Fleishman v Eastern Union Funding LLC
2019 NY Slip Op 30944(U)
April 4, 2019
Supreme Court, Kings County
Docket Number: 513743/18
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of April, 2019.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

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LEIB FLEISHMAN,

Plaintiff,

- against -

Index No. 513743/18

EASTERN UNION FUNDING LLC,

Defendants,

----------X

The following papers numbered 1 to 5 read herein:	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4
Reply Affidavits (Affirmations)	5

Upon the foregoing papers, defendant Eastern Union Funding LLC (Eastern) moves for an order: (1) dismissing the complaint filed by plaintiff Leib Fleishman (Fleishman), pursuant to CPLR 3012 (b) and 3211, on the grounds that it was not served in a timely fashion, it fails to state a cause of action and it fails to name a

necessary party,[1] and (2) imposing costs and sanctions, and awarding Eastern attorneys' fees, pursuant to 22 NYCRR § 130-1.1 (Part 130).

Background

The Alleged Facts

Eastern allegedly "provided funding" to Elrob Realty LLC a/k/a Eser Realty (Elrob) for the purchase of the premises known as 150 North 12th Street in Brooklyn (Building). Additionally, Eastern "held a mortgage upon" and "was a co-owner" of the Building, which was under construction in May of 2016 (complaint at ¶¶ 6-8 and 21). On or before May 26, 2016, Eastern allegedly hired Fleishman, "*through* his sign company, Bedford Signs," to install signs on the scaffolding of the Building, pursuant to "an oral and/or written contract[,]" (*id.* at ¶¶ 4-5 and 15 [emphasis added]). Eastern was allegedly "aware that [Fleishman] may need to secure, fix and/or steady the scaffolding, where the sign(s) were to be installed" (*id.* at ¶ 25). Eastern allegedly "represented to [Fleishman] that it had . . . permission to install sign(s) upon the scaffolding . . ." from the Building's owner, Elrob, and/or the general contractor, Rubin Development and Construction Inc. a/k/a RDC Inc. (Rubin), and that Fleishman "would be supervised . . ." by Elrob and/or Rubin (*id.* at ¶¶ 18, 22 and 23).

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[1] Notably, while Eastern's notice of motion states that the complaint fails to name a necessary party, Eastern's motion does not discuss this issue as a basis for dismissal.

On or before May 26, 2016, Fleishman allegedly "upheld the terms of the subject contract and was in the appointed location with the aforesaid sign(s) ready for installation[,]" but Elrob and Rubin "did not have any knowledge of the . . . signs installation agreement . . ." because Eastern "never told" Elrob or Rubin about the contract (*id.* at ¶¶ 17 and 19-20). The complaint alleges that on May 26, 2016, while Fleishman was installing a sign at the Building, he was injured when "he was caused to fall from a ladder" (*id.* at ¶ 28).

On July 3, 2018, Fleishman commenced this action against Eastern by filing a summons with notice. On July 9, 2018, before Eastern was served, Eastern served and filed its demand for the complaint. On July 31, 2018 (22 days later), Fleishman filed his complaint, alleging that he sustained personal injuries as a result of Eastern's breach of contract and violation of Labor Law §§ 200, 240 (1) and 241 (6).

Eastern's Dismissal Motion

On August 2, 2018, Eastern filed this pre-answer motion to dismiss Fleishman's complaint on the grounds that: (1) the complaint fails to state a cause of action for breach of contract or violation of the Labor Law, and (2) the complaint was belatedly filed more than 20 days after Eastern served and filed a demand for the complaint.

In support of its dismissal motion, Eastern submits the affidavit of Abraham Bergman (Bergman), Eastern's managing partner, who attests that "Eastern did not own, operate, manage, or otherwise have any interest in the [Building] in 2016 when

Plaintiff was allegedly injured . . ." and "Eastern did not supervise any of the work allegedly performed by plaintiff . . . at the [Building], and had no control or supervision over any aspect of the work . . ."

Eastern contends that dismissal of Fleishman's first cause of action for breach of contract is warranted because Eastern "can have no liability to a third party for personal injuries under a theory of breach of contract, when it had nothing to do with the [Building] or worksite, the actual installation of the signs, or owed any duty of care to the plaintiff." Eastern also argues that "[t]here is no proximate cause between an alleged misrepresentation in a contract to install a sign and injuries allegedly sustained by plaintiff. Eastern further asserts that "according to the complaint's allegations . . . any contract, if there was one at all, was by and between defendant and Bedford Signs, not the plaintiff."

Eastern argues that Fleishman's second cause of action for violation of Labor Law § 200 should be dismissed because "[t]here is no evidence whatsoever that defendant is an owner, contractor, or exercised any control or supervision of the [Building] or work at any time relevant to this lawsuit." Based entirely on Bergman's affidavit, Eastern argues that "the allegations in the complaint that defendant either owned, controlled, managed, operated, supervised, maintained, provided funding for, or held a mortgage on the property [are] patently false . . ." Eastern further argues that "nowhere in [the] Complaint is there any allegation that [it] controlled, managed, operated, or supervised the installation of any sign."

Regarding Labor Law §§ 240 (1) and 241 (6), Eastern argues that "liability cannot be imposed, on a party who was not the owner of the property, or a contractor and did not have any control over the workplace." Eastern also seeks dismissal, pursuant to CPLR 3012 (b), on the ground that Fleishman failed to timely file his complaint in response to Eastern's July 9, 2018 demand.

Fleishman's Opposition

Fleishman, in opposition, argues that "[u]nder the Labor Law . . . the term, 'owner' encompasses a person who has an interest in the property, and who fulfilled the role of the owner by contracting to have work performed for its benefit" and "includes a lessee who has 'the right or authority to control the work site, even if the lessee did not hire the general contractor.'" Notably, Fleishman does not reference any of his allegations in the complaint. Instead, Fleishman submits: (1) email communications between Eastern and Bedford Signs, in which Eastern directs Bedford Signs to install signs on the Building, and (2) a purported "picture" of the Building. Fleishman also submits "Google search" results purporting to show that Eastern "brokered a deal for $18,000,000 on behalf of the owner in order to continue building . . ." Fleishman contends that "[t]he true nature of the relationship between defendant EASTERN . . . and the listed owner of the building, ELROB[,] specifically as to why the listed owner gave the defendant . . . the authority to install signs and the extent of their actual relationship needs to be revealed during discovery."

Fleishman also opposes dismissal of his breach of contract claim based entirely on the following argument:

> "It is plaintiff's position, that defendant represented to the plaintiff, that he would be supervised during the sign installation by itself, acting as an agent of the owner, or by the owner, or the General Contractor. However, during his installation plaintiff was left alone and not supervised, thus defendant breached the contract with the plaintiff and as a result of the breach, in not being supervised, plaintiff's ladder moved and fell, thereby damaging the plaintiff with a fractured elbow requiring surgery, as well as other injuries."

Fleishman, once again, does not reference any of the allegations in his complaint.

Fleishman contends that, as a procedural matter, dismissal pursuant to CPLR 3012 (b) would be improper because Eastern served a demand for the complaint "two weeks prior to ever having be[en] served with the Summons with Notice." Fleishman submits a copy of his affidavit of service reflecting that he did not serve Eastern with his summons and notice until July 24, 2018. Fleishman argues that Eastern's demand for a complaint and dismissal motion were "premature, and [are] thus a nullity."

Eastern's Reply

In reply, Eastern argues that Fleishman "is making a preposterous, self-serving, false, and conclusory *allegation* that [it] is the owner of the property, or a silent partner in the ownership of the property . . ." (emphasis added). Eastern submits an *uncertified* copy of Fleishman's deposition testimony in a related Labor

Law action previously commenced by Fleishman against Elrob and Rubin,[2] and notes that Fleishman "testified that he doesn't know who the owner of the building is." Eastern also contends that the Google search results that Fleishman submitted in opposition to its dismissal motion "don't support Plaintiff's claim of [Eastern's] ownership [and] demonstrate that [Eastern] was simply a mortgage broker." Eastern asserts that "[t]here is absolutely no need for any discovery on this issue" because "[t]here isn't anything at all anywhere that would yield anything . . . contrary to [Bergman's] affidavit."

Eastern further argues that "[i]f the allegedly dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, liability does not attach under the common-law or under the Labor Law." Eastern asserts that Fleishman "testified [in the Related Action] that no one at the property provided him with any equipment or told him how to do the job" and "[t]here is also no evidence that [it] exercised supervisory control or had any input into how the sign was to be hung." Eastern also asserts that "Plaintiff's claim does not fall within the purview of [the] Labor Law . . ." because Fleishman was not "engaged in the type of activities enumerated, i.e. the demolition, construction, alteration, or repair of a building or structure."

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[2] *See Fleishman v Elrob Realty LLC a/k/a Eser Realty, et ano.*, Kings County index No. 510576/16 (Related Action).

Discussion

Eastern's Dismissal Motion

"In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211 (a) (7) 'the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail'" (*Quinones v Schaap*, 91 AD3d 739, 740 [2d Dept 2012] [quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)]). "The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference" (*Hense v Baxter*, 79 AD3d 814, 815 [2d Dept 2010]). Importantly, affidavits that contradict factual allegations in the complaint cannot establish the failure to state a legally cognizable cause of action (*Alsol Enterprises, Ltd. v Premier Lincoln-Mercury, Inc.*, 11 AD3d 493, 494 [2d Dept 2004] [holding that "[t]o the extent that the affidavit of the defendant's general manager and the affirmation of its attorney, both submitted in support of the motion, contradicted the complaint, they did not 'conclusively establish that the [plaintiff] has no cause of action' ... but merely disputed some of the factual allegations in the complaint"]).

The complaint herein alleges that "plaintiff, LEIB FLEISHMAN, "*through Bedford Signs* and defendant, EASTERN ... had an oral and/or written contract for plaintiff to install sign(s) at [the Building]" (complaint at ¶ 15 [emphasis added]).

While the complaint is not artfully worded, paragraph 15 of the complaint alleges that the sign installation contract was between Eastern and Bedford Signs. The complaint does not allege that Eastern and Fleishman entered into a contract. Absent privity of contract between Fleishman and Eastern, Fleishman cannot assert a breach of contract cause of action against Eastern (*Martirano Const. Corp. v Briar Contracting Corp.*, 104 AD2d 1028, 1030 [2d Dept 1984] [holding that "(i)nasmuch as the pleadings fail to indicate that Tishman and Girl Scouts were in privity of contract with Martirano, that portion of the fourth cause of action which sounds in breach of contract must also be dismissed as to them"]; *see also Outrigger Const. Co. v Bank-Leumi Tr. Co. of New York*, 240 AD2d 382, 383 [2d Dept 1997] ["plaintiff may not assert a contractual cause of action against a party with whom it was not in privity"]). Accordingly, dismissal of Fleishman's first cause of action for breach of contract is warranted.

Labor Law § 200 is a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2d Dept 2000]). "It is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner . . . under section 200 of the Labor Law" (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Here, Fleishman's complaint fails to state a cause of action for violation

of Labor Law § 200, as there is no allegation within the complaint that Eastern exercised supervision or control over Fleishman's installation of the signs.

"It is settled law that owners are subject to liability under Labor Law §§ 240 (1) and 241 (6) (*Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]). Further, the duty imposed by these statutes is nondelegable, and an owner who breaches that duty may be held liable in damages regardless of whether it has actually exercised supervision or control over the work (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Here, the complaint alleges that Eastern is a "co-owner" of the Building and, as such, may be subject to liability under Labor Law §§ 240 (1) and 241 (6). Although Eastern attempts to establish that it is not an owner by submitting the Bergman affidavit, such affidavit testimony, which merely contradicts the allegations in the complaint, cannot be considered on a pre-answer dismissal motion. The complaint, therefore sufficiently states a cause of action for violation of Labor Law §§ 240 (1) and 241 (6).

Accordingly, Eastern's motion to dismiss Fleishman's second cause of action for violation of the Labor Law is granted, to the extent that Fleishman's claim under Labor Law § 200 is dismissed.

Eastern's Motion For Sanctions

Eastern also moves for an order, pursuant to 22 NYCRR Part 130-1.1 (hereinafter Part 130), awarding it litigation costs and attorneys' fees, as "Plaintiff's actions here are being undertaken purely to harass and annoy defendant, and has

little to do with any merits" since "there are absolutely no facts whatsoever which can support that defendant owned, controlled, managed, operated, or maintained the [Building] on May 26, 2016." Eastern further argues that the imposition of Part 130 sanctions is warranted because "Plaintiff has no factual basis to make a proper and viable allegation [and] the complaint in this case is clearly frivolous . . ."

Pursuant to Part 130, the court, in its discretion, may award a party to an action "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part," and, in addition to awarding such costs, may impose financial sanctions upon a party. Conduct constitutes "frivolous conduct" under Part 130 where it "is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," or where "it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." Section 22 NYCRR 130-1.1 (c) provides that "[i]n determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

Here, Eastern has failed to demonstrate that Fleishman's conduct rose to the level of "frivolous conduct" within the meaning of Part 130. Accordingly, it is

ORDERED that Eastern's motion to dismiss is granted, to the extent of dismissing plaintiff's first cause of action for breach of contract and that portion of plaintiff's second cause of action based on Labor Law § 200; and it is further

ORDERED that the branch of Eastern's motion seeking an award of costs, sanctions and attorneys' fees is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

KINGS COUNTY CLERK
FILED
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HON. WAVNY TOUSSAINT
J. S. C.