

Greenlaw v Guevara
2022 NY Slip Op 34385(U)
December 19, 2022
Supreme Court, New York County
Docket Number: Index No. 152248/2022
Judge: James G. Clynnes
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES G. CLYNES **PART** **22M**

Justice

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JANE GREENLAW,

Plaintiff,

- v -

JOSE ELISEO LOPEZ GUEVARA, KELCO
CONSTRUCTION, INC., ARSENAL SCAFFOLD, INC., MP
COLUMBUS PARKING LLC, A/R GARAGE LLC, A/R
RETAIL LLC, THE RELATED COMPANIES, LP, RELATED
CONSTRUCTION, LLC, COLUMBUS SPONSORSHIP LLC,
COLUMBUS CENTRE LLC, CROSS MANAGEMENT
CORP., STRUCTURE TONE, LLC

Defendant.

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INDEX NO. 152248/2022
MOTION DATE 08/01/2022
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for DISMISS

JAMES G. CLYNES, J.:

Upon the foregoing documents, in this wrongful death action, the motion by defendant Structure Tone, LLC (Structure Tone), pursuant to CPLR 3211 (a) (1), 3211 (a) (7) and 3212, to dismiss the complaint and all cross claims as against it on the ground that it is an improper party to this lawsuit is decided as follows:

Background

On April 3, 2021, Kathie Coblenz (Coblenz) was a lawful pedestrian walking at or near a parking garage entrance/exit on 58th Street just east of 9th Avenue, in New York County, Block 1049 and Lot 1001, 10 Columbus Circle (the Building) when she was struck and killed by a vehicle driven by defendant Jose Eliseo Lopez Guevara (Guevara) and owned by defendant Kelco Construction, Inc. (Kelco) (complaint, ¶¶ 1, 142, 156-157 [NYSCEF Docket No. 1]). At the time of the accident, Guevara was exiting the parking garage, operated by defendant MP Columbus Parking LLC, and making a left turn onto 58th Street.

The only cause of action set forth against Structure Tone is the third cause of action in which plaintiff alleges negligence against Structure Tone for failing to maintain, manage, control, supervise, repair, inspect, construct the premises, including but not limited to the sidewalk shed, scaffolding, sidewalk, and/or parking lot entrance, in good repair.

Guevara and Kelco assert cross claims against Structure Tone in their answer and in its answer, defendant MP Columbus Parking LLC also asserts cross claims against Structure Tone. In opposition to the motion, plaintiff sets forth the crux of its negligence allegation against Structure Tone:

“One theory of the case—separate from the claim of negligent operation by Guevara—is that a sidewalk shed erected down the entire length of 58th Street had a steel leg or railing obstructing the exit lane of the parking garage that would have forced Guevara to alter his path to the left, forcing him toward Coblentz”

(plaintiff affirmation in opp., para. 4; complaint, para. 325).

Plaintiff further states that “[b]ecause the site is a large condominium complex (commercial and residential), pre-suit research was performed that revealed Structure Tone was a general contractor performing construction at 10 Columbus Circle” (aff in opp, para. 4).

Structure Tone argues that it was in no way involved with any of the following: the work being done at the subject building, the scaffolding involved, the driver of the vehicle involved in the accident, or the vehicle itself that was involved in the accident. Further, Structure Tone states that it was not responsible for the garage out of which the vehicle emerged.

Structure Tone’s position is that it was added as a defendant in this action because its name “showed up regarding this building and Structure Tone has shown via sworn statements from James G. Bickerstaff (Bickerstaff), its Vice President of Operations, that the work that Structure Tone performed at this building was an interior build out for a tenant and their work was limited to the interior floors” (Stein affirmation in support at 7).

In support of its motion, Structure Tone submits only Bickerstaff’s affidavit as proof of its lack of any exterior work on the subject building. In his affidavit in support of Structure Tone’s motion, Bickerstaff avers that Structure Tone did not do any exterior work at this site at any time. According to Bickerstaff, Structure Tone was at the building to do work for tenant Deutsche Bank on the following floors: 4 south, 5 south, 6 south, 7 north and south, 8 north and south, 9 north and south, 10 north and south, 11 south, 12-23 south and placed air chillers on a building set back:

“Structure Tone LLC’s work was limited to these interior spaces and the spaces within the walls of these floors and the placement of the air chillers. Structure Tone LLC did not do any exterior work at this site at any time. Structure Tone LLC did not do any work at this site that involved, required or used any exterior scaffolding”

(Bickerstaff affidavit, para. 3)

Further, Bickerstaff avers that Structure Tone had nothing to do with “any exterior scaffolding that was ever erected around the building at any location at any time,” and that Structure Tone did not contract with or work with any of the defendants listed in this suit with respect to the worksite at 10 Columbus Circle (Bickerstaff affidavit, paras. 4-5).

In opposition, plaintiff argues that although Bickerstaff states that Structure Tone was at the subject premises to do interior build-out work only, had no contractual relationship with the landlord, and does not refer to Structure Tone as a general contractor, there are questions of fact concerning the scope of Structure Tone’s work at the site and whether Structure Tone was the general contractor. In support of this position, plaintiff offers documentation, that was not certified, for 10 Department of Buildings (DOB) ECB/OATH violations for the premises at 991 8th Avenue, block 1049, lot 7501 and Structure Tone is the respondent for all. Plaintiff argues that the reference to “excavation” implies that Structure Tone was involved in construction work beyond interior build-out work. The first annexed DOB violation detail occurred on June 20, 2022. Of the violation, the inspector wrote:

“failure to institute and maintain safety measures on equipment and temporary construction. note: at time of my inspection of a 54 story underalt excavation permit active job- site. inspection to complaint of incid[ent]”

(Aydiner aff, exhibit D at 1).

For a violation that occurred on November 17, 2020, the inspector wrote:

“failure to maintain & institute safety measures during operation. note at time of my inspection of a 54 sty bldg under interior renovation in response to incident reported that 1 worker received a cut on his arm”

(*id.* at 2).

For a violation that occurred on February 24, 2021, the inspector wrote:

“failure to institute & maintain safety measures. at time of inspection responding to an incident where a worker fell from a baker scaffold. during inspection noted that a worker

fell when he leaned to the scaffo [sic]"

(*id.* at 3).

Plaintiff argues that Structure Tone is not entitled to the relief it seeks under CPLR 3211 (a) (1), since Structure Tone relies solely on the affidavit of its designee, James G. Bickerstaff, and not on any other documents. "A motion pursuant to CPLR 3211 (a) (1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law" (plaintiff memo in opp at 5-6 citing *Flowers v 73rd Townhouse LLC*, 99 AD3d 431, 431 [1st Dept 2022]).

Under New York law, an affidavit does not constitute documentary evidence under CPLR 3211 (a) (1) (*Serao v Bench-Serao*, 149 AD3d 645, 646 [1st Dept 2017] ["factual affidavits do not constitute documentary evidence within the meaning of the statute"]).

"To constitute documentary evidence, the evidence must be 'unambiguous, authentic and undeniable,' such as records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable. Conversely, letters, emails, and . . . affidavits, do not meet the requirements for documentary evidence"

(*Phillips v Taco Bell Corp.*, 152 AD3d 806, 807 [2d Dept 2017] [internal quotation marks and citation omitted]).

Here, plaintiff alleged in the third cause of action that Structure Tone maintained, managed, controlled, supervised, repaired, inspected, constructed the premises, including but not limited to the sidewalk shed, scaffolding, sidewalk, and/or parking lot entrance. Because Structure Tone relies only on Bickerstaff's affidavit to undermine this allegation, the court denies its motion pursuant to CPLR 3211 (a) (1).

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept as true the facts as alleged in the complaint and accord plaintiffs the benefit of every favorable inference" (*Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613 [1st Dept 2015]). Where extrinsic evidence is introduced and considered on a CPLR 3211 motion, the allegations of the complaint are not conclusively presumed true (*see Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). However, "[f]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may properly be negated by affidavits and

documentary evidence” (*Facebook, Inc.*, 134 AD3d at 613 [internal quotation marks and citation omitted]).

With respect to a motion to dismiss pursuant to CPLR 3211 (a) (7), for failure to state a cause of action, “affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint” (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). On the one hand, “affidavits submitted by the defendant [as movant] will seldom if ever warrant the relief [sought under CPLR 3211 (a) (7),] ‘unless too the affidavits establish conclusively that plaintiff has no cause of action’” (*id.*).

According to plaintiff’s complaint, Structure Tone is liable in negligence for failing to maintain the premises, including but not limited to the sidewalk shed, scaffolding, sidewalk, and/or parking lot entrance. In opposition to Structure Tone’s 3211 (a) (7) motion, plaintiff argues that questions of fact exist as to Structure Tone’s role at the site, whether it was the general contractor, and whether it was involved in the construction outside the building. Bickerstaff’s affidavit, with no supporting documentation whatsoever, does no more than assert the inaccuracy of plaintiffs’ allegations, does not eliminate all questions concerning the validity of the claim, and, therefore, does not conclusively establish that plaintiff has failed to state a cause of action (*see Serao v Bench-Serao*, 149 AD3d 645, 646 [1st Dept 2017]).

In accordance with the foregoing, it is

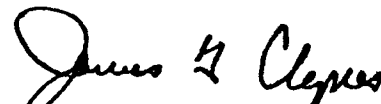
ORDERED that the defendant Structure Tone LLC’s motion, pursuant to CPLR 3211 (a) (1), 3211 (a) (7) and 3212 is denied; and it is further

ORDERED that defendant Structure Tone LLC is directed to serve and file and answer in this matter within 30 days of the date on this decision.

This constitutes the Decision and Order of the Court.

12/19/2022

DATE


JAMES G. CLYNES, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: