Clark v Shields
2021 NY Slip Op 31730(U)
May 10, 2021
Supreme Court, Kings County
Docket Number: 524031/2019
Judge: Carl J. Landicino

At an IAS Term, Part 81 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 10th day of May, 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

----------x

ROBERT CLARK and BEVERLY CLARK,

Plaintiff,

Index No.: 524031/2019

DECISION AND ORDER

-against-

GARLAND SHIELDS, 500 EPKY LLC, SUBHUT, REALTY, LLC, SUBHUT REALTY USA, LLC, EASTERN PARKWAY MEZZ INC., and THEODORE IRVING CORP.,

Defendants.

Motion Sequence #1

----------x

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)	
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	3-11,
Opposing Affidavits (Affirmations)	32,
Reply Affidavits (Affirmations)	
Memorandum of Law	12, 33

After a review of the papers and oral argument on the motion the Court finds as follows:

This is an action for personal injuries allegedly occasioned by a trip and fall accident on October 24, 2019, at a property located at 500 Eastern Parkway, Brooklyn (hereinafter referred to as the "Property"). The Plaintiff, Robert Clark (hereinafter the "Plaintiff"), states that he was injured after he tripped and fell into a hole in the basement of the Property. Plaintiff Beverly Clark is the spouse of Robert Clark and states a cause of action for loss of services.

Defendant Eastern Parkway Mezz, Inc. (hereinafter "Defendant Eastern") now moves (motion sequence #1) for an order, pursuant to CPLR 3012(d), extending the time for Eastern Mezz to appear and move or plead in this action, up to and including the filing date of the instant motion; or alternatively pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint against it. Defendant Eastern contends that the matter should be dismissed against it given that there is documentary proof that it is not an owner of the subject premises and that the Plaintiffs fail to state a cause of action against Defendant Eastern, since Defendant Eastern had no duty to the Plaintiff. In the alternative, as it relates to their to CPLR 3012(d) application, Defendant Eastern contends that it has a reasonable excuse for not answering the complaint as Defendant Garland Shields had previously agreed to indemnify and defend Defendant Eastern but had thereafter failed to do so.[1]

In opposition, the Plaintiffs contends that the motion by Defendant Eastern should be denied as there are issues of fact regarding ownership of the Property. The Plaintiffs further contend that the motion is premature as discovery is ongoing and the Plaintiffs should be allowed to conduct further discovery regarding who may own or have an ownership interest in the Premises.

> **On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove his or her claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss.**

---

[1] The Plaintiff filed the instant summons and complaint on November 2, 2019. Defendant Eastern acknowledges that the instant motion was made on May 6, 2020. Defendant Eastern contends that they had been previously mis-informed by Defendant Shields in that he agreed to defend and indemnify Defendant Eastern Mezz in this action and Defendant Shield's insurer was placed on notice of this lawsuit. The Court finds that Defendant Eastern "set forth a reasonable excuse for their delay in answering, and demonstrated that there was no evidence of willful misconduct or a desire to abandon the action, and that there was no prejudice to the plaintiff." *Fischer v. City of New York*, 147 AD3d 1029, 1030, 46 N.Y.S.3d 916, 917 [2d Dept 2017]. Moreover, Defendant Eastern has articulated a meritorious defense. Accordingly, the time to answer or otherwise move is extended to the date of service of the motion and the motion is therefore timely.

Kinnear v. Cefoli, 184 A.D.3d 628, 123 N.Y.S.3d 509, 510 [2d Dept 2020].

Pursuant to CPLR §3013, "[s]tatements in a pleading should be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense" Furthermore, "[a]lthough on a motion to dismiss plaintiff's allegations are presumed to be true and accorded every favorable inference, conclusory allegations - claims consisting of bare legal conclusions with no factual specificity - are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y. 3d 358, 373, 892 N.Y.S.2d 272, 278 [2009].

> **Where evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one. A motion to dismiss based on documentary evidence may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law.**

Feggins v. Marks, 171 AD3d 1014, 1015-6, 99 N.Y.S.3d 45, 47 [2d Dept 2019]

Turning to the merits of the motion by Defendant Eastern, the Court finds that Defendant Eastern has provided sufficient documentary evidence to satisfy its application made pursuant to CPLR 3211(a)(1). Defendant Eastern contends that it is not an owner of the Premises and as a result did not owe a duty to the Plaintiff regarding the alleged condition at the Premises. In support of this contention, Defendant Easter submits a copy of the deed to the Premises, a copy of the mezzanine loan promissory note between Defendant Eastern and Defendant Garland Shields, a Pledge and Security Agreement, and an affidavit from Frank Chiarello, purported President of Defendant Eastern. The Court finds that the deed, promissory note and other agreements submitted[2] "conclusively established that [Defendant

[2] Although the Plaintiff raises the inadmissibility of the note and pledge agreement, the Plaintiff does not challenge the deed and even acknowledges the ownership of the Property during the relevant time in 500 EPKY, LLC. The remaining documents are identified by Frank Chiarello.

Eastern] did not own the [Property] on the date that the plaintiff claims [he] was injured." *Karpovich v. City of New York*, 162 AD3d 996, 998, 80 N.Y.S.3d 364, 365 [2d Dept 2018]; *see also Forbes v. Aaron*, 81 AD3d 876, 877, 918 N.Y.S.2d 118, 119 [2d Dept 2011]. These documents serve to show that the movant provided financing, accepted a pledge of equity interest in the owner LLC as security, and had no ownership interest in the Property at the relevant time. *See Randolph Equities, LLC v. Carbon Cap., Inc.*, No. 05 CIV 10889 PAC, 2007 WL 914234 [S.D.N.Y. 2007].

In opposition, the Plaintiff has failed to show pursuant to CPLR 3211(d) that the instant motion is premature by failing "...to identify particular evidence which would justify their opposition to the motion." *See Long Island Med. Anesthesiology, P.C. v. Rosenberg Fortuna & Laitman, LLP*, 191 A.D3d 864 [2d Dept 2021]. Accordingly, the motion by Defendant Eastern is granted and the complaint is dismissed as against them.

Based upon the foregoing, it is hereby ORDERED as follows:

The motion by Defendant Eastern Parkway Mezz, Inc. (motion sequence #1) to dismiss the complaint is granted, and the action is dismissed as against it.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
FILED
2021 MAY 19 AM 10:25