

**Dilmanian v Zar**

2019 NY Slip Op 34513(U)

March 29, 2019

Supreme Court, Nassau County

Docket Number: 605087/18

Judge: Antonio I. Brandveen

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This opinion is uncorrected and not selected for official publication.

ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

ESTER DILMANIAN,
Plaintiff,

TRIAL / IAS PART 25
NASSAU COUNTY

Action No. 1

- against -

Index No. 605087/18

RACHEL ZAR, KOROSH ZAR,
INTERNANTIONAL DESIGN & MEG LLC,
SUSSAN LARI ARCHITECT PC and
VILLADOM CORP.,

Motion Sequence No. 001

Defendant.

INTERNATIONAL DESIGN & MFG, LLC,

Third Party Plaintiff,

- against -

SUSSAN LARI ARCHITECT PC and
VILLADOM,

Third Party Defendant.

The following papers having been read on this motion:

Table listing documents and page numbers: Notice of Motion, Affidavits, & Exhibits (1), Answering Affidavits (2, 3, 4, 5), Replying Affidavits (6), Briefs: Plaintiff's / Petitioner's, Defendant's / Respondent's (7)

Upon the foregoing papers, the motion by defendant Sussan Lari Architect

PC (“Architect”) for an order pursuant to CPLR §§ 3211 (a) (1) and (7), dismissing the complaint and all cross claims against it, is denied. The alternative relief sought by defendant Architect to convert the motion into a motion for summary judgment pursuant to CPLR 3211 ( c) is also denied. However, the movant may make a motion for summary judgment after the completion of discovery if it is so advised.

This is an action to recover damages for the personal injuries allegedly sustained by the plaintiff on September 9, 2017, while attempting to go down a staircase in the home of defendants Zar. The plaintiff contends *inter alia* that her injuries were caused by the design of the staircase by defendant Architect, as well as the handrail and gate around the staircase.

“In considering a motion to dismiss a complaint or counterclaims pursuant to CPLR 3211(a)(1) based on documentary evidence, dismissal is warranted ‘only where the documentary evidence utterly refutes [the] factual allegations, conclusively establishing a defense as a matter of law’ (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326, 774 N.E.2d 1190, 746 N.Y.S.2d 858; see Sabre Real Estate Group, LLC v Ghazvini, 140 AD3d 724, 35 N.Y.S.3d 109)” (Wynkoop v 622A President St. Owners Corp., \_\_AD3d\_\_, 2019 NY Slip Op 01450 [2d Dept Feb 27, 2019]).

“On a motion pursuant to CPLR 3211(a)(7) to dismiss for failure to state a cause of action, the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ (*Garcia v Polsky, Shouldice & Rosen, P.C.*, 161 AD3d 828, 829, 77 N.Y.S.3d 424 [internal quotation marks omitted]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326; *Leon v Martinez*, 84 NY2d 83, 87-88)” *First Class Concrete Corp. v Rosenblum*, 167 A.D.3d 989, 989 [2d Dept 2019]. “A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a) (7)” (*Gugliotta v. Wilson*, 168 A.D.3d 817, 818, 92 N.Y.S.3d 309 [2d Dept 2019], *quoting Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). “Where evidentiary material is submitted and considered, and the motion is not converted into a motion for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the 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 it cannot be said that a significant dispute exists regarding it, dismissal should not eventuate (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Rodriguez v Daily News, L.P.*, 142 AD3d 1062, 1063; *Steve Elliot, LLC v Teplitsky*, 59 AD3d 523, 524 [2d

Dept 2009])” (*Stone v. Bloomberg L.P.*, 163 AD3d 1028, 1030 [2d Dept 2018]).

In applying these principles to the motion at bar, the Court finds that defendant Architect has failed to sufficiently demonstrate by documentary evidence its entitlement to dismissal of the complaint and cross-claims pursuant to CPLR 3211 (a) (1) (*see, Leon v. Martinez, supra* at 87-88), that the complaint adequately states, and the plaintiff has, a cause of action sounding in negligence against defendant Architect (*see, Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342 [2015]; *Rovello v. Orofino Co.*, 40 NY2d 633 [1976]), and that the co-defendants have adequately asserted cross-claims for indemnification against defendant Architect.

The parties shall appear for a preliminary conference to schedule all discovery on *April 25, 2019, at 10 a.m.* A copy of this order shall be served by the plaintiff on the Preliminary Conference Clerk.

The foregoing constitutes the decision and order of this Court.

Dated: **March 29, 2019**

ENTER:



NOT FINAL DISPOSITION

J. S. C.

**ENTERED**

HON. ANTONIO I. BRANDVELLO  
APR 11 2019

**ORIGINAL**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE