr. Piccone to Ms. Schetter dated December 28, 2016, asking Ms. Schetter to transfer their current “HAP contracts” to the Lindley Todd LLC from On the Square Apartments. Mr. Piccone’s e-mail indicates he is the Vice President of On the Square Apartments, Inc.

Defendant Housing Authority also provides a print out from the NYS Department of State showing that Ronald Piccone is the Chief Executive Officer of On the Square Apartments, Inc. Diamond Affirmation, Exhibit F.

In opposition to the Motion, Plaintiff submits an attorney affirmation and affidavits of service on Defendants The Lindley Todd LLC and On the Square Apartments, Inc.

To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR

3211(a)(1), it must be shown that the documentary evidence utterly refutes the plaintiff's factual allegations and conclusively establishes a defense as a matter of law. *XXXX, L.P. v 363 Prospect Place, LLC*, 153 AD3d 588 [2d Dept 2017]; *Torres v City of New York*, 153 AD3d 647 [2d Dept 2017]; *Wilson v Poughkeepsie City School Dist.*, 147 AD3d 1112 [2d Dept 2017]. If the evidence submitted in support of the motion is not "documentary," the motion must be denied. To constitute documentary evidence, the evidence must be "unambiguous, authentic, and undeniable", such as judicial records and documents reflecting out of court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable. Conversely, letters, emails and affidavits do not meet the requirements of documentary evidence. *Phillips v Taco Bell Corp.*, 152 AD3d 806 [2d Dept 2017]. "An affidavit is not documentary evidence because its contents can be controverted by other evidence, such as another affidavit." *Phillips, supra, citing J.A. Lee Elec., Inc. v City of New York*, 119 AD3d 652 [2d Dept 2014].

On a motion to dismiss pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. In considering such a motion, 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. *DeMarzo v DeMarzo*, 150 AD3d 1202 [2d Dept 2017]; *Rodriguez v Daily News, L.P.*, 142 AD3d 1062 [2d Dept 2016]. That is, such a motion to dismiss should be granted only where, even viewing the allegations as true, the plaintiff cannot establish a cause of action. *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Anderson v Armentano*, 139 AD3d 769

[2d Dept 2016]. “Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate” *Gutierrez v McGrath Mgt. Servs., Inc.*, 152 AD3d 498 [2d Dept 2017].

In the instant matter, Defendant Housing Authority argues that Plaintiff’s claims should be dismissed as the documentary evidence submitted establishes that the Housing Authority does not own, occupy, control or make special use of the apartment in which Plaintiff was injured. Notably, not all of the evidence submitted by Defendant Housing Authority is considered “documentary evidence” sufficient to support a motion pursuant to §3211(a)(1). The deeds and leases attached as Exhibits B, C, D and E are “unambiguous, authentic, and undeniable” and can support such a motion. *Phillips, supra*. But, emails and affidavits do not meet the requirements of documentary evidence. *Id.*

Liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control, or special use of the property. The existence of one or more of these elements is sufficient to give rise to a duty of care, however, where none is present, a party generally cannot be held liable for injuries caused by the allegedly defective condition. *Donatien v. Long Island Coll. Hosp.*, 153 AD3d 600, 600–01 [2d Dept. 2017].

The documentary evidence submitted by Defendant Housing Authority in the form of deeds, attached to the Diamond Affirmation as Exhibits D and E, establish that contrary to

paragraph 20 of the Amended Complaint, Defendant Housing Authority does not own the subject property. In addition, documentary evidence in the form of a lease and an addendum thereto, attached as Exhibits B and C to the Diamond Affirmation, establish that contrary to paragraphs 25 and 26 of the Amended Complaint, Defendant Housing Authority was not the lessee nor the lessor of the property. Finally, those leases also establish that the “owner” is responsible for maintaining the dwelling unit. See Exhibit B at Part B(4) and Exhibit C at Section (e), Diamond Affirmation. As it has been established that Defendant Housing Authority is not the owner of the premises, contrary to paragraph 21 of the Amended Complaint, it is clear that Defendant Housing Authority did not maintain the property.

Plaintiff’s opposition essentially concedes that Defendant Housing Authority is not the owner, lessee or lessor of the property. Campbell Affirmation, ¶16. Nevertheless, Plaintiff argues that the documents provided do not address whether Defendant Housing Authority “maintained, managed or controlled the premises.” *Id.* As discussed above, the documentary evidence does establish that Defendant Housing Authority was not responsible for the maintenance of the property. But, the only evidence presented by Defendant Housing Authority as to the issues of management and control is the Schetter Affidavit itself. Ms. Schetter avers at paragraph 10 that Defendant “Housing Authority never owned, occupied, maintained, *managed, controlled, operated or leased* Apartment 5 at 207 Main Street in Beacon. Nor has the Beason Housing Authority ever used that apartment for any purpose [emphasis supplied].” See also, Diamond Reply Affirmation at ¶3. The Schetter Affidavit also addresses management of the subject premises at paragraph 8 by stating: “[a]lthough the Housing Authority does manage some apartments, Apartment 5 at 207 Main Street in Beacon has never

been one of those apartments.”

It is well-settled that an affidavit is not documentary evidence because its contents can be controverted by other evidence, such as another affidavit. *Phillips, supra*, at 807. As the Schetter Affidavit is not documentary evidence, Defendant Housing Authority cannot conclusively establish a defense as a matter of law or utterly refute the Plaintiff’s factual allegations pursuant to CPLR §3211(a)(1) with respect to the allegations of management and/or control of the subject property. *Id.* Therefore, Defendant Housing Authority’s motion to dismiss pursuant to CPLR §3211(a)(1) is denied.²

Defendant Housing Authority’s motion to dismiss pursuant to CPLR §3211(a)(7) is also denied. In considering such a motion, 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. *DeMarzo, supra*. In the instant matter, accepting as true Plaintiff’s allegation that Defendant Housing Authority controlled the subject premises (Amended Complaint, ¶23), Plaintiff has stated a claim with respect to premises liability against Defendant Housing Authority. *See Donatien, supra*.

As such, it is hereby

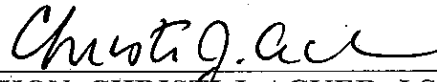
ORDERED that Defendant’s motion pursuant to CPLR §§3211(a)(1) and (7) is denied;
and it is further

² Notably, the two cases relied upon by Defendant Housing Authority, *Suero-Sosa v. Cardona*, 112 A.D.3d 706 [2d Dept. 2013] and *Charest v. K Mart of N.Y. Holdings, Inc.*, 71 A.D.3d 471 [1st Dept. 2010] are cases decided on motions for summary judgment, not motions to dismiss pursuant to §3211(a)(1).

ORDERED that the parties are directed to appear on **May 30, 2018 at 9:30 a.m.** for a preliminary conference.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
May 17, 2018



HON. CHRISTI J. ACKER, J.S.C.

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