SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49M

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JOSE PACHECO, JALY PACHECO,

Plaintiff,

- v -

GEORGETOWN ELEVENTH AVENUE OWNERS, LLC,DOOLEY ELECTRIC COMPANY, INC.,

Defendants.

INDEX NO. 157529/2017

MOTION DATE 11/03/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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GEORGETOWN ELEVENTH AVENUE OWNERS, LLC

Third-Party Plaintiff,

-against-

DOOLEY ELECTRIC COMPANY, INC.

Third-Party Defendant.

Third-Party
Index No. 595027/2019

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GEORGETOWN ELEVENTH AVENUE OWNERS, LLC

Second-Third Party Plaintiff,

-against-

MANHATTAN FORD LINCOLN, INC., MANHATTAN LINCOLN-MERCURY, INC., and MANHATTAN FORD, LINCOLN-MERCURY, INC.,

Second Third-Party Defendants.

Second Third-Party
Index No. 595389/2021

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HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for DISMISSAL.

In this action arising out of a worksite accident, second third-party defendants Manhattan Ford Lincoln, Inc., Manhattan Lincoln-Mercury Inc., and Manhattan Ford, Lincoln-Mercury, Inc. (Manhattan Ford) move pursuant to CPLR 3211(a)(1) and (7) to dismiss the second-third party complaint in its entirety.

Defendant and first and second third-party plaintiff Georgetown Eleventh Avenue Owners. LLC (Georgetown) opposes the motion.

Background

Plaintiff Jose Pacheco alleges that he was injured on August 4, 2017, when he was taking down ceiling tiles while standing on a ladder at the property located at 787 Eleventh Avenue, New York, NY (the Building). It is alleged that the accident occurred when Pacheco touched a live electrical wire in the ceiling causing him to fall. In the main action, plaintiffs assert claims against Georgetown, the owner of the Building, and Dooley Electrical Company, Inc., an electrical subcontractor, for violations of Labor Law §§ 240(1), 241(6), 200 and for common law negligence (NYSCEF # 14 -Amended Complaint). Georgetown purchased the Building from Manhattan Ford pursuant to a purchase agreement dated May 12, 2015 (NYSCEF # 46-Purchase Agreement).

In the second third-party action Georgetown asserts claims against Manhattan Ford for common law indemnification and contribution based on allegations that Manhattan Ford negligently caused or contributed to the accident resulting in Pacheo's injuries (NYSCEF # 49-Second Third-Party Complaint). Specifically, it is alleged that Manhattan Ford knowingly permitted, suffered, and or allowed a defective condition to exist at the Building at the time of the sale to Georgetown, and that Georgetown "did not own the [Building] for a reasonable amount of time to have remedied such conditions which may have been known to it" (*id.*, ¶¶ 18, 24, 30).

Manhattan Ford seeks to dismiss the second third-party complaint on the grounds that (i) the Purchase Agreement provides documentary evidence that Georgetown purchased the Building "as is" more than two years before the accident such that Manhattan Ford cannot be held liable for injuries sustained by Pacheco due to the condition of the Building, (ii) the claim for common law indemnification fails to state a cause of action as Georgetown cannot show that it is merely vicariously liable or that Manhattan Ford breached a duty to plaintiffs, and (iii) common law contribution claim fails a cause of action since Manhattan Ford owes no duty to plaintiffs.

In opposition, Georgetown counters that the Purchase Agreement is inadmissible and, in any event, does not refute the second third-party claims. Specifically, Georgetown asserts that the Purchase Agreement does not establish that Manhattan Ford did not create the alleged defects. In support, Georgetown submits records from the New York Department of Buildings (DOB) from the period of Manhattan Ford's ownership of the Building which show violations dated July 13, 2007, May 29, 2002, and August 7, 2002, regarding "defective and exposed" electrical wiring including in the ceilings and between floors (NYSCEF # 53, 54, 55).

Based on the DOB records, Georgetown argues that there are material issues of fact as to nature and extent of the Building's electrical issues before the sale and whether such electrical conditions were latent and undiscoverable, and as to whether Georgetown had a reasonable time to discover such conditions. Georgetown also argues that Manhattan Ford has not met its burden of showing that the allegations in the second third-party complaint are insufficient to state a claim for common law indemnification and contribution.

In reply, Manhattan Ford contends that Georgetown provides no grounds for contesting the existence, execution or authenticity of the Purchase Agreement and it therefore qualifies as documentary evidence. In addition, Manhattan Ford submits a sworn declaration authenticating that the copy of the Purchase Agreement annexed to the motion is accurate and true (NYSCEF # 59-Declaration of Jeffrey Lynch). Manhattan Ford also points out the DOB violations relied on by Georgetown were dated approximately eight and thirteen years before Georgetown's purchase of the Building and, in any event, indicate that the complaints as to the electrical wiring were "resolved" (*id*).

Discussion

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 plaintiffs the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v E. 149th Realty Corp.,* 104 AD3d 401, 403 [1st Dept 2013]). At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference'" (*Morgenthow & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 78 [1st Dept 2003][internal citation and quotation omitted]). However, dismissal based on documentary evidence pursuant to CPLR 3211(a)(1) may result "only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it'" (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]), quoting, *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]).

While CPLR 3211(a)(1) does not explicitly define "documentary evidence," typically a document will qualify as "documentary evidence" if it is unambiguous, authentic, and its contents are essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019];*see also, Gottesman Co. v A.E.W, Inc.,* 190 AD3d 522, 524 [1st Dept 2021] [finding that undisputed emails and transaction documents constitute "documentary evidence"]. New York courts have found that contracts provide a proper basis for a CPLR 3211(a)(1) motion as "documentary evidence" (*see Hart 230, Inc. v PennyMac Corp.*, 194 AD3d 789, 791

[2d Dept 2021] [holding that "documents reflecting out-of-court transactions such as mortgages, deeds, contracts" would qualify as documentary evidence]).

Under these principles, contrary to Georgetown's position, the Purchase Agreement, which is signed by representatives of Georgetown and Manhattan Ford is the type "essentially undeniable" document that provides an appropriate basis for a motion to dismiss based on documentary evidence. Moreover, to the extent there can be any issues as to the Purchase Agreement's authenticity, the declaration submitted by Manhattan Ford in reply puts such issues to rest.

Here, the unambiguous terms of the Purchase Agreement establish that contrary to the allegations in the second third-party complaint, Manhattan Ford cannot be held liable to Georgetown for indemnification or contribution based on the condition of the Building on the date of the accident (*see Nieves-Hoque v 680 Broadway*, 99 AD3d 536, 537 [1st Dept 2012][absent liability claim for indemnification must fail]). Not only did Georgetown purchase the Building more than two years before the accident, but the terms of the Purchase Agreement evince a clear intent to transfer responsibility for the condition of the Building to Georgetown as its purchaser (*see generally Bittrolff v Ho Dev. Corp.*, 77 NY2d 896, 898 [1991][noting that "as a general rule, liability of dangerous conditions on the land does not extend to the prior owner"]). In this connection, the Purchase Agreement states in bold type and in capital letters that "the [Building] shall be transferred to and accepted by purchaser in as-is condition with no representation or warranty of any kind, express or implied whatsoever" (NYSCEF # 46, § 11.07). It further provides that the "seller [i.e., Manhattan Ford] makes no representation as to the fitness of the Premises for any particular purpose" (*id.*, § 11.08).

Georgetown argues, however, that dismissal based on the Purchase Agreement is nonetheless unwarranted based on a "narrow exception" to the general rule that a prior owner is not responsible for the condition of the conveyed property, since Georgetown "did not have a reasonable time to discover the [subject] condition" (*Bittrolff*, 77 NY2d at 898). Georgetown's argument is unavailing as its assertion that it did not have reasonable time to discover the alleged electrical defect is flatly contradicted by the terms Purchase Agreement which establishes that Georgetown owned the Building two years before the accident, and that prior to the purchase, Georgetown was afforded the right to inspect the Building and "to conduct reasonable tests thereon, and to make such other examinations with respect there to as Purchaser, or its counsel, licensed engineers, surveyors or other representatives may deem reasonably necessary" (NYSCEF # 46, § 11.01).

Additionally, Georgetown's reliance of the records of DOB is misplaced since the violations related to electrical writing evidenced by these records were resolved between eight and thirteen years before Georgetown purchased the Building. Under these circumstances, dismissal is appropriate based on documentary evidence (*see*

Smith v Morris Realty LLC, 173 AD3d 586, 586 [1st Dept 2019])[prior property owner was entitled to dismissal based on "documentary evidence that it did not own, lease or otherwise control premises where plaintiff's accident took place," and current owner submitted no evidence that it did not have time to remedy or investigate the condition]; *see also Privette v Precision EI,* 143 AD3d 639, 640 [1st Dept 2016][three months was a reasonable time to correct and discover dangerous condition]; compare *Gramazio v 370 Lexington Ave, LLC*, 40 AD3d 303, 304 [1st Dept 2007][issues of fact existed as to whether two-day ownership was sufficient time to discovery unknown sidewalk condition]).

Because the documentary evidence establishes a basis for dismissal, the court need not reach Manhattan Ford's argument that the second third-party complaint is subject to dismissal for failure to state a cause of action.

Conclusion

In view of the above, it is

ORDERED that the motion by second third-party defendants Manhattan Ford Lincoln, Inc., Manhattan Lincoln-Mercury Inc., and Manhattan Ford, Lincoln-Mercury, Inc. to dismiss the second third-party complaint is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing the second-third party complaint in its entirety.

3/9/2022
DATE

MARGARET CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE