

Ruiz v Pizzarotti LLC
2021 NY Slip Op 30431(U)
February 16, 2021
Supreme Court, New York County
Docket Number: 161076/2019
Judge: Richard G. Latin
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evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (see *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]). Evidence such as "[j]udicial records, such as judgments and orders, would qualify as 'documentary,' as should the entire range of documents reflecting out-of-court transactions, such as contracts, deeds, wills, mortgages, and even correspondence" (see *Amsterdam Hospitality Group, LLC v Marshall-Alan Associates, Inc.*, 120 AD3d 431 [1st Dept 2014]). To qualify as "documentary," the paper's content must be "essentially undeniable ..., assuming the verity of [the paper] and the validity of its execution, will itself support the ground on which the motion is based (*id.*).

Here, defendant ICC submits the affidavit of Ketan Shah, President of ICC and a copy of New York City Housing Authority ("NYCHA") correspondence dated April 7, 2015. Shah testified that ICC's work contract number BW1313869 required ICC to perform certain exterior restoration work at the Amsterdam Houses project, which included the location of plaintiff's alleged accident. However, he further stated that on April 7, 2015, NYCHA directed ICC by correspondence to cease and not perform any further work at the purported location of the accident, at 249 West 62nd Street, New York, New York 10023, which was prior to plaintiff's alleged accident of November 22, 2016. Shah averred that ICC did not own, operate, maintain, control, design, supervise, use or repair or have any duties whatsoever with the front entrance of the accident site on November 22, 2016, or any other time alleged in plaintiff's complaint. Moreover, he stated that ICC did not perform any other work at the site under any other contract after April 7, 2015. However, it is well settled that affidavits "which do no more than assert the inaccuracy of plaintiffs' allegations" cannot be considered (see *Art and Fashion Group Corp. v Cyclops Production, Inc.*, 120 AD3d 436 [1stDept 2014]). Moreover, although certain correspondence may

qualifies as documentary evidence, correspondence such as the NYCHA letter, does not resolve all factual issues as a matter of law, and does not conclusively dispose of plaintiff's claim.

Based on the above, the defendant ICC failed to meet its burden of providing "documentary evidence" showing that they had no connection or did not contribute to or cause plaintiff's alleged accident which occurred outside of the Amsterdam Houses Project

Likewise, on a motion to dismiss pursuant to CPLR 3211(a)(7), the facts alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Here, construing plaintiff's complaint liberally, accepting the facts alleged in the complaint as true, and affording the plaintiff the benefit of every possible inference, as required, the plaintiff states a cause of action for negligence for the injuries sustained herein (*see Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). Whether the plaintiff can ultimately prevail on this allegation against the defendant is not relevant on this pre-answer motion to dismiss, because there is insufficient documentary evidence showing who created, caused or repaired the alleged defect at the walkway/entrance way, what ICC's work consisted of, how long the defect existed and ICC's connections with the Amsterdam Houses Project (*see J.P. Morgan Securities Inc. v Vigilant Ins. Co.*, 21 NY3d 324 [2013]).

Based on the above, the defendant ICC failed to meet its burden of providing "documentary evidence" showing that they had no connection or did not contribute to or cause plaintiff's alleged accident which occurred outside of the Amsterdam Houses Project.

Accordingly, defendant International Construction Contracting, Inc.'s motion is denied.

Plaintiff is directed to serve a copy of this order on all parties within thirty (30) days of the date of entry of this order, together with notice of entry.

2/16/2021
DATE


RICHARD G. LATIN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		SUBMIT ORDER	
				FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	