

**Chimborazo v Gilbane Residential Constr., LLC**

2023 NY Slip Op 31353(U)

April 25, 2023

Supreme Court, New York County

Docket Number: Index No. 152708/2022

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. MARY V. ROSADO PART 33M**

*Justice*

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**INDEX NO. 152708/2022**

JUNIOR CHIMBORAZO,

**MOTION DATE 09/21/2022**

Plaintiff,

**MOTION SEQ. NO. 001**

- v -

GILBANE RESIDENTIAL CONSTRUCTION,  
LLC,TPHGREENWICH OWNER LLC

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for DISMISS.

Upon the foregoing documents, and after oral argument, which took place on February 7, 2023, where Christopher J. Soverow, Esq. appeared for the Plaintiff Junior Chimborazo (“Plaintiff”) and Abraham D. Leybengrub, Esq. appeared for the Defendants Gilbane Residential Construction, LLC (“Gilbane”), and TPHGreenwich Owners LLC (“Greenwich”) (collectively “Defendants”), the Defendants motion to dismiss is denied.

**I. Background**

This action arises out of injuries Plaintiff allegedly sustained on a construction site. Plaintiff initiated this action via summons and complaint on March 30, 2023 (NYSCEF Doc. 1). Plaintiff alleges that Defendants owned, leased, or operated real property located at 42 Trinity Place, New York, NY 10006 (the “Construction Site”) (*id.* at ¶¶ 13-30). Plaintiff alleges construction was ongoing on March 9, 2022 (*id.* at ¶ 31). Plaintiff alleges that Defendants contracted with non-party Mike & McRae Construction LLC (“Mike & McRae”) to work on the Construction Site (*id.* at ¶ 35). Plaintiff claims he was employed by Mike & McRae. Plaintiff

alleges that he was working on the Construction site on March 9, 2022 and was severely injured by Defendants' negligence and violations of the New York Labor Law ("NYLL") (*id.* at ¶¶ 56-68). Plaintiff alleges violations of NYLL §§ 200, 240(1), and 241(6) (*id.* at ¶¶ 69-102).

In response, on September 16, 2022, Defendants filed this pre-answer motion to dismiss (NYSCEF Doc. 8). Defendants argue Plaintiff was not working on the premises for Mike & McRae on the date of the alleged incident (NYSCEF Doc. 9 at ¶ 7). Defendants submitted the payroll records of Mike & McRae encompassing the date of the accident (NYSCEF Doc. 11). Plaintiff's name is absent from that document. Defendants also submitted site access records, which do not evidence Plaintiff accessing the Construction Site on the date of the incident (NYSCEF Doc. 12).

Defendant submitted the affidavit of Keith McRae ("Mr. McRae"), who is the owner of Mike & McRae (NYSCEF Doc. 13 at ¶ 2). Mr. McRae testified that Mike & McRae's accident protocol requires employees to report an accident to the labor foreman, who would then report the accident to the safety manager for Gilbane for the completion of an incident report (*id.* at ¶ 6). Mr. McRae testified that following the completion of an incident report, the employee would see the site medic to complete a separate injury report (*id.*). Mr. McRae swore that despite this policy, and upon a search of Mike & McRae's employment records, they had no record of Plaintiff ever being employed by Mike & McRae, nor did they have any records of Plaintiff working at the premises (*id.* at ¶ 8). Mr. McRae testifies that his company typically employs around twenty employees, but he had never heard of Plaintiff prior to the filing of this Complaint (*id.* at ¶ 7).

Defendants provided the affidavit of Scott Palumbo ("Mr. Palumbo"), the site safety manager employed by Gilbane (NYSCEF Doc. 14 at ¶ 2). Mr. Palumbo testified that employees hired by all of Gilbane's subcontractors, including Mike & McRae employees, must go through a 30-to-45-minute orientation covering the rules of the job site (*id.* at ¶ 4). Mr. Palumbo also testified

that all employees are given swipe badges to swipe in and out of turnstiles to access the jobsite (*id.*). Mr. Palumbo testified that he was not aware of Plaintiff until the filing of this action, nor is there any record of any incident involving Plaintiff on the Construction Site (*id.* at ¶ 7). Defendants argue that these records are sufficient to dismiss Plaintiff's Complaint (NYSCEF Doc. 15).

In opposition, Plaintiff argues that the affidavits submitted do not constitute documentary evidence and are inadmissible to support a motion to dismiss under CPLR §§ 3211(a)(1) and (a)(7) (NYSCEF Doc. 19). Plaintiff argues that Defendants are asking, on a pre-answer motion to dismiss "to have the Court afford them the benefit of the doubt that their business practices are flawless and completely above board" (*id.* at ¶ 5). Plaintiff argues that the documentary evidence does not resolve all factual issues as a matter of law, and therefore the motion must be denied (*id.* at ¶ 27). Plaintiff provided his own affidavit in opposition to the motion (NYSCEF Doc. 22). Plaintiff swears he does not appear on the payroll because he was paid in cash (*id.* at ¶ 4). Plaintiff also swears that he does not appear on site access records because there was another entrance he used which allowed him to enter without presenting an ID card or to swipe a badge (*id.*).

In reply, Defendants argue that the crucial factual issue is whether or not Plaintiff was employed by Mike & McRae and present at the Construction Site on the date of the incident (NYSCEF Doc. 24 at ¶ 15). Defendants assert that the documentary evidence conclusively resolves this factual issue (*id.* at ¶ 16). Defendants argue Plaintiff's self-serving statements in his affidavit in opposition are insufficient to refuse the Defendants' documentary evidence (*id.* at ¶ 17).

Defendants also submitted a supplemental affidavit from Mr. McRae (NYSCEF Doc. 25). Mr. McRae swore that all employees are paid via direct deposit except new employees who are paid by check until their direct deposit is set up (*id.* at ¶ 4). Mr. McRae also swore that Mike & McRae never paid Plaintiff in cash (*id.* at ¶ 5). Mr. Palumbo provided a supplemental affidavit

(NYSCEF Doc. 26). Mr. Palumbo admitted that “[t]here is technically a third access point through the main lobby of the building...but no workers are permitted to enter this way, and if they try, they are directed to exit the building” (*id.*).

Finally, submitted for the first time in reply, was the affidavit of Andy McRae (“Andy”<sup>1</sup>), who swears he is the labor foreman for Mike and McRae (NYSCEF Doc. 27 at ¶ 1). Andy admits in his affidavit that Mike & McRae employs non-union laborers (*id.* at ¶ 3). He states that he maintains daily attendance records which identify the names of all laborers employed by Mike & McRae (*id.* at ¶ 7). Andy swears that he found no records that Plaintiff ever worked for Mike & McRae (*id.* at ¶ 9). The attendance record are attached to Andy’s affidavit, and there are numerous names, some of which are illegible (*id.*).

## II. Discussion

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). In opposing a motion to

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<sup>1</sup> Andy McRae’s first name is used to avoid confusion with references to Keith McRae.

dismiss for failure to state a claim, a plaintiff may amplify the allegations in the Complaint through affidavits (*Mulder v Donaldson, Lifkin & Jenrette*, 208 AD2d 301, 307 [1<sup>st</sup> Dept 1995]).

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1<sup>st</sup> Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Pursuant to the standard of analysis on a pre-answer motion to dismiss, Defendants' motion to dismiss is denied. First, the "documentary evidence" Defendants' submitted for the first time on reply cannot be relied on in support of their motion to dismiss (*Anderson & Anderson LLP-Guangzhou v North American Foreign Trading. Corp.*, 165 AD3d 511, 514 [1<sup>st</sup> Dept 2018]). In so far as Defendants rely on the affidavits of Mr. McRae and Mr. Palumbo to provide testimony contradicting Plaintiffs' allegations, the Court cannot consider those affidavits to show the insufficiency of Plaintiff's Complaint on a motion to dismiss (*Tsimerman v Janoff*, 40 AD3d 242 [1<sup>st</sup> Dept 2007]). However, as stated by the Court of Appeals, on a motion to dismiss, a court may consider a plaintiff's affidavit to remedy pleading problems (*Sargiss v Magarelli*, 12 NY3d 527 [2009]). To the extent Plaintiff's affidavit amplifies the challenged pleadings, the Court can consider his affidavit.

Second, even if the pay roll records and badge swipe records are admissible, the factual allegations have not been definitively contradicted by this documentary evidence (*Leon v*

*Martinez*, 84 NY2d 83, 88 [1994]). Plaintiff provided an affidavit in opposition to the motion to dismiss swearing, under penalty of perjury, that he was paid in cash, which explains why he does not appear on Mike & McRae's payroll (*see* NYSCEF Doc. 22 at ¶ 4). Plaintiff also swore that he entered the Construction Site through an entrance that did not require any identification (*id.*). Plaintiff has therefore provided sworn testimony amplifying his pleadings which explains why his name does not appear on the documentary evidence submitted by Defendants. These factual issues require denial of Defendant's pre-answer motion to dismiss.

The Court reiterates that on a pre-answer motion to dismiss, the Court must accept as true all of Plaintiff's factual allegations and give Plaintiff the benefit of all favorable inferences which may be drawn from the Complaint. Based on this standard of analysis, the Court cannot give Defendants a favorable inference that their business practices were as flawless as they testify. In other words, given the allegations and Plaintiff's affidavit, he is entitled to an inference that Defendants did employ laborers who were paid in cash, and that there were some laborers who were able to access the Construction Site through an entrance that did not require swiping their badge. While the payroll records and swipe records may prove strong evidence in showing a prima facie entitlement to summary judgment, or may successfully impeach Plaintiff's credibility at trial, as this matter is currently stalled on a pre-answer motion to dismiss, the Court cannot dismiss Defendants. The Court further highlights that Defendants have failed to supply any binding precedent which would mandate the Court dismiss Plaintiff's labor law and negligence claims based solely on his absence from payroll and badge swipe records.

Therefore, Defendant's motion is denied in its entirety. The Court does not pass judgment on the merits of a future summary judgment motion after the record is more fully developed and

discovery has been conducted. However, as this is a pre-answer motion to dismiss, the Court cannot, pursuant to the CPLR and binding precedent, grant Defendants' the relief they seek.

Accordingly, it is hereby,

ORDERED that Defendants' motion to dismiss is denied in its entirety; and it is further

ORDERED that on or before May 17, 2023, the parties are directed to submit a proposed preliminary conference order to the Court via e-mail to SFC-Part33-Clerk@nycourts.gov. If the parties are unable to agree to a proposed preliminary conference order, the parties are directed to appear for an in-person preliminary conference with the Court in Room 442, 60 Centre Street, on May 24, 2023 at 9:30 a.m.; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on Defendants; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

<u>4/25/2023</u> DATE	<u>Mary V Rosado JSC</u> HON. MARY V. ROSADO, 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"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE