Ragusin v Gabrielli
2018 NY Slip Op 34067(U)
September 20, 2018
Supreme Court, Nassau County
Docket Number: 600425/17
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

JENNIFER A. RAGUSIN,

Plaintiff,

- against -

ROBERT GABRIELLI and BLANCA NAVARRO,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 600425/17
Motion Seq. Nos.: 01, 02
Motion Dates: 05/09/18
06/22/18
XXX

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation, Affidavit and Exhibits and Memorandum of Law	1
Notice of Cross-Motion (Seq. No. 02), Affirmation and Exhibit	2
Reply Affirmation in Support of Motion (Seq. No. 01) and in Opposition to Cross-Motion (Seq. No. 02) and Exhibit	3

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendants move (Seq. No. 01), pursuant to CPLR § 3211(a)(1), (3), (7) and (8), for an order dismissing plaintiff's Verified Complaint based on lack of personal jurisdiction; and move, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint.

Plaintiff opposes the motion and cross-moves (Seq. No. 02), pursuant to CPLR § 306-b, for an order granting her an extension of time to serve the Summons and Verified Complaint upon defendants. Defendants oppose the cross-motion.

In support of the defendants' motion (Seq. No. 01), their counsel submits, in pertinent part, that, "[t]he instant motion should be granted, and the Complaint dismissed, because Plaintiff's claims are barred pursuant to Workers (*sic*) Compensation Law §29(6). In addition, Plaintiff never executed proper service on the Defendants pursuant to CPLR §308(2). As such, the Complaint must be dismissed in its entirety with prejudice. This matter arises from an alleged trip and fall in the parking area of a dental practice located at 200 Old Field Road, Centerport, New York 11721 and operated by 'Robert Gabrielli, DDS and Blanca Navarro, DDS, PC' (hereinafter the 'PC'). Plaintiff was an employee of the PC and was in the course of her employment when the accident occurred.... The PC, which employed the Plaintiff, leased the subject premises from the Defendants ROBERT GABRIELLI and BLANCA NAVARRO (as individuals). **The Defendants are also officers and 100% shareholders of the PC**.... As a matter of law, a worker who is injured during the course of her employment cannot maintain an action to recover damages for personal injuries against the owner of the property **where the accident occurred when the owner is also an officer of the corporation that employed the worker**. [citations omitted]. Notably, a Workers (*sic*) Compensation action was fully adjudicated and Plaintiff received a monetary award in the Workers (*sic*) Compensation Court.... Plaintiff now brings an action against the Defendants seeking the proverbial 'second bite at the apple,' i.e., further compensation for the same accident. Lastly, Plaintiff never executed proper service on the Defendants. The Affidavit of Service by the Plaintiff's process server demonstrates that the Defendants were purportedly served by delivery to a person of suitable age and discretion, however, said delivery was not at the Defendants' 'current place of business, dwelling place or abode' as required by the CPLR." *See* Defendants' Memorandum of Law Exhibits A and D.

Counsel for defendants further asserts that, "[p]laintiff alleges that on January 28, 2014 at approximately 8:40 a.m., she slipped and fell on ice on (*sic*) premises located at 200 Old Field

Road, Centerport, New York, 11721.... The premises at 200 Old Field Road are (*sic*) owned by defendants ROBERT GABRIELLI and BLANCA NAVARRO and leased to a professional corporation named, 'Robert Gabrielli, DDS and Blanca Navarro, DDS, PC' (the 'PC').... It is undisputed that on January 28, 2014, Plaintiff was employed by the PC.... Plaintiff alleges that on that date, she was caused to fall on ice on the premises and injure her right knee.... Following the accident, Plaintiff commenced a Workers (*sic*) Compensation action, where she alleged that she sustained an injury to her right knee in a work-related accident on January 28, 2014. The Workers (*sic*) Compensation Board concluded that Plaintiff indeed sustained a work-related injury on January 28, 2014 and directed the PC's workers compensation insurance carrier to pay a sum of $14,286.53 to cover the disability over a period of January 28, 2014 to March 7, 2015 (57.6 weeks) at a rate of $248.03 per week.... Plaintiff then commenced the instant action in Nassau County Supreme Court by filing he (*sic*) Summons and Verified Complaint on January 17, 2017.... In the instant action, Plaintiff again alleges that she sustained injuries to her right knee while in the course of her employment on January 28, 2014.... The injury and date of accident are identical to those at issue in the Workers (*sic*) Compensation action.... Plaintiff purportedly served the Defendants the Summons and Verified Complaint by delivery to a person of suitable age and discretion at 66 Fernwood Lane, Roslyn, New York 11576.... However, neither Defendant has ever worked or resided at that address.... Additionally, although the Affidavit of Service states that the papers were left with a 'relative', Defendant Gabrielli attests that the physical description contained in the Affidavit of Service matches neither of his relatives that live at that address. While Defendant Gabrielli's mother resides at that address, she does not fit the description of a woman of apparent age of 40 years old that is 5'4" tall and 120 lbs." *See* Defendants' Memorandum of Law Exhibits A, C and D.

Counsel for defendants argues that, "[i]t is well settled that pursuant to Workers (*sic*) Compensation (*sic*) §29(6), workers (*sic*) compensation is the exclusive remedy for work related injuries. More specifically, Workers (*sic*) Compensation (*sic*) §29(6) states, 'the right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee...' Further Workers (*sic*) Compensation (*sic*) § 11 states, 'The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee...' Here, Plaintiff has already recovered compensation for her injury via Workers (*sic*) Compensation. That claim is concluded and Plaintiff received a monetary award.... Plaintiff is now seeking additional recovery for the same injury against her employers. This attempt to circumvent the Workers (*sic*) Compensation exclusive remedy doctrine must be denied by this Court. We anticipate that in opposition, Plaintiff may attempt to argue that the Defendants in this matter are being sued as owners in their individual capacity and not in the capacity as the PC/employers. That argument is absolutely unavailing as a matter of law. It is well settled that a worker who is injured during the course of her employment cannot maintain an action to recover damages for personal injuries against the owner of the property **where the accident occurred when the owner is also an officer of the corporation that employed the worker**. [citations omitted]. Here, as noted above, the Defendants are indeed officers of and 100% shareholders of the corporation that employed the worker.... As such, Plaintiff simply cannot sue the Defendants.... To the extent that Plaintiff intends to argue that she can maintain this action notwithstanding the case law cited above, because the Defendants are being sued as owners of the premises, and not as the Plaintiff's employer, that argument has been expressly, categorically and unequivocally denounced by the Court of Appeals. Plaintiff simply cannot be heard to argue that the Defendants have a 'dual capacity' as employer and owner of the premises separately."

Counsel for defendants further contends that, "CPLR §3211(a)(1) provides statutory grounds for dismissal because documentary evidence provides a complete defense to Plaintiff's

claims. [citations omitted]. Here, the documentary evidence, i.e., the decisions (*sic*) of the Workers Compensation Board ... demonstrate (*sic*) that Plaintiff's accident was already deemed 'work related' by a tribunal. As such, her exclusive remedy is Workers (*sic*) Compensation and this action must be denied. Judicial records, like the Workers (*sic*) Compensation decisions, have been deemed 'documentary evidence for the purposes of CPLR § 3211(a)(1).... Moreover, this action is subject to dismissal pursuant to CPLR §3211(a)(3), because Plaintiff lacks capacity/standing to sue the Defendants in light of Workers (*sic*) Compensation being her sole remedy as a matter of law.... The matter is also subject to dismissal pursuant to CPLR §3211(a)(7) because Plaintiff has not pleaded a legally cognizable cause of action against the Defendants. For the reasons stated above, Plaintiff simply has no cause of action against the Defendants because, again, her exclusive remedy is Workers (*sic*) Compensation. Lastly, should this Court entertain the instant motion as one for summary judgment pursuant to CPLR § 3212, as opposed to a motion to dismiss pursuant to CPLR § 3211, the motion must still be dismissed because there can be no material issues of fact here. The facts are undisputed."

Defendant Robert Gabrielli ("Gabrielli") submits his own Affidavit in support of the motion. *See* Defendants' Gabrielli Affidavit in Support.

In opposition to the motion (Seq. No. 01) and in support of the cross-motion (Seq. No. 02), counsel for plaintiff submits, in pertinent part, that, "[i]n the interest of justice, Ragusin's time to serve the Defendants should be extended.... Here, it is undisputed that the Summons and Complaint was (*sic*) served within 120 days of the filing. But the service was found to be defective more than 120 days after. Yet, service was sufficient enough that Defendants did Answer. In fact, Defendants filed two Answers.... As a result, Defendants will not be prejudiced at all by Ragusin being granted an extension of time to serve. Additionally, the length of delay in service as well as the promptness of Ragusin's request both weigh in favor of extending Ragusin's time to serve: Ragusin timely served within the 120 days and now cross-moves less than 3 months after first being informed service was improper. [citations omitted]. The Statute of

Limitations has since expired after the filing of the Summons and Complaint. This also weighs in favor of extending Ragusin's time to serve the Complaint. [citations omitted]. The merit in this action is shown by Ragusin's verified (*sic*) Bill of Particulars and Summons and Complaint, which show that she was caused to slip and fall on Defendants' premises.... For all of these reasons, it is respectfully submitted that Ragusin's time to serve should be extended under the interest of justice." *See* Plaintiff's Affirmation in Opposition to Motion (Seq. No. 01) and in Support of Cross-Motion (Seq. No. 02) Exhibit A.

Counsel for plaintiff also argues that defendants' motion (Seq. No. 01) is premature, asserting that, "[i]n the instant action, there are facts essential to Ragusin's opposition to the instant application, but which cannot yet be stated. No depositions have been held yet. Given that depositions have not taken place, it would be premature to dismiss the case against Defendants.... Here, neither Defendant has appeared for a deposition. Ragusin has not been provided an opportunity to question the defendant (*sic*) on essential facts necessary to oppose summary judgment, including the corporate structure of The PC, and whether Defendants were both, in fact, officers.... Here, Ragusin should be allowed discovery to examine the corporate structure of the PC to see of Defendants were , in fact, officers of the PC."

In opposition to the cross-motion (Seq. No. 02) and in reply to the motion (Seq. No. 01), counsel for defendants submits, in pertinent part, that, "[p]laintiff's Opposition fails to overcome that her claims against the Defendants are without merit and ought to be dismissed. As set forth in the moving papers, the applicable case law clearly and unequivocally dictates that Plaintiff's claims herein are barred by Workers (*sic*) Compensation (*sic*) § 29(6). Annexed hereto are true and accurate copies of the Stock Certificates for ROBERT GABRIELLI, D.D.S. and BLANCA NAVARRO, D.D.S., P.C. (the 'PC'), which prove that Defendants Robert Gabrielli and Blanca Navarro are the sole shareholders of the PC. Moreover, Plaintiff's cross-motion is moot because the case should be dismissed on the merits. It is argued in Opposition (*sic*) that the instant motion is premature and that further discovery is necessary to ascertain 'the corporate structure of the PC

and whether Defendants were both, in fact, officers.'... The argument in Opposition (*sic*) is unavailing. Robert Gabrielli executed an Affidavit in which he attested that both he and Dr. Navarro are each 50% shareholders. The Stock Certificates of the PC, ..., further prove what Dr. Gabrielli attested (*sic*) in his Affidavit.... There is no question of fact as to whether the Defendants are the owners of the PC. As such, Workers (*sic*) Compensation is Plaintiff's exclusive remedy for this work-related injury.... Depositions are not needed in this case, as it is clear that the Defendants are indeed officers and owners of the PC and therefore cannot be liable to the PC's employee for her alleged work-related injury.... Here, there is no basis at all to suggest that Drs. Gabrielli and Navarro are not the owners of the PC that bears both their names. Thus, there is no basis for discovery in this matter." *See* Defendants' Affirmation in Opposition to Cross-Motion (Seq. No. 02) and in Reply to Motion (Seq. No. 01).

Counsel for defendants adds that, "[a]lthough, Defendants maintain that Plaintiff failed to effectuate proper service, Defendants nevertheless contend that this issue is essentially moot, as the case should be dismissed in its entirety on the merits,.... Notably, Plaintiff does not dispute that service was improper. Rather, Plaintiff asks the Court for leave to re-serve 'in the interests of justice.' Plaintiff alleges that the action is meritorious but fails to show that it does indeed have merit.... Also, Plaintiff alleges that she 'promptly' cross-moved for leave to re-file, however, by her own admission, this cross-motion was not made until nearly 3 months after first being informed of the improper service. We dispute that 3 months is 'prompt.'"

CPLR § 3211(a)(1) states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that...a defense is founded upon documentary evidence." To obtain dismissal of a complaint pursuant to CPLR § 3211(a)(1), a defendant must submit documentary evidence which "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002) *citing Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). An application predicated upon this section of law will be granted only upon a showing that the

"documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010) *quoting Scadura v. Robillard*, 256 A.D.2d 567, 683 N.Y.S.2d 108 (2d Dept. 1998). "[T]o be considered documentary evidence, it must be unambiguous and of undisputed authenticity." *Fontanetta v. John Doe 1, supra, citing* SIEGEL, PRACTICE COMMENTARIES, MCKINNEY'S CONS LAWS OF NY, BOOK 7B, CPLR 3211:10 pp. 21-22. "[T]hat is, it must be 'essentially unassailable.'" *Torah v. Dell Equity, LLC*, 90 A.D.3d 746, 935 N.Y.S.2d 33 (2d Dept. 2011) *quoting Schumacher v. Manana Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686 (2d Dept. 2010).

A complaint may be dismissed pursuant to CPLR § 3211(a)(1), based on documentary evidence, only if the factual allegations are definitively contradicted by the evidence or a defense is conclusively established. *See Yew Prospect v. Szulman*, 305 A.D.2d 588, 759 N.Y.S.2d 357 (2d Dept. 2003). A motion to dismiss based on documentary evidence may be granted only where such documentary evidence utterly refutes the plaintiffs' factual allegations, resolves all factual issues as a matter of law and conclusively disposes of the claims at issue. *See Yue Fung USA Enters., Inc. v. Novelty Crystal Corp.*, 105 A.D.3d 840, 963 N.Y.S.2d 678 (2d Dept. 2013). In sum, the analysis is two-pronged - the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

CPLR § 3211(a)(3) states that, "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:... 3. the party asserting the cause of action has no legal capacity to sue;..."

"In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), '"the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) *quoting Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) *quoting Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d

756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiff can succeed on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiff can ultimately establish the truth of the allegations. *See 219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). "In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon v. Martinez*, *supra* at 88.

Notably, "[w]here a defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(8) on the ground of lack of personal jurisdiction, a plaintiff 'need only make a prima facie showing' that such jurisdiction exists." *See Lang v. Wycoff Heights Medical Center*, 55 A.D.3d 793, 866 N.Y.S.2d 313 (2d Dept. 2008); *Cornely v. Dynamic HVAC Supply, LLC*, 44 A.D.3d 986, 845 N.Y.S.2d 797 (2d Dept. 2007); *Peterson v. Spartan Indus.*, 33 N.Y.2d 463, 354 N.Y.S.2d 905 (1974); *Daniel B. Katz & Assoc. Corp. v. Midland Rushmore, LLC*, 90 A.D.3d 977, 937 N.Y.S.2d 236 (2d Dept. 2011); *Marist College v. Brady*, 84 A.D.3d 1322, 924 N.Y.S.2d

529 (2d Dept. 2011); *Alden Personnel, Inc. v. David*, 38 A.D.3d 697, 833 N.Y.S.2d 136 (2d Dept. 2007). Nevertheless "[a]s the party seeking to assert personal jurisdiction, the plaintiff bears the ultimate burden of proof on this issue." *Cornely v. Dynamic HVAC Supply, LLC, supra* at 987. *See also Urfirer v. SB Builders, LLC*, 95 A.D.3d 1616, 946 N.Y.S.2d 266 (3d Dept. 2012); *Armouth Intern., Inc. v. Haband Co., Inc.*, 277 A.D.2d 189, 715 N.Y.S.2d 438 (2d Dept. 2000).

Generally, the exclusivity rule of the Workers' Compensation Law applies to insulate a person or entity from liability to a worker for tortious conduct where the person or entity is the alter ego of the worker's direct employer. *See Quizhpe v. Luvin Const. Corp.*, 103 A.D.3d 618, 960 N.Y.s.2d 130 (2d Dept. 2013); *Cappella v. Suresky at Hatfield Lane, LLC*, 55 A.D.3d 522, 864 N.Y.S.2d 316 (2d Dept. 2008). An owner of property on which a worker is injured during the course of his or her employment may be considered an employer for purposes of the exclusivity rule where the owner is an officer of the worker's employer, especially a controlling officer, at least if the owner is acting within the scope of his or her employment in directing the work in question, as well as where the owner is a co-owner of the property with the worker's employer. *See Coppola v. Singer*, 211 A.D.2d 744, 621 N.Y.S.2d 924 (2d Dept. 1995); *Lovario v. Vuotto*, 266 A.D.2d 191, 697 N.Y.S.2d 685 (2d Dept. 1999).

It is evident that plaintiff has already been compensated by the New York State Workers' Compensation Board for the exact same incident and injuries alleged in the matter before this Court. *See* Defendants' Affirmation in Support Exhibit D. Therefore, based upon the exclusivity rule of the Workers' Compensation Law, plaintiff cannot maintain the present action. As a result, the Court finds that the documentary evidence submitted by defendants resolves all factual issues as a matter of law and conclusively dispose of the claims at issue. *See* CPLR § 3211(a)(1). The Court further finds that plaintiff has no legal capacity to sue. *See* CPLR § 3211(a)(3). Additionally, the Court finds that plaintiff has failed to state a cause of action against defendants that falls within a cognizable legal theory. *See* CPLR § 3211(a)(7). The Court also finds that it is

without dispute that plaintiff failed to serve the Summons and Verified Complaint upon defendants within the one hundred twenty (120) day deadline as set forth in CPLR § 306-b. *See* CPLR § 3211(a)(8).

Moreover, defendants' motion (Seq. No. 01) was not premature, since plaintiff failed to offer an evidentiary basis to suggest that the discovery may lead to relevant evidence. Plaintiff's "hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery was an insufficient basis for denying the motion." *Conte v. Frelen Assoc., LLC*, 51 A.D.3d 620, 858 N.Y.S.2d 258 (2d Dept. 2008). *See also Lopez v. WS Distrib., Inc.*, 34 A.D.3d 759, 825 N.Y.S.2d 516 (2d Dept. 2006).

Therefore, based upon the above, the branch of defendants' motion (Seq. No. 01), pursuant to CPLR § 3211(a)(1), (3), (7) and (8), for an order dismissing plaintiff's Verified Complaint based on lack of personal jurisdiction, is hereby **GRANTED**.

The branch of defendants' motion (Seq. No. 01), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint, is also hereby **GRANTED**. Plaintiff's cross-motion (Seq. No. 02), pursuant to CPLR § 306-b, for an order granting her an extension of time to serve the Summons and Verified Complaint upon defendants, is hereby **DENIED as moot**.

This constitutes the Decision and Order of this Court.

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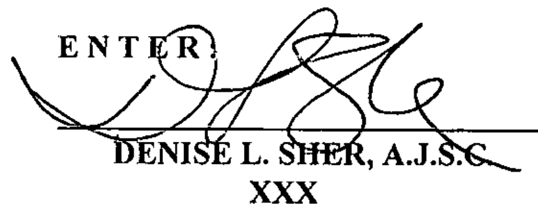

DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
September 20, 2018

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