

Shaikh Group LLC v Wheeler
2020 NY Slip Op 35335(U)
June 26, 2020
Supreme Court, Steuben County
Docket Number: Index No. E2018-1428CV
Judge: Patrick F. McAllister
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF STEUBEN

SHAIKH GROUP LLC,
Plaintiff,

Index No. E2018-1428CV

-v-

DECISION and ORDER

BRANDON WHEELER and FINANCE of AMERICA
COMMERCIAL LLC,

Defendants.

PRESENT: Hon. Patrick F. McAllister
Acting Supreme Court Justice

The Defendant, Finance of America Commercial LLC, moves the court for summary judgment dismissing the complaint as against Finance of America. The motion was originally scheduled for April 24, 2020, but due to the pandemic Plaintiff's counsel was unable to submit answering papers. The motion was adjourned until answering papers could be filed. The motion is being decided on submission.

In support of the Defendant's motion the court received and reviewed the following submissions:

(Proposed) Order Granting Summary Judgment Dismissing the Complaint as
Against Defendant Finance of America Commercial LLC;
Affirmation of Service by William Sandelands;
Notice of Motion;
Attorney Affirmation in Support of Motion for Summary Judgment
[attachments: Notice of Service of Process,
Secretary of State filing,
Summons & Complaint,
Work Order Isaac Heating and Air Conditioning Receipt
Department of Public Works,
Certified Mailing,
Deposition Shoel Shaikh , and
Work Order Isaac Heating and Air Conditioning Receipt
Department of Public Works]; and
Affidavit in Support of Defendant Finance of America Commercial LLC's Motion
for Summary Judgment by Mark Thomas sworn to February 27, 2020

[attachments: Lenders Closing Instructions,
Appraisal,
Project Review & Recommendation, and
Environmental Indemnity Agreement]

In opposition to the motion for summary judgment the court received and reviewed the following submissions:

Affirmation in Opposition to Defendant's Motion for Summary Judgment by
Kamran F. Hashmi affirmed June 19, 2020

[attachments: Summons and Complaint
Isaac Heating Work Order,
Receipt from Department of Public Works,
Defendant Finance of America Commercial LLC's Answer
with Affirmative Defenses and Cross-claims,
e-mails]

Affidavit of Shoel Shaikh sworn to June 19, 2020

[attachments: e-mails,
Project Review & Recommendation,
e-mails,
Isaac Heating Work Order
Receipt from Department of Public Works, and
e-mails]; and

Plaintiff Shaikh Group LLC's Memorandum of Law in Opposition to Defendant
Finance of America Commercial LLC's Motion for Summary Judgment.

Discussion:

Summary judgment is essentially an expedited remedy to avoid needless trials and delays where no genuine issue of fact remains to be resolved at trial. CPLR § 3212. The remedy is based "in the interests of justice". Halpern v. Lavine (1946 Sup App T) 60 NYS2d 121. Because it is a drastic remedy, summary judgment should be denied when the court has doubt (except as to damages) concerning whether a material and triable issue of fact exists. Rotuba Extruderes, Inc. v. Ceppos 46 NY2d 223 (1978).

The parties have not completed discovery. A summary judgment motion made prior to the completion of discovery should be denied as premature. Grove's v. Land's End Housing Co., Inc., 80 NY2d 987 (1992). Without the completion of discovery, it is manifestly premature to think that a question of fact cannot be raised that requires submission to the trier of fact. Ross v. Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 (1993). In Ross the court found that the defendant's representatives had yet to be deposed. "Thus, any conclusion that plaintiff cannot produce evidence to justify submitting the question of International Paper's control and/or supervision to a tier of fact is, manifestly, premature . . ." Ross v. Curtis-Palmer

Hydro-Electric Co., id., at 506 (1993).

The very fact that discovery has not been completed in and of itself produces sufficient doubt to deny a summary judgment motion. “Because discovery has not been conducted with respect to the special employment defense, however, the court properly denied that part of defendant’s motion seeking summary judgment dismissing the complaint.” Nastasi v. Span, Inc., 8 AD3d 1011 (Fourth Dept. 2004).

The party moving for summary judgment has the initial burden of setting forth evidentiary facts that establish the cause of action, or in this case, a defense sufficiently to entitle them to judgment as a matter of law. McCabe v. CSX Transport, Inc., 27 AD3d 1150 (Fourth Dept., 2006). To meet this burden the moving papers must contain evidence confirming that there is no material and triable issue of fact. Royal v. Brooklyn Union Gas Co., 122 AD2d 132 (Second Dept. 1986). Anything less requires dismissal of the motion regardless of the contents of the opposing party’s papers. Filkins v. Village of Elbridge, 24 AD3d 1293 (Fourth Dept., 2005); Silverman v. Sciartelli, 2 AD3d 1463 (Fourth Dept. 2003). To make such a showing, the moving party’s supporting papers must include allegations in affidavit format, made with personal knowledge of the underlying facts (C.P.L.R. §3212[b]), together with a copy of the pleadings, and other available proof such as depositions and written admissions. Proof must be in evidentiary form. Foremost Ins. Co. v. Moore, 103 AD2d 1042 (Fourth Dept., 1984). Conclusory statements are inadequate (Ciccarelli v. Cotira, Inc., 24 AD3d 1276 [Fourth Dept., 2005]) as are hearsay allegations (Central School Dist. v. Cohen, 60 Misc 2d 337 [1969]).

Summary judgment may only be granted if the opposing party fails to deny any of the moving party’s factual allegations and contests the motion only on legal grounds (Brickman v. Niagara Fruit Co. [1971] 65 Misc 2d 483), or if the record of undisputed facts is sufficient for the court to resolve the case as a matter of law (Central School Dist. v. Cohen [1969] 60 Misc 2d 337).

The Plaintiff has alleged that the Defendant conducted an inspection of the properties prior to closing and that the asbestos problem came to light as a result of the inspection and further, that the Plaintiff was lead to believe that the financing would not be approved until the asbestos problem was properly dealt with. At the very least this raises an issue of fact as to whether or not the Plaintiff acted in reliance upon the Defendant’s actions.

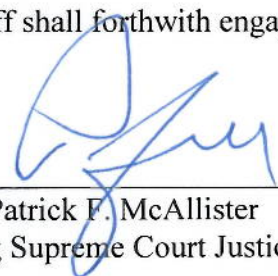
The court finds that the motion for summary judgment is premature since discovery has yet to be complete and there appears to be an issue of fact. For the reasons set forth above the Defendant’s motion for summary judgment is denied without prejudice.

NOW, therefore, upon consideration of all papers and proceedings heretofore had herein, and after due deliberation, it is

ORDERED, ADJUDGED, and DECREED that Defendant's motion for summary judgment dismissing the action be, and hereby is denied without prejudice; and it is further

ORDERED, ADJUDGED, and DECREED that Plaintiff shall forthwith engage in discovery which is to be completed by September 30, 2020.

Dated: June 26, 2020



Hon. Patrick F. McAllister
Acting Supreme Court Justice

ENTER