Williams v McKoy
2020 NY Slip Op 34008(U)
October 16, 2020
Supreme Court, Queens County
Docket Number: 719352/2018
Judge: Phillip Hom

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Hon. Phillip Hom IAS Part 43
Justice

ERICA WILLIAMS,

Plaintiff,

-against-

DOLTON MCKOY, VIOLET MCKOY and ALL CITY RESTORATION INC.,

Defendants.

Index No.: 719352/2018
Motion Dates: 8/13/2020 and 9/10/2020
Motion Seq. No.: 2, 3 and 4
Motion Cal. No.: 52, 55, and 56

The following numbered papers were read on these motions by Plaintiff for a default judgment and to amend the caption, and by Defendant All City Restoration Inc. to dismiss the complaint on the grounds of documentary evidence, failure to state a cause of action, and personal jurisdiction:

Papers	Numbered
Motion #2	
Notice of Motion - Affidavits - Exhibits	E 31 - 38
Affirmation in Opposition - Exhibits	E 71 - 83
Motion #3	
Notice of Motion - Affidavits - Exhibits	E 42 - 59, 84-85
Affirmation in Opposition - Exhibits	E 60 - 62
Affirmation in Opposition - Exhibits	E 63 - 67
Reply - Exhibits	E 92
Motion #4	
Notice of Motion - Affidavits - Exhibits	E 68 - 70
Affirmation in Opposition - Exhibits	E 86 - 91
Reply - Exhibits	E 93

Upon the foregoing papers it is ordered that the motions are determined as follows:

Background

This action, commenced on December 18, 2018, arises from an incident that occurred on May 27, 2018 in which Plaintiff, Erica Williams ("Williams"), was allegedly injured when improperly installed kitchen cabinets in her apartment collapsed on her. Williams rented an apartment owned by Defendants Dolton McKoy and Violet McKoy ("McKoys"). The apartment is located at 119-35 198th Street, St. Albans, NY 11412. By this Court's Order dated October 8, 2019, Defendant All City Restoration Inc. ("ACR") was joined as a Defendant in this action for allegedly installing the defective cabinets. Williams now moves for default against ACR. ACR moves to dismiss the complaint under CPLR §3211. Williams also moves to amend the caption.

Motion #2 - Default Judgment

CPLR §3215 permits a party to seek a default judgment against a defendant who has failed to answer or appear (see CPLR §3215 [a][f]; *Giovanelli v Rivera*, 23 AD3d 616 [2d Dept 2005]). To obtain a default judgment against a corporation which has been served with process under Business Corporation Law §306, a plaintiff must serve an additional copy of the summons and complaint by first class mail on the defendant corporation at its last known address at least twenty days before the entry of judgment (see CPLR §3215 [g][4][i]). The plaintiff's application for a default judgment must also be accompanied by an affidavit attesting to the satisfaction of this additional mailing requirement (see CPLR §3215 [g][4][i]; *Schilling v Maren Enters.*, 302 AD2d 375, 376 [2d Dept 2003]).

Williams alleges that ACR failed to answer the summons and complaint on time. The summons and complaint was served on ACR through the Secretary of State on November 18, 2019, and the Affidavit of Service was filed on November 21, 2019.

In opposition, ACR claims that Williams failed to comply with the requirements of CPLR §3215 [g][4][i] for additional service by first class mail and that it was never initially served with process. The affidavit of service shows Williams served the summons and complaint on "All City Restoration Inc." which is a separate entity from All City Contracting & Cleaning, Inc. d/b/a All City Restoration, the alleged correct Defendant. ACR has submitted evidence that it was incorporated in New York on August 29, 1995 as All City Contracting & Cleaning, Inc. and that they filed for the assumed name "All City Restoration" on June 26, 1997.

Although Williams may have also served the wrong party, her motion for a default judgment is denied because she has failed to submit any proof of the

additional mailing requirement of CPLR §3215 [g][4][i] (see *Schilling v Maren Enters.*, *supra*; *Guarino v W.-Put Contr. Co.*, 289 AD2d 290 [2d Dept 2001]).

Motion #3 - CPLR §3211(a)(1) Dismiss based upon documentary evidence

"A motion pursuant to CPLR §3211(a)(1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law" (*Mendelovitz v Cohen*, 37 AD3d 670 [2d Dept 2007]). To succeed on a motion to dismiss a complaint under CPLR 3211 (a) (1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (see *Jesmer v Retail Magic, Inc.*, 55 AD3d 171 [2d Dept 2008]; *Sato Constr. Co., Inc. v 17 & 24 Corp.*, 92 AD3d 934, 935 [2d Dept 2012]).

In support of their motion, ACR submits documentary evidence showing they did not install any kitchen cabinets in Williams' apartment. ACR alleges its involvement in the Williams' apartment was limited to packing and moving the contents due to a fire

The Williams' amended complaint alleges ACR was negligent in the installation of the kitchen cabinets. The McKoys' answer makes crossclaims against ACR and seeks indemnification and contribution. The evidence submitted by ACR show that they were at least involved in packing and moving in the apartment after a fire. The McKoys also submit Dolton McKoys' unsigned deposition testimony that it was ACR that installed the cabinets. However, the transcript is not admissible because it was unsigned and there was no evidence presented that it was presented to Dolton McKoy and he failed to sign it after 60 days. (see *Martinez v. 123-16 Liberty Ave. Realty Corp*, 47 A.D.3d 901 [2d Dept 2008].

The Court finds ACR fails to resolve all factual issues as a matter of law, and did not conclusively dispose this cause of action (see *Jesmer v Retail Magic, Inc.*, *supra*). Dismissal is not warranted under CPLR §3211(a)(1), because the documentary evidence that ACR submitted did not utterly refute all of Williams' and McKoys' factual allegations, thereby conclusively establishing a defense as a matter of law (see *Mendelovitz v Cohen*, *supra*). As such, Court denies this branch of ACR's motion.

Motion #3 - CPLR §3211(a)(7) failure to state a cause of action

"When a party moves to dismiss a complaint pursuant to CPLR §3211(a)(7),

the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (*Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]). Although "bare legal conclusions are not presumed to be true" on a motion to dismiss under CPLR §3211(a)(7) (*Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793 [2d Dept 2011]), "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 within any cognizable legal theory" (*Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]; *Mills v Gardner,* 106 AD3d 885 [2d Dept 2013]; *Shah v Exxis, Inc.*, 138 AD3d 970 [2d Dept 2016]). "Yet, affidavits submitted by a defendant will almost never warrant dismissal under CPLR §3211 unless they establish conclusively that [the plaintiff] has no cause of action" (*id*. at 1182). "Indeed, a motion to dismiss pursuant to CPLR §3211(a)(7) must be denied 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" (*id.*).

In the present case, dismissal of the amended complaint is not warranted under CPLR §3211 (a)(7) for failure to state a cause of action. The affidavits and the other documents submitted by ACR fail to establish as a matter of law that Williams has no cause of action (see *Leader v Steinway, Inc.* 180 AD3d 886 [2d Dept 2020]). Williams has substantially complied with CPLR §3013 and the statements in the pleading are sufficiently particular to give the Court and parties notice of the nature of its action (see *Foley v D'Agostino*, 20 AD2d 770 [1st Dept 1964]). Williams' pleading is sufficient to overcome a motion to dismiss because CPLR §3211(a)(7) dismissals merely address the adequacy of the pleading, and do not reach the substantive merits of a party's cause of action (see *Lieberman v Green*, 139 AD3d 815 [2d Dept 2016]).

The Court finds that Williams' allegations, in the complaint, state a viable cause of action against the Defendants. Under these circumstances, the branch of the motion seeking to dismiss the action under CPLR §3211(a)(7) is denied.

Motion #3 - CPLR §3211(a)(8) personal jurisdiction

The purpose of the summons is to notify the defendant that the plaintiff seeks a judgment against him or her so that he or she may take such steps as may seem advisable to protect his or her interests. Such notice is an absolutely fundamental requirement of due process of law under the Fourteenth Amendment to the United States Constitution (see *Schroeder v New York*, 371 US 208 [1962]; *Connell v Hayden*, 83 AD2d 30 [2d Dept 1981]).

In accordance with BCL § 306(b)(1), "service of process on the secretary of state as agent of a domestic or authorized foreign corporation shall be made by

personally delivering to and leaving with the secretary of state or a deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process... Service of process on such corporation shall be complete when the secretary of state is so served..." Serving a summons and complaint with an incorrectly captioned corporate defendant upon the Secretary of State is insufficient to obtain personal jurisdiction over the corporation under BCL § 306 (see *Pereira v. Oliver's Restaurant, Inc.*, 260 AD2d 358 [2nd Dept. 1999]).

Williams attempted to obtain personal jurisdiction over ACR by service on the Secretary of State (see Business Corporation Law § 306 [b]). The caption on the summons and in the body of the complaint which were delivered to the Secretary of State (see, Business Corporation Law § 306 [b]) misstated the name of the intended corporate as "All City Restoration Inc." when the intended entity was "All City Contracting & Cleaning, Inc. d/b/a All City Restoration."

Here, the incorrect party "All City Restoration Inc." was served through the Secretary of State on two occasions. The McKoys attempted to serve a Third-Party Summons and Third party Verified Complaint on April 1, 2019 and Williams attempted to serve the amended Summons and Amended Complaint on November 18, 2019. The McKoys and Williams also attempted to serve "All City Restoration Inc." by delivering copies of the documents to it at 160 Hicks Street in Westbury, NY and leaving them with a receptionist. However, even assuming that the receptionist was authorized to accept service, the documents misstated the name of the intended defendant.

The Court finds these service attempts insufficient to obtain jurisdiction over All City Contracting & Cleaning, Inc. d/b/a All City Restoration. Under these circumstances, Williams and McKoys did not obtain personal jurisdiction over ACR (see *Pereira v Oliver's Rest., Inc.*, 260 AD2d 358, 359 [2d Dept 1999]).

Motion #4 - Amend Caption

Williams moves to amend caption under CPLR §3025 (b) to change "All City Restoration, Inc" to read "All City Cleaning & Contracting d/b/a All City Restoration." ACR, in opposition, argues that Williams' motion was made after the expiration of the statute of limitations. However, the statute of limitations for a personal injury action is three years from the date of accident (see CPLR §214[5]). Here, Williams' injury occurred on May 27, 2018 and this action commenced on December 18, 2018. Therefore, the three years statute of limitation has not yet passed. The Court grants Williams' motion to amend the caption to read as follows:

ERICA WILLIAMS,

Plaintiff,

-against-

DOLTON MCKOY, VIOLET MCKOY and ALL CITY CONTRACTING & CLEANING INC, d/b/a ALL CITY RESTORATION,

Defendants.

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The Court also grants Williams leave to serve the amended summons and complaint with the amended caption upon Defendants within 60 days of the date of this order.

Conclusion

Accordingly, Williams' motion for default judgment is denied; ACR's motion to dismiss under CPLR §3211 is granted in part and denied in part; and Williams' motion to amend the caption is granted.

This constitutes the decision and order of the Court.

Dated: October 16, 2020

Hon. Phillip Hom, J.S.C.

FILED
10/19/2020
1:44 PM
COUNTY CLERK
QUEENS COUNTY