

Horowitz v L.A. Fitness Intl., LLC

2020 NY Slip Op 35698(U)

April 27, 2020

Supreme Court, Queens County

Docket Number: Index No. 709326/2017

Judge: Pam Jackman Brown

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NEW YORK SUPREME COURT - COUNTY OF QUEENS

IAS PART 19

Short Form Order

Present: Hon. Pam Jackman Brown, JSC

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DAN HOROWITZ,

Plaintiff,

-against-

**L.A. FITNESS INTERNATIONAL, LLC, and NYS POOL
MANAGEMENT COMPANY OF LI, INC.,**

Defendants.

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**FITNESS INTERNATIONAL, LLC, (MISNAMED IN THE
VERIFIED COMPLAINT AS “L.A. FITNESS
INTERNATIONAL, LLC”).**

Defendant/Third-Party Plaintiff,

-against-

WORLD INSURANCE ASSOCIATES, LLC,

Third-Party Defendant.

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Recitation, as required by CPLR § 2219(a), of the following papers e-filed numbered 33 to 40 read on this motion by Third Party Defendant, Word Insurance Associates, LLC for an order dismissing the complaint of Defendant and Third-Party Plaintiff Fitness International, LLC in its entirety with prejudice: (1) pursuant to CPLR § 3211(a)(3) for lack of standing; (2) pursuant to CPLR § 3211 (a)(1) on the basis of documentary evidence; (3) pursuant to CPLR § 3211 (a)(7) for failure to state a cause of action; and (4) such other and further relief as this Court deems just and proper.

	<u>E-FILED PAPERS NUMBERED</u>	
	Papers	Exhibits
Notice of Motion – Affirmation(s), Affidavit(s), Memorandum of Law in Support, and Exhibit(s) Annexed	33-34;36; 40	35; 37-39

Upon the papers listed above, this Notice of Motion is hereby decided in accordance with this Decision/Order.

This is a premises liability action seeking damages for Plaintiff's injuries. Plaintiff alleges that on the May 7, 2017, he was at the Defendant and Third-Party Plaintiff, L.A. Fitness International, LLC (hereinafter referred to as "Fitness International") and Defendant NYC Pool Management Company of LI, Inc. (hereinafter referred to as "NYC Pool Management") premises located at 711 Stewart Avenue, Garden City, New York (hereinafter referred to as "subject premises"). While at the subject premises, Plaintiff utilized the whirlpool and allegedly sustained injuries.

Plaintiff commenced this action with the filing of a summons and complaint against Defendant Fitness International on the June 6, 2017. Issue was joined on the November 11, 2017 when Defendant Fitness International filed an answer denying all allegations and providing affirmative defenses. An amended complaint was filed on the November 28, 2018, including Defendant NYS Pool Management. Issue was joined on the January 9, 2019, when NYS Pool Management filed an answer denying all allegation and asserting affirmative defenses. In addition, Defendant NYS Pool Management asserted a counterclaim against Defendant Fitness International seeking a judgment dismissing the complaint against it. A third-party claim was commenced by Fitness International on the April 17, 2019, against Word Insurance Associates, LLC (hereinafter referred to as "Third-Party Defendant World Insurance").

Third-Party Defendant World Insurance now moves to dismiss Third-Party Plaintiff, Fitness International's, complaint with prejudice pursuant to CPLR §§ 3211(a)(1), (a)(3), and (a)(7) for lack of standing, on the basis of documentary evidence, and for failure to state a cause of action. There is no opposition to the motion.

The Court turns to the branch of the motion seeking dismissal pursuant to CPLR § 3211(a)(1). A motion to dismissed based on documentary evidence will be granted only if the documentary evidence proffered resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (CPLR § 3211[a][1]). To be considered documentary for the purposes of a motion to dismissed based on documentary evidence, the evidence must be unambiguous and of undisputed authenticity (*Fontanetta v. John Doe 1*, 73 A.D. 3d 898 [2nd Dept 2010]; *see also Cives Corp. v. George A. Fuller Co., Inc.*, 97 A.D.3d 948 [2nd Dept 2012]). "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, would qualify as documentary evidence (*Id.*).

Here, in support of this branch of its motion, Third-Party Defendant submits an affirmation in support from Joseph Francoeur, Esq.; an affidavit in support from Thomas Fontana, an insurance broker with World Insurance; a copy of the relevant insurance

policy; a copy of the pool/spa maintenance and life services agreement; a letter from David Kupfer of Kennedys CMK; a certificate of liability insurance; and a letter from Steve Niehaus of Western World Insurance Group. The relevant insurance policy, which qualifies as documentary evidence, includes a section for covered locations and states that such locations will be identified in Schedule B of the agreement. Schedule B includes the subject premises where the incident took place. Moreover, the certificate of liability insurance includes Third-Party Plaintiff, Fitness International, as a certificate holder with the proper endorsement.

Third-Party Defendant World Insurance has failed to establish its entitlement to dismissal since it appears, based on the policy submitted, that the subject premises was a listed location on the maintenance and life services agreement. Therefore, this branch of the motion seeking dismissal on the basis of documentary evidence is denied.

The Court now turns to the branch of the motion pursuant to CPLR § 3211(a)(3) to dismiss Fitness International's third-party complaint against World Insurance because it lacks legal capacity to sue. Parties are not shown to lack legal capacity merely because they may have no cause of action against the third-party defendants for damages (*Silver v. Pataki*, 96 N.Y.2d 755 [Court App. 2001]; *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 639 [Court App. 1994]). In addition, “[t]here is a difference between capacity to sue, which gives the right to come into court, and possession of a cause of action, which gives the right to relief in court” (*Iannucci v Kucker & Bruh, LLP*, No. 16155/05, 2006-03483, 840 N.Y.S.2d 375, 2007 N.Y. Slip Op. 06026, 2007 WL 2002915 [2nd Dept. 2007] quoting *Kittinger v. Churchill Evangelistic Assn., Inc.*, 239 [4th Dept 1993]).

Here, Third-Party Defendant World Insurance has failed to establish Fitness International's lack of legal capacity to sue since it has shown that it has a right to come into court. Therefore, this branch of the motion seeking dismissal based on Fitness International's lack of capacity to sue is denied.

The court now turns to the branch of the motion pursuant to CPLR § 3211(a)(7). “A party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that ... the pleading fails to state a cause of action” (*Id.*). On a motion to dismiss pursuant to CPLR 3211(a)(7), “the pleading is to be afforded a liberal construction. The court should accept the facts as alleged in the complaint as true, accords the plaintiffs the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory” (*Epifani v. Johnson*, 65 AD3d 224, 229 [2nd Dept., 2009]). The test to dismiss a complaint for failure to state a cause of action is whether a cognizable cause of action can be discerned from the four corners of the complaint, not whether the claim has been properly stated (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633 [1976]).

Here, Third Party Plaintiff Fitness International asserts six causes of action against Word Insurance, which World Insurance has denied all the allegations. However, the Court, accepting the facts alleged in the third-party complaint as true, finds that causes of actions can be discerned from the third-party complaint. Therefore, this branch of the motion seeking dismissal on the basis of failure to state a cause of action is denied.

Accordingly, Third-Party Defendant Word Insurance's motion is denied in its entirety. The foregoing constitutes the Decision and Order of this Court.

Dated: April 27, 2020
Jamaica, NY



HON. PAM JACKMAN BROWN, JSC

FILED
4/28/2020
COUNTY CLERK
QUEENS COUNTY