

Irrizarry v Rosselli

2021 NY Slip Op 31193(U)

April 8, 2021

Supreme Court, Kings County

Docket Number: 519320/2018

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

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 8TH day of APRIL 2021.

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

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KERMIT IRRIZARRY,

Plaintiffs,

Index No.: 519320/2018

-against-

Decision and Order

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

Defendants.

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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.

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The following papers numbered 130 to 166 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/	
Affidavits (Affirmations) Memorandum Annexed _____	130-140; 143; 144-145
Opposing Affidavits (Affirmations) _____	146-150; 151-155
Reply Affidavits (Affirmations) _____	157-163; 164-166

After oral argument held on April 8, 2021 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(a)(1)(3)(5)(7) to dismiss the third-party complaint. Third Party plaintiff opposes the same. (MS#5). Third-party defendants JOSEPH PASSALACQUA, ROSALIE PASSALACQUA, move pursuant to 3211(a)(1)(3)(5)(7) to dismiss the third-party complaint. Third Party plaintiff opposes the same. (MS#6).

ANALYSIS

First the court shall address Third-party Defendants, GARY ROSEN LAW FIRM P.C. and GARY ROSEN ESQ., pursuant to 3211(a)(1)(3)(5)(7) to dismiss the third-party complaint. The single motion rule prohibits parties from making successive motions to dismiss a pleading (see CPLR 3211 [e]; *Held v Kaufman*, 91 NY2d 425, 430 [1998]; *Klein v Gutman*, 12 AD3d 417, 419 [2004]; *B.S.L. One Owners Corp. v Key Intl. Mfg.*, 225 AD2d 643, 644 [1996]). Therefore, although a “motion based on the ground that the complaint fails to state a cause of action may be raised at any time, a party may not make a second motion pursuant to CPLR 3211 based on that ground, but must raise the ground ‘in another form’” (*McLearn v Cowen & Co.*, 60 NY2d 686, 689 [1983]; see CPLR 3211 [e]); quoting *Ramos v. City of New York*, 51 A.D.3d 753, 754, 858 N.Y.S.2d 702 (2008). In the present case it is clear, this newly filed 3211(a)(1)(3)(5)(7) motion is exactly the same motion as previously filed, which was denied by this court. In the present motion there are no new grounds as such this motion must be denied. Therefore, Third-party defendant ROSEN new motion to dismiss on the same exact grounds as the last motion to dismiss, is hereby denied.

Next the court shall address Third-party defendants JOSEPH PASSALACQUA, ROSALIE PASSALACQUA, motion pursuant to 3211(a)(1)(3)(5)(7)¹.

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*,

¹ The court notes this motion has no exhibits that were filed, but throughout the motion refers to exhibits included on another parties motion.

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).

As this court has previously found and is the law of the case now, 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. Notably, third-party defendant has not provided a single piece of documentary evidence to support their assertions, that differs from the proofs previously filed as stated above. 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. Numerous factual issues exist in which no documentation submitted resolves.

Accordingly, Third-party Defendants, GARY ROSEN LAW FIRM P.C. and GARY ROSEN ESQ., pursuant to 3211(a)(1)(3)(5)(7) to dismiss the third-party complaint is hereby denied for the reasons stated above. (MS#5). Third-party defendants JOSEPH PASSALACQUA, ROSALIE PASSALACQUA, move pursuant to 3211(a)(1)(3)(5)(7) to dismiss the third-party complaint is hereby denied for the reasons stated above. (MS#6). This constitutes the Decision/Order of the Court.

Date: April 8, 2021

ENTER FORTHWITH:



RICHARD VELASQUEZ, J.S.C.