Supreme Court of New York
County of Kings
Part LL1

RICARDO SONNY,

Plaintiff,

against

ERZULI, LLC. AND SWEENEY & CONROY, INC.,

Defendants.

Index Number 522254/2022
(Seq. 001)

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	
Other	

Upon review of the foregoing papers, defendant Erzuli, LLC's motion to dismiss plaintiff's Labor Law §§ 240 and 241 (1) claims is hereby decided as follows:

Introduction & Procedural History

Plaintiff commenced this action against Erzuli, LLC and Sweeney & Conroy, Inc. (Sweeney) on August 3, 2022, alleging, *inter alia*, personal injuries as a result of an incident which occurred on February 10, 2021, at a construction site at 50 West 69th Street, New York, New York (the premises). Plaintiff claims defendants violated Labor Law §§ 200, 241 and 240. Sweeney has yet to appear in this litigation.

Factual Background

The Premises is owned by Erzuli. On the deed, Erzuli is named as the fee owner (*see* Nature of Interest). The premises was deeded to Erzuli on November 28, 2012. The premises consists of one lot which contains two buildings (*Architect's Designs and Permits*).

On December 21, 2018, Erzuli contracted with Sweeney as construction manager and general contractor for the buildout of the premises. Specifically, the construction entailed the conversion of two townhomes into a one-unit single-family home (Bastid Aff. at 1). Plaintiff alleges he was injured during this construction work on February 10, 2021, when an object fell from a scaffold and landed on his shoulder (Aff. in Opp. at 2).

Analysis

A motion to dismiss pursuant to CPLR 3211 is not a substitute for a motion for summary judgment, and considerations about whether a party may one day prevail on summary judgment play no part in deciding a pre-answer motion to dismiss (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]). Affidavits are neither anticipated nor intended by CPLR as substitutes for testimony, and rarely warrant dismissal of a plaintiff's claims (*VIT Acupuncture, P.C. v State Farm Auto. Ins. Co.*, 28 Misc 3d 1230[A], 2010 NY Slip Op 51560[U] [Civ Ct, Kings County 2010]; *Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2d Dept 2003]).

CPLR 3211 (a) (1)

To dismiss a claim pursuant to CPLR 3211 (a) (1), the movant must produce documents that resolve "all factual issues as a matter of law, and conclusively [dispose] of the plaintiff's claim" (*534 K, LLC v Flagstar Bank, FSB*, 187 AD3d 971 [2d Dept 2020]; *see also Braun Soller v Dahan*, 173 A.D.3d 803, 805 [2d Dept 2019]). Documentary evidence for the purpose of this statute includes "out-of-court transactions such as mortgages, deeds, contracts, and any other

papers, the contents of which are essentially undeniable" (*McDonald v O'Connor*, 189 AD3d 1208, 1210 [2d Dept 2020])

In support of its motion, defendant submits a certified deed, an architect's plan, and affidavits of Pierre Bastid and Brian Caffery who both allegedly hold roles in the Erzuli corporation. The affidavits submitted are testimonial in nature and therefore improper submissions on a motion made pursuant to CPLR 3211 (a) (1) (*Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). Additionally, the architect's plan is not authenticated by the affidavit of an architect, which would have been a proper affidavit in such a motion (*see Seaman v Three Vil. Garden Club Inc.*, 67 AD3d 889, 889 [2d Dept 2009]).

Labor Law §§ 240(1) and 241(6), which impose certain non-delegable safety duties upon "contractors, owners, and their agents," specifically exempt "owners of one and two-family dwellings who contract for but do not direct or control the work" (*Parise v Green Chimneys Children's Servs., Inc.*, 106 AD3d 970, 971 [2d Dept 2013]; see *Cannon v Putnam*, 76 NY2d 644 [1990]). Defendant argues that the documents provided show that, as a matter of law, it falls within the homeowner exemption of the Labor Law.

Although property owned by a corporation can still qualify for the homeowner exemption (*Assevero v Hamilton & Church Props., LLC*, 131 AD3d 553 [2d Dept 2015]), renovations performed in furtherance of a commercial purpose is not covered (*see Bartoo v Buell*, 87 NY2d 362 [1996]). The only piece of documentary evidence provided by defendant is the certified deed. The certified deed does not prove that Ezruli did not actually direct or control the work and does not conclusively establish that the renovations of the premises were unrelated to any commercial purpose. Even the AIA work contract, if it were to be considered as documentary

evidence, is not indisputable proof that Ezruli did not direct or control the work. The defendant's proofs are also unavailing in that the deed lists the premises as an apartment building in three separate instances and does not contain any evidence that the building is a one or two-family dwelling (Deed at 3).

CPLR 3211 (a) (7)

"Under CPLR § 3211 (a) (7), the applicable test is whether the pleading states a cause of action, not whether the proponent of the pleading, in fact, has a meritorious cause of action . . . The court must determine whether, accepting as true the factual averments of the complaint and according the plaintiff the benefits of all favorable inferences which may be drawn therefrom, the plaintiff can succeed upon any reasonable view of the facts stated" (*VIT Acupuncture P.C. v State Farm Auto Ins. Co.,* 28 Misc 3d 1230[A], 2010 NY Slip Op 51560[U], *1 [Civ Ct, Kings County 2010] quoting *Board of Educ. Of City School Dist. Of City of New Rochelle v County of Westchester,* 282 AD2d 561 [2d Dept 2001]).

In this case, defendant's submissions are inadequate to show that the plaintiff failed to plead a cause of action. The statutory exemption within the Labor Law is designed to protect owners who are not in a position to know about, or provide for, the responsibilities of absolute liability (*see DeSabato v 674 Carroll St. Corp.*, 24 Misc 3d 1236[A], 2005 NY Slip Op 52404[U] [Sup Ct, Kings County 2005]). Although the affidavits and other evidence submitted by the defendant, if true, might bear on the merits of plaintiff's action, they do not affect whether the

complaint itself states a cause of action. As plaintiff's complaint does state a cause of action under the New York Labor Law, dismissal is not appropriate under CPLR 3211 (a) (7).

Conclusion

For the foregoing reasons, defendant's motion to dismiss (Seq. 001) is denied.

July 18, 2023
DATE

DEVIN P. COHEN
Justice of the Supreme Court