Khan v Precision Worldwide Contr. Corp.
2020 NY Slip Op 34318(U)
November 23, 2020
Supreme Court, Queens County
Docket Number: 707794/2016
Judge: Maureen A. Healy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MAUREEN A. HEALY
Justice

IA Part 13

ASADULLAH KHAN,

Plaintiff,

-against-

PRECISION WORLDWIDE CONTRACTING CORP., PATRICK BLACK and FAS MAIN STREET FAMILY LIMITED PARTNERSHIP,

Defendants.

Index Number: 707794/2016

Motion Date February 24, 2020

Motion Seq. No. 3

FILED
DEC - 8 2020
COUNTY CLERK
QUEENS COUNTY

The following papers numbered EF103 to EF147 read on this motion by Orion Development Inc. ("Orion"), to dismiss the second third-party complaint as against it pursuant to CPLR 3211[a][1] and [a][7].

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF103-EF122
Answering Affidavits - Exhibits	EF123-EF128, 132-147
Reply Affidavits	EF129-EF131

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

Plaintiff in this negligence action seeks damages for personal injuries sustained on December 23, 2015, at 40-20 Main Street, Flushing, New York ("building" or "premises"), while in the course of his employment with ADO Flushing LLC ("ADO"). Plaintiff alleges that he tripped and fell at approximately 4:30 p.m., "on the staircase between the 3d floor and the floor above it, known as 3M, and/or 3d Mezzanine." Specifically, the trip occurred at the saddle at the top of the staircase, causing plaintiff to fall down the staircase to the 3d floor. As of December 23, 2015, the building in question was owned by FAS Main Street Family Limited Partnership ("FAS"), and as of that date ADO was a tenant in the building. The subject building was erected circa 2005, and the general contractor was Orion. The third floor and the mezzanine level remained vacant from the time the construction of the building was completed in 2005 through July 2014, when ADO leased that portion of the building. The space occupied by ADO was pursuant to a written lease. At their deposition, a copy of the lease was introduced into evidence and Ms. Sy, the managing member of FAS, identified her signature on behalf of FAS and that of "Dr. Phil" on behalf of ADO. Ms. Sy testified that the lease took effect on July 1, 2014, the date it was executed. The lease agreement was for the third floor plus the mezzanine level. After the lease was executed, ADO undertook to have the space renovated. The space delivered to ADO was a "white box", and had been vacant from the time the building was constructed circa 2005 to the time ADO agreed to lease the space.

Testifying on behalf of ADO was Dr. Philip Hirschhorn ("Dr. Phil" or "Dr. Hirschhorn"), who testified as follows: In 2015 ADO maintained a dental office at 40-20 Main Street, Flushing, New York pursuant to a written lease, which he identified and acknowledged signing. When Dr. Hirschhorn first looked at the space it was "empty raw space" or as commonly referred to in real estate parlance as a "white box". He described the space as "raw unfinished unpainted space on two levels - a third floor and third floor mezzanine level." With respect to the build out of the ADO dental office, ADO contracted with Precision Worldwide Contracting Corp ("Precision"), and identified the contract between ADO and Precision, as well as the signators to the contract. The build out of the dental space required the hiring of different trades which were all hired by Patrick Black on behalf of Precision.

Patrick Black, the sole shareholder of Precision, testified that his company contracted with ADO to build a dental suite at 40-20 Main Street, Flushing, New York. Pursuant to the contract, the work to be performed was the interior build out of a dental office which included floor finishing. Subcontractors for this job were hired by Precision. Multiple subcontractors were hired by Precision and he

identified EC Glass and Architectural Metal ('EC Glass"), as the "glass/flooring" subcontractor. EC Glass was hired in part to do the flooring throughout the entire project which included the third-floor mezzanine level where plaintiff fell.

Plaintiff commenced an action against FAS, Precision and Patrick Black. FAS then commenced a third-party action against ADO. FAS then later commenced a second third-party action against Orion for indemnity, breach of contract and contribution. Orion had previously been retained to perform certain services at the premises which included the construction of the subject staircase, and their work was completed in 2005 when a certificate of occupancy ("CO") was issued for the building. By the instant motion, Orion moves to dismiss the second third-party complaint, insofar as asserted against it, on the ground that it did not create the complained-of condition which caused plaintiff's fall. Orion alleges that East Coast Architectural Glass Corp. ("East Coast"), was paid to perform flooring work at the premises subsequent to Orion's work there. East Coast opposes the motion, in part, and submits that it was solely a glass contractor and never performed flooring work at the premises. In any event, the motion is also opposed by ADO and FAS.

Discussion

In the first instance, the motion to dismiss pursuant to CPLR 3211[a][1], is denied as untimely, as it was not made within the time period in which Orion was required to serve an answer (*see* CPLR 3211 [e]), and no extension of time to make the motion was requested by Orion or granted by the court (*see* CPLR 2004; *Portilla v Law Offices of Arcia & Flanagan*, 125 AD3d 956, 956-57 [2d Dept 2015]; *Lema v New York Cent. Mut. Fire Ins. Co.*, 112 AD3d 891 [2d Dept 2013]; *Clinkscale v Sampson*, 74 AD3d 721 [2d Dept 2010]; *Bennett v Hucke*, 64 AD3d 529 [2d Dept 2009]; *Bowes v Healy*, 40 AD3d 566 [2d Dept 2007];*see also Manhattan Real Estate Equities Group LLC v Pine Eauity NY, Inc*., 2005 WL 5351322, 1 [Sup Ct, NY County, Apr. 01, 2005], *affd.*, 7 AD3d 323[1st Dept 2006]).

"A motion to dismiss a complaint based on documentary evidence 'may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law' " (*Stein v Garfield Regency Condominium*, 65 AD3d 1126, 1128 [2009], quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *Parekh v Cain*, 96 AD3d 812, 815 [2d Dept 2012]; *Sato Constr. Co., Inc. v 17 & 24 Corp.*, 92 AD3d 934, 935-936 [2d Dept 2012]). "The evidence submitted in support of a [CPLR 3211 (a) (1)]

motion must be 'documentary' or the motion must be denied" (*Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010]; *see Attias v Costiera*, 120 AD3d 1281, 1282 [2d Dept 2014]; *Rodolico v Rubin & Licatesi, P.C.*, 114 AD3d 923, 925 [2d Dept 2014]). To qualify as documentary evidence, the evidence "must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d at 86; *see Flushing Sav. Bank, FSB v Siunykalimi*, 94 AD3d 807, 808 [2d Dept 2012]; *Granada Condominium III Assn. v Palomino*, 78 AD3d at 997). "[J]udicial 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,' would qualify as 'documentary evidence' in the proper case" (*Fontanetta v John Doe 1*, 73 AD3d at 84-85, quoting David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10 at 21-22 [2005 ed]; *see Datena v JP Morgan Chase Bank*, 73 AD3d 683, 685 [2d Dept 2010]). Affidavits and letters "were not the types of documents contemplated by the Legislature when it enacted this provision" (*Fontanetta v John Doe 1*ain , 73 AD3d at 85; *see Eisner v Cusumano Constr., Inc.*, 132 AD3d 940, 942 [2d Dept 2015]; *J.A. Lee Elec., Inc. v City of New York*, 119 AD3d 652, 653 [2d Dept 2014]; *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d at 714; *Granada Condominium III Assn. v Palomino*, 78 AD3d at 997).

Here, the certificate of occupancy submitted by Orion does not constitute documentary evidence for the purpose of a motion pursuant to CPLR 3211 (a) (1) (*see Anderson v Armentano*, 139 AD3d 769, 770-71 [2d Dept 2016]; *Lindsay v Pasternack Tilker Ziegler Walsh Stanton & Romano LLP*, 129 AD3d 790, 792 [2015]; *Attias v Costiera*, 120 AD3d at 1283; *Pasquaretto v Long Is. Univ.*, 106 AD3d 794, 795 [2013]; *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d at 714; *Jones v Rochdale Vil., Inc.*, 96 AD3d 1014, 1017 [2012]). The certificate of occupancy includes the following language, "... certifies that the premises described herein *conforms substantially* to the approved plans and specifications and requirements of all applicable laws, rules and regulations for the uses and occupancies specified" (emphasis added). Thus, the certificate of occupancy does not "utterly refute" FAS' allegations that the staircase was negligently constructed/installed by Orion, (*see Anderson v Armentano*, 139 AD3d 769 [2d Dept2016]; *Shofel v DaGrossa*, 133 AD3d 649 [2d Dept 2015]; *Pasquaretto v Long Island University*, 106 AD3d 794 [2d Dept 2013]). The issuance of a certificate of occupancy does not translate to a "*carte blanche*" approval of the defendant's work product (*see Town of Huntington v Am. Mfrs. Mut. Ins. Co.*,

32 Misc 3d 1240(A) [Sup Ct 2011]). A certificate of occupancy merely creates a rebuttable presumption that a building complies with New York City law (*see Bd. of Managers of Loft Space Condominium v SDS Leonard, LLC*, 142 AD3d 881, 882 [1st Dept 2016]; *Board of Mgrs. of Olive Park Condominium v Maspeth Props. LLC*, 2014 N.Y. Slip Op. 33012 [U], 2014 WL 6669702 [Sup.Ct., Kings County 2014]; *see also Solomons v Greens at Half Hollow, LLC*,26 Misc.3d 83, 86 [App. Term, 2d Dept 2010]). Therefore, it is not the kind of documentary evidence that warrants dismissal of a complaint pursuant to CPLR 3211(a)(1) (*see e.g. Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

The branch of the motion which is to dismiss the claims pursuant to CPLR 3211[a][7], is also denied. A motion to dismiss a cause of action pursuant to CPLR 3211(a)(7) should not be granted "if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (*Sonne v Bd. of Trustees of Vil. of Suffern*, 67 AD3d 192, 200 [2d Dept 2009], quoting*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]; *see AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 591 [2005]; *Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). A court may consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a) (7) (*see Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (*Rabos v R&R Bagels & Bakery, Inc.*, 100 AD3d 849, 851-852 [2d Dept 2012];
see Guggenheimer v Ginzburg, 43 NY2d 268, 274-275 [1977]).

Here, FAS' Amended Second Third-Party Complaint sets forth cognizable causes of action for common law indemnity, contribution, contractual indemnity, legal fees and breach of contract for failure to obtain insurance for the benefit of FAS. Orion's submissions do not conclusively establish that FAS has no cause[s] of action. Rather, it merely disputes some of the factual allegations in FAS' pleadings. However, in considering a motion to dismiss the court is not authorized to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action (*Guqqenheimer v Ginzburg*, 43

NY2d 268 [1977]). The standard for deciding a CPLR §3211 motion to dismiss is different than a motion made pursuant to CPLR §3212 (*Rovello v Orofino*, 40 NY2d 633 [1976]). It must be kept in mind that a CPLR 3211 (a) (7) motion is not a motion for summary judgment unless the court elects to so treat it under CPLR 3211 (c), after giving adequate notice to the parties (*see* CPLR 3211 [c]; *Rovello v Orofino Realty Co.*, 40 NY2d at 635).

Pursuant to CPLR §3211 (c), it is within the court's discretion to convert a motion under CPLR §3211(a) and/or (b), upon proper notice to the parties, as one for summary judgment. Should this court consider Orion's motion as one for summary judgment pursuant to CPLR §3212, it would also be denied on the basis that material issues of fact exist as to the condition of the staircase as built by Orion. The evidence herein submitted establishes that the subject staircase was originally installed by Orion and that it remained unaltered up to the time that ADO contracted with Precision for the build out of its dental suite. FAS submits that when Orion built the staircase, there existed a height differential at the head of the staircase. This issue is not resolved by the certificate of occupancy submitted by Orion in support of its motion, as the issuance of the certificate of occupancy does not in and of itself preclude a finding of negligence against Orion for violation of the building code or preclude a finding that it negligently constructed and/or installed the subject staircase (*see Garrett v Holiday Inns, Inc.*, 58 NY2d 253 [1983]; *Cirino by Gkanios v Greek Orhtodix C.ommunity, Inc.*, 193 AD2d 576 [2d Dept 1993]). The question of whether this height differential constituted a tripping hazard is clearly a question of fact to be resolved by a jury.

Furthermore, the motion for summary judgment would also be denied as premature pursuant to CPLR §3212(f), as Orion has yet to produce a deposition witness (*see Adrianis v Fox*, 30 AD3d 550, 550 [2d Dept 2006]). The Orion project manager for the building construction at the premises was Michael Lin. It is alleged that he would have personal knowledge as to the condition of the staircase as of the time construction was completed and the building turned over to the owner.

Conclusion

The motion for summary dismissal of the second third-party complaint is denied.

Dated: NOV 23 2020

Maureen A. Healy, J.S.C.

FILED
DEC - 8 2020
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