

**Irrizarry v Rosselli**

2020 NY Slip Op 35703(U)

June 16, 2020

Supreme Court, Kings County

Docket Number: Index No. 519320/2018

Judge: Richard Velasquez

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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16<sup>TH</sup> day of JUNE 2020.

P R E S E N T:  
HON. RICHARD VELASQUEZ

Justice.

-----X  
KERMIT IRRIZARRY,

Plaintiffs,

Index No.: 519320/2018

-against-

Decision and Order

PATRICIA ROSSELLI,  
JOSEPH PASSALACQUA &  
J.R.M. CONSTRUCTION CORP.,

Defendants.

-----X  
PATRICIA ROSSELLI,

Plaintiffs,

-against-

JOSEPH PASSALACQUA,  
J.R.M. CONSTRUCTION CORP.  
ROSALIE PASSALACQUA,  
J&R SALALQUA CONTRACTING CO., INC.  
GARY ROSEN LAW FIRM P.C. and  
GARY ROSEN ESQ.,

Defendants.

-----X  
The following papers numbered 51 to 112 read on this motion:

Papers

Numbered

Notice of Motion/

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Affidavits (Affirmations) Memorandum Annexed _____	51-54; 63-69
Opposing Affidavits (Affirmations) _____	79-89; 92; 93
Reply Affidavits (Affirmations) _____	94; 96-102; 103-110, 112

After oral argument held on May 22, 2020 and a review of the submissions herein, the Court finds as follows:

Third-party Defendants, GARY ROSEN LAW FIRM P.C. and GARY ROSEN ESQ., pursuant to 3211 to dismiss the third-party complaint. Third Party plaintiff opposes the same. (MS#3)

Defendant/Third-party defendants JRM CONSTRUCTION CORP move to sever Third-party plaintiff causes of action. Third Party plaintiff opposes the same. (MS#4).

### ANALYSIS

Pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v. Morone*, 50 NY2d 481, 484, 429 NYS2d 592, 413 NE2d 1154; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 NYS2d 314, 357 NE2d 970). **“The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one”** (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17; *Rovello v. Orofino Realty Co.*, 40 NY2d at 636, 389 NYS2d 314, 357 NE2d 970). **“[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion”** (*Palazzolo v. Herrick, Feinstein, LLP*, 298 AD2d 372, 751 NYS2d

401). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (see *McGuire v. Sterling Doubleday Enters., LP*, 19 AD3d 660, 661, 799 NYS2d 65). “Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims ... plays no part in the determination of a pre-discovery 3211[a][7] motion to dismiss” (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38; see *EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 832 NE2d 26, 799 NYS2d 170 (Ct of Appeal 2005; *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 372 NE2d 17 (1977)).

In the present case accepting the facts as alleged in the complaint as true, according third-party plaintiffs the benefit of every possible favorable inference, this court finds that they have alleged facts sufficient to state a cause of action for common law indemnification; slander of title; and quiet title, especially at this pre-answer pre-discovery stage of the litigation. Additionally, third-party defendant has not provided a single piece of documentary evidence to support their assertions. Additionally, an indemnity claim arises only when the party seeking indemnity makes payment. CPLR 213(2). As the claim is still ongoing and no payments have yet been made, third-party defendant ROSEN cannot claim that third-party plaintiff' claim for common law indemnity is time barred. Additionally, third-party plaintiff alleged in the third party complaint that the third-party defendant wrongfully filed documentation which casts a cloud upon defendant/third-party plaintiff title to or interest in Lot 26 giving rise to an action for slander of title and quiet title.

Additionally, numerous factual issues exist in which no documentation submitted resolves. Therefore, Third-party defendant ROSEN motion to dismiss is hereby denied

Next addressing third-party defendant's JRM CONSTRUCTION CORP motion to sever third party plaintiff's action is hereby denied. CPLR 603 provides that "[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue." "The determination to grant or deny a request for a severance pursuant to CPLR 603 is a matter of judicial discretion which should not be disturbed on appeal absent a showing of prejudice to a substantial right of the party seeking the severance" (*Naylor v. Knoll Farms of Suffolk County, Inc.*, 31 AD3d 726, 727, 818 NYS2d 460; see *Mothersil v. Town Sports Int'l.*, 24 AD3d 424, 425, 804 NYS2d 687).

Although underlying complaint is regarding premises liability it is imperative that the owner of the property is ascertained. In the underlying action plaintiff, Kermit Irizarry claims to have been injured on property located at 758 East 98th Street, Brooklyn, New York. Ownership of that same property is at issue in the third-party action. In the present case, there are common factual and legal issues involved in the action and the third-party action, and the interests of judicial economy and consistency of verdicts will be served by having a single trial (see *Naylor v. Knoll Farms of Suffolk County, Inc.*, 31 AD3d at 727, 818 NYS2d 460). Furthermore, third party defendant JRM Construction Corp. failed to establish that a single trial would result in it suffering prejudice to a substantial right, or that any such prejudice could not be mitigated by the trial court with the appropriate jury instructions (see *Zili v. City of New York*, 105 AD3d 949, 950, 963 NYS.2d 684; *Chiarello v. Rio*, 101 AD3d 793, 797, 957 NYS2d 133; *Bentoria Holdings, Inc. v. Travelers Indem.*

Co., 84 AD3d 1135, 1137, 925 NYS2d 516, *revd. on other grounds* 20 NY3d 65, 956 NYS2d 456, 980 NE2d 504; *Mothersil v. Town Sports Int'l.*, 24 AD3d at 425, 804 NYS2d 687; *accord Hanover Ins. Group v. Mezansky*, 105 AD3d 1000, 1001, 964 NYS2d 201); *Quoting, Sumi Chuang Yeh v. Leonardo*, 134 AD3d 695, 696, 20 NYS3d 561, 563 (2 dep't 2015).

Accordingly, Third-party Defendants, GARY ROSEN LAW FIRM P.C. and GARY ROSEN ESQ., pursuant to 3211 to dismiss the third-party complaint is hereby denied for the reasons stated above. (MS#3). Defendant/Third-party defendants JRM CONSTRUCTION CORP move to sever Third-party plaintiff causes of actionis hereby denied for the reasons stated above. (MS#4).


This constitutes the Decision/Order of the Court.

Date: JUNE 16, 2020

  
RICHARD VELASQUEZ, J.S.C.

So Ordered  
Hon. Richard Velasquez

JUN 16 2020

  
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KINGS COUNTY CLERK  
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