

Torres v Sherman Pharm. Corp.
2021 NY Slip Op 30730(U)
March 12, 2021
Supreme Court, New York County
Docket Number: 155744/2020
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN **PART** **IAS MOTION 58EFM**

Justice

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INDEX NO. 155744/2020

CLARA TORRES,

Plaintiff,

MOTION SEQ. NO. 001

- v -

SHERMAN PHARMACY CORP, SHERMAN 232 LLC,
GOOD CARE PHARMACY INC, SHERMAN PHARMACY 2
INC., and BRONSTEIN PROPERTIES, LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for DISMISSAL.

In this personal injury action commenced by plaintiff Clara Torres, defendants Good Care Pharmacy Inc. and Sherman Pharmacy 2 Inc. move, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint based on documentary evidence. Plaintiff opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on December 23, 2019 in which plaintiff was allegedly injured by a shelving unit at Sherman Pharmacy Corp., located at 232-A Sherman Avenue in Manhattan ("the store"). Doc. 1. Plaintiff commenced the captioned action against defendants Sherman Pharmacy Corp. ("SPC"), Sherman 232 LLC (Sherman 232"), Good Care Pharmacy Inc. ("GCP"), Sherman Pharmacy 2 Inc. ("SP2"), and Bronstein Properties, LLC ("Bronstein")

by filing a summons and complaint on July 27, 2020, alleging that said defendants were negligent, inter alia, in their ownership, operation, and management of the store. SPC, Sherman 232, and Bronstein joined issue by their answer filed March 4, 2021. Doc. 19.

In lieu of answering, defendants GCP and SP2 (collectively “the movants”) filed the instant motion seeking dismissal of the complaint pursuant to CPLR 3211(a)(1) and (a)(7) on the ground that the claims against them are barred by documentary evidence. Docs. 8-14. The movants argue that the documentary evidence they submit conclusively establishes that neither of them owned, operated or managed the store as of the date of the alleged incident.

With respect to the branch of their motion seeking dismissal against GCP, the movants rely on a document obtained from the New York State Department of Education Office of the Professions (“the OOP document”), dated October 26, 2020, which, they claim, establishes that GCP operated under the trade name “Sherman Pharmacy” at the premises prior to July 9, 2019, over five months before the alleged incident, when its license was transferred to SPC. Doc. 12.

The movants also rely on a November 2018 purchase agreement (“the purchase agreement”) pursuant to which it claims GCP sold the store to SPC. Doc. 13. The purchase agreement is executed by SPC but not by GCP or the escrow agent. *Id.* at 33. The movants assert that these documents “conclusively establish[] that [GCP] sold [the store] to [SPC] on January 11, 2019 and as such did not own and/or operate the store on December 23, 2019[,] when [p]laintiff alleges she sustained her injuries.” Doc. 9 at par. 12.

With respect to the branch of the motion seeking dismissal against SP2, the movants argue that “[OOP] records demonstrate that [d]efendant [SP2] has never operated and/or held a pharmacy establishment permit for the [store at] 232-A Sherman Avenue, New York, New York . . .” Doc. 9 at par. 11. In support of their contention that the claim against CP2 must be

dismissed, the movants rely on a printout from the New York State Division of Corporations (“the DOC printout”) reflecting that SP2 was located at 58-10 Myrtle Avenue, Ridgewood, New York. Doc. 14.

In opposition to the motion, plaintiff argues that the OOP document is insufficient to warrant dismissal of the claim against GCP since the “terms and conditions of use” on the OOP website indicate that “The State Education Department makes no representations or warranties . . . that this Web service will be . . . error-free.” Doc. 17. Thus, asserts plaintiff, the OOP document is not of undisputed authenticity and cannot be the basis for relief pursuant to CPLR 3211(a)(1). *Id.* Plaintiff further asserts that, since the purchase agreement is not fully executed, it, too, cannot be the basis for relief under that statute. *Id.* Further, plaintiff maintains that, contrary to the movants’ contention, the DOC printout does not establish that SP2 never operated a pharmacy at 232-a Sherman Avenue. *Id.* Finally, plaintiff asserts that the movants have not submitted any documentation refuting her claim that their negligent acts and/or omissions caused her injuries. *Id.*

LEGAL CONCLUSIONS

A motion to dismiss on the ground that a claim is barred by documentary evidence is appropriately granted “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]; *Residential Bd. of Mgrs. v 46th St. Dev., LLC*, 154 AD3d 422 [1st Dept 2017]).

A paper will qualify as “documentary evidence” only if it satisfies the following criteria: (1) it is “unambiguous”; (2) it is of “undisputed authenticity”; and (3) its contents are “essentially undeniable” (*Fontanetta v John Doe 1*, 73 AD3d 78, 86-87 [2d Dept 2010], citing Siegel, Practice Commentaries, McKinney’s Cons Laws

of NY, Book 7B, CPLR C3211:10 at 21-22 [2005 ed]). A court may not dismiss a complaint based on documentary evidence unless “the factual allegations are definitively contradicted by the evidence or a defense is conclusively established” (*Yew Prospect v Szulman*, 305 AD2d 588, 589 [2d Dept 2003]; see *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

(*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]).

This Court agrees with plaintiff that the documents submitted in support of the movants’ argument for dismissal of the claims against GCP are insufficient to establish a defense as a matter of law. As plaintiff asserts, the OOP itself states on its website that it does not guarantee that the records retrieved therefrom are “error-free”. Additionally, the fact that the purchase agreement is neither dated nor fully executed casts doubt on its authenticity. Further, as plaintiff argues, there is no basis in the documents submitted substantiating the movants assertion that they “conclusively establish[] that [GCP] sold [the store] to [SPC] on January 11, 2019 and as such did not own and/or operate the store on December 23, 2019[,] when [p]laintiff alleges she sustained her injuries.” Doc. 9 at par. 12. Indeed, the date January 11, 2019 does not appear on any of the documents submitted.

Additionally, as plaintiff asserts, the DOC printout does not establish that SP2 never operated a pharmacy at 232-A Sherman Avenue and therefore fails to establish a defense as a matter of law.

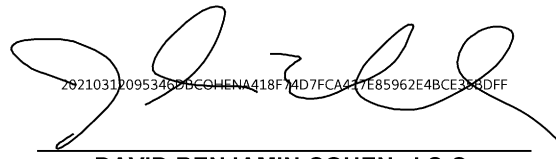
Finally, as noted by plaintiff, the documents submitted by the movants do not utterly refute her claim that they caused or contributed to her injuries.

Accordingly, it is hereby:

ORDERED that the motion by defendants Good Care Pharmacy Inc. and Sherman Pharmacy 2 Inc. seeking to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) is denied in all respects; and it is further

ORDERED that said defendants shall serve their answer(s) to the complaint filed as NYSCEF Doc. 1 within twenty (20) days after being served with a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference in this matter on May 3, 2021 at 3:00 p.m., which will be held by Microsoft Teams, with a link to the conference to be sent via a subsequent court notice, unless, prior to that day, the parties meet and confer in order to complete a bar coded preliminary conference form to be provided by the Part 58 Clerk at SFC-Part58-Clerk@nycourts.gov, in which case the conference will be cancelled.



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DAVID BENJAMIN COHEN, J.S.C.

3/12/2021
DATE

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