

<b>Francisco v Kiara Foods, Inc.</b>
2019 NY Slip Op 30709(U)
March 12, 2019
Supreme Court, Kings County
Docket Number: 518317/2016
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12<sup>th</sup> day of March, 2019.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

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JOANEL FRANCISCO AND ADALMYA PAULINO,

*Petitioner,*

Index No.: 518317/2016

DECISION AND ORDER

- against -

KIARA FOODS, INC. D/B/A MANOLO TAPAS RESTAURANT, MRS. II, LLC and LA ROSA FINE FOOD,

*Respondent.*

Motion Sequence #1, #3

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**Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:**

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	<u>1/2, 3/4,</u>
Opposing Affidavits (Affirmations).....	<u>5, 6,</u>
Reply Affidavits (Affirmations).....	<u>7, 8,</u>

After oral argument and a review of the submissions herein, the Court finds as follows:

Plaintiffs Joanel Francisco and Adalmya Paulino<sup>1</sup> (hereinafter “the Plaintiffs”) commenced this action for alleged injuries sustained by Plaintiff Joanel Francisco (hereinafter “Plaintiff Francisco”) at 4165 Broadway, New York, N.Y. (the “Premises”) while employed by Defendant Kiara Foods, Inc. d/b/a Manolo Tapas Restaurant (hereinafter “Defendant Kiara”). The Complaint, *inter alia*, raises causes of action for negligence. In his Verified Bill of Particulars Plaintiff Francisco states in Paragraph 6 that he sustained a “grave injury” in as much as he allegedly suffered a traumatic brain injury resulting in permanent disability. On November 1, 2018, this Court issued a

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<sup>1</sup> Plaintiff Adalmya Paulino, Plaintiff Francisco’s spouse, seeks damages relating to derivative claims of, *inter alia*, deprivation of services.

Decision and Order wherein Ronald V. Zezima, Esq. was appointed Guardian *Ad Litem* for Plaintiff Francisco pursuant to CPLR 1202 (motion sequence #4).

Defendant Kiara moves (motion sequence #1) for an Order pursuant to CPLR 3211(a)(7), or in the alternative pursuant to CPLR 3211(c) to treat this motion as a motion for summary judgment pursuant to CPLR 3212. Defendant Kiara contends that the matter should be dismissed pursuant to CPLR 3211(a)(7) for failing to state a cause of action due to the Workers Compensation bar. Specifically, Defendant Kiara argues that the Plaintiffs are barred from bringing a law suit against Defendant Kiara given that Plaintiff Francisco was employed by Defendant Kiara at the time of the alleged incident and the Workers' Compensation Law prohibits an employee from maintaining the subject claim(s) against his employer. Defendant La Rosa Fine Foods (hereinafter "Defendant La Rosa") also moves (motion sequence #3) for an Order pursuant to CPLR 3211(a)(7), or in the alternative pursuant to CPLR 3211(c) to treat this motion as a motion for summary judgment pursuant to CPLR 3212. Defendant La Rosa contends that the Plaintiffs have failed to state a cause of action given that the alleged incident did not occur at its purported business locations of 4161 and/or 4163 Broadway, New York, N.Y. Defendant La Rosa argues that the injury was sustained at 4165 Broadway and that it has no relationship to this location.

The Plaintiffs oppose these motions and argue that they should be denied. In their Affirmation in Opposition to the Defendant Kiara and Defendant La Rosa motions, the Plaintiffs contend that both motions should be denied as the Complaint states a cause of action and any application for summary judgment is premature. Defendant MRS II Realty, LLC, also opposes the motions by Defendant Kiara and Defendant La Rosa and contends that its cross-claims for

indemnification as against those Defendants should not be dismissed given Plaintiff Francisco's claim of having suffered a grave injury.<sup>2</sup>

Defendant Kiara's 3211(a)(7) Application

The Court grants the application made by Defendant Kiara pursuant to CPLR 3211(a)(7). As the employer of Plaintiff Francisco at the time of the alleged incident, there is a bar against a direct claim of negligence by the Plaintiffs against Defendant Kiara. Generally, in order to prevail 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." *Sokol v. Leader*, 74 A.D.3d 1180, 904 N.Y.S.2d 153, 155 [2<sup>nd</sup> Dept]; see *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Foley v. D'Agostino*, 21 A.D.2d 60, 64–65, 248 N.Y.S. 2d 121. In the instant proceeding, the fact that Plaintiff Francisco has suffered a grave injury does not impact the bar established by the Workers' Compensation Law, since the grave injury exception applies to third party claims for contribution and indemnification. See *Grech v. HRC Corp.*, 150 A.D.3d 829, 829, 54 N.Y.S.3d 433, 435 [2<sup>nd</sup> Dept, 2017]; *Persaud v. Bovis Lend Lease, Inc.*, 93 A.D.3d 831, 832, 941 N.Y.S.2d 208, 210 [2<sup>nd</sup> Dept, 2012].

Even assuming, *arguendo*, that the Court had determined that the Complaint was sufficiently plead as to Defendant Kiara, "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

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<sup>2</sup> As an initial matter, this Court finds that the instant applications do not at this time impact the cross-claims (1<sup>st</sup> through 5<sup>th</sup>) of Defendant MRS II Realty, LLC as against the remaining co-defendants.

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.” *Agai v. Liberty Mut. Agency Corp.*, 118 A.D.3d 830, 832, 988 N.Y.S.2d 644, 647 [2<sup>nd</sup> Dept, 2014]. A review of the facts alleged by the Plaintiffs do not change the Court’s finding in relation to the bar established by the Workers Compensation Law, concerning claims arising from Plaintiffs’ allegations. As a result, the Plaintiffs’ complaint is dismissed as against Defendant Kiara.

*Defendant La Rosa’s 3211(a)(7) Application*

The Court denies the application made by Defendant La Rosa pursuant to CPLR 3211(a)(7). Defendant La Rosa contends that the Plaintiffs’ complaint should be dismissed given that “it did not own, lease, maintain, manage, operate, or control the property where plaintiff allegedly sustained his injury.” However, a Court must “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” *Nonnon v. City of New York*, 9 N.Y.3d 825, 827, 842 N.Y.S.2d 756, 874 N.E.2d 720, quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511. As a result, the Court finds that the Plaintiffs have sufficiently plead a cause of action sounding in negligence as against Defendant La Rosa.

The Court also denies Defendant La Rosa’s application that the Plaintiffs’ complaint be dismissed pursuant to CPLR 3212. In support of this application, Defendant La Rosa relies on a purported copy of the deed for 701 West 176<sup>th</sup> Street, New York, NY (apparently otherwise known as 4161 and 4163 Broadway), a copy of the lease between Defendant La Rosa and Defendant Mrs II Realty, an Affidavit by Jesus Perez, and a copy of the lease between Defendant Kiara and Defendant Mrs II Realty, LLC. Notwithstanding the fact that Defendant La Rosa’s application pursuant to CPLR 3211(a)(7) seeks to rely on the aforementioned evidentiary material submitted, the Court

declines to treat the instant motion as a summary judgment motion pursuant to CPLR 3211(c). *See Hendrickson v. Philbor Motors, Inc.*, 102 A.D.3d 251, 259, 955 N.Y.S.2d 384, 390 [2<sup>nd</sup> Dept, 2012]. The support for the subject motion, documentary or otherwise, is conclusory, not conclusive. The instant application is premature, and the Plaintiffs and Defendant Mrs II, LLC, are entitled to discovery to determine if anyone associated with Defendant La Rosa used, accessed, or otherwise controlled the subject stairs at issue and contributed to the Plaintiffs' injuries. *See Juseinoski v. New York Hosp. Med. Ctr. of Queens*, 29 A.D.3d 636, 637, 815 N.Y.S.2d 183, 184-85 [2<sup>nd</sup> Dept, 2006]. Accordingly, Defendant LaRosa's application is denied.

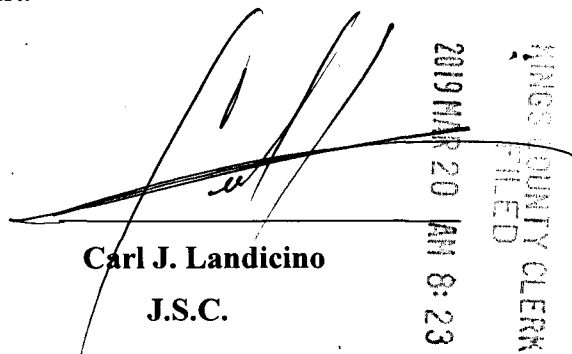
Based on the foregoing, it is hereby ORDERED as follows:

Defendant Kiara's application (motion sequence #1) is granted. The Plaintiffs' complaint is dismissed as against Defendant Kiara.

Defendant LaRosa's application (motion sequence #3) is denied.

This constitutes the Decision and Order of the Court.

ENTER:

  
**Carl J. Landicino**  
 J.S.C.

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