Vazquez v City of New York
2019 NY Slip Op 33168(U)
October 10, 2019
Supreme Court, New York County
Docket Number: 155892/2018
Judge: Doris Ling-Cohan

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DORIS LING-COHAN PART IAS MOTION 36
Justice

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INDEX NO. 155892/2018

MOTION DATE

MOTION SEQ. NO. 001

RUBEN VAZQUEZ,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES (DHS), ACACIA NETWORK HOUSING, INC., ACACIA NETWORK, INC., THE PROMESA HOUSING DEVELOPMENT FUND CORPORATION, NBX ACQUISITION, LLC, SERA SECURITY SERVICES, LLC, JOHN DOE, JOHN DOE

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 32, 40

were read on this motion to/for DISMISS.

DORIS LING-COHAN, J.:

Upon the foregoing documents, it is

ORDERED that this pre-answer motion by defendants NBX Acquisition, LLC ("NBX Acquisition"), The City of New York ("City of New York"), and The New York City Department of Homeless ("DHS") (collectively "movants") for an order, pursuant to CPLR 3211, dismissing the complaint as against them, is granted as to DHS only, and denied as to NBX Acquisition and the City of New York, as detailed below.

This action was commenced on or about June 22, 2018 against defendants after plaintiff Ruben Vazquez, a resident of the homeless shelter located at 102 West 128th Street, New York, NY 10027 (the "subject premises"), sustained injuries on October 21, 2017 while at the shelter. Plaintiff alleges he was assaulted by defendant John Doe, another resident at the shelter, whom repeatedly struck him with a metal object. Plaintiff claims that defendants, their agents, servants,

and employees: (1) were negligent in their ownership, operation, control, inspection, maintenance, repair, and supervision of the premises; and (2) failed to provide adequate and proper security for the protection of plaintiff, failed to prohibit dangerous instruments on the premises, failed to properly screen residents, and failed to provide a safe environment for the plaintiff. Plaintiff also claims that defendants were negligent in their screening, retention, and supervision of employees.

Defendants NBX Acquisition, City of New York, and DHS move collectively to dismiss the complaint as against them, arguing that they are not proper parties to this action. With respect to defendant NBX Acquisition, movants contend that such defendant is an out-of-possession owner, that had no control over the premises and did not participate in the operation of the subject premises. Movants further argue that because Promesa Housing Development Fund Corporation ("Promesa"), also a named defendant in this action, is the operator of the shelter, the claims against all three movants should be dismissed.

In support of their motion, movants submit as documentary evidence, a copy of a lease agreement between NBX Acquisition, as landlord, and Promesa, as tenant in possession, dated September 16, 2014 ("subject lease") (Aff. In Support, Ex. E). According to the terms of such lease, the building is to be operated as a transitional housing facility, pursuant to a separate agreement between Promesa and DHS. *Id.*

In seeking dismissal pre-answer and prior to any discovery, movants contend that Sections 8.1 and 26.7 of the subject lease clearly establish that NBX Acquisition cannot be held liable for claims such as the ones asserted in this action. (Aff. In Support, 5, 10). Section 8.1 of the subject lease states that Tenant, "at its sole cost and expense" is to "indemnify and hold harmless Landlord and Landlord Parties against and from any and all claims by or on behalf of any Person arising from or in connection with … (d) any accident, injury or damage whatsoever caused by Tenant or Tenant Parties to any person or persons …" (Aff. In Support, Ex. E). Section 26.7 states that "Landlord shall not be deemed, in any way or for any purposes, to have become, by the execution of this Lease, or any action taken under this Lease, a partner of Tenant

in Tenant's business or otherwise or a member of any joint enterprise with Tenant. The sole relationship of the parties is that of Landlord and Tenant". *Id.*

Movants also rely upon an affidavit from Joshua Schwartz, a managing member of NBX Acquisition, who asserts that NBX did not retain a right of reentry to the premises, does not participate in management or maintenance, in providing security, in screening employees or residents at the shelter, and does not have any knowledge of the occupants at the premises. (Schwartz Aff, Ex. G).

Movants also argue that DHS is an improper defendant because it is an agency of the City of New York, and, pursuant to the New York City Charter, "any action or proceeding to recover penalties for violations of law must be brought in the name of the City of New York, not in the name of a City Agency" (Aff. In Support, 19; NY City Charter Sec. 396).

In opposition, plaintiff makes the following arguments: (1) movants' motion was untimely because it was served twenty-one (21) days after service of the Supplemental Summons and Amended Complaint; (2) movants are barred from seeking dismissal based upon documentary evidence because they waived their right to do so; (3) DHS provides training and guidance for security at transitional housing facilities and DHS owns all security equipment; (4) the subject lease indicates that DHS refers occupants to the shelter and were negligent in referring and retaining residents that would pose a danger to others; and (5) further discovery is needed to determine NBX Acquisition's degree of control over the premises, whether NBX Acquisition was engaged in a joint venture according to its obligations under the subject lease, and for the production of the contract between Promesa and DHS, which the subject lease refers to, but was not supplied in the within submissions (Aff. In Opp.).

In reply, movants maintain that their motion was timely filed, since while their answers were due on January 27, 2019 (twenty days [20] days after plaintiff filed the Amended Complaint on January 7, 2019), because January 27, 2019 fell on a Sunday, they had until the following business day, January 28, 2019, to file the instant motion, which they did. As to plaintiff's remaining arguments, movants reiterate their position that the subject lease establishes

Promesa as the operator of the homeless shelter, and not any of the movants, and that NBX Acquisition has no business relationship with the tenant, nor any such landlord/tenant relationship with occupants of the subject premises. Movants further maintain that the provisions of the subject lease that plaintiff relies upon in opposition, are irrelevant and insufficient to rebut the documentary evidence that movants have submitted.

DISCUSSION

Pursuant to CPLR 3025(d), service of responses to amended or supplemental pleadings "shall be made within twenty days [20] days after service of the amended or supplemental pleading to which it responds". However, "when any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a ... Sunday ..., such act may be done on the next succeeding business day ..." (Gen. Constr. Law § 25-a [1]).

Here, plaintiffs served their amended pleadings on January 7, 2019, and, therefore, service of responses to such amended pleadings were to be made within twenty (20) days, on January 27, 2019. However, as correctly asserted by movants, because January 27, 2019 fell on a Sunday, defendants were entitled to the benefit of Gen. Constr. Law Sec. 25-a, and had until the following business day (January 28, 2019) to file their motion, which defendants did in fact do. Thus, defendants' motion was timely.

On a motion to dismiss, pursuant to CPLR 3211, the pleading is given a liberal construction and the facts alleged therein are accepted as true. *Leon v Martinez*, 84 NY2d 83, 87 (1994). The motion to dismiss will only be granted if, upon giving the non-party every favorable inference, the facts do not fit within any cognizable legal theory. *Id.* at 87-88.

Dismissal under CPLR 3211(a)(1) is warranted "only where the documentary evidence 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 NY2d 314, 326 [2002]). "To be considered 'documentary' under CPLR 3211(a)(1), evidence must be unambiguous and of undisputed authenticity" (*Fontaneta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010] [citation omitted]).

Judicial mortgages, deeds and contracts constitute documentary evidence (*id.* at 84), but affidavits and deposition testimony are not considered documentary evidence (*see Lowenstern v Sherman Sq. Realty Corp.*, 143 AD3d 562, 562 [1st Dept 2016]; *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 651 [1st Dept 2011]). "[T]he paper's content must be "essentially undeniable and ..., unassuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014][internal citation omitted]). Affidavits that do no more than "assert the inaccuracy of plaintiff['s] allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint" (*Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007]).

NBX Acquisition

"It is well settled that an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless that entity retained control of the premises or is contractually obligated to repair the unsafe condition." (*Putnam v Stout*, 38 NY2d 607 [1976] [citations omitted]; *see also Jackson v United States Tennis Assoc.*, 294 AD2d 470 [2d Dept 2002]; *Dixon v Nur-Hom Realty Corp.*, 254 AD2d 66 [1st Dept 1998]. Additionally, an out-of-possession owner with limited rights of entry cannot be held liable for an assault that occurred on the premises that tenant operated (*Regina v Broadway-Bronx Motel Co.*, 23 AD3d 255 (1st Dept 2005); *see DeLeon v Port Auth.*, 306 AD2d 146 (1st Dept 2003). Furthermore, a landlord has no duty to protect a resident of a homeless shelter from abuse by another resident of the shelter, where landlord and tenant in possession, the homeless shelter, entered into a contract under which the tenant assumed the obligation to operate the shelter, pursuant to a separate contract with the city (*Rivera v 760-770 East Tremont Ave. Housing Dev.*, 21 AD3d 321 [1st Dept 2005]).

Here, as indicated above, in support of their motion to dismiss based upon documentary evidence, movants produced a lease between NBX Acquisition and Promesa, to demonstrate that NBX Acquisition did not retain control of the premises and that Promesa, not the City of New York, nor DHS, is the operator of the homeless shelter. Movants fail, however, to allude to a specific provision in the lease, which would show that NBX Acquisition was an out-of-possession landlord, that had no control over the premises and did not participate in the operation

of the premises. Instead, movants rely on Section 8.1 of the subject lease, the indemnification provision, which does not provide language that would show whether NBX Acquisition had control of the premises, or whether NBX Acquisition participated in the operation of the premises. Further, the affidavit submitted by a managing member of NBX Acquisition, to support its argument that it is an out-of-possession landlord, cannot be considered on this motion to dismiss, as it does not constitute as "documentary evidence" within the meaning of CPLR 3211. As the subject lease does not conclusively establish that NBX Acquisition was an out-of-possession landlord, dismissal is not warranted, at this juncture (pre-answer and without discovery), with respect to NBX Acquisition. Moreover, plaintiff argues that NBX Acquisition was in a joint venture with Promesa, DHS, and the City of New York. However, review of such argument is premature at this juncture, and similar to movants' out-of-possession landlord argument above, further discovery is needed as to such assertion.

The City of New York and DHS

With respect to dismissal as to defendants City of New York and DHS on the basis that they did not operate the shelter, notably, the subject lease refers to a separate contract between DHS and Promesa, which has not been supplied in the within submissions. Moreover, since the subject lease refers to DHS in multiple sections, movants failed to establish that dismissal is warranted at this juncture, as their role within the shelter is unclear (Aff. In Support, Ex. E).[1] Thus, dismissal is denied as to the City of New York and DHS on the basis that they did not operate the shelter.

Nevertheless, dismissal is warranted as to DHS, based upon the New York City Charter. Specifically, pursuant to Section 396, any action or proceeding seeking to recover penalties for violations of law must be brought against the City of New York, and not against the City agency. It has been established that such section "has been construed to mean that any plaintiff's action

[1] For example, Section 2.1 ("renewal and rent increases shall be subject to DHS approval"), Section 3.2 ("[a]fter the first six months of the lease or if sooner, DHS may terminate the Emergency Declaration and enter into an Agreement with Tenant whereby Tenant shall operate the Premises as an approved contracted facility), Section 4.2.3 ("[p]urchasing and installing furnishings in all units, pursuant to the procurement standards set by DHS. ... The purchase price of the furnishings cannot exceed the prices set by DHS).

arising out of City activities must be brought against the City of New York" directly (*NY City Charter § 396*; *see also Paporters v Campos*, 122 AD3d 521 [1st Dept 2013] [Dept. of Sanitation is not a suitable entity as a defendant and plaintiff should have sued the City of New York]; *Gil v The City of New York*, 143 AD3d 572 [1st Dept 2016][(NYC Dept. of Parks and Recreation was not an entity subject to be sued]; *Siino v Department of Educ. Of City of New York*, 44 AD3d 568 [1st Dept 2007] [Dept. of Investigation is not a proper part as it is a city agency]; *Carpenter v NYCHA*, 146 AD3d 674 [1st Dept 2017] [the Court found the NYPD and "Human Resources" to be agencies of the City of New York and are therefore not amendable to be sued]). "Penalties" as used in this section is not limited to recovery of money damages, but also applies to actions or proceedings that seek injunctive relief (*NY City Charter § 396*). Therefore, the complaint is dismissed as to defendant DHS.

Accordingly, for the foregoing reasons, it is

ORDERED that the motion to dismiss, pursuant to CPLR 3211, by defendants NBX Acquisition, LLC, The City of New York, and The New York City Department of Homeless Services, is granted as to The New York City Department of Homeless Services only, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant, and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption of this case is amended to reflect the dismissal against defendant The New York City Department of Homeless Services and that all future papers filed with the Court bear the amended caption as follows:

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RUBEN VAZQUEZ,

Plaintiff

- v -

THE CITY OF NEW YORK, ACACIA NETWORK

HOUSING, INC., ACACIA NETWORK, INC., THE PROMESA HOUSING DEVELOPMENT FUND CORPORATION, NBX ACQUISITION, LLC, SERA SECURITY SERVICES, LLC, JOHN DOE, JOHN DOE

Defendant

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It is further

ORDERED that, within 30 days of entry, counsel for defendant The New York City Department of Homeless Services shall serve a copy of this order with notice of entry upon all parties and the Clerk of the Court (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to amend their records accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

Dated: October 10, 2019

Hon. Doris Ling-Cohan, J.S.C.

CHECK ONE:	☐	CASE DISPOSED			X	NON-FINAL DISPOSITION	
	☐	GRANTED	☐	DENIED	X	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE

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