

Vasquez v Lorimer St Holdings LLC.

2023 NY Slip Op 34512(U)

December 15, 2023

Supreme Court, Kings County

Docket Number: Index No. 503425/2023

Judge: Devin P. Cohen

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Supreme Court of New York
County of Kings
Part LL1

Index Number 503425/2023
(Seqs. 001 & 002)

LUIS DAVID SAMANIEGO VASQUEZ,

Plaintiff,

against

LORIMER ST HOLDINGS LLC., YATZIV CORP.,
DEVELOPING NY STATE, LLC.,

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.....	<u>1-2</u>
Order to Show Cause and Affidavits Annexed...	<u> </u>
Answering Affidavits.....	<u>2-3</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>
Other.....	<u> </u>

Upon review of the foregoing papers, plaintiff Luis David Samaniego Vasquez’s motion for default judgment (Seq. 001) and defendant Yatziv Corp. (Yatziv)’s cross-motion to dismiss the complaint (Seq. 002) are hereby decided as follows:

Introduction

Plaintiff brings this action for injuries he claims he sustained on November 21, 2022, when he fell from height at a worksite. Plaintiff filed this action on February 1, 2023, alleging that defendants are liable under New York State Labor Law §§ 200, 240 (1), and 241 (6).

On July 6, 2023, plaintiff filed a motion for default judgment against all defendants: Lorimer St Holdings LLC. (Lorimer), Yatziv, and Developing NY State, LLC (Developing NY). On July 17, 2023, plaintiff and Yatziv stipulated to extend the time to answer or move to August 17, 2023. On August 9, 2023, Yatziv filed a pre-answer cross-motion to dismiss plaintiff’s claims pursuant to CPLR §§ 3211 (a) (1) and 3211 (a) (7). On August 16, 2023, plaintiff and Yatziv appeared for oral argument before this Court.

Analysis

Plaintiff's Motion for Default Judgment

Plaintiff's motion for default against defendants Lorimer, Yatziv and Developing NY must meet the essential requirements of CPLR § 3215.

Plaintiff served the summons and complaint to all defendants properly in the first instance (Plaintiff's Exhibit A). On July 6, 2023, approximately six (6) months after the complaint was filed, plaintiff filed his notice of motion for default judgment. For each defendant, Plaintiff attaches proof of service of the summons and complaint which was effectuated through the Secretary of State (Plaintiff's Exhibits B, D, and F). Plaintiff filed an affidavit of merit signed by the plaintiff himself (*see* Aff. of Merit). Finally, additional default letters were properly delivered to the corporate business addresses of each defendant (Plaintiff's Exhibits C, E, and G). Lorimer and Developing NY did not respond to plaintiff's motion.

Accordingly, plaintiff's motion as to defendants Lorimer and Developing NY is granted. Plaintiff has met the requisite elements of CPLR § 3215 and both Lorimer and Developing NY have not answered.

Defendant Yatziv and plaintiff entered into a stipulation requiring Yatziv to "answer, move, or otherwise respond to the Summons and Verified Complaint" by August 17, 2023 (stipulation at ¶ 1). The stipulation further states that "upon Defendant's filing of an answer, motion, or otherwise a response to the Summons and Complaint . . . Plaintiff shall withdraw its motion for Default Judgment against [Yatziv] only" (stipulation at ¶ 2). Yatziv filed its cross-motion to dismiss on August 9, 2023. Because Yatziv interposed a pre-answer motion to dismiss

within the timeline established by the stipulation between the parties, plaintiff's motion for default judgment is denied as to Yatziv.

Yatziv's Motion to Dismiss

Yatziv cross-moves to dismiss the complaint pursuant to CPLR §§ 3211 (a) (1) and 3211 (a) (7). A motion to dismiss 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]).

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 the motion, Yatziv submits certified work permits (Yatziv's Exhibits G, H, and I) as well as the affidavit of Yatziv's corporate principal Yehoshua Wertzberger elaborating upon and explaining the contents of the permits (see *Seaman v Three Vil. Garden Club Inc.*, 67 AD3d 889, 889 [2d Dept 2009]).

Yatziv submits a demolition permit which was issued to Yehoshua Wertzberger, Yatziv's principal, on March 23, 2022, a demolition permit titled "Signed Off" from May 31, 2022 which

does not name Yatziv, and a series of “post demolition” permits that do not name Yatziv. Yatziv argues that the permits show that it was not an owner, contractor, or agent under Labor Law. Instead, Yatziv claims it was solely the safety supervisor of the demolition phase of the construction. However, the fact that the initial demolition permit ascribes a “[General Contractor] Safety Registration” identification number to Mr. Wertzberger and Yatziv belies defendant’s contention that it was “indisputably” not a general contractor. Additionally, the subsequent permits are insufficient on their own to demonstrate that all of Yatziv’s authority to control the site during the demolition phase was revoked during subsequent phases of the project, much less whether Yatziv performed any other work following demolition. The court notes that Yatziv was not named in the “sign off” at the conclusion of the demolition phase of the project.

Yatziv also seeks to rely on the affidavit of Mr. Wertzberger. However, explanatory or narrative affidavits are testimonial in nature, and as such generally cannot support dismissal of a plaintiff’s claims under CPLR 3211 (*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]). These affidavits are neither anticipated nor intended to substitute for the more complete testimony which may be adduced through the discovery process. Moreover, without further evidence, permits alone are insufficient to dispel the outstanding questions about the duration and extent of Yatziv’s authority at the site.

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 Yatziv, 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

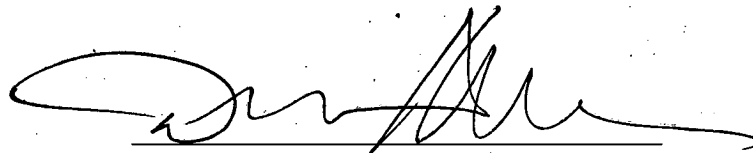
For the foregoing reasons, plaintiff’s motion for default judgment (Seq. 001) is granted as to Lorimer and Developing NY only. The motion is denied as to Yatziv. An inquest shall be held as to defendants Lorimer and Developing NY at the time of trial.

Defendant Yatziv’s motion to dismiss is denied, and Yatziv is directed to interpose an answer within twenty (20) days of the entry of this order.

This constitutes the decisions and order of the court.

December 15, 2023

DATE



DEVIN P. COHEN

Justice of the Supreme Court