

Perez v 1790-1792 Third Ave. LLC

2019 NY Slip Op 34985(U)

August 8, 2019

Supreme Court, Bronx County

Docket Number: Index No. 29976/2017E

Judge: Robert T. Johnson

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This opinion is uncorrected and not selected for official publication.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
Ignacio Perez,

Plaintiff,

-against-

1790-1792 Third Avenue LLC., Ashraf Corporation,
Rock Group NY Corp., and Dayna Cebus Construction, LLC.,

DECISION AND ORDER
Index No. 29976/2017E

Defendants.
-----X

The following papers, numbered 1-3 were considered on the motion to dismiss:

PAPERS

NUMBERED

Notice of Motion and annexed Exhibits and Affidavits.....	1
Answering Affidavits and Exhibits.....	2
Reply Affirmation.....	3

Upon the foregoing papers, it is ordered that the motion to dismiss is denied:

This is an action in which Plaintiff allegedly fell fifteen feet as a result of a defective plank in a heavy-duty sidewalk shed. Plaintiff sued the defendant for violations of Labor Law Sections 200, 240, 241 and 241-a, and based upon regulatory violations of the Industrial Code. On February 28, 2018, the defendant Ashraf Corporation ('Ashraft'), an engineering firm, filed a pre-answer motion to dismiss the case under CPLR 3211(a)(1) and (7). The motion is decided herein as follows:

A motion to dismiss based on documentary evidence pursuant to CPLR 3211 (a) (1) may be granted only where the documentary evidence "utterly refutes" the plaintiff's factual allegations, resolves all factual issues as a matter of law, and conclusively disposes of the claims at issue. (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]; *Rodeo Family Enters., LLC v Matte*, 99 A.D.3d 781, 782 [2d Dept. 2012].)

Neither the defendant's affidavit nor the document it presented constitutes the type of documentary evidence that may be considered on a motion pursuant to CPLR 3211(a)(1). Ashraft

provided a copy of a permit application with engineering drawings as documentary evidence that its involvement in the subject property was limited to obtaining a permit for the subject heavy-duty sidewalk shed on behalf of co-defendant, Rock Group NY Corp. (Exh. B, Defendant's Motion) and, accordingly, barred the plaintiff's action against it. This evidentiary support offered by the defendant does not conclusively establish a defense to the asserted claims as a matter of law (See, *Leon v. Martinez*, 84 NY2d 83, 88, 638 N.E.2D 511, 614 N.Y.S.2d 972 [1994]), because it not only failed to utterly refute the plaintiff's allegations, but also contradicted the defendant's assertion that its involvement in the said structure was limited to obtaining a permit. In fact, the permit to erect the sidewalk shed was submitted according to the plans and engineering drawings the defendant prepared and approved (Exh. B). (See, *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 85 [2d Dept. 2010], "judicial records, as well as documents reflecting out-of-court transactions, such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' qualify as 'documentary evidence'").

On the other hand, when deciding whether or not a complaint should be dismissed pursuant to CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true, limiting the inquiry to whether or not the complaint states, in some recognizable form, any cause of action known to our law (see, *World Wide Adjustment Bureau et al., v. Edward S. Gordon Company, Inc., et al.*, 111 AD2d 98 [1st Dept, 1985]). In assessing the sufficiency of the complaint, the court must also consider the allegations made in both the complaint and the accompanying affidavit, submitted in opposition to the motion, as true and resolve all inferences which reasonably flow therefrom, in favor of plaintiff (*Joel v. Weber*, 166 Ad2d 130, [1st Dept, 1991]).


The defendant failed to show that the plaintiff has not presented sufficient allegations to sustain a cognizable cause of action against it. To correctly claim that liability for a worker's injury may not be imposed upon it, the defendant must show that it did not have contractual obligations to inspect the premises. (*Domenech v. Associated Engrs.*, 257 A.D.2d 403 [2d Dept. 2003] [liability cannot be imposed upon an engineering firm absent a clear contractual provision imposing such liability or an affirmative act of negligence on its part]). The defendant failed to do just that. Merely asserting that no duty of care is owed to the plaintiff simply because it did not perform inspections performed at the worksite, without more, provides no basis for dismissal. Thus, if the Plaintiff were to have the benefit of every reasonable inference favorable to him, the complaint states a cause of action against Ashraft based on its alleged negligence in the performance of its engineering services.

Accordingly, the motion to dismiss is denied, and it is

ORDERED that defendant shall serve an answer no later than ten (10) days after plaintiff serves of a copy of this Order, with Notice of Entry, upon the moving defendant (see CPLR § 3211 [f]).

This constitutes the decision and order of this court.

Dated: August 8, 2019



Robert T. Johnson, J.S.C.