

<b>Centeno v Long Is. Univ.</b>
2020 NY Slip Op 35272(U)
August 31, 2020
Supreme Court, Nassau County
Docket Number: Index No. 617791/19
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack  
Justice

\_\_\_\_\_  
CHRISTINA CENTENO and GALO  
CENTENO,

TRIAL/IAS, PART 18  
NASSAU COUNTY

Plaintiff(s),

Index No.: 617791/19

-against-

LONG ISLAND UNIVERSITY and NEW  
YORK STATE SCHOOL MUSIC  
ASSOCIATION,

Motion Seq. No.: 002

Motions Submitted: 7/23/2020

Defendant(s).

\_\_\_\_\_  
x

The following papers read on this motion

Notice of Motion/Supporting Exhibits.....X  
Affirmation in Opposition.....X  
Reply Affirmation.....X

Defendant, New York State School Music Association (NYSSMA), moves this court for an order, pursuant to CPLR §3211(a)(1) dismissing the complaint based upon documentary evidence. In the alternative, NYSSMA moves for summary judgment, pursuant to CPLR §3212, dismissing the complaint against it. Plaintiffs, Christina Centeno (Christina) and Galo Centeno (Galo) oppose the motion. Co-Defendant, Long Island University (LIU), submits no papers in support of, or in opposition to the motion.

Plaintiffs commenced this slip and fall action by summons and complaint dated December 20, 2019. Issue was joined by service of an answer by LIU dated January 14, 2020. NYSSMA interposed an answer with cross claims dated March 4, 2020.

Christina alleges that on January 15, 2017, she was at the Tilles Center for Performing Arts (Tilles Center), a venue owned by LIU, to see a concert. While at the concert, she allegedly fell and suffered injuries. NYSSMA now moves to dismiss the complaint, arguing it is the wrong party to this action.

A motion to dismiss a complaint based on CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations conclusively establishing a defense as a matter of law (*Gosch v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Bibbo v 31-30, LLC*, 105 AD3d 791, 792 [2d Dept 2013]). To be considered documentary, for the purposes of a motion to dismiss based on documentary evidence, the evidence must be unambiguous and of undisputed authenticity. Judicial 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," qualify as "documentary evidence" in the proper case. If the document does not reflect an out-of-court transaction, and is not essentially undeniable, it is not documentary evidence within the intendment of CPLR 3211(a)(1) (*see Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). Neither affidavits, deposition testimony or letters are considered documentary evidence within the intendment of CPLR 3211(a)(1) (*Integrated Constr. Servs., Inc. v Scottsdale Ins. Co.*, 82 AD3d 1160, 1163 [2d Dept 2011]).

In a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Films Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of action. (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980], *supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, (*see Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 [1st Dept 1992]), and it should only be granted when there are no triable issues of fact (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]).

One cannot be held liable for a dangerous or defective condition on property unless ownership, occupancy, control or special use of the property has been established. (*Ruggiero v. City School District of New Rochelle*, 109 A.D.3d 894 [2<sup>nd</sup> Dept 2013]; *Soto v. City of New York*, 244 A.D.2d 544 [2<sup>nd</sup> Dept. 1997]; *James v. Stark*, 183 A.D.2d 873 [2<sup>nd</sup> Dept. 1982]).

Herein, in support of its motion, NYSSMA submits a contract between LIU and non-party Nassau Music Educators Association (NMEA), and the affidavit of David Gaines, Executive Director of NYSSMA. The contract is a license agreement wherein NMEA is granted the right to use the Tilles Center for certain dates, including January 15, 2017, the date of Christina's accident. Mr. Gaines states in his affidavit that NYSSMA and NMEA are separate entities, and that NYSSMA had no connection to the Tilles Center on the date Christina was injured. Mr. Gaines denies that NYSSMA owned, used or occupied the Tilles Center on January 15, 2017. Further, NYSSMA did not help to plan or organize the concert Christina went to see, nor did it provide any employees or services. According to Mr. Gaines: "NYSSMA had no involvement in the use or occupation of the Tilles Center on January 15, 2017."

The court finds that the evidence presented does not suffice as documentary evidence pursuant to CPLR §3211(a)(1). While the contract qualifies as documentary evidence, the affidavit does not. Without the affidavit, the contract merely indicates that LIU and NMEA had a contract. It does not preclude NYSSMA's involvement.

However, the court does find that the contract and the affidavit, together with LIU's answer acknowledging ownership of the Tilles Center, establish NYSSMA's entitlement to judgment as a matter of law under CPLR §3212. Using a summary judgment standard, the affidavit is competent evidence, and it establishes a lack of ownership, occupancy, control or special use of the Tilles Center on January 15, 2017. The burden shifts to plaintiffs to raise a material issue of fact requiring a trial of the action.

In opposition, Plaintiffs offer only the affirmation of counsel and no admissible evidence. Counsel's first argument is that the contract cannot be considered by the court because it has not been authenticated. Mr. Gaines was not Executive Director at the time the contract was executed. As pointed out by NYSSMA in reply, the argument is refuted by CPLR §4540-a which allows a party to offer into evidence a document turned over by an adverse party in discovery. Under such circumstances, authenticity of the document is presumed. The presumption is rebuttable. The contract was turned over by LIU to NYSSMA, and they are adverse parties as established by NYSSMA's cross claims. Therefore, the contract is presumed authentic. Plaintiffs offer nothing to rebut the presumption.

Counsel next argues that the summary judgment motion is premature because discovery is not complete. However, Plaintiffs have neglected to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. "The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion" (*Hanover Ins. Co. v. Prakin*, 81 AD3d 778 [2d Dept. 2011]; see also *Essex Ins. Co. v. Michael Cunningham Carpentry*, 74 AD3d 733 [2d Dept. 2010]; *Peerless Ins. Co. v. Micro Fibertek, Inc.*, 67 AD3d 978 [2d Dept. 2009]; *Gross v. Marc*, 2 AD3d 681 [2d Dept. 2003]).

Finally, counsel asserts that the motion should be denied because Plaintiffs were in the process of "obtaining documentation...which will conclusively establish that...[NYSSMA's] name was prominently depicted at various musical concert events held at the subject premises." This is unpersuasive for a number of reasons. First, it is

asserted by counsel who does not indicate he has firsthand knowledge of this alleged evidence. Second, there is no affidavit from whomever allegedly saw the advertisements. Third, NYSSMA did not deny every holding events at the Tilles Center. They denied not owning the Tilles Center and denied being involved in any way whatsoever with the event where Christina was hurt. As such, even if the alleged evidence exists, its relevance would be questionable, at best. In light of the foregoing, the court finds Plaintiffs are unable to raise an issue of fact.

Accordingly, it is hereby

**ORDERED**, that NYSSMA's motion is DENIED in part and GRANTED in part.

It is DENIED to the extent NYSSMA moves pursuant to CPLR §3211(a)(1); and it is further

**ORDERED**, that NYSSMA's motion is GRANTED to the extent it seeks summary judgment. The complaint is dismissed against NYSSMA. As the court finds NYSSMA cannot be found liable, their cross claims are dismissed as moot.

The foregoing constitutes the Decision and Order of the Court.

Dated: August 31, 2020  
Mineola, N.Y.

**ENTERED**

**Sep 02 2020**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

  
Hon. James P. McCormack, J. S. C.