

Hall v 171 Holding Corp.
2020 NY Slip Op 30996(U)
April 23, 2020
Supreme Court, New York County
Docket Number: 152677/2016
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X

DUSTIN HALL,

Plaintiff,

- v -

171 HOLDING CORP., JIM-GILES CORP.,

Defendant.

-----X

JIM-GILES CORP.

Plaintiff,

-against-

COLGATE ENTERPRISE CORP.

Defendant.

-----X

**DECISION + ORDER ON
MOTION**

INDEX NO. 152677/2016

MOTION DATE 01/14/2020

MOTION SEQ. NO. 004

Third-Party
Index No. 595657/2019

The following e-filed documents, listed by NYSCEF document number (Motion 004) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103

were read on this motion to/for DISMISSAL.

In this action seeking damages for personal injury, third-party defendant Colgate Enterprise Corp. (“Colgate”) moves, pursuant to CPLR 3211(a)(1), (3) and (7), to dismiss the third-party complaint, alleging that defendant/third-party plaintiff Jim-Jiles Corp. (“Jim-Jiles”) lacks capacity to sue;¹ that Colgate has established a defense based on documentary evidence; and

¹ Colgate’s argument regarding Jim-Jiles’ lack of capacity to maintain this action, premised on the fact that no such entity is registered with the Department of State, is rendered moot. During oral argument, and without any opposition from Colgate, this Court allowed Jim-Jiles to amend the caption to correct its name and include the spaces between “Jim” and “Jiles” (“Jim - Jiles Corp.”) (hereinafter “Jim - Jiles”), so as to conform to the existing records maintained by the Department of State (Doc. 101).

that Jim - Jiles has failed to state a cause of action (Doc. 89). Jim - Jiles opposes the motion (Doc. 99). After oral argument, as well as a review of the parties' papers and the relevant statutes and case law, the motion is decided as follows.

PROCEDURAL AND FACTUAL HISTORY:

The facts of this case are set forth in detail in the decision and order of this Court entered December 10, 2018 (the "12/10/18 order"), which, *inter alia*, granted defendant 171 Holding Corp.'s ("Holding") summary judgment motion dismissing the complaint and co-defendant Jim - Jiles' cross claims, as well as granted summary judgment on Holding's cross claim against Jim - Jiles for indemnification (Doc. 71). Briefly stated, this action stems from allegations that, on October 14, 2015, while on the roof of 109 East 9th Street, New York, New York ("the premises"), plaintiff Dustin Hall ("Hall") was injured when he tripped over a wire allegedly left behind from prior construction work (Doc. 71). Other relevant facts are set forth below.

Hall filed a note of issue in this action on April 18, 2018, representing that all discovery was complete and that the parties were ready for trial (Doc. 38). However, in July 2019, more than a year after the filing of the note of issue, Jim - Jiles commenced a third-party action against Colgate by filing a summons and third-party complaint (Doc. 86). In the third-party complaint, Jim - Jiles alleged that, if Hall's injuries resulted from negligence, it was the negligence of Colgate, which had performed work on the roof of the premises on or before 2015 (Doc. 86). Thus, Jim - Jiles claimed, it was entitled to common-law indemnification and contribution from Colgate (Doc. 86). Colgate was served with process via the Secretary of State on August 6, 2019 and, on September 9, 2019, Colgate filed the instant motion to dismiss in lieu of an answer (Docs. 87, 89).

In the instant motion, Colgate argues, *inter alia*, that “it is clear that Colgate had nothing to do with plaintiff’s accident and, in fact, had removed all of its equipment from [the] accident site two years prior to plaintiff’s accident” (Doc. 90). Colgate claims that, contrary to the third-party complaint, in which Jim - Jiles alleges, in pertinent part, that “on or before October 14, 2015 . . . [Colgate], its agents, servants and/or employees, performed work on the roof of the subject premises” (Doc. 91 at 6), there is documentary proof that Colgate did not perform any work on the roof (Doc. 90).

In support of this argument, Colgate submits the affidavit of its president, Peter O’Farrell (“O’Farrell”), who affirms, *inter alia*, that Colgate does not construct buildings but, rather, that it “installs and rent[s] scaffolding to general contractors and/or owners for their use in putting up the building, all of which is removed from the site when it is no longer in use” (Doc. 93 at 2). In 2013, Colgate entered into a subcontract with non-party Eurostruct Inc. (“Eurostruct”) for the erection and dismantling of a sidewalk bridge and pipe scaffolding at the premises (Doc. 93). As reflected by this agreement, work was to be performed only on the east side and front of the building, and O’Farrell avers that no equipment or materials were located on the roof of the premises and that there were no wires used in assembling the pipe scaffolding (Doc. 93). O’Farrell also submits the “Project Review” related to the work Colgate performed at the premises, reflecting that all equipment was removed from the premises in 2013 and that the New York City Department of Buildings (“DOB”) signed off on Colgate’s permit for the sidewalk bridge and scaffolding on December 5, 2013 and January 6, 2014, respectively, after Colgate’s removal of all equipment and materials from the site (Doc. 95).

Although Jim - Jiles opposes the motion, it should be noted that it applies the standard for a summary judgment motion, which is not applicable here (Doc. 99). Jim - Jiles argues, *inter alia*,

that O'Farrell lacks personal knowledge to confirm that Colgate did not utilize the roof when it performed work at the premises because he neither claims to have inspected the work nor to have made observations regarding Colgate's placement of equipment and materials while at the premises (Doc. 99). Additionally, claims Jim - Jiles, insofar as O'Farrell lacks personal knowledge to make any assertion as to the DOB documents, they lack probative value (Doc. 99). Jim - Jiles also argues, in effect, pursuant to CPLR 3212 (f), that any witnesses and records relating to Colgate's work at the premises is within Colgate's exclusive control and, thus, that the motion should be denied so as to allow reasonable disclosure (Doc. 99).

LEGAL CONCLUSIONS:

“On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must ‘accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’” (*David v Hack*, 97 AD3d 437, 438 [1st Dept 2012], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, it is well-settled that “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration” (*David v Hack*, 97 AD3d at 438 [internal quotation marks and citation omitted]). “[I]f the defendant's evidence establishes that the plaintiff has no cause of action (i.e., that a well-pleaded cognizable claim is flatly rejected by the documentary evidence), dismissal would be appropriate” (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [citations omitted]). Additionally, “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that a defense is founded upon documentary evidence” (CPLR 3211[a][1]). However, “such motion may be appropriately granted

only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]).

Colgate has failed to establish its entitlement to dismissal pursuant to CPLR 3211(a)(1) and (7). The subcontract, which reflects that the scope of Colgate's work at the premises was limited to the side and front of the premises, does not, standing alone, refute the factual allegations in the third-party complaint. Although the subcontract defines Colgate's responsibilities at the premises and the work it was contracted to perform, as well as the materials it was required to use, it does not resolve the factual possibility that Colgate also performed work on the roof, that it used wires, and/or that it was negligent (*see Board of Mgrs. of 285 Driggs Ave. Condominium v 285 Driggs Ave., LLC*, 173 A.D.3d 821, 823 [2d Dept 2019]; *Hartnagel v FTW Contr.*, 147 AD3d 819, 821 [2d Dept 2017]). O'Farrell's affidavit, affirming that no wires were used by Colgate at the premises and that it did not perform any work on the roof, is deficient since he fails to establish that he has the personal knowledge to make such assertions (*see Bou v Llamaza*, 173 AD3d 575, 575-576 [1st Dept 2019]; *see generally Gogos v Modell's Sporting Goods*, 87 AD3d 248, 253-254 [1st Dept 2011]). In any event, "affidavits are not documentary evidence that can be used on a motion to dismiss under CPLR 3211. [Although] [t]he affidavit can be used to introduce the exhibits, . . . the allegations in the affidavit [themselves] are not documentary evidence" (*Humphries v Metropolitan Prop. & Cas. Ins. Co.*, 2016 NY Slip Op 30053[U], 2016 NY Misc LEXIS 89, *4 [Sup Ct, NY County 2016]; *see Asmar v 20th & Seventh Assoc., LLC*, 125 AD3d 563, 563-564 [1st Dept 2015]).

The Project Review and documents from the DOB reveal that the sidewalk bridge and scaffolding were removed from the premises in 2013 and that the DOB signed off on the permits. However, these documents fail to flatly refute Jim - Jiles' allegation that Colgate's work at the

premises resulted in materials being left on the roof (*see generally Modern Communication Servs., Inc. v. NEP Image Group, LLC*, 19 Misc 3d 1134[A], *9 [Sup Ct, NY County 2008]). Since this Court must afford plaintiffs the benefit of every favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the motion is denied.

Although the third-party complaint was filed several months after the filing of the note of issue, this Court finds that an expedited discovery schedule will eliminate any prejudice.

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the caption is hereby amended on consent to change the name of defendant/third-party plaintiff Jim-Jiles Corp. to Jim - Jiles Corp. and, thus, that branch of third-party defendant Colgate Enterprise Corp.'s motion seeking dismissal pursuant to CPLR 3211(a)(3), based on lack of capacity to maintain an action, is rendered moot; and it is further

ORDERED that the caption of this action will hereinafter read as follows:

 DUSTIN HALL,
 Plaintiff,

Index No. 152677/2016

v

171 HOLDING CORP. and JIM - JILES CORP.,
 Defendants.

 JIM - JILES CORP.,
 Third-Party Plaintiff,

Third-Party Index No. 595657/2019

v

COLGATE ENTERPRISE CORP.,
 Third-Party Defendant.

 and it is further

ORDERED that that branch of third-party defendant Colgate Enterprise Corp.'s motion seeking dismissal based on CPLR 3211(a)(3) and (7) is denied; and it is further

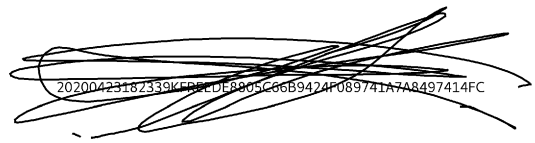
ORDERED that, within 20 days of the entry of this order, counsel for defendant/third-party plaintiff Jim - Jiles Corp. shall serve a copy of this order with notice of entry upon all parties, upon the Clerk of the Court (60 Centre Street, Room 141 B), and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption; 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* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.govisupctmanh); and it is further

ORDERED that the parties shall appear for a conference in room 280, 80 Centre Street, on July 28, 2020 at 3:00 P.M , unless otherwise notified by the Court, for the purpose of scheduling an expedited discovery schedule; and it is further

ORDERED that this constitutes the decision of this Court.

4/23/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: