

**Wright v Cavan Props., Inc.**

2019 NY Slip Op 35109(U)

February 1, 2019

Supreme Court, Bronx County

Docket Number: Index No. 24993/2017E

Judge: Alison Y. Tuitt

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

**TANYSHA WRIGHT,**

INDEX NUMBER: 24993/2017

Plaintiff,

-against-

Present:  
**HON. ALISON Y. TUITT**  
*Justice*

**CAVAN PROPERTIES, INC., CITICORE I LLC  
and CITICORE ASSET MGMT, INC.,**

Defendants.

The following papers numbered 1 to 3,

Read on this Defendants' Motion to Dismiss

On Calendar of 4/16/18

Notice of Motion-Exhibits, Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendants Citicore I LLC ("Citicore LLC") and Citicore Asset Mgmt, Inc. ("Citicore Asset Mgmt") motion to dismiss the action is denied for the reasons set forth herein.

The within is an action for personal injuries allegedly sustained by plaintiff as a result of a ceiling collapse on January 29, 2016, in apartment 6F, located at 340 East 184<sup>th</sup> Street, Bronx, New York. Defendants Citicore LLC and Citicore Asset Mgmt argue that it they are not proper parties to the action because at the time of the alleged occurrence, neither Citicore entity owned nor managed the subject building in which plaintiff alleges the incident occurred. The Citicore defendants claims that on June 21, 2016, the building was sold by Cavan Properties, Inc. to 2319 Loring Place Realty LLC, 2297 Loring LLC, 1929 Andrews Ave LLC and 2321 Andrews Ave Owner LLC, as Tenants In Common. It was not until after June 21, 2016 that either Citicore LLC or Citicore Asset Mgmt had anything to do with the management of the subject building. In support of their

motion, defendants submit a copy of the contract for the sale of the property which is dated June 21, 2016. Defendants also submit the affidavit of Timour A. Shafran, an agent for the Citicore defendants, who states that at the time of the accident, neither Citicore LLC nor Citicore Asset Mgmt owned or managed the building where the accident occurred.

In opposition, plaintiff argues that the motion is premature because no discovery has been held in the action. More importantly, in that defendants Citicore LLC and Citicore Asset Mgmt clearly admit to managing this property after June 21, 2016, there must exist a contract between these defendants and the property owner, yet the Citicore fail to produce any of these operative contracts. Such documents are exactly the type of discovery remaining and necessary prior to dismissing the action against defendants.

Generally, on a motion to dismiss made pursuant to C.P.L.R. §3211, the court must "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 into any cognizable legal theory". Leon v. Martinez, 84 N.Y.2d 83 (1994); Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 780 N.Y.S.2d 593 (1<sup>st</sup> Dept.2004) . Defendants here have moved pursuant to C.P.L.R. §3211(a)(1) and (a)(7). Pursuant to C.P.L.R. §3211:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence; or...
7. the pleading fails to state a cause of action.

Moreover, dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted "utterly refutes plaintiff's factual allegations", Goshen v. Mutual Life Insurance Co. of N.Y., 98 N.Y.2d 314 (2002); Greenapple v. Capital One, N.A., 939 N.Y.S.2d 351 (1<sup>st</sup> Dept.2012 ), and conclusively establishes a defense to the asserted claims as a matter of law". Weil, Gotshal, Manges, LLP, 780 N.Y.S.2d at 593; Mill Fin., LLC v. Gillett, 992 N.Y.S.2d 20 (1<sup>st</sup> Dept. 2014). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to C.P.L.R. §3211(a)(1) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action. See, McGuire v. Sterling Doubleday Enters., L.P., 799 N.Y.S.2d 65 (1<sup>st</sup> Dept. 2005). On a motion to dismiss pursuant to C.P.L.R. §3211(a)(7), the complaint survives when it gives notice of what is intended to be proved and the material elements of each cause of action. Rovello v. Orofino Realty Co., Inc. 40 N.Y.2d 633 (1976); Underpinning & Foundation Construction v. Chase Manhattan Bank, 46 N.Y.2d 459 (1979).

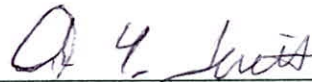
Defendants' motion to dismiss premised upon documentary evidence must be denied because the documentary evidence submitted by defendants in support of their motion to dismiss neither "utterly refutes plaintiff's factual allegations," nor "conclusively establishes a defense to the asserted claims as a matter of law".

The contract for the property shows that the building changed ownership in June 21, 2016, but those documents alone are insufficient to refute plaintiff's allegations that the Citicore defendants managed and maintained the premises on the date of plaintiff's accident. The documentary evidence submitted does not conclusively establish a defense as the contract between the Citicore defendants and the property owner was not submitted. The document would show when the contract went into effect and as of what date the Citicore defendants became the managing agent of the subject premises. See, Celentano v. Boo Realty, LLC; (The deed for the property and the lease for plaintiff's apartment show that Boo Realty owns the property, but those documents alone are insufficient to refute plaintiff's allegations that Jo Lu managed and maintained the premises). Moreover, the affidavit of defendants' agent is not "documentary evidence" within the meaning of CPLR 3211(a)(1). See, Flowers v. 73rd Townhouse LLC, 951 N.Y.S.2d 393 (1<sup>st</sup> Dept. 2012), citing Granada Condominium III Association v. Palomino, 913 N.Y.S.2d 668 (2d Dept. 2010)(In order for evidence to qualify as "documentary," it must be unambiguous, authentic, and undeniable. Neither affidavits, deposition testimony, nor letters are considered "documentary evidence" within the intendment of CPLR 3211(a)(1)); Fontanetta v. John Doe 1, 898 N.Y.S.2d 569 (2d Dept. 2010). Furthermore, plaintiff's complaint states a cause of action for negligence.

Accordingly, defendants Citicore LLC and Citicore Asset Mgmt's motion to dismiss the complaint is denied for the reasons set forth herein.

This constitutes the decision and Order of this Court.

Dated: 2/11/19



Hon. Alison Y. Tuitt