

Williams v Ben-Art, Inc.
2022 NY Slip Op 30276(U)
January 27, 2022
Supreme Court, New York County
Docket Number: Index No. 161829/2018
Judge: William Perry
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. WILLIAM PERRY PART 23

Justice

-----X

ALAN WILLIAMS,

Plaintiff,

- v -

BEN-ART, INC., GUARDIAN REALTY MANAGEMENT INC., TOWNHOUSE BUILDERS, INC., PARK ROW REALTY, L.P.,

Defendant.

-----X

TOWNHOUSE BUILDERS, INC.

Plaintiff,

-against-

BEN-ART, INC.,

Defendant.

-----X

BEN-ART, INC.,

Plaintiff,

-against-

ZONCA TERRAZZO & MOSAIC, LLC, and CML TAPING & PAINTING CORP., D/B/A CML CONSTRUCTION

Defendants.

-----X

INDEX NO. 161829/2018
MOTION DATE 10/20/2021
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

Third-Party
Index No. 595763/2019

Third-Party
Index No. 595659/2021

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion to/for DISMISSAL

Plaintiff Alan Williams brings this action against Defendants Ben-Art, Inc., Guardian Realty Management Inc., Townhouse Builders, Inc., and Park Row Realty LP for injuries allegedly

sustained while performing pest control services. In motion sequence 003, second third-party Defendant Zonca Terrazzo & Mosaic LLC (“Zonca”) moves to dismiss the second third-party summons and complaint filed against it by Ben-Art, Inc. (“Ben-Art”). The motion is fully submitted.

Background

Plaintiff was formerly employed by nonparty Global Pest Control and alleges that on February 8, 2018, while in the course of performing pest control services, he was caused to fall while descending a staircase into the basement area at 15 Park Row, New York, NY 10038. At the time, the basement area was undergoing construction.

By decision and order dated December 4, 2019, this court granted Plaintiff’s motion sequence 001 to add Ben-Art, a contractor, as a Defendant. (NYSCEF Doc No. 33.) On May 13, 2021, Ben-Art filed the second third-party summons and complaint, impleading Zonca and CML Taping & Painting Corp. as second third-party defendants and setting forth claims for common law indemnity against them. (NYSCEF Doc No. 54.)

Zonca moves to dismiss the second third-party complaint as against it for failure to state a claim, arguing that it neither proximately caused Plaintiff’s accident nor had notice, control, or responsibility of the staircase. (NYSCEF Doc No. 81, Zonca Memo, at 5.) In support, Zonca submits the affidavit of Matthew Holdsworth, an employee of Zonca, who alleges that Zonca never performed any work in the basement area, as demonstrated by Zonca’s work contract with Defendant Townhouse Builders. (*Id.* at ¶¶ 10-12; NYSCEF Doc No. 78, Holdsworth Aff., at 13-14.) Further, Holdsworth alleges that the only work Zonca performed on any staircase was to “Staircase C”, as labeled on a blueprint of the work area, and that Zonca email correspondence proves that Zonca commenced work on Staircase C on July 13, 2018 because that is when it

received staircase tread. (*Id.* at ¶¶ 10-13.) Alternatively, Zonca argues that its motion could be viewed as a motion for summary judgment.

In opposition, Ben-Art argues that the motion must be denied because numerous issues of fact exist and the motion is premature as discovery remains outstanding. (NYSCEF Doc No. 92, Opposition.) Specifically, Ben-Art argues that Zonca was working at the premises on the date of the incident, as established by work logs, and thus there is an issue of fact as to whether Zonca created the “dust condition” which Plaintiff testified caused his fall. (*Id.* at ¶ 4.)

Discussion

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], “the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory.” (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002].) However, “factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

Pursuant to CPLR 3211(a)(1), in order to prevail on a motion to dismiss based on documentary evidence, “the documents relied upon must definitively dispose of plaintiff’s claim.” (*Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995].) Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted “utterly refutes plaintiff’s factual allegations” (*Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]) and “conclusively establishes a defense to the asserted claims as a matter of law.”


(Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267, 271 [1st Dept 2004] [internal quotation marks omitted].)

Here, Zonca fails to meet its burden for relief, as its contract and blueprint do not definitively dispose of Ben-Art’s claims against it. (NYSCEF Doc No. 78 at 13.) Zonca has simply failed to demonstrate, as a matter of law, that its contract “does not describe any work to be performed in the basement,” to the extent of foreclosing the possibility of any liability on Zonca’s part. (Zonca Memo at ¶ 12.) Further, Holdsworth’s affidavit is self-serving and sets forth conclusory allegations insufficient to demonstrate Zonca’s entitlement to summary judgment. (Lupinsky v Windham Const. Corp., 293 AD2d 317, 318 [1st Dept 2002].)

In any event, Plaintiff’s deposition testimony and the work logs exchanged by Townhouse Builders demonstrate that an issue of fact remains as to the cause of the dust on the staircase. (NYSCEF Doc No. 94, Pl.’s Deposition, at 46:07-46:11; NYSCEF Doc No. 95 at 17.) Thus, it is hereby

ORDERED that Zonca’s motion sequence 003 to dismiss the second third-party summons and complaint against it is denied in its entirety.

1/27/22
DATE


WILLIAM PERRY, J.S.C.

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