

<b>Tishman v Himmel &amp; Meringoff Props., LLC</b>
2021 NY Slip Op 31762(U)
May 21, 2021
Supreme Court, New York County
Docket Number: 156708/2020
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART IAS MOTION 5

Justice

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STEVEN TISHMAN, AS EXECUTOR OF THE ESTATE OF ERICA TISHMAN, STEVEN TISHMAN INDIVIDUALLY,

Plaintiff,

INDEX NO. 156708/2020

MOTION DATE 10/16/2020

MOTION SEQ. NO. 001

- v -

HIMMEL & MERINGOFF PROPERTIES, LLC, 729 ACQUISITION LLC, MERINGOFF PROPERTIES INC AND, THE CITY OF NEW YORK

Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISMISS

Plaintiffs, Steven Tishman, As Executor of the Estate of Erica Tishman, and Steven Tishman individually (plaintiffs), commenced this action for damages stemming from the death of Erica Tishman on December 17, 2019, when she was struck by a piece of building debris while walking on the sidewalk adjacent to the premises located at 729 Seventh Avenue, New York, New York (premises). The parties do not dispute that the object that struck plaintiff came from the premises. Defendants Himmel & Meringoff Properties, LLC (Himmel and Meringoff), 729 Acquisition LLC (729 Acquisition), and Meringoff Properties Inc. (Meringoff Properties) (collectively, the Himmel defendants), now move pursuant to CPLR 3211(a)(1) to dismiss the complaint against Himmel and Meringoff and Meringoff Properties, pursuant to CPLR 3211(a)(7) to dismiss plaintiffs' demand for punitive damages, and pursuant to CPLR 3024(b) to strike certain paragraphs of the complaint. Plaintiffs and co-defendant, the City of New York (the City), oppose the motion. For the following reasons, and after oral argument on May 19, 2021, the Himmel defendants' motion is granted in part.

The relevant alleged facts are as follows. The complaint alleges that on April 29, 2019, the New York City Department of Buildings (DOB) inspected the exterior of the premises (NYSCEF # 6, compl at ¶ 23). On the same day, the DOB determined that the premises' exterior façade was not adequately maintained and issued 729 Acquisition a citation indicating that the premises was in violation of Administrative Code § 28-302.1 (id. at ¶ 24). According to the complaint, the citation stated that "the building had damaged terra cotta at areas above the 15th floor in several locations which posed a falling hazard for pedestrians" (id. at ¶ 25). The citation included corrective measures that 729 Acquisition was to undertake, namely "provide safety measures; maintain building exterior façade; repair damaged façade as per RCNY 103-04" (id. at

¶ 27). Plaintiff further alleges that the citation was a “Class 1” violation pursuant to 1 RCNY 102-01 (*id.* at ¶ 26). A Class 1 violation indicates that “the violating condition poses a threat that severely affects life, health, safety, property, the public interest, or a significant number of persons so as to warrant immediate corrective action” (*id.*). On July 24, 2019, the City allegedly issued 729 Acquisition an additional citation for failing to correct the condition cited in the April 29, 2019 citation (*id.* at ¶ 30). On September 12, 2019, a hearing was held before the Office of Administrative Trials and Hearings (OATH) to address the citations, wherein the April 29, 2021 citation was reduced from a “Class 1” to a “Class 2” violation and 729 Acquisition was required to pay a fine of \$1,250 (*id.* at ¶¶ 32-33). According to plaintiff, the Himmel defendants never repaired the defective condition (*id.* at ¶¶ 34-36).

According to the complaint, on December 17, 2019, after the incident that caused the decedent’s death, the City ordered the premises’ owner to install a sidewalk shed, and the work to install the shed commenced that day (*id.* at ¶ 47). However, as plaintiffs allege, the façade has not been repaired and remains “in violation” (*id.* at ¶¶ 49, 50). In fact, plaintiffs allege, that as of June 30, 2020, only two months before the complaint in this action was filed, the premises received fines for failing to façade status information sheet (*id.* at ¶ 51). Plaintiffs further claim that the Himmel defendants’ failure to repair the premises’ façade is part of a pattern of failure to repair defective conditions related to building violations issued to other buildings owned by the Himmel defendants, including at their properties (*id.* at ¶¶ 57-61).

## DISCUSSION

“On a motion to dismiss under CPLR 3211, the pleading is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference” (*Simkin v Blank*, 19 NY3d 46, 52 [2012] [citation omitted]; *accord Vestal v Pontillo*, 158 AD3d 1036, 1038 [2018]). Dismissal is warranted only if the documentary evidence “utterly refute plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). Affidavits are not considered to be “documentary evidence” in the context of a motion pursuant to CPLR 3211(a)(1) (*Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 924 [1st Dept 2011]; *Summer v Severance*, 85 AD3d 1011, 1012 [2d Dept 2011]). Documentary evidence is “unambiguous, authentic and undeniable,” including “[j]udicial records, documents reflecting out-of-court transactions such as mortgages, deeds, contracts” (*Attias v Costiera*, 120 AD3d 1281 [2d Dept 2014]).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, “ ‘factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . are not entitled to such consideration’ ” (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836, [2007], cert denied 552 US 1257 [2008]). “Whether the plaintiff will ultimately be successful in establishing those allegations is

not part of the calculus” (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6 [2013], *rearg* denied 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

## I. Ownership and control of the premises

In support of the branch of their motion to dismiss the complaint as against co-defendants Himmel and Meringoff and Meringoff Properties, the Himmel defendants argue that those co-defendants did not own, operate, or otherwise control the premises. To this end, the Himmel defendants submits a deed to the premises, which reveals that the premises was conveyed to 729 Seventh Owner LLC on or about June 30, 2005 (NYSCEF # 7). In opposition, plaintiffs argue that an issue of fact exists as to which entities own the property. Specifically, plaintiffs submit screenshots of the premises’ website, indicating that the premises is owned by “long-term owner Himmel + Meringoff” (NYSCEF # 15). Plaintiffs also submit several screenshots from “www.merprop.com,” which details, among other things, the acquisition of the premises, and even lists the premises under the title of “current holdings” (NYSCEF # 17, 20). The City also opposes the Himmel defendants’ motion, arguing that financing statements related to the property create an issue of fact as to the connection between Himmel and Meringoff and the premises. The City argues that the motion is premature to the extent that the UCC -1 Financing Statement dated January 7, 1998 and mortgage documents were signed by Himmel and Meringoff 729, LLC as a managing member (NYSCEF # 28, 29, 30, 31).

“Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises” (*Gibbs v Port Auth. of New York*, 17 AD3d 252, 254 [2005]). Here, the documentary evidence submitted by the Himmel defendants conclusively demonstrate that the premises were not owned by either Himmel and Meringoff or Meringoff Properties. Plaintiffs do not submit any documentary evidence refuting the deed for the property. Additionally, the UCC and mortgage documents list 729 Acquisition as the owner and mortgagor, respectively, and do not otherwise connect Himmel and Meringoff and Meringoff Properties to the premises. The court notes that neither plaintiff nor the City argue that the deed submitted by the Himmel defendants fail to demonstrate ownership, or lack thereof, at the time of the incident.

However, as plaintiff argues, the deed does not demonstrate that Himmel and Meringoff and/or Meringoff Properties did not operate or otherwise control the premises (*see Celentano v. Boo Realty, LLC*, 160 AD3d 576, 577 [1st Dept 2018] [deed for property insufficient to refute the plaintiff’s allegations that co-defendants managed and maintained the premises]). The deed does not, and would not, reflect what party manages or otherwise controls the premises. Further, the affidavit of Jason Vacker, president and chief executive officer of Meringoff Properties, wherein he states Himmel and Meringoff did not own the premises is not considered as documentary evidence for the purpose of the instant motion. The Himmel defendants fail to present any other documentary evidence demonstrating that they did not operate or control the premise. Accordingly, the branch of the Himmel defendants’ motion pursuant to CPLR 3211(a)(1) is granted, and the complaint is dismissed as to Himmel and Meringoff and Meringoff Properties’ ownership of the premises only.

## II. Punitive damages

In support of their motion pursuant to CPLR 3211(a)(7), the Himmel defendants argue that the alleged conduct did not rise to the level needed to impose punitive damages. “Punitive damages are available in a tort action where the wrongdoing is intentional or deliberate, presents circumstances of aggravation or outrage, evinces a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton” (*Bishop v 59 W. 12th St. Condo.*, 66 AD3d 401, 402 [1st Dept 2009], citing *Prozeralik v Cap. Cities Commc'ns, Inc.*, 82 NY2d 466, 479 [1993]; see *Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 201 [1990]; *Borst v Lower Manhattan Dev. Corp.*, 162 AD3d 581, 582 [1st Dept 2018] [punitive damages justified where failure to test the standpipe system to ensure it was operational and failure to enforce the no smoking policy a “willful and wanton disregard for the interests of others, justifying an award of punitive damages”] *Randi A.J. v Long Island Surgi-Ctr.*, 46 AD3d 74, 85 [2d Dept 2007] [“Punitive damages may be awarded ‘for the conscious disregard of the rights of others or for conduct so reckless as to amount to such disregard’”], quoting *Hartford Acc. & Indem. Co. v Vill. of Hempstead*, 48 NY2d 218, 227 [1979]). “An act is wanton and reckless when it demonstrates conscious indifference and utter disregard of its effect upon the health, safety and rights of others” (PJI 2:278).

“Punitive damages, in contrast to compensatory damages, are awarded to punish a defendant for wanton and reckless or malicious acts and to protect society against similar acts” (*Rivera v City of New York*, 40 AD3d 334, 344 [1st Dept 2007]; *Ross v. Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007] [“Punitive damages are not to compensate the injured party but rather to punish the tortfeasor and to deter this wrongdoer and others similarly situated from indulging in the same conduct in the future”]).

Taken as true, as required under a motion pursuant to CPLR 3211(a)(7), plaintiffs’ allegations that the Himmel defendants: 1) were aware of the defective condition; 2) were on notice that the condition posed a hazard to pedestrians below (i.e., the general public); 3) were aware that the condition warranted immediate corrective action; and 4) failed to undertake any corrective measures, amount to a willful and reckless disregard of a dangerous condition, and thus, sufficient to sustain a demand for punitive damages (see *Solis-Vicuna v Notias*, 71 AD3d 868, 871 [2d Dept 2010] [punitive damages appropriate where defendants were aware of dangers of lead paint and failed to abate the lead paint in the apartment despite notice by the Department of Health]; *O'Brien v. Jack LaLanne Fitness Centers, Inc.*, 237 AD2d 587, 588 [2d Dept 1997] [“(a)s the complaint generally alleged that the defendants were previously and repeatedly cited for infractions by the Nassau County Health Department regarding the maintenance or operation of the whirlpool where the incident occurred, that branch of the motion which was to strike the plaintiff’s demand for punitive damages was properly denied at this juncture”]; *Gruber v Craig*, 208 AD2d 900, 901 [2d Dept 1994] [“We agree with the trial court that the defendant’s conduct was so flagrant as to transcend mere carelessness, since he had notice of the hazardous condition for such a significant period of time, and the risk to the tenant was so great. Thus, the imposition of punitive damages was not unreasonable, and it will serve as a deterrent to such culpable conduct in others”]).

The Himmel defendants cite to *Shannon v New York Times Bldg., LLC* (170 AD3d 600 [1st Dept 2019]) in support of their argument that their actions fail to allege a conscious and

deliberate disregard for the lives of others. In *Shannon*, the plaintiff was injured after the elevator he was riding in malfunctioned and went into a “free fall” (*id.*). The plaintiff claimed that the defendants were issued a violation four months prior to the incident concerning the elevator’s hoist cable, stating that the condition should be monitored, but that no corrective action was taken (*id.*). In reversing the lower court’s decision to grant the plaintiff’s motion to amend the complaint to add a demand for punitive damages, the court held that:

“[t]he allegations do not rise to the level of moral culpability necessary to support a claim for punitive damages, as they fail to allege conduct that can be viewed as conscious and deliberate disregard for the lives of others; [nor] does the additional evidence found in the record support a finding that defendants acted so recklessly or wantonly as to justify a claim for punitive damages”

(*id.* at 603).

*Shannon* is distinguishable in the fundamental respect that the violation at issue, a “Class 2” violation, was limited to identifying the defective condition only, and the private inspection report only advised the defendants to monitor the condition (*id.* at 601). Here, on the other hand, the complaint alleges that the April 29 and July 24, 2019 violations specifically placed the Himmel defendants on notice of the condition which posed a falling hazard to pedestrians below. That the Himmel defendants are alleged to have been on notice of the damaged façade, the potential harm it posed to pedestrians, and their alleged failure to undertake any remedial measures sets this matter apart from the facts in *Shannon*.

Accordingly, the branch of the Himmel defendants’ motion to dismiss plaintiffs’ demand for punitive damages is denied.

### III. CPLR 3024(b)

The Himmel defendants argue that the complaint asserts multiple allegations which are irrelevant, scandalous, and prejudicial to them and request that the court strike the following paragraphs from the complaint: 44, 47-51, 52, 57-61. CPLR 3024(b) provides that “[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.” “In reviewing a motion pursuant to CPLR 3024(b), the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action” (*Soumayah v Minnelli*, 41 AD3d 390, 392 [1st Dept 2007]; see *Irving v Four Seasons Nursing & Rehab. Ctr.*, 121 AD3d 1046, 1048 [2d Dept 2014]). Paragraphs 47-51 and 57-61 could go to establishing the Himmel defendants’ pattern of alleged negligent conduct. Further, paragraph 47 and 52 concerns plaintiffs’ claims against the City. Moreover, the court notes that the allegations the Himmel defendants argue are scandalous are no more scandalous than the core allegations in this matter. Accordingly, the branch of defendants’ motion to strike certain paragraphs contained in the complaint is denied.

Accordingly, it is hereby

ORDERED that the Himmel defendants' motion is granted as to the branch of the motion seeking dismissal of the complaint only as it alleges the Himmel defendants were owners of the premises; and it is further

ORDERED that the Himmel defendants shall serve a copy of this order and decision upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



5/21/2021  
DATE

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DAKOTA D. RAMSEUR, J.S.C.

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