

Silva v Scopo

2023 NY Slip Op 34409(U)

December 8, 2023

Supreme Court, Kings County

Docket Number: Index No. 501206/2023

Judge: Devin P. Cohen

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Supreme Court of New York
County of Kings
Part LL1

Index Number 501206/2023
(Seqs. 002)

SALVADOR SILVA,

Plaintiff,

against

RALPH J. SCOPO, HUDSON MERIDIAN CONSTRUCTION
GROUP LLC, ECMN CORP., HYBRID FRAMING &
INTERIORS INC., EZ RUBBISH REMOVAL INC.,

Defendants.

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 Hudson Meridian Construction Group LLC's
(Hudson) motion to dismiss (Seq. 002) the complaint is hereby decided as follows:

Introduction & Procedural History

Plaintiff commenced this action to recover for injuries he claims to have sustained on
September 28, 2019, when he fell from a ladder at a worksite located at 184 Hart Street, Brooklyn,
New York. Hudson made its first motion to dismiss on July 13, 2023 (Seq. 001). That motion was
denied on August 9, 2023, due to the non-appearance of the movant at oral argument. Hudson now
moves again for the same relief, saying its prior non-appearance was unintentional.

Plaintiff pled the following: Ralph Scopo was the general contractor and/or construction
manager at the site where plaintiff was injured (Complaint at ¶ 9). Mr. Scopo was an agent, servant,
and/or employee of Hudson (id. at ¶ 10). Hudson was performing work at the site (id. at ¶ 12).
Plaintiff also provides emails from June 3, 2019, between the site owner and Mr. Scopo where Mr.
Scopo states that he was employed by Hudson. Hudson now moves to dismiss the complaint (Seq.
002).

Analysis

A motion to dismiss is not a substitute for a motion for summary judgment (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

CPLR 3211 (a) (7)

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]).

Hudson submits three putative “documents” to support this branch of its motion: an email terminating Mr. Scopo’s employment, Mr. Scopo’s “Final Pay Form”, and an affidavit of Walter Haass.

It is well settled that affidavits are not documentary evidence. Affidavits are neither anticipated nor intended by the CPLR as substitutes for testimony gleaned through discovery, 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]). The statements in Mr. Haass’ affidavit purported to explain

Hudson's involvement at the worksite. They do not constitute documentary evidence and therefore will not be considered on a motion to dismiss.

The termination email is presumably submitted to confirm the day Mr. Scopo was terminated. The email was sent on April 22, 2019. Additionally, the Final Pay Form states the final pay date was also April 22, 2019.

However, these offerings are inadequate to meet the burden a defendant bears on a CPLR 3211 (a) (1) motion, as they are not alone "essentially undeniable" and do not conclusively dispose of the plaintiff's claims. These documents do not establish that Hudson was not involved at this site, even if they purport to show when Mr. Scopo himself left. The ambiguity of defendant's evidence is highlighted by plaintiff's submission of emails where Mr. Scopo identifies his business address as "Hudson Meridian 61 Broadway NYC 7 floor Ralph Scopo" after the date of his apparent termination. Defendant's motion is therefore denied as to this section.

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 state a cause of action. Although the affidavits and other evidence submitted by Hudson, if true, might bear on the merits of plaintiff's action, they do not bear on 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, defendant's motion is denied under CPLR 3211 (a) (7).

Conversion to Summary Judgment

Finally, defendant makes the alternative request that the motion be treated as one for summary judgment, pursuant to CPLR 3211 (c). On this pre-answer motion to dismiss there has been neither consent by the parties nor prior notice by the court that this motion will be treated as one for summary judgment (*see Hendrickson v Philbor Motors, Inc.*, 102 AD3d 251, 258 [2d Dept 2012]). Additionally, it is clear from this action's procedural posture that parties have not charted a course for summary judgment by laying bare their proofs (*see Sokol v Leader*, 74 AD2d 1180, 1183 [2d Dept 2010]). Defendant's request to treat this as a motion for summary judgment is therefore denied.

Conclusion

For the foregoing reasons, Hudson's motion (Seq. 002) is denied in its entirety.

This constitutes the decision of the court.

December 8, 2023

DATE



DEVIN P. COHEN

Justice of the Supreme Court