

Figueroa v 2026 Westchester Realty LLC
2022 NY Slip Op 35165(U)
February 1, 2022
Supreme Court, Bronx County
Docket Number: Index No. 33503/2020
Judge: Laura G. Douglas
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
COUNTY OF BRONX
PART 6

Index No. 33503/2020

JOSEPH FIGUEROA,

Plaintiff,

-against-

2026 WESTCHESTER REALTY LLC, MOOSE BEAR 2016, LLC,
HP PARK WEST HOUSING DEVELOPMENT FUND
COMPANY, INC., HOUSING PARTNERSHIP DEVELOPMENT
CORPORATION, and SPEIDEL AND SONS CONTRACTING, INC.,

Defendant.

DECISION/ORDER

Present:

**Hon. Laura G. Douglas
J.S.C.**

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for summary judgment (seq. no. 2):

Papers

Numbered

Notice of Motion by Defendants 2026 Westchester Realty LLC, Moose Bear 2016, LLC, HP Park West Housing Development Fund Company, Inc., and Housing Partnership Development Corporation, Statement of Material Facts by Martin K. Rowe, Esq. dated April 30, 2021, Memorandum of Law by Martin K. Rowe, Esq. dated April 30, 2021 in Support of Motion, Affirmation of Martin K. Rowe, Esq. dated April 30, 2021 in Support of Motion, and Exhibits ("A" through "F").....	1
Plaintiff's Notice of Cross-Motion, Statement of Material Facts by Glen Devora, Esq. dated June 28, 2021, Affirmation of Glen Devora, Esq. dated June 15, 2021 in Support of Cross-Motion, and Exhibits ("A" through "D").....	2
Affirmation of Glen Devora, Esq. June 28, 2021 in Opposition to Motion and Response to Statement of Material Facts by Glen Devora, Esq. dated June 23, 2021	3
Reply Affirmation of Martin K. Rowe, Esq. dated August 16, 2021.....	4

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

Defendants 2026 Westchester Realty LLC, Moose Bear 2016, LLC, HP Park West Housing

Development Fund Company, Inc., and Housing Development Fund Company, Inc. (collectively, “2026 Westchester Realty”) seek summary judgment pursuant to CPLR § 3212 dismissing the plaintiff’s complaint in its entirety as against them. The motion is granted. The plaintiff’s cross-moves for an order amending his complaint and the caption of this action to add Westchester Mews LLC, Westchester Mews LIHTC LLC, and HP Westchester Mews Housing Development Fund Company, Inc. (collectively, “Westchester Mews”) as additional defendants, and directing the filing and service of the plaintiff’s proposed amended summons and complaint. The cross-motion is granted without opposition.

The plaintiff (“Figueroa”) seeks monetary damages for personal injuries allegedly sustained on January 11, 2018 while working for Procida Construction at a construction site located at 2026 Westchester Avenue in Bronx, New York. He asserts claims under the New York Labor Law, alleging that the various defendants were negligent in their ownership, supervision, and/or control of the site and the ongoing work.

In order to obtain summary judgment, 2026 Westchester Realty must demonstrate that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law under these undisputed facts (*see Winegrad v. New York University Medical Center*, 64 NY2d 851 [Ct App 1985] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]). To defeat such a showing, Figueroa must present facts in admissible form demonstrating that a genuine, triable issue(s) of fact exists precluding summary judgment (*see Zuckerman v. City of New York*, 49 NY2d 557 [Ct App 1980] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]).

2026 Westchester Realty contends that it cannot be held liable for Figueroa’s injuries, since his accident could not have occurred at the premises known as 2026 Westchester Avenue, Bronx, New York as alleged in his complaint. In support, 2026 Westchester Realty submits an affidavit from Mario Procida (“Procida”) dated April 26, 2021. Procida states that he is the Manager of defendant 2026 Westchester Realty LLC, the Managing Member of defendant Moose Bear 2016, LLC, and President and CEO of non-party Procida Construction Corp. and has personal knowledge of the matters set forth in his affidavit. His roles include record searching, project applications, vendor and employee hiring, filing and review of tax applications and financial analyses, completing of various New York City Department of Housing and Department of Buildings applications and the maintenance of same, project management, and oversight and management of each of these entities’ daily operation.

Procida avers that the premises located at 2026 Westchester Avenue are owned by defendant HP

Park West Housing Development Fund Company, Inc. (“HP Park West”), which was created and is owned by defendant Housing Partnership Development Corporation as an affordable housing entity. Defendant 2026 Westchester Realty LLC was the developer for a project to construct certain apartments at that location and subsequently own the apartments. Defendant Moose Bear 2016, LLC is a partial owner of 2026 Westchester Realty LLC. Procida admits that Figueroa was employed by Procida Construction Corp. from December 19, 2017 to October 17, 2018 and was so employed on the alleged accident date. While Procida acknowledges that construction work was ongoing at 2026 Westchester Avenue in 2016 and 2017, he avers that the work had ended by January 2018, prior to the date on which the plaintiff was allegedly injured and prior to the date that the plaintiff became employed by Procida. In support, Procida submits a certificate of occupancy for the premises issued by the New York City Department of Buildings on July 26, 2017, some six months before the alleged date of Figueroa’s on-the-job accident. Procida also avers that no construction or active labor was being performed at 2026 Westchester Avenue on the date of the plaintiff’s accident, that the building was fully occupied by tenants on that date, and that Figueroa never did any work at 2026 Westchester Avenue while employed by Procida Construction Corp.

This evidence establishes 2026 Westchester Realty’s prima facie entitlement to judgment as a matter of law. Specifically, the 2026 Westchester Realty defendants have demonstrated that there was no duty on their part to Figueroa under any theory of negligence or liability under the Labor Law, since all work at their site had been completed prior to the accident date.

To defeat the initial showing, Figueroa must demonstrate the existence of a material issue of fact that would preclude summary judgment. Figueroa’s argument that such issues are raised because the allegations in his complaint contradict Procida’s affidavit is unavailing, since his complaint is only verified by counsel and cannot be used as the basis of the merits of a claim or defense (*see Soffer v. Montanez*, 198 AD3d 606 [1st Dept 2021]). Figueroa has also failed to demonstrate that this motion is premature. CPLR § 3212(f) allows a court to deny a summary judgment where “it appear[s] from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated.” However, when seeking to avoid summary judgment on the grounds that discovery has not been conducted, a party must provide an evidentiary basis demonstrating that discovery may lead to relevant evidence or that facts essential to opposing the motion are in the exclusive knowledge and control of the moving party (*see Medina v. Rodriguez*, 92

A.D.3d 850, [2nd Dept 2012]). Here, Figueroa's contention that further discovery may produce some evidence of fault by 2026 Westchester Realty is purely speculative. The mere hope that he might be able to uncover some favorable evidence through disclosure is insufficient to deny summary judgment (*see Costaneda v. DO & CO New York Catering, Inc.*, 144 A.D.3d 407 [1st Dept 2016]).

Finally, Figueroa contends that Procida's affidavit is self-serving and that there is no affidavit from defendant HP Park West or defendant Housing Partnership Development Corporation supporting dismissal. However, as the principal and/or agent of a party to this litigation, Procida's testimony can be expected to be self-serving, which is not alone a reason to disregard it. In any event, Procida confirms his testimony that no work was ongoing at 2026 Westchester Avenue at the time of Figueroa's alleged accident by submission of the unchallenged certificate of occupancy. This testimony and documentary evidence also tilts in favor of both HP Park West and Housing Partnership Development Corporation, showing the absence of their liability for an accident occurring at the alleged time and place. Notably absent from the papers submitted in opposition to this motion is an affidavit from Figueroa verifying the allegations made by his attorney in the complaint. For these reasons, the motion is granted.

Turning to the cross-motion, leave to amend shall be freely given and denied only if the delay has directly caused prejudice or surprise or if the proposed amendment is palpably improper or insufficient as a matter of law (*see LDIR, LLC v. DB Structured Products, Inc.*, 172 AD3d 1 [1st Dept 2019]). Here, the proposed amendment would add the three Westchester Mews entities as defendants within the three-year statute of limitations set forth in CPLR § 214(5) (*see Long v. Sowande*, 27 AD3d 247 [1st Dept 2006]) on sufficiently plead causes of action sounding in negligence and Labor Law violations (*see Padilla v. Frances Schervier Housing Development Fund Corporation* 303 AD2d 194 [1st Dept 2003]). The absence of any prejudice to the existing defendants is evident from the lack of any opposition to this motion. The allegations in the amended complaint are sufficient to state an actionable cause of action(s) against the proposed defendants.

Accordingly, it is hereby

ORDERED that summary judgment is granted to defendants 2026 Westchester Realty LLC, Moose Bear 2016, LLC, HP Park West Housing Development Fund Company, Inc., and Housing Partnership Development Corporation, dismissing the plaintiff's complaint as against them in its entirety; and it is further

ORDERED that the Clerk of the Court make all necessary entries to reflect this disposition, including entry of a judgment of dismissal, if one is submitted; and it is further

ORDERED that the plaintiff has leave to file and serve an amended verified summons and complaint as set forth in Exhibit "D" to the instant cross-motion upon Westchester Mews LLC, Westchester Mews LIHTC LLC, and HP Westchester Mews Housing Development Fund Company, Inc. in accordance with the CPLR no later than 60 days from entry of this Order; and it is further

ORDERED that this action shall bear the following caption and the Clerk of the Court is directed to make all necessary entries to effectuate this change in caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

JOSEPH FIGUEROA,

Plaintiff,

Index No. 33503/2020

-against-

2026 WESTCHESTER REALTY LLC, MOOSE BEAR 2016, LLC,
HP PARK WEST HOUSING DEVELOPMENT FUND COMPANY,
INC., HOUSING PARTNERSHIP DEVELOPMENT
CORPORATION, SPEIDEL AND SONS CONTRACTING INC.,
WESTCHESTER MEWS LLC, WESTCHESTER MEWS
LIHTC LLC, and HP WESTCHESTER MEWS HOUSING
DEVELOPMENT FUND COMPANY, INC.,

Defendants.
_____.

The foregoing constitutes the Decision/Order of this Court.

DATED: February 1, 2022
Bronx, New York



HON. LAURA G. DOUGLAS

J.S.C.