

Guachun v 666 Fifth Owner LLC

2023 NY Slip Op 32548(U)

July 25, 2023

Supreme Court, New York County

Docket Number: Index No. 158394/2021

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

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PAUL GUACHUN,

Plaintiff,

- v -

666 FIFTH OWNER LLC, THE 666 FIFTH AVENUE
CONDOMINIUM, 666 FIFTH ASSOCIATES LLC, 666 FIFTH
RETAIL ASSOCIATES, LLC, BSREP III NERO LLC, FSF
NEW YORK, LLC, TURNER CONSTRUCTION COMPANY,
WOC 666 FIFTH RETAIL TIC OWNER LLC, WDC 666
FIFTH RETAIL TIC OWNER LLC, GREEN ACRES 666
FIFTH RETAIL EAT TIC OWNER LLC,

Defendant.

-----X

THE 666 FIFTH AVENUE CONDOMINIUM, 666 FIFTH
ASSOCIATES LLC, BSREP III NERO LLC, FSF NEW YORK,
LLC, TURNER CONSTRUCTION COMPANY

Plaintiff,

-against-

ALL STATE INTERIOR NJ CORP.,

Defendant.

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INDEX NO. 158394/2021
MOTION DATE 01/09/2023
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595217/2022

The following e-filed documents, listed by NYSCEF document number (Motion 001) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 87, 88, 89, 90, 91, 92

were read on this motion to/for JUDGMENT - SUMMARY.

In this Labor Law action, Defendant FSF New York, LLC (“FSF”) moves to dismiss the Complaint as against it pursuant to CPLR 3211(a)(1) and (7), or in the alternative for summary judgment dismissing the Complaint as against it pursuant to CPLR 3212. Plaintiff Paul Guachun (“Plaintiff”) and Third-Party Defendant All State Interior NJ Corp. (“All State”) oppose the motion.

This action stems from injuries Plaintiff alleges he sustained as an employee of All State on a construction site on the 38th floor of 666 Fifth Avenue (“the building”) on August 25, 2021 (NYSCEF Doc No. 78, Bill of Particulars ¶ 4). The building is a 41-floor condominium with ground-floor commercial space. Plaintiff brought the instant action alleging violations of Labor Law §§ 240(1), 241(6) and 200 and common law negligence against Turner Construction Company as the general contractor of the project, along with various entities associated with the building, including FSF.

In support of its motion, FSF annexes an affidavit of Dilip Patel, an authorized signatory of FSF (NYSCEF Doc. No. 81). Patel states that FSF is “a commercial tenant of the ground floor” of the building and “was not involved in any fashion with the construction work at issue and does not have any interest, ownership or otherwise, in the 38th/39th floor of the subject premises” (*id.* ¶ 3). He annexes a Commercial Condominium Unit Deed dated March 4, 2011 (“Deed”). The Deed names FSF as the grantee for “Commercial Unit 1” at the building. Based on the Deed and Patel’s affidavit, FSF argues the action must be dismissed as against it because it did not owe Plaintiff any duty of care and Plaintiff’s injury was not caused by any negligence on its part, and because the relevant sections of the Labor Law do not bind FSF under the circumstances.

Plaintiff opposes. He points to language in the Deed providing that FSF has “an undivided 2.920% percentage interest in the Common Elements (as such term is defined in the definitions).” He further annexes a copy of the Deed with a cover page from the New York City Department of Finance Office of the City Register (NYSCEF Doc. No. 84). The cover page describes the property by listing the Borough Block and Lot, says “Entire Lot, Unit 1, Address 666 5 AVENUE, Property Type: COMMERCIAL CONDO UNIT(S).” Plaintiff argues that this

document “shows quite clearly that FSF New York owns, occupies, and possesses Block 1268. [sic] Lot 1101 also known as 666 Fifth Avenue, New York, NY, the site of the accident. FSF New York has an undivided 2.9% interest in all common elements of the building. Schedule, attached and part of the deed does NOT limit ownership to the ground floor.”

All State also opposes. It argues FSF has failed to explain its 2.92% interest in the common areas in the building, and that a “complex series of financial transactions involving this premises” must be fleshed out in discovery. It argues the motion, which it characterizes as one for summary judgment, is premature as depositions have not been held.

In reply, FSF maintains that the focus on its interest in the building’s common elements is irrelevant, since neither Plaintiff nor All State provided evidence to demonstrate or even represented that the accident occurred in a common area. It notes that Plaintiff did not sue the building’s other individual unit owners with ownership interests in the common elements of the building. It annexes a second affidavit of Patel, in which he clarifies: “FSF New York, LLC is the owner of the retail space for ZARA at the subject premises, which consists of portions of the Sub-Cellar, Cellar, First Floor, Second Floor and Third Floor (also known as the commercial unit)” (NYSCEF Doc. No. 91, ¶ 3).

On a motion to dismiss pursuant to CPLR 3211(a)(1), dismissal 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]). “In considering a motion to dismiss for failure to state a claim [pursuant to CPLR 3211(a)(7)], the court is required to accept as true the facts as alleged in the complaint, afford the plaintiff the benefit of every favorable inference and strive to determine only whether the facts alleged fit within any

cognizable legal theory” (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144-145 [1st Dept 2009], citing *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). Nevertheless, “conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss” (*Godfrey v Spano*, 13 NY3d 358, 374 [2009], citing *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 [1st Dept 1994]).

Labor Law §§ 240(1), 241(6) and 200 impose a duty upon contractors, owners, and their agents to protect workers performing construction work on jobsites (*see e.g., Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Rizzuto v L.A. Wenger Constr. Co.*, 91 NY2d 343, 348-349 [1998]; *Comes v NY State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Likewise, to state a cause of action for common law negligence, a plaintiff must allege that it was owed a duty by the defendant, that the defendant breached the duty, and that the breach proximately caused an injury (*Ferreira v City of Binghamton*, 38 NY3d 298, 308 [2022]). “The threshold question in any negligence action is” whether the defendant owes “a legally recognized duty of care to [the] plaintiff” (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 572 [2015] [internal quotations and citations omitted]).

FSF submits the Deed which conclusively establishes that it is the owner of a commercial unit on the lower floors. Neither the Deed nor the Department of Finance cover page annexed by Plaintiff describe FSF’s ownership as including the 38th floor. The contention that FSF has an ownership interest in the area where Plaintiff was injured based on its 2.92% interest in the building’s common elements amounts to a bare legal conclusion lacking the necessary factual specificity. Plaintiff’s Bill of Particulars states he was injured “on the interior 38th floor.” Neither Plaintiff’s nor All State’s opposition papers provide any support for the contention that

the accident occurred in a common area of the building or that anyone other than the owners of the 38th floor were involved with the work being performed there. Accordingly, it is hereby,

ORDERED that the motion of defendant FSF New York, LLC to dismiss the complaint herein is granted and the complaint 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

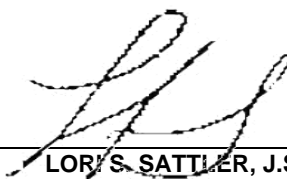
ORDERED that the action is severed and continued against the remaining defendants; and it is further

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.

This constitutes the Decision and Order of the Court.

7/25/2023
DATE


LOR S. SATTLER, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE