

<b>Lewis v North Six, Inc.</b>
2022 NY Slip Op 30804(U)
March 10, 2022
Supreme Court, New York County
Docket Number: Index No. 160420/2020
Judge: David B. Cohen
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. DAVID B. COHEN

PART 58

*Justice*

-----X

INDEX NO. 160420/2020

JOHNATHAN LEWIS,

Plaintiff,

MOTION SEQ. NO. 001

- v -

NORTH SIX, INC.,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14

were read on this motion to/for

DISMISSAL

In this personal injury action commenced by plaintiff Johnathan Lewis, defendant North Six, Inc. moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint. Plaintiff opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND**

This case arises from an incident on March 9, 2019 in which plaintiff tripped and fell on an allegedly defective sidewalk located adjacent to the premises located at 159-161 Bleecker Street in Manhattan. The premises were owned by B&C Bleecker LLC, Bleeker Fish LLC,<sup>1</sup> and BS Bleecker LLC and leased to defendant on March 31, 2017. Paragraph 4 of the lease provided, inter alia, that defendant "shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost

<sup>1</sup> This is the spelling in the lease.

and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition” excluding “reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty.” Paragraph 60 of the lease provided that:

Anything to the contrary contained in this Lease notwithstanding, [defendant] shall maintain and repair but not replace the sidewalk, which shall be the sole responsibility of Owner, adjacent to demised premises, except [defendant] shall be responsible for replacement of the sidewalk if necessity for replacement of the sidewalk was caused in connection with deliveries to and from the Demised Premises.

Plaintiff commenced the captioned action on December 2, 2020, alleging that he was injured as a result of the carelessness, recklessness and negligence of defendant in its ownership, operation, management, supervision, maintenance, repair, inspection, and control of the sidewalk, and in creating the condition and allowing it to exist for an unreasonable period of time.

In lieu of answering, defendant now moves, pursuant to CPLR 3211(a)(1) (documentary evidence) and (a)(7) (failure to state a cause of action).<sup>2</sup> In support of the motion, defendant argues that the complaint must be dismissed on the ground that it did not own the premises and, thus, owed no duty to plaintiff.<sup>3</sup> In support of this argument, defendant submits its lease as well as the affidavit of its principal, Jeffrey Yang, who states, inter alia, that defendant did not own the premises, has never “engaged any person or entity to perform construction, renovation, or repair on the sidewalk abutting the subject premises”, and that it did not make special use of the sidewalk. Yang annexes the lease to his affidavit.

---

<sup>2</sup> Although the notice of motion only refers to CPLR 3211(a)(7), defendant raises CPLR 3211(a)(1) in his papers and this Court thus considers this section as well.

<sup>3</sup> Plaintiff commenced a separate action against the City of New York and BS Bleecker LLC in this Court under Index Number 152186/20 and represents that he had intended to consolidate that action with this one once an answer was served by defendant herein.

Plaintiff opposes the motion, arguing that the motion is premature and that defendant has failed to establish that it had no duty to maintain the sidewalk.

### LEGAL CONCLUSIONS

When a court rules on a motion to dismiss under CPLR 3211, it “must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory” (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012] [internal quotation marks and citations omitted]). “However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence” (*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 627 [1st Dept 2017] [citation omitted]). A motion to dismiss under CPLR 3211 (a) (1) “may be granted if documentary evidence utterly refutes the plaintiff’s factual allegations, thereby conclusively establishing a defense as a matter of law.” (*Whitebox Concentrated Convertible Arbitrage Partners, L.P.*, 20 NY3d at 63 [internal quotation marks, alteration and citations omitted]).

On a motion to dismiss under CPLR 3211 (a) (7), “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Again, the court must “accept the complaint’s factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory” (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-71 [1st Dept 2004] [internal quotation marks and citations omitted]). “Whether a plaintiff can

ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Defendant is not entitled to dismissal under CPLR 3211(a)(1) or (a)(7). Although defendant correctly asserts that Administrative Code of the City of New York § 7-210 imposes a non-delegable duty on an owner to maintain and repair a sidewalk abutting its property, a tenant can be liable for any injuries arising from a defective sidewalk where it affirmatively caused or created the defect that caused plaintiff to trip, or it made “special use” of the sidewalk, i.e., used the sidewalk for its own benefit, thereby assuming such a duty. (*Kellogg v All Sts. Hous. Dev. Fund Co., Inc.*, 146 AD3d 615, 617 [1st Dept 2017] [citations omitted]). Plaintiff alleges that defendant created the dangerous condition and negligently maintained the sidewalk. Although defendant submits Yang’s affidavit in an attempt to establish that it has no liability herein, an affidavit does not constitute documentary evidence within the purview of CPLR 3211(a)(1) (*See Celentano v Boo Realty, LLC*, 160 AD3d 576, 577 [1st Dept 2018] [citations omitted]). Further, although Yang represents that defendant “never engaged any person or entity to perform construction, renovation, or repair on the sidewalk”, this fails to refute plaintiff’s claim that defendant itself was negligent in maintaining, repairing, operating, and/or inspecting the sidewalk. (*See Celentano*, 160 AD3d at 577).

Nor has defendant established its entitlement to dismissal pursuant to CPLR 3211(a)(7). Although a tenant of property abutting a public sidewalk generally owes no duty to maintain the sidewalk in safe condition, it may, as noted above, be held liable for injuries arising from a sidewalk defect if it created the condition or made special use of the sidewalk (*See Kellogg*, 146 AD3d at 617). Since defendant may also be held liable if it negligently repaired the sidewalk (see *Torres v City of New York*, 153 AD3d 647, 648-649 [2d Dept 2017] [citations omitted]), the lease

requires defendant to make repairs to the sidewalk, and plaintiff alleges that defendant was negligent, inter alia, in its repair of the sidewalk, plaintiff has clearly stated a cause of action.

In asserting that the complaint must be dismissed, defendant relies, inter alia, on *Collado v Cruz*, 81 AD3d 542 (1<sup>st</sup> Dept 2011). However, Collado is clearly distinguishable insofar as it was undisputed in that case that the tenant did not create the alleged defect or make special use of the sidewalk.

Accordingly, it is hereby:

ORDERED that the motion to dismiss by defendant North Six, Inc. is denied in all respects; and it is further

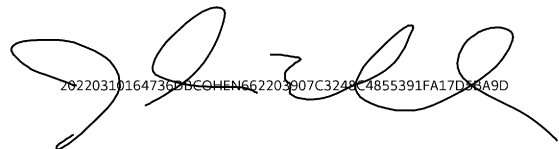
ORDERED that plaintiff Johnathan Lewis is to serve this order on defendant, with notice of entry, within 5 days after this order is uploaded to NYSCEF; and it is further

ORDERED that defendant is to file and serve its answer within 30 days after such service by plaintiff of this order with notice of entry; and it is further

ORDERED that the parties are to appear for a preliminary conference in this matter on May 17, 2022 at 3:00 p.m. unless they email a completed preliminary conference order to the Part 58 Clerk at [SFC-Pat58-Clerk@nycourts.gov](mailto:SFC-Pat58-Clerk@nycourts.gov) at least two business days prior to the scheduled preliminary conference.

3/10/2022

DATE



DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE