

<b>Danielyan v Gladstein</b>
2020 NY Slip Op 34199(U)
December 15, 2020
Supreme Court, Kings County
Docket Number: 519379/2019
Judge: Karen B. Rothenberg
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avers that at the time of the incident he was using a ladder that belonged to Dr. Gladstein and that one of the reasons he fell and injured himself was because the ladder was “defective, unstable and dangerous.” Danielyan commenced this action against the defendants alleging common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6).

In support of their respective motion and cross-motion pursuant to CPLR 3211, Avdalyan and Kirakosyan each submit an affidavit attesting to the fact that they had no connection with this construction project. Avdalyan states in his affidavit that he briefly worked at the subject property about a year prior to the alleged accident and never employed or supervised Danielyan and was never employed to manage, maintain, control, operate, supervise, inspect, repair, or perform construction at the property at the time of this alleged accident. Avdalyan further states in his affidavit that on the date of this accident he was not bound by any agreements with Danielyan and had no agreements or connection with any of the named defendants regarding this property.

Similarly, Kirakosyan states in his affidavit that neither he nor his corporation Kork performed any services or work or contracted with any person or entity with regard to this construction project. Kirakosyan further states in his affidavit that neither he nor Kork directed, supervised, or inspected the construction work performed at the premises and they were not retained to supervise, inspect, or direct any of the work. Kirakosyan also submits separate affidavits from the Gladsteins in which they each state that they owned the subject property and that Irene Gladstein retained Arko pursuant to an agreement dated May 24, 2019 to perform renovation work at their premises. The Gladsteins further state that to the best of their knowledge Kirakosyan and Kork were not involved in the renovation project and did not perform any work for such project.

Avdalyan and Kirakosyan also argue that even if either of them had been Danielyan’s employers at the time of the accident, the complaint must still be dismissed as the exclusivity provisions of Workers’ Compensation Law §§ 11 and 29[6] deprives the court of subject matter jurisdiction<sup>1</sup>. Both Avdalyan and Kirakosyan submit evidence that they and/or their corporations had workers’ compensation insurance policies in effect on the date of this accident

In opposition to both the motion and cross-motion, Danielyan, in his affidavit, maintains that he was hired by and was working for Avdalyan and Kirakosyan at the time of his accident. Danielyan further contends that he was not aware of any workers’

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<sup>1</sup> Although Avdalyan’s moving papers (and Kirakosyan for the first time in the reply papers) seek dismissal pursuant to CPLR 3211(a)(2), the exclusivity provisions of the Workers’ Compensation Law “do not implicate the subject matter jurisdiction of the court, but rather deprive a plaintiff of a cause of action” (*Rodriguez v Dickard Widder Industries*, 150 AD3d 1169, 1171 [2d Dept 2017]). Thus, this portion of the motion should have been brought under CPLR 3211(a)(7) rather than CPLR 3211(a)(2). The court, however, will consider the arguments made with respect to the Workers’ Compensation Law under the standards of CPLR 3211(a)(7).

compensation benefits that were available to him as a result of the injuries he sustained from this accident.

“A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) will be granted only if the documentary evidence submitted by the defendant utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law” (*Bodden v. Kean*, 86 AD3d 524, 526 [2d Dept 2011]). Affidavits are not considered documentary evidence within the meaning of CPLR 3211(a)(1) as its contents can be refuted by other evidence, such as another affidavit (*see Attias v. Costiera*, 120 AD3d 1281[2d Dept 2014]; *J.A. Lee Electric, Inc. v City of New York*, 119 AD3d 652 [2d Dept 2014]).

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, “the court must accept the facts as 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” (*see JDI Display America, Inc. v Jaco Electronics Inc*, 2020 WL 6602008 [2d Dept 2020]). “Whether a plaintiff can ultimately establish its allegation is not part of the calculus” (*Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). When a court considers evidentiary material in determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion has not been converted to one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether plaintiff states one, and unless it is shown that a material fact as alleged by the plaintiff is not a fact at all, and unless it can be said that no significant dispute exists regarding the alleged fact, dismissal is not warranted (*see Belling v. City of Long Beach*, 168 AD3d 900, 901 [2d Dept 2019]). Affidavits will almost never warrant dismissal under CPLR 3211 unless such affidavits establish “conclusively” that the plaintiff has no cause of action (*see Bokhour v. GTI Retail Holdings, Inc.*, 94 AD3d 682, 683 [2d Dept 2012]).

Here, in light of the parties’ conflicting affidavits as to who employed Danielyan on the date of this alleged accident and as to the availability of workers’ compensation benefits, Avdalyan and Kirakosyan do not conclusively establish that Danielyan has no cause of action insofar as asserted against them (*see Phillips v Taco Bell Corp.*, 152 AD3d 806 [2d Dept 2017]). However, determinations as to the applicability of the Workers’ Compensation Law is vested in the Workers’ Compensation Board, which has primary jurisdiction to resolve these matters (*Botwinick v Ogden*, 59 NY2d 909, 911 [1983]). Thus, whether Danielyan is able to maintain his action against any of these defendants or will be relegated to benefits under the Workers’ Compensation Law must first be determined by the Board (*Nunes v Window Network, LLC*, 54 AD3d 834, 835 [2d Dept 2008]). After final resolution of a prompt application to the Workers’ Compensation Board to determine the parties’ rights under the Workers’ Compensation Law, the defendants may seek a new determination of this motion or move for summary judgment.

With respect to Danielyan's motion and cross-motion pursuant to CPLR 3025(b), "leave to amend pleadings 'shall be freely given', provided that the amendment is not palpably insufficient as a matter of law, does not prejudice or surprise the opposing party, and is not patently devoid of merit (*see HSBC Bank v Picarelli*, 110 AD3d 1031 [2d Dept 2013]). Inherent in this rule is that "[n]o evidentiary showing of merit is required under CPLR 3025(b)" (*see Favia v Harley-Davidson Motor Co., Inc.*, 119 AD3d 836 [2d Dept 2014]). "If the opposing party wishes to test the merits of the proposed added cause of action..., that party may later move for summary judgment upon a proper showing" (*Lucido v Macnuso*, 49 AD3d 220, 229 [2d Dept 2008]). Here, there is no showing of prejudice, and in light of the parties' differing affidavits as to the persons and/or entities involved in this renovation project, the proposed amendment to the complaint to name Kork and Arco as defendants is not shown to be palpably insufficient or patently devoid of merit (*see Rodriguez v Paramount Dev. Assoc., LLC*, 67 AD3d 767 [2d Dept 2009]). Any arguments these new defendants may have with respect to the exclusivity of the Workers' Compensation Law, is to be made before the Workers' Compensation Board.

Accordingly, Avdalyan's motion and Kirakosyan's cross-motion pursuant to CPLR 3211 are denied. Danielyan's motion and cross-motion pursuant to CPLR 3025(b) to amend the complaint and caption to add Kork and Arco as defendants are granted.

This constitutes the decision/order of the Court

Dated: December 15, 2020

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Karen B. Rothenberg  
J.S.C.