

Williams v WPP Owner LLC.
2023 NY Slip Op 35152(U)
July 25, 2023
Supreme Court, Bronx County
Docket Number: Index No. 31658/2020E
Judge: Paul L. Alpert
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 26-----X
Marita Williams

Plaintiff,

-against-

Index No.: 31658/2020E

DECISION/ORDERWPP Owner LLC., WPP Note Owner, LLC.,
White Plains Plaza Realty LLC., White Plains Plaza
Partners, LLC., Newmark Knight Frank Global
Management Services, LLC., Newmark Knight Frank
Valuation & Advisory, LLC., Newmark Group, Inc.,
Ivy Realty XXXI, LLC., and 275 Main Street Associates, LPDefendants.
-----XRecitation, as required by CPLR §2219(a), of the papers considered in the review of the order to
show cause as indicated below:

Papers	Numbered
Notice of Motion & Affirmation in Support & Exhibits.....	1
Affirmation in Opposition	2
Affirmation in Reply.....	3

Upon the foregoing cited papers the Decision/Order on this motion is decided as follows:

The plaintiff commenced this action for personal injuries after she fell on October 11, 2017 in a building on the premises located at 275 Main Street, White Plains, New York. It is alleged in the complaint that the premises were owned, operated, maintained, controlled and managed by the defendants, Newmark Knight Frank Global Management Services, LLC., Newmark Knight Frank Valuation & Advisory LLC., and Newmark Group, Inc., (hereinafter “Newmark”). The Newmark defendants move to dismiss the complaint pursuant to CPLR §§ 3211 (a) (1) and (7). The motion is opposed by the plaintiff.

The plaintiff served the Newmark Group Inc., by serving the Secretary of State on October 15, 2020. The plaintiff served the Newmark Knight Frank Global Management Services, LLC and the Newmark Knight Frank Valuation & Advisory, LLC by serving the Secretary of State on October 16, 2020. Mr. Hupart, a member of the plaintiff's firm, affirms that on December 3, 2020, a representative of Newmark called the firm and requested an extension of time to answer. He states that an associate of the firm told them that the firm would extend Newmark's time to answer a couple of weeks from December 3, 2020 if they agreed to waive jurisdictional defenses in a signed stipulation. He claims that Newmark never forwarded the stipulation and instead filed an answer on December 15, 2020.

Newmark moves to dismiss the action based upon CPLR § 3211 (a) (1), arguing that it has a defense founded upon documentary evidence. The documentary evidence that its defense is based upon is an agency agreement between 275 Main Street Associates, LLC and Newmark of Connecticut, LLC, d/b/a Newmark Knight Frank CT. In the agreement, 275 Main Street Associates, LLC is listed as the Owner of the property located at 275 Main Street in White Plains, New York 10601 and Newmark Knight Frank CT is listed as the leasing agent. Newmark contends that this agreement establishes that it was a leasing agent and that it did not own, operate, maintain or control the premises when the plaintiff's accident occurred. They argue that this documentary evidence demonstrates that the action against them should be dismissed.

Newmark also moves to dismiss the complaint under CPLR § 3211 (a) (7), for the plaintiff's failure to state a cause of action. They claim that the documentary evidence submitted in support of the motion establishes that the plaintiff has no cause of action for negligence

against Newmark because Newmark did not own, operate, maintain or control the premises at the location on the plaintiff's date of accident. They argue that when a motion to dismiss for the failure to state a cause of action is supported by documentary evidence and when that evidence flatly contradicts factual claims in the plaintiff's complaint, the causes of action must be dismissed. They argue that the contract clearly provides that Newmark's duty was to lease the premises to a suitable lessee. The agency agreement commenced two years following the plaintiff's injury and they had no relationship to the premises when the plaintiff's injury occurred.

The plaintiff opposes the motion and argues that the branch of the motion seeking a dismissal pursuant to CPLR § 3211 (a) (1) is untimely. She contends that pursuant to CPLR § 3211 (e) a motion under CPLR § 3211 (a) (1) must be brought within the time the party has to answer. The plaintiff argues that the motion was filed four months after the time to answer expired and three months after they filed an answer. The plaintiff also argues that Newmark did not assert the defense founded upon documentary evidence in its answer resulting in a waiver of this defense. In reply, Newmark requests that the pre-answer motion to dismiss be converted to a motion for summary judgment.

"A CPLR 3211 (a) (1) motion, however, must be made before an answer is interposed or preserved in a responsive pleading; otherwise it is waived " (*M & E 73-75 LLC v. 57 Fusion, LLC*, 189 A.D.3d 1 [1st Dept. 2020]; CPLR § 3211 [e]). In *M & E 73-75 LLC*, the plaintiff entered into a contract with defendant seller to purchase real property in Manhattan. Plaintiff sued for breach of contract. The Appellate Division opined that "the buyer correctly argued that the documentary evidence submitted by the seller on its pre-answer motion cannot be considered

because of the motion's post-answer posture and the seller's failure to preserve the CPLR 3211 (a) (1) defense in its answer" (*M & E 73-75 LLC* at 6).

The Newmark defendants were served the summons and complaint on October 15, 2020 and October 16, 2020 when the plaintiff served the Secretary of State. Newmark filed an answer on NYSCEF on December 15, 2020 and the motion to dismiss was filed on NYSCEF on March 18, 2021. The pre-answer motion to dismiss was filed four months after the time to file an answer expired and is untimely. Newmark did not assert the defense of documentary evidence in their answer therefore this defense is waived. Moreover, the agency agreement annexed to Newmarks' motion indicates that the signatory to the agency agreement is Newmark of Connecticut, LLC, a Connecticut Limited Liability Company d/b/a Newmark Knight Frank Ct. Newmark Knight Frank Ct is not a party to this action and the agency agreement does not conclusively establish a defense to the plaintiff's claim. Newmarks' pre-answer motion to dismiss the complaint based on documentary evidence is denied.

The Newmark defendants also move to dismiss the complaint pursuant to CPLR § 3211 (a) (7) for the plaintiff's failure to state a cause of action. Here, they claim that the documentary evidence submitted in support of the motion demonstrates that the plaintiff does not have a cause of action for negligence against them. They argue that the agency agreement established that they did not own, operate, maintain, manage or control the premises where the plaintiff injured herself.

The plaintiff opposes this branch of the motion and argues that Newmark did not meet their burden because they did not offer any proof that they were not involved with the subject premises on the date of the incident. She argues that the agency agreement was effective after the

plaintiff's injury occurred and does not prove the absence of an earlier agreement. She also claims that the motion lacks an affidavit of someone with personal knowledge of the agreement to state that the agreement is the only agreement Newmark had in relation to the premises. She states that the attorney's affirmation submitted is insufficient since "an attorney's affirmation that is not based upon personal knowledge is of no probative value" (*Dempsey v. Intercontinental Hotel Corp.*, 126 AD2d 477 [1st Dept 1987]). She argues that Newmark did not offer any proof that contests the plaintiff's cause of action and she maintains that she has a cognizable cause of action against Newmark.

"The standard in a CPLR § 3211 (a) (7) motion is whether the pleading states a cause of action, not whether the proponent has a cause of action" (*Sokol v. Leader*, 74 AD3d 1180 [2nd Dept 2010]; *Guggenheimer v. Ginzburg*, 43 NY2d 268 [Ct App 1977]). The court must accept the facts alleged in the pleading as true and accord the opponent of the motion, "the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v. Martinez*, 84 NY2d 83 [Ct App 1994]). A dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see e.g., *Heaney v. Purdy*, 29 NY2d 157 [Ct App 1971]; *Leon* at 88). However, if evidentiary material is considered, the question then becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Grassi & Co., v. Honka*, 180 AD3d 564 [1st Dept 2020]). A motion to dismiss pursuant to CPLR § 3211 (a) (7) must be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Sokol v. Leader*, 74 AD3d at 1182, quoting *Guggenheimer v. Ginzburg*, 43 NY2d

The plaintiff alleges in her complaint that Newmark owned, operated, maintained, managed or controlled the premises and it is their negligence that has caused the plaintiff's injury. The agency agreement offered by Newmark in support of their motion does not conclusively establish as a matter of law that Newmark did not own, operate, maintain, manage or control the premises on the date the plaintiff's accident occurred. The agreement is made between 275 Main Street Associates, LLC., and Newmark of Connecticut, LLC d/b/a/ Newmark Knight Frank Ct. This entity is not a defendant in the instant action. The agreement does not establish that any of the Newmark defendants had an agency agreement to lease out the space at 275 Main Street in White Plains, New York. Newmarks' motion to dismiss pursuant to CPLR § 3211 (a) (7) is denied as Newmark did not establish that the plaintiff does not have a cognizable cause of action.

Newmarks' request to convert this motion into a motion for summary judgment is denied. Newmark did not provide an affidavit from someone with personal knowledge regarding the ownership, operation, maintenance, management or control of the premises and the documentary evidence submitted is insufficient to establish their burden in a motion for summary judgment.

Based on the foregoing, it is hereby:

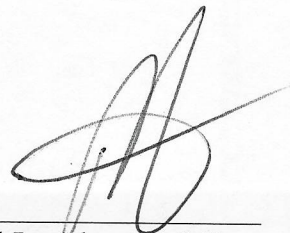
ORDERED AND ADJUDGED, that the defendants, Newmarks' pre-answer motion to dismiss pursuant to CPLR § 3211 (a) (1) is denied, and it is further,

ORDERED AND ADJUDGED, that the defendants, Newmarks' pre-answer motion to dismiss pursuant to CPLR § 3211 (a) (7) is denied, and it is further,

ORDERED AND ADJUDGED, that the Newmark defendants shall serve a copy of this decision upon all parties within twenty (20) days of notice of entry.

This constitutes the decision and order of the court.

Dated: July 25, 2023



Hon. Paul L. Alpert, J.S.C.