| **M.N.C. Gen. Contrs. Corp. v R.V.M. Carpentry, Inc.** |
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| 2019 NY Slip Op 32372(U) |
| August 6, 2019 |
| Supreme Court, Kings County |
| Docket Number: 521192/2018 |
| Judge: Debra Silber |
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At an IAS Term, Part 9 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 6th day of August, 2019.

PRESENT:

HON. DEBRA SILBER,
Justice.

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M.N.C. General Contractors Corp.
d/b/a MNC + SONS CONTRACTORS,

Plaintiff,

- against -

R.V.M. CARPENTRY, INC.,

Defendant.

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DECISION/ORDER

Index No. 521192/2018

Motion Sequence No. 1

| The following papers number 1 to 4 read herein: | Papers Numbered |
| --- | --- |
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1-2 |
| Opposing Affidavits (Affirmations) | 3 |
| Reply Affidavits (Affirmations) | 4 |

Upon the foregoing papers, defendant, R.V.M. Carpentry, Inc. (defendant or RVM), moves for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the summons and complaint of plaintiff, M.N.C. General Contractors Corp. d/b/a MNC+Sons Contractors. For the reasons which follow, the motion is granted.

***Background***

This action was commenced by electronically filing a summons and verified complaint with this court on October 19, 2018 and was originally a second third-party action to *Wojtasiewicz v Chehebar* (index no. 503298/2014), also filed in this court. By order dated September 6, 2018 in the underlying action, the present action was severed.

The complaint alleges that plaintiff was the general contractor for a construction project in which a new single family residence was to be erected at 2008 East 4th Street in Brooklyn. As the general contractor, plaintiff hired the various trade subcontractors, among them defendant RVM and nonparty Old Fashion Woodworking, Inc. (OFW).[1] Plaintiff herein hired OFW to construct a large (approximately ten feet by ten feet on the drawing [E-file Doc #274] oak staircase for the residence.

Jaroslaw Wojtasiewicz, an OFW employee and the plaintiff in the underlying action, alleges that he sustained injuries at the site when he fell through a temporary plywood cover or platform over the opening on the first floor[2] and struck the basement floor below. The underlying complaint alleges that plaintiff MNC herein, the general contractor, is both vicariously responsible for violations of the Labor Law and is liable for negligence. Wojtasiewicz further claims that the contractor's negligent acts and omissions and Labor Law violations proximately caused his injuries.

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[1] Described as a millwork subcontractor.

[2] Plaintiff herein and the other parties in the underlying action acknowledge Wojtasiewicz's allegations but nevertheless dispute his account of the accident.

As relevant to the instant action, after a note of issue was filed in the underlying action, plaintiff herein impleaded defendant RVM. Plaintiff's complaint asserts that defendant was the subcontractor responsible for installing the subfloors (windows and other items) at the construction site. Plaintiff argues that Wojtasiewicz's contentions in the underlying action suggest that defendant's MNC's work was negligent. Accordingly, plaintiff MNC asserts claims against RMV for contribution, indemnity and breach of a written covenant to maintain a general commercial liability policy insuring plaintiff.

Defendant subsequently interposed an answer with counterclaims. Defendant then moved to sever this action; that motion was granted. Shortly after the instant action was severed, defendant served and filed the instant motion to dismiss.

***Movant's Supporting Arguments***

In support of its motion, defendant first addresses plaintiff 's claim in the underlying action that he fell through the first floor of the site and struck the basement floor. Defendant asserts that, according to Wojtasiewicz, the accident occurred when a first-floor temporary "platform" collapsed. Defendant then turns to MNC's deposition testimony in the underlying action. Defendant RMV claims that MNC's co-owner Aviran Nachum (E-file doc # 37) gave sworn testimony on its behalf and notes that his testimony indicates that OFW installed the subject platform. Defendant further points out that the same deposition indicates that defendant RMV had no presence at the site on the day of the underlying accident. Morever, defendant adds, the deposition testimony indicates that defendant had finished construction of the plywood "subfloor" at least ten months prior to the date of the alleged accident.

Defendant also claims that in this deposition, plaintiff MNC's principal has, in essence, admitted that defendant's subfloor construction work had no role in the underlying accident.

Defendant claims that the transcript of MNC's witness' sworn testimony, given in the underlying action speaks for itself and demonstrates that defendant's subfloor construction was not a factor in the underlying accident. Defendant argues that, therefore, the transcript constitutes evidence establishing a complete defense to the claims in this action. Moreover, defendant points out that plaintiff has relied on this witness' sworn testimony in litigating the underlying action. Defendant argues that, therefore, plaintiff herein should not now be permitted to ignore its principal's sworn testimony simply because it undermines the theory of its instant action. For these reasons, defendant concludes that plaintiff has not asserted any viable causes of action against it, and, accordingly, this court should grant the instant motion to dismiss the action.

***Plaintiff's Opposing Arguments***

In opposition to the motion to dismiss, plaintiff argues that although Wojtasiewicz has proffered several accounts of his accident, the multiple accounts have one common element: he fell and struck the basement floor because plywood collapsed underneath him. Irrespective of whether the plywood was permanent or temporary, plaintiff continues, defendant was contractually obligated to install (and did install) the plywood subfloor. Plaintiff reasons that the accident thus arose out of defendant's work. Plaintiff further points out that its written trade agreement with defendant contains a broad indemnity provision, in favor of plaintiff, which is unambiguous, enforceable, applicable and was in effect at all relevant times. Moreover, plaintiff adds, the subject written agreement also obligated

defendant to purchase and maintain a general commercial liability policy that insured plaintiff. Plaintiff asserts that in the event it is found vicariously liable for the underlying accident, those written contract provisions form the basis for meritorious (formerly third-party) claims against defendant RMV. For these reasons, plaintiff concludes that the instant motion should be denied.

Alternatively, plaintiff claims that defendant's arguments for dismissal are based upon a misrepresentation of the underlying record. Plaintiff states that defendant's claim that MNC's co-owner stated under oath that the subject accident had nothing to do with RVM's work is false.

Plaintiff points out that the discussion of "platforms" at the deposition involved Mr. Nachum, MNC's witness, discussing what he had heard from other sources. It was not, as defendant claims, an admission that the accident actually involved a platform that was not constructed by defendant. Indeed, plaintiff avers, MNC's deposition witness did not observe the accident and could not aver to the facts surrounding it. In any event, continues plaintiff, the record contains statements from other deposition witnesses (including Wojtasiewicz and the OFW witness) which indicate that the quality of the plywood subfloor installed by defendant was certainly involved in the accident. In fact, plaintiff notes, one deposition witness (Wojtasiewicz's boss) explicitly states that the accident could not have possibly occurred as described by plaintiff because there was no "temporary plywood surface," on a "platform" or otherwise, at the site's first floor on the date of the alleged accident. At least, plaintiff MNC argues, the underlying record indicates the existence of a factual issue as to

defendant's responsibility for the alleged accident. For this additional reason, plaintiff concludes that this court should deny the instant motion.

***Discussion***

In considering a motion to dismiss, the pleadings "must be given their most favorable intendment" (*Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]). However, a complaint containing factual claims that are flatly contradicted by documentary evidence should be dismissed (*Well v Rambam,* 300 AD2d 580, 581 [2002]; *Kenneth R. v Roman Catholic Diocese of Brooklyn,* 229 AD2d 159, 162 [1997], *cert. denied* 522 US 967 [1997]). To properly support a motion for dismissal pursuant to CPLR 3211 (a) (1), the contents of the proffered documentary evidence must be "essentially undeniable" (*Fontanetta v John Doe 1*, 73 AD3d 78, 85-85 [2d Dept 2010], citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22). Examples of such "essentially undeniable" documentary evidence include judicial records, mortgages, deeds, contracts, written agreements (such as trust and lease agreements) and notes (*Fontanetta*, 73 AD3d at 84-85). Documents that are, in essence, unilaterally created by a party (such as affidavits, letters, notes or file documents) do not contain "essentially undeniable" information and thus do not properly support a motion to dismiss pursuant to CPLR 3211 (a) (1) (*Fontanetta*, 73 AD3d at 85-86). "In sum, to be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta*, 73 AD3d at 86, citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22).

In considering a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, "the pleadings must be liberally construed" and "[t]he sole criterion is whether from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Gershon v Goldberg*, 30 AD3d 372, 373 [2d Dept 2006], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Dinerman v Jewish Bd. of Family & Children's Servs., Inc.*, 55 AD3d 530, 531 [2d Dept 2008]; *Morone v Morone*, 50 NY2d 481, 484 [1980]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). This court may consider affidavits and other evidentiary material submitted by the movant to establish conclusively that no viable cause of action exists (*Simmons v Edelstein*, 32 AD3d 464, 465 [2006]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). A court considering a motion to dismiss must both accept as true the allegations in the complaint and afford the plaintiff the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Great Eagle Intl. Trade, Ltd. v Corporate Funding Partners, LLC*, 104 AD3d 731 [2d Dept 2013]). Nevertheless, allegations in the complaint that either consist of bare legal conclusions or contain factual claims flatly contradicted by the record are not entitled to favorable inferences (*see e.g. Garber v Board of Trustees of State Univ. of N.Y.*, 38 AD3d 833, 834 [2007]; *see also Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]; *Doria v Masucci*, 230 AD2d 764 [2d Dept 1996], *lv denied* 89 NY2d 811 [1997]). In essence, the court must determine whether the alleged causes of action are sustainable "upon any reasonable view of the facts as stated" (*Schneider v Hand*, 296 AD2d 454, 454 [2d Dept 2002]; *see also Manfro v McGivney*, 11 AD3d 662, 663 [2d Dept 2004]).

For purposes of CPLR 3211 (a) (1), deposition transcripts are not documentary evidence (*In re Walker*, 117 AD3d 838, 839 [2d Dept 2014] ["Court should not have considered an affidavit and a transcript of deposition testimony submitted by LIU in determining whether the petition should have been dismissed, as neither qualifies as documentary evidence"]; *Fontanetta*, 73 AD3d at 84-85).

However, with regard to the branch of the motion for dismissal under CPLR 3211(a)(7), plaintiff's co-owner Aviran Nachum's acknowledgment in his deposition testimony that the work on the permanent subflooring was completed by RVM many months before the accident, that defendant RVM was not present on the site on the date of the accident, that the subflooring was not altered or modified in any way after RVM completed it, that MNC installed a guardrail around the opening after RVM finished the subfloor which was removed by Old Fashion so the staircase could be installed, and that plaintiff was injured as a result of the collapse of a platform/landing constructed by plaintiff's employer Old Fashion which was not secured, defendant has shown that the allegations in the pleading as to defendant R.V.M. Carpentry's involvement in the subject accident, a "material fact as claimed by the pleader to be one[,] is not a fact at all" (*Thaw v N. Shore Univ. Hosp.*, 129 AD3d 937, 938 [2d Dept 2015]).

Accordingly, the motion is granted and the complaint is dismissed. Defendant's counterclaims, all related to the plaintiff's claims, are dismissed as academic.

The foregoing constitutes the decision and order of the court.

**E N T E R,**

**Hon. Debra Silber, J S.C.**

Hon. Debra Silber
Justice Supreme Court