

<b>Sanchez v JRM Constr. Mgt.</b>
2021 NY Slip Op 30611(U)
March 2, 2021
Supreme Court, New York County
Docket Number: 160285/2019
Judge: Phillip Hom
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. PHILLIP HOM PART IAS MOTION 2

*Justice*

-----X INDEX NO. 160285/2019

DANIEL SANCHEZ,

Plaintiff,

MOTION DATE 02/17/2021,  
02/17/2021

- v -

MOTION SEQ.  
NO. 001 002

JRM CONSTRUCTION MANAGEMENT,  
LLC, TRANSPARENT CONSTRUCTION LLC, TISHMAN  
SPEYER PROPERTIES, L.P., 422 FULTON OWNER,  
L.L.C.

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ORDERED that Transparent Construction LLC's motion to dismiss under CPLR §§3211(a)(1) and (a)(7) or alternatively for summary judgment under CPLR §3211(c), is denied; Transparent shall file its answer within 20 days of this order; and it is further ORDERED that JRM Construction Management, LLC, Tishman Speyer Properties, L.P. and 422 Fulton Owner. L.L.C.'s motion to dismiss or alternatively, to compel discovery is granted to the extent that the parties shall attend a virtual conference on March 25, 2021 to resolve the outstanding discovery issues.

Plaintiff Daniel Sanchez (“Sanchez”) is suing for personal injuries under Labor Law §§200, 240(1) and/or 241(6) from a January 22, 2019 incident when he was allegedly injured while working at the 422 Fulton Street Project at 422 Fulton Street (the “Project”), Brooklyn, NY. Sanchez served the Summons and Complaint on Defendants on December 4, 2019 by service upon the Secretary of State. Defendants JRM Construction Management, LLC, Tishman Speyer Properties, L.P. and 422 Fulton Owner, L.L.C. (collectively the “Answering Defendants”) answered on January 30, 2020. Transparent filed the present motion to dismiss instead of filing an answer on January 22, 2020.

*Transparent’s Motion to dismiss*

Sanchez’s Verified Summons and Complaint names movant Transparent Construction LLC (“Transparent”) as a Defendant, alleging, among other things, that Transparent provided certain work, repairs, construction, demolition, and other things at the project. In support of its motion, Transparent submits the Summons and Complaint with affidavit of service and an affidavit from Joseph Romano (“Romano”), a member of Transparent. Romano’s affidavit stated Transparent did not do any work at the Project, but merely worked as an expeditor to obtain permits for the Project. He further states that Transparent had no contractual relationship with Sanchez’s employer Manhattan Concrete, LLC or any type of agreement to perform work at the Project.

In opposition, Sanchez argues he had a good faith basis to sue Transparent and submits permits issued by the New York City Department of Buildings to

Transparent for the Project and a picture of a sign posted outside the construction site listing Transparent as the general contractor. Sanchez also argues that while Transparent may not have “[swung] a hammer” at the Project, there is a question whether Transparent had the authority to control the construction means and methods and the authority to supervise the work.

CPLR §3211(a)(1) provides in relevant part that a party may move for judgment dismissing causes of action against it on the ground that a defense is founded upon documentary evidence. While “documentary” is not defined by statute, the Courts have listed categories, such as documents reflecting out-of-court transactions, such as contracts, deeds, wills, mortgages, and even correspondence that constitute documentary evidence. *Amsterdam Hospitality Group LLC v. Marshall-Alan Assoc.*, 120 A.D.3d 431 [1<sup>st</sup> Dept 2014] (*Citing* David D. Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:10 at 22). Factual affidavits do not constitute documentary evidence under the statute. (*Serao v. Bench-Serao*, 149 A.D.2d 645 [1<sup>st</sup> Dept 2017]).

Transparent asserts it only acted as an expeditor on the project, but fails to submit any documentary evidence such as a contract outlining its role in the project. The only evidence presented by Transparent is an affidavit from a member of the LLC, Romano, disputing the allegations in Sanchez’s complaint and stating that Transparent only worked on the project as an expeditor. Since this affidavit does not constitute documentary evidence, this Court denies Transparent’s motion to dismiss under CPLR §3211(a)(1).

Transparent also moves to dismiss under CPLR §3211(a)(7) for failure to state a cause of action. Under this rule, the court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). While a court may dismiss a complaint if documentary proof disproves an essential element of the complaint (*see McGuire v. Sterling Doubleday Enters., LP*, 19 AD2d 660, 661 [2d Dept 2005]), as discussed, Transparent has not submitted documentary evidence sufficient to meet its burden under CPLR §3211(a)(1). The Court denies Transparent's motion under this statute also because Sanchez's complaint states a cause of action under New York Labor Law against Transparent.

### *Summary Judgment*

In the alternative, Transparent moves for summary judgment under CPLR §3212. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851,853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Id.* citing *Matter of Redemption Church of Christ v Williams*, 84 AD2d 648, 649 [3<sup>rd</sup> Dept 1981]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]). 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 the action (*Zuckerman v City of New York, supra*, at 562).

Sanchez is suing under Labor Law §§200, 240(1) and 241(6), which require the owner of or general contractor at a worksite to provide a safe place to work. As discussed, Transparent argues in Romano's affidavit that it did not perform any work at the site, but merely assisted in expediting permits for the project. Transparent also argues it did not sign any agreements for work at the premises and had no contractual relationship with Sanchez's employer. Transparent meets its prima facie burden to shift the burden of proof to Sanchez to produce evidence in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action.

In opposition, Sanchez submits, among other things, Department of Buildings Permits issued to Transparent, photos of signs listing Transparent as the general contractor at the worksite, and DOB accident reports listing Transparent as the contractor. This evidence is sufficient to establish material issues of fact requiring a trial of the action. Since this motion is submitted in place of an answer and before any discovery, there may also be facts essential to justify opposition, but cannot be stated, requiring the denial of this motion. (CPLR §3212(f)).

*Outstanding Discovery*

The Answering Defendants move under CPLR §§3126 and 3124 to compel Sanchez to provide discovery or have his summons and complaint dismissed or be precluded from offering evidence at trial. Under this Court’s discretion to make discovery determinations (see *Andon v. 302-304 Mott St. Assocs*, 94 NY2d 740 [2000]), the Court grants this motion to the extent that the parties are ordered to attend a virtual Microsoft Teams conference to resolve outstanding discovery issues.

*Conclusion*

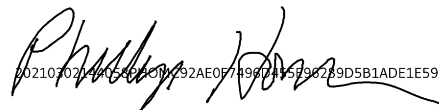
Accordingly, it is,

ORDERED, Transparent’s motion to dismiss under CPLR §§3211(a)(1) and (a)(7) or alternatively for summary judgment under CPLR §3211(c), is denied and it is further,

ORDERED, Transparent shall file an answer within 20 days of this order; and it is further,

ORDERED, JRM Construction Management, LLC, Tishman Speyer Properties, L.P. and 422 Fulton Owner. L.L.C.’s motion to dismiss or alternatively, to compel discovery is granted to the extent that the parties shall attend a virtual conference on March 25, 2021 to resolve the outstanding discovery issues.

This constitutes the decision and order of the Court.



3/2/2021  
DATE

\_\_\_\_\_  
PHILLIP HOM, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE