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| Lanza v 1301 Props. Owner, LP |
| 2019 NY Slip Op 33432(U) |
| November 20, 2019 |
| Supreme Court, Suffolk County |
| Docket Number: 17289/2015 |
| Judge: Sanford Neil Berland |
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SHORT FORM ORDER

INDEX NO.: 17289/2015

ORIGINAL

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:

Hon. Sanford Neil Berland, A.J.S.C.

GREGORY LANZA,

Plaintiff(s),

-against-

1301 PROPERTIES OWNER, LP, 1301 PROPERTY OWNER, LLC, CAMERON MITCHELL RESTAURANTS, LLC, CERTIFIED OF N.Y., INC., ROWAN CONSTRUCTION CO., INC., and PARAMOUNT GROUP, INC.,

Defendant(s).

ORIG. RETURN DATE: September 25, 2018
FINAL RETURN DATE: January 8, 2019
MOT. SEQ.#: 007-MD

PLAINTIFF'S ATTORNEY:

SIBEN & SIBEN, ESQS.
90 East Main Street
Bay Shore, New York 11706

DEFENDANTS' ATTORNEYS:

BELLO & LARKIN, ESQS.
Attorneys for 1301 Properties and Paramount Group, Inc.
150 Motor Parkway, Suite 405
Hauppauge, New York 11788

CERTIFIED OF N.Y., INC.,

Third-Party Plaintiff,

-against-

ENERGY 1 SYSTEMS, INC.,

Third-Party Defendant.

LITCHFIELD & CAVO LLP
Attorneys for Certified of NY, Inc.
420 Lexington Avenue, Suite 2104
New York, New York 10170

CASCONE & KLUEPFEL LLP
Attorneys for Energy 1 Systems, Inc.
1399 Franklin Avenue, Suite 302
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1301 PROPERTIES OWNER, LP, 1301 PROPERTIES OWNERS, L.L.C. and CAMERON MITCHELL RESTAURANTS, LLC,

Second Third-Party Plaintiffs,

-against-

ENERGY 1 SYSTEMS, INC.,

Second Third-Party Defendant.

STEVEN E. LOSQUADRO, PC
649 Route 25A, Suite 4
Rocky Point, New York 11778

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CERTIFIED OF N.Y., INC.,

Second Third-Party Plaintiff,

-against-

ROWAN CONSTRUCTION CORP., a/k/a ROWAN
CONSTRUCTION CO., INC.,

Second Third-Party Defendant.

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendant/second third-party defendant Rowan Construction Corp., a/k/a Rowan Construction Co., Inc. and supporting papers; and (2) Affirmation in Opposition by plaintiff dated August 30, 2018 and supporting papers, it is

ORDERED, that the motion made by defendant/second third-party defendant Rowan Construction Corp., a/k/a Rowan Construction Co., Inc. seeking an Order dismissing plaintiff's complaint against it pursuant to CPLR §§ 3211[a][1] and [a][7], is denied; and it is further

ORDERED, that defendant Rowan Construction Co., Inc. shall serve and file an answer within twenty (20) days of the date of entry of this Order; and it is further

ORDERED, that counsel for the parties to this action are directed to appear for a the previously scheduled pre-trial conference before this Court **on Tuesday, January 21, 2020 at 9:30 a.m.**

This action arises out of an accident that occurred on June 4, 2015, at premises located at 123 West 52 Street in Manhattan, while plaintiff was performing construction work at the premises. Plaintiff alleges that he was exiting a scissor lift at the site when it unexpectedly descended further, entrapping his right foot and causing him to sustain serious physical injury. Plaintiff brought an action against 1301 Properties Owner LP, Certified of N.Y., Inc. ("Certified") and a number of other defendants under index number 17289/2015, and several third-party actions were then commenced in that action, including one brought by Certified against Rowan Construction Co., Inc. (Rowan). Plaintiff subsequently brought separate actions directly against Rowan, under index number 60512/2018, and against Paramount Group, Inc., under index number 610473/2018. Subsequently, all three actions were consolidated under index number 17289/2015. Plaintiff's complaint against Rowan alleges that plaintiff's injuries were

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caused by Rowan's negligence in the performance of construction work at the premises and that Rowan violated Labor Law §§ 200, 240 and 241[6]. Rowan has not answered the plaintiff's complaint against it and is now moving to dismiss that complaint against it pursuant to CPLR § 3211[a][1] and [a][7] on the ground that plaintiff has failed to state a cause of action against it.

In support of its motion, Rowan proffers, *inter alia*, the plaintiff's original complaint under index number 17289/2015, the affidavits of Joseph Rowan, Jr. and Antonio M. Polisi, an invoice from Rowan addressed to (Certified) and a proposal from Rowan to Certified.

Joseph Rowan, Jr., the President of Rowan, states in his affidavit that Rowan did not at any time exercise any supervision, control or oversight of the construction site project at the subject premises, nor did it have any relationship with plaintiff. Mr. Rowan states that Rowan's only role in the subject construction project was to provide paymaster service for certain union laborers at the site at the behest of Certified, the general contractor of the project. Mr. Rowan states that Rowan provided payroll services for two union laborers who worked at the site at different times, pursuant to a letter agreement with Certified. A copy of the letter agreement is proffered by Rowan in support of the motion. The agreement reads, in pertinent part: "Rowan assumes no responsibility on project other than payment of union laborers." Antonio Polisi states in an affidavit that he "solely worked for and answered to Certified" while at the subject construction site, that while working there, his "employer was Certified," that Certified "directed [his] activities and as a Laborer" and that Certified had engaged Rowan as paymaster in order to pay his payroll, that it "had no involvement with the job site or the construction whatsoever" and that its sole function was to issue paychecks to him at Certified's request. Rowan argues, likewise, that it had no connection with the premises or the project conducted at the premises other than to perform a limited administrative service for Certified, nor did it have any relationship with plaintiff, and that therefore the complaint against it should be dismissed.

Plaintiff opposes the motion on the grounds that Rowan played a significantly greater role in the project than a mere administrative one and that affidavits are not "documentary evidence" that can be considered in a motion to dismiss pursuant to CPLR § 3211[a][1]. In opposition to the motion, plaintiff proffers, *inter alia*, the deposition testimony of Donald Waller, Gary DeLuca and John Inglese. Donald Waller testified that he is the Director of Construction at Cameron Mitchell Restaurants, the entity that contracted with Certified to construct a restaurant at the subject premises. Gary DeLuca testified that he is the sole owner of Energy 1 Systems, Inc. (Energy 1), which had been subcontracted by Certified to perform construction work on the ceiling at the subject premises. DeLuca testified that when he visited the construction site, he interacted with employees of Certified and Rowan. He testified that he noticed Rowan employees on several of his visits to the site, one of whom he saw wearing a sweatshirt that said "Rowan" on it. John Inglese testified that he was the Vice President and Director of Operations

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for Certified. He testified that Certified hired Energy 1 as a subcontractor on the subject construction project and Rowan to do work on the project. Inglese testified that Rowan provided general cleanup laborers to the project. He testified that he saw employees of Rowan using the lifts at the site. He testified that Certified hired a laborer from Rowan named "Abdullah" and that Rowan sent additional laborers to the project. Inglese testified that he interacted with Abdullah approximately 130 times and that he was told by the project superintendent that Abdullah was the person who was operating the scissor lift when plaintiff was injured. Inglese testified that Abdullah was a Union 79 laborer and that as Certified was not allowed to have their own non-union laborers at the project, Certified hired someone from Rowan.

"[I]n considering a motion to dismiss pursuant to CPLR § 3211 [a] [7], the court should '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'" (*Sinensky v Rokowsky*, 22 A.D.3d 563,564, 802 NYS2d 491 [2d Dept. 2005] quoting *Leon v Martinez*, 84 N.Y.2d 83,87-88, 614 NYS2d 972 [1994]; *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351, 961 NYS2d 364 [2013]); *Simos v. Vic-Armen Realty, LLC*, 92 A.D.3d 760, 938 NYS2d 609 [2d Dept. 2012]). However, the movant has come forward with evidentiary material for the court's consideration. "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; see "*John Doe I*" v *Board of Educ. of Greenport Union Free Sch. Dist.*, 100 AD3d 703, 705, 955 NYS2d 600, 287 Ed. Law Rep. 524 [2d Dept 2012]).

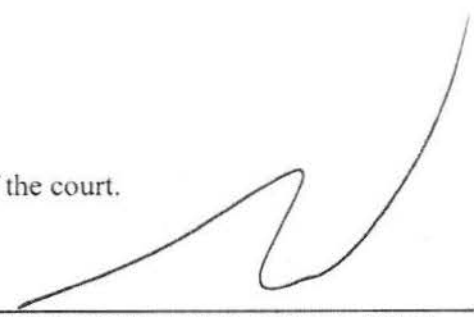
Here, the complaint against the movant is predicated upon allegations that it performed construction work at the premises and/or participated in the direction and supervision of the project. The movant has provided affidavits denying that they had any involvement with performing, supervising or controlling the project, and the plaintiff has proffered deposition testimony that, it contends, controverts Rowan's assertions. "An affidavit cannot constitute "documentary evidence" for purposes of a motion pursuant to CPLR § 3211[a][1] because its contents can be controverted by other evidence, such as another affidavit" (*John R. Higgett, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3211:10, citing J.A. Lee Electric, Inc. v City of New York*, 119 AD3d 652, 990 NYS2d 223 [2d Dept 2014]; *Flowers v 73rd Townhouse, LLC*, 99 AD3d 431, 951 NYS2d 393 [1st Dept 2012]; *Lopes v Bain*, 82 AD3d 1553, 920 NYS2d 792 [3d Dept 2011]). Therefore, the court is not considering the affidavits submitted by Rowan as evidence for purposes of the motion to the extent that motion invokes CPLR § 3211[a][1]. In any event, Rowan has failed to meet its burden of showing that the material facts alleged in the complaint against Rowan are not facts at all. Accordingly, the

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motion to dismiss the complaint against it is denied.

The foregoing constitutes the decision and order of the court.

Dated: 11/20/2019
Riverhead, New York


HON. SANFORD NEIL BERLAND, A.J.S.C.

 FINAL DISPOSITION

 XX NON-FINAL DISPOSITION