Batson v Avalonbay Redevelopment LLC
2020 NY Slip Op 35206(U)
February 24, 2020
Supreme Court, Westchester County
Docket Number: Index No. 66846/2019
Judge: Charles D. Wood
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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KHANIJA L. BATSON,

DECISION & ORDER

Plaintiffs,

Index No.:66846/2019
Sequence No. 1

-against-

AVALONBAY REDEVELOPMENT LLC,
AVALONBAY COMMUNITY INC., ASSET PRESERVATION, INC., 255 HUGUENOT STREET CORP
255 HUGUENOT OWNER LLC,
275 HUGUENOT REIT LLC,
OTIS ELEVATOR COMPANY,

Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 25 -35, 38-40, were read in connection with defendant Otis Elevator Company's ("Otis") pre-Answer Motion to Dismiss.

Plaintiff brought this action to recover damages for personal injuries allegedly sustained by plaintiff on July 1, 2018, when plaintiff was allegedly injured by an elevator within the building at 255 Huguenot Street in New Rochelle. Otis now moves the court for an order pursuant to CPLR 3211(a)(7) dismissing and severing plaintiffs complaint and action as against Otis; dismissing and severing any and all cross-claims as against Otis; or in the alternative, converting its motion into a motion for summary judgment and granting summary judgment in

favor of defendants; and for costs, sanctions and attorneys fees. Essentially, Otis moves to dismiss on the ground that plaintiff sued the wrong elevator company.

NOW based upon the foregoing, the motion is decided as follows:

Pursuant to CPLR 3211 (a)(7) "upon a motion to dismiss [for failure to state a cause of action], the sole criterion is whether the subject pleading states a cause of action, and if, from the four comers of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Esposito v Noto, 90 AD3d 825 [2d Dept 2011]). Additionally, if the court considers evidence submitted by a defendant in support of a motion to dismiss under CPLR 3211 (a) (7)... a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint," and if the court does so, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Leon v Martinez, 84 NY2d 83, 88 [1994]; Uzzle v Nunzie Ct. Homeowners Ass'n. Inc., 70 AD3d 928, 930 [2d Dept 2010]).

In support of its motion, Otis offers the Affidavit of Joseph Villano, a Service Manager for Otis in the Yonkers office, which handles Otis service operations in Westchester County. He has been employed with Otis for 30 years, and has been its service manager for 19 years. (NYSCEF Doc No. 27). Through his affidavit, Villano attests that Otis does not, and has never owned, operated, managed controlled, repaired and/or inspected any of the elevators in the subject building. At the time of the incident, Otis was not contractually obligated to perform any

services at the building. He personally searched the data base for information on the premises, and no record of any kind, was found that Otis ever operated, managed, controlled, inspected, maintained, serviced surveyed modernized or installed elevators at that location. In addition there is no record of Otis performing the installation of elevators at the subject premises. The elevators in the apartment building were not designed, manufactured or sold by Otis. Otis does not sell its elevators to other companies, entities or individuals for installation.

In opposition, plaintiff argues that Otis's motion is premature and that the Villano affidavit is self-serving. Counsel argues that Villano says that Otis has no record of any work performed at the subject location, but does not state whether Otis had a contractual agreement with other company and or customer for any work at the subject location. Specifically, plaintiff is not in possession of records of mainteneance and inspection or contracts for the servicing of the subject elevator.

"A party who contends that a motion for summary judgment is premature must "demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (Marrone v Miloscio, 145 AD3d 996, 998 [2d Dept 2016]). Here, plaintiff has not demonstrated there is a need for discovery nor depositions as to Otis.

The evidence clearly demonstrates that inasmuch as plaintiff has commenced action against Otis, the action is directed to the wrong party.

Even accepting the facts as alleged in the complaint to be true, and affording plaintiff the benefit of every possible favorable inference under CPLR 3211(a)(7), the court grants defendants' pre-answer motion to dismiss.

As for costs and sanctions, Otis's counsel contends that it attempted to contact plaintiff's counsel on a number of occasions, to no avail, as counsel never returned the calls, thus requiring the filing of this motion resulting in additional unnecessary defense costs to Otis.

Pursuant to 22 NYCRR § 130–1.1, the court, in its discretion, declines to impose sanctions against plaintiff and plaintiff's counsel. Otis has not established that plaintiffs' conduct was "without legal merit; or [was] undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another; or assert[ed] material factual statements that are false (22 NYCRR 130-1.1 [c]).

All matters not specifically addressed are herewith denied.

This constitutes the Decision and Order of the Court.

Accordingly, it is hereby

ORDERED, that defendants' pre-answer motion to dismiss is granted, and the complaint and all cross claims are dismissed as against Otis.

Dated: **February 24, 2020**
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties' Counsel by NYSCEF