

**Buckstine v Schor**

2018 NY Slip Op 34464(U)

May 3, 2018

Supreme Court, Westchester County

Docket Number: Index No. 57710/2016

Judge: Lawrence H. Ecker

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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 WESTCHESTER

-----X  
HANNAH BUCKSTINE,

Plaintiff,

-against-

JORDAN SCHOR, JORDAN'S OF NEW PALTZ LLC,  
LCORE ENTERPRISE CORP., KEITH CARPENTIER,  
WAYNE BRADFORD and ROBERT GERMINARA,

Defendants.  
-----X

INDEX NO. 57710/2016

DECISION/ORDER

Motion Date: 3/28/18  
Motion Seqs. 6, 7

ECKER, J.

The following papers numbered 1 through 32 were read on the motion of KEITH CARPENTIER ("Carpentier"), made pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7), for an order dismissing the third amended complaint [Seq. 6], and the cross-motion of HANNAH BUCKSTINE ("plaintiff"), made pursuant to CPLR 3025 [Seq. 7], for an order granting permission to amend the third amended complaint:

PAPERS

NUMBERED

Notice of Motion [Mot. Seq. 6], Affirmation (Romano), Exhibits A-H, Affidavit (Carpentier), Exhibits 1-2	
Memorandum of Law in Support, Exhibits A-B	1-16
Notice of Cross-Motion [Mot. Seq. 7], Memorandum in Opposition and in Support of Cross-Motion, Answer with Cross-claims	17-19
Affirmation in Reply and in Opposition (Romano), Exhibit A-D, <sup>1</sup>	20-24

<sup>1</sup> Court rules state that the same exhibit number/letter shall not be repeated with the same motion sequence(s).

Reply Memorandum of Law in Opposition to Cross-Motion and in Support of Motion [Mot. Seq. 6], Exhibit 1	25-26
Affidavit in Opposition to Cross-Motion and in Support of Motion [Mot. Seq. 6] (Romano), Exhibits A-D	27-31
Reply (Krouner) Affirmation	32

Upon the foregoing papers, the court determines as follows:

Plaintiff, in her third amended complaint, for which permission to serve was granted by the court, without opposition, by order dated December 14, 2017 [Mot. Seq. 5], has added Carpentier as a party defendant. The apparent basis for this having been done is that Carpentier and Schor, as purchasers, had entered into an agreement with Robert Germinara (now deceased), as seller, dated June 13, 2013, relative to certain assets of a Fat Bob's Pizzeria, 52 Main Street, New Paltz, New York [Ex. D to motion], being the premises in which it is alleged by plaintiff that she fell and injured herself on October 25, 2014. The court, by decision/order dated December 23, 2016 [Mot. Seqs. 2 and 3], denied the motion of Jordan Schor to dismiss the complaint against him and denied plaintiff's cross-motion to amend the first complaint, due to her failure to include copy of the proposed second amended complaint to her moving papers.

Carpentier argues that plaintiff cannot establish any nexus between him and the premises, as demonstrated by documentary evidence (CPLR 3211[a][1]), and also moves for dismissal based on a failure to state a cause of action (CPLR 3211[a][7]. In plaintiff's opposition to Carpentier's motion, she failed to include a copy of the deposition of Schor, relying instead solely upon the agreement, Carpentier's affidavit and an unsigned loan agreement dated September 1, 2013, between Jordan's of New Paltz LLC and Jordan Schor (personally) as borrower and American Fixture Co. as lender [NYSCEF Nos. 115,117]. There is no nexus between American Fixture and anyone else; the unsigned document does refer to Fat Bob's at the address on Main Street and the terms of the repayment of the loan referenced in the agreement. It is upon these documents that plaintiff argues Carpentier is a proper party defendant, as they show a sufficient nexus between the site of the accident and him to warrant denial of the motion to dismiss.

In reply, Carpentier included a copy of Schor's deposition where he unequivocally represents that Carpentier at no time exercised dominion, control, management or in any other fashion undertook an action that would be an indicia of control at the premises from which liability could be ascribed to him. Plaintiff's attorney participated in Schor's deposition on September 13, 2017 [NYSCEF No. 141], but failed to include the transcript, or allude to any part of Schor's testimony in plaintiff's cross-motion. In reply, plaintiff offers no rebuttal to Schor's testimony, other than characterizing it as "incoherent." It is upon this record that the court is called upon to decide the motion *sub judice*.

As for the motion to dismiss based upon documentary evidence (CPLR 3211[a][1]), in order to prevail on this ground, the movant must demonstrate that the proffered documentary evidence utterly refutes plaintiff's allegations, conclusively establishing a

defense as a matter of law. *Bibbo v Arvanitakis*, 145 AD3d 656 [2d Dept 2016]. In order for evidence submitted in support of a CPLR 3211(a)(1) motion to qualify as “documentary evidence,” it must be “unambiguous, authentic, and undeniable.” *Attias v Costiera*, 120 AD3d1281 [2d Dept 2014]; *Ralex Services, Inc.v Southwest Marine & General Ins. Co.*, 155 AD3d 800 [2d Dept 2017]. Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence. *Attias v Costiera, supra*; *Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]. At the same time, neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211 (a)(1). *Attias v Costiera, supra*; *Sims v Prom Realty Co., LLC*, 2018 NY Slip Op. 02822 [2d Dept 2018]; *Fontanetta v John Doe 1, supra*.

Here, Carpentier relies on the agreement signed by him, Schor and Germinara, and the unsigned loan documents in support of his claim that he had no connection to the premises at the time of the accident. The court finds that these documents do not, as a matter of law, constitute papers “the contents of which are essentially undeniable” and, as such, the documents are insufficient proof that “utterly refutes plaintiff’s allegations.” The court notes that deposition testimony does not meet the test to be applied by the court in determining whether the document presented “utterly refutes” the claim asserted. See *Eisner v Cusumano Const., Inc.*, 132 AD3d 940, 941 [2d Dept 2015], citing, *Granada Condominium III Association v Palomino*, 78 AD3d 996 [2d Dept 2010]. Hence, dismissal, based upon documentary evidence, is denied.

Carpentier also moves to dismiss based upon a failure to state a cause of action (CPLR 3211(a)(7)). The court is mindful that in deciding this motion, it is required to deem the factual allegations in the pleading as true, and that the pleader must be afforded the benefit of every favorable inference. *Matter of Palmore v Board of Educ. of Hempstead Union Free School Dist.*, 145 AD3d 1072 [2d Dept 2016]. Further, when “the evidentiary material outside the pleading’s four corners is considered, and the motion is not converted into one for summary judgment, the question becomes whether the pleader has a cause of action, not whether the pleader has stated one, and, unless it has been shown that a material fact as claimed by the pleader is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate.” *Matter of Palmore v Board of Educ. of Hempstead Union Free School Dist.*, *supra* at p.1073, citing *Matter of Clavin v Mitchell*, 131 AD3d 612, 614 [2d Dept 2015].

Unlike on a motion to dismiss based upon documentary evidence, however, deposition testimony may be considered on a motion to dismiss for failure to state a cause of action. In fact, CPLR 3211(c) provides that on a motion to dismiss under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. See *Penato v George*, 52 AD2d 939 [2d Dept 1976], citing *Rappaport v International Playtex Corp.*, 43 AD2d 393 [3d Dept 1974] (court granted the motion to dismiss on the pleadings upon its consideration of the deposition transcript); see generally *Arkin v Village of Owego*, 55 Misc.3d 1219(A) [Sup. Ct. Tioga County 2017].

The court finds that, upon consideration of Schor's deposition, notwithstanding the documents submitted by plaintiff, plaintiff has failed to establish a material issue of fact from which the inference may be drawn that a cause of action exists. *Gym Door Repairs, Inc. v Astoria General Contracting Corp.*, 144 AD3d 1093 [2d Dept 2016]. Plaintiff does not provide any document or statement from plaintiff or any witness that in any manner contradicts Schor's non-refuted testimony. That being said, the court finds that Carpentier is entitled to the dismissal of the third amended complaint.<sup>2</sup>

As to the cross-motion, given the court's rulings herein, there is no remaining relief to be afforded plaintiff. In any event, she has failed to provide the court with a copy of the proposed amended complaint. Hence, there is no basis upon which to grant this relief. See CPLR 3025(b).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendant KEITH CARPENTIER, made pursuant to CPLR 3211(a)(1) and (a)(5), for an order dismissing the third amended complaint, as against plaintiff HANNAH BUCKSTINE, is denied; and it further

ORDERED that the motion of defendant KEITH CARPENTIER, made pursuant to CPLR 3211(a)(7), for an order dismissing the third amended complaint, as against plaintiff HANNAH BUCKSTINE, is granted; and it further

ORDERED that the cross-motion of plaintiff HANNAH BUCKSTINE, made pursuant to CPLR 3025(b), for an order permitting the amendment of the third amended complaint, as against defendant KEITH CARPENTIER, is denied; and it is further

ORDERED that the third amended complaint is dismissed as to defendant KEITH CARPENTIER; and it is further

ORDERED that the remaining parties shall appear for the previously scheduled compliance conference at 9:30 a.m. on May 9, 2018 in Room 811.

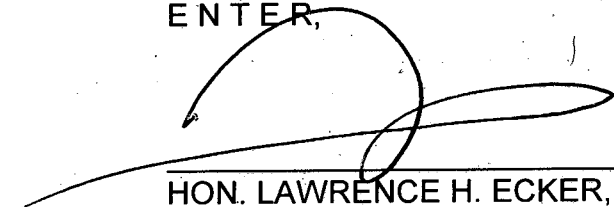
---

<sup>2</sup> Given this ruling, the court is not considering Carpentier's motion to dismiss based upon the expiration of the statute of limitations (CPLR 3211[a][5]).

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York  
May 3 2018

ENTER,



HON. LAWRENCE H. ECKER, J.S.C.

**Appearances**

Todd J. Kroumer, Esq.  
Attorney for Plaintiff  
Via NYSCEF

Miranda Sambursky Slone Sklarin Verveniotis, LLP  
Attorney for Defendants Jordan Schor and Jordan's  
of New Paltz LLC  
Via NYSCEF

McCabe & Mack LLP  
Attorneys for Defendant LCore Enterprises Corp.  
Via NYSCEF

French & Casey, LLP  
Attorneys for Defendant Keith Carpentier  
Via NYSCEF