

Solis v Harlem Yimby LLC

2023 NY Slip Op 32478(U)

July 19, 2023

Supreme Court, New York County

Docket Number: Index No. 158238/2022

Judge: Lori S. Sattler

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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. LORI S. SATTLER PART 02TR

Justice

-----X

JOSE A. SOLORZANO SOLIS,
Plaintiff,

- v -

HARLEM YIMBY LLC, DAVID CONSTRUCTING NY,
INC., CELTIC SERVICES NYC INC., CELTIC DEMOLITION,
INC.,

Defendant.

-----X

HARLEM YIMBY LLC
Plaintiff,

-against-

MAJOR GENERAL CONSTRUCTION 1 CORP.

Defendant.

-----X

INDEX NO. 158238/2022
MOTION DATE 06/08/2023
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595367/2023

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for DISMISS.

Defendant Celtic Services NYC Inc. (“Celtic Services”) moves for an Order dismissing Plaintiff’s Amended Complaint and any cross claims against it pursuant to CPLR 3211(a)(1).

Plaintiff does not oppose the motion. Defendant Harlem Yimby LLC (“Harlem Yimby”) opposes the motion.

According to the Amended Complaint (NYSCEF Doc. 6), Plaintiff was working at 164-168 West 136th Street (“premises”) when he tripped on an exposed metal edge of a step. Harlem Yimby was an owner of the premises. The Amended Complaint further asserts Harlem Yimby

entered into a contract with Celtic Services by which it would be the contractor for work to be performed on the premises.

Celtic Services moves to dismiss the Amended Complaint as against them. It alleges that it was wrongfully named as a defendant in the action. It claims that it never owned the premises and never performed any services or work at the address. In its Answer, Harlem Yimby confirms that it did not have a contract with Celtic Services. Plaintiff's counsel was notified that no contract existed, but counsel did not discontinue the action or answer any communications. Nevertheless, Plaintiff does not oppose the motion.

Harlem Yimby, in contradiction to its own Answer, does oppose the motion. It points to certain PW2 forms filed with the New York City Department of Buildings which indicate that Celtic Services was the construction superintendent onsite. The forms were signed by Nicholes Adams for Celtic Services on January 19, 2022. Harlem Yimby further submits an affidavit from Daniel Similow, the director of construction of Haussman Development LLC. Haussman served as development manager for the project and retained Major General Construction 1 Corp. as the general contractor for the project (NYSCEF Doc. 27, ¶ 6). He states that “[u]pon information and belief, Major retained Celtic to provide superintendent services as evidenced by . . . the PW2 Work Permit Application forms . . .” (*id.* at ¶ 8). Similow does not attest to having specific knowledge that Celtic Services did in fact serve in that role for the project.

In a reply affidavit, Kieran Slevian, President of Celtic Services, reiterates that the company had no connection to the project. He further attests that Nicholes Adams left the employ of Celtic Services as of January 29, 2021, a year prior to the submission of the Department of Buildings application, and has not returned to work for the company. He annexes payroll records he states are maintained in the regular course of business as well as an Automatic

Reply generated from Adams's work email address which support the substance of Slevian's affidavit (NYSCEF Docs. 32-34).

CPLR 3211(a)(1) permits a party to seek dismissal of a cause of action on the ground that a defense is founded upon documentary evidence. Dismissal under this section is warranted "where the documentary evidence utterly refutes a plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; see also *511 W. 232nd Owners Corp v Jennifer Realty Co*, 98 NY2d 144, 152 [2002]). "Factual affidavits . . . do not constitute documentary evidence within the meaning" of CPLR 3211(a)(1) (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]).

Here, the documentary evidence submitted by Celtic Services, namely the certified business records showing that Nicholes Adams was not its employee, supports its position that the company performed no work on the premises and were not the construction superintendents. Harlem Yimby, whose Answer also supports Celtic Services' position, fails to present any evidence to refute Celtic Services' contention, and Plaintiff does not oppose the motion. Accordingly, the motion to dismiss is granted and it is hereby,


ORDERED that the motion of defendant Celtic Services NYC Inc. to dismiss the complaint and all cross claims herein is granted and the complaint as well as any and all cross claims is dismissed in its entirety as against said defendant and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein.

7/19/2023
DATE


LORI S. SATTLER, 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