

Guo Xin Zheng v Bay 20th LLC

2023 NY Slip Op 32863(U)

August 9, 2023

Supreme Court, Kings County

Docket Number: Index No. 503947/2022

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 503947/2022
Seqs. 001-003

Part LL1

DECISION/ORDER

GUO XIN ZHENG,

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

Plaintiff,

Papers Numbered

against

Notice of Motion and Affidavits Annexed	<u>1-3</u>
Order to Show Cause and Affidavits Annexed. . . .	<u> </u>
Answering Affidavits	<u>3-5</u>
Replying Affidavits	<u>6-7</u>
Exhibits	<u>Var.</u>
Other	<u> </u>

BAY 20TH LLC AND DYNASTY CONTRACTING LLC,

Defendants.

Upon the foregoing papers, defendant Dynasty Contracting LLC (Dynasty)'s pre-answer motion to dismiss (Seq. 001), plaintiff's motion to add a party and amend the caption (Seq. 002), and defendant Bay 20th LLC (Bay)'s cross-motion for summary judgment (Seq. 003) are decided as follows:

Introduction & Factual Background

This action arises out of injuries plaintiff allegedly sustained on September 18, 2021, while unloading materials while in the course of performing demolition and construction work at 11 Bay 20th Street, Brooklyn, NY. No discovery has been conducted. The summons and complaint was served on March 3, 2022, and Bay interposed an answer on July 14, 2022. Defendant Dynasty filed its pre-answer motion to dismiss on August 25, 2022.

Analysis

Dynasty's Motion to Dismiss (Seq. 001)

Dynasty seeks dismissal on the grounds that it was not the general contractor due to a limited contractual carve out for steelwork at the site, and that it did not supervise, direct, or control the plaintiff's work. In support of these arguments, Dynasty provides an executed

construction contract between Dynasty and Bay and an affidavit executed by Eric Li, the management member of Dynasty.

Dynasty's arguments are unavailing. First, the affidavit of Mr. Li is testimonial, rather than documentary, evidence and it does not demonstrate that plaintiff failed to plead a cause of action (*see e.g. Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2d Dept 2003]). Second, the construction agreement offered by Dynasty is insufficient to warrant pre-answer dismissal pursuant to CPLR 3211 (a) (1). An obligation or agreement to perform a certain way *ex ante* is not proof of what happened *ex post*. Here, a contract is not sufficient to show that Dynasty complied with that contract; therefore, the contract does not "utterly refute" the allegations of the plaintiff's complaint (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 [2021]). Dynasty has neither shown that plaintiff failed to plead a cause of action nor provided sufficient documentary evidence to warrant the drastic remedy of pre-answer dismissal, instead relying on arguments that would more properly underpin a request for summary judgment pursuant to CPLR 3212 (*see VIT Acupuncture P.C. v State Farm Auto. Ins. Co.*, 28 Misc 3d 1230(A) [Civ Ct 2010]).

Bay's Cross-Motion for Summary Judgment (Seq. 003)

As an initial matter, although Bay's motion was noticed as a motion for summary judgment, the bulk of the affirmation submitted in support makes arguments pursuant to CPLR 3211 (a) (1) and (a) (7)—the standard for a motion to dismiss (Aff. in Supp. at 7–10). In any event Bay's motion is without merits under CPLR 3211 and premature under CPLR 3212. First, the purported indemnification agreement between Dynasty and Bay, even if bona fide, does not insulate Bay from liability to the plaintiff. Rather, the agreement merely provides a potential mechanism by which Bay can recover from Dynasty if Bay is ultimately obliged to pay damages

to plaintiff in the event that the relevant contractual and statutory criteria are satisfied (*see e.g. George v Marshalls of MA, Inc.*, 61 AD3d 925, 931 [2d Dept 2009]). Second, it is undisputed that the plaintiff was unloading materials for the purpose of the ongoing project on the premises owned by Bay. The fact that the truck from which the plaintiff was removing materials was parked on the public street adjacent to the premises is irrelevant as the plaintiff was performing the work for the benefit of, and unloading directly into, Bay's construction project (*see e.g. Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]).

Plaintiff's Motion to Add a Party (Seq. 002)

Finally, plaintiff's motion to add Richmond Construction Inc. as a party, and to amend the caption, is granted. Plaintiff properly attached a copy of the proposed amended pleadings to his motion.

The amended caption shall read:

Guo Xin Zheng,

Plaintiff,

v

Bay 20th LLC, Dynasty Contracting LLC, and
Richmond Construction Inc.,

Defendants.

Plaintiff shall serve the amended pleadings on all parties via personal service within 21 days of the entry of this order. All responsive pleadings shall be served in accordance with the CPLR.

Conclusion

Defendant Dynasty's motion (Seq. 001) is denied.

Plaintiff's motion (Seq. 002) is granted, and plaintiff is directed to comply with the service instructions provided above.

Defendant Bay's cross-motion (Seq. 003) is denied.

This constitutes the decision of the court.

August 9, 2023

DATE



DEVIN P. COHEN

Justice of the Supreme Court