

Wiegand v Air Pegasus Heliport, Inc.

2024 NY Slip Op 30398(U)

February 5, 2024

Supreme Court, New York County

Docket Number: Index No. 157079/2020

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

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INGRID WIEGAND,

Plaintiff,

- v -

AIR PEGASUS HELIPORT, INC., JET AVIATION FLIGHT SERVICES INC., JET AVIATION GROUP, INC., AMAZING FLIGHT LLC, BAY CRANE SERVICES OF CONNECTICUT, INC., HBH AIRCRAFT, LLC, BGHN HOLDINGS LLC, 576 LLC, NYON LLC,

Defendants.

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AIR PEGASUS HELIPORT, INC.

Plaintiff,

-against-

JET AVIATION FLIGHT SERVICES, INC., JET AVIATION GROUP, INC., AMAZING FLIGHT LLC, BAY CRANE SERVICES OF CONNECTICUT, INC., HBH AIRCRAFT LLC, BGHN HOLDINGS LLC, 576 LLC, NYON LLC, AZIMUTH AVIATION LLC, NYON AIR and HELIFLITE SHARES LLC

Defendants.

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INDEX NO. 157079/2020

MOTION DATE 10/03/2023

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

Third-Party
Index No. 596009/2021

The following e-filed documents, listed by NYSCEF document number (Motion 007) 198, 199, 200, 201, 202, 203, 204, 205, 223, 224, 225, 226, 227, 228, 230

were read on this motion to/for DISMISSAL.

In this personal injury action, third-party defendant Heliflite Shares LLC (Heliflite) moves to dismiss Air Pegasus Heliport Inc. (Air Pegasus)'s third-party complaint as against it.

BACKGROUND

Plaintiff alleges that at around 1:00 p.m. on November 25, 2018, she was riding her bicycle on a path adjacent to the West 30th Street heliport in Manhattan when a helicopter flew

directly over her, and a downdraft caused by the helicopter's rotor blades knocked plaintiff off her bicycle and into a wall, causing injury (NYSCEF Doc No 1). On September 3, 2020, plaintiff filed suit against defendant Air Pegasus Heliport, Inc. (Air Pegasus) as the operator of the heliport. On November 18, 2021, Air Pegasus filed a third-party complaint against eight entities operating aircrafts at the heliport at the approximate time of the incident (NYSCEF Doc No 200). Air Pegasus later filed a motion to amend its third-party complaint to include Heliflite and two other entities as third-party defendants on the same basis, which was granted by decision and order dated December 12, 2022 (NYSCEF Doc No 121).

The amended third-party complaint avers that, should judgment be entered against Air Pegasus, it is entitled to indemnification and/or contribution from Heliflite on the basis of its: (1) possible negligence in the operation of the aircraft which caused plaintiff's injury; (2) contractual obligation to indemnify Air Pegasus from suit; (3) breach of its contractual obligation to "procure insurance coverage for third-party plaintiff's benefit including defense and indemnification of any claims due to Heliflite's activities occurring at or in connection with the Heliport"; and (4) breach of its contractual obligation to "purchase a liability policy for third-party plaintiff's benefit and protection for claims such as those plaintiff has asserted in this action" (NYSCEF Doc No 77). Heliflite now moves, pursuant to CPLR § 3211(a)(1) and/or CPLR § 3211(a)(7), to dismiss Air Pegasus's third-party complaint as against it (NYSCEF Doc No 199).

DISCUSSION

When determining if a complaint may be dismissed for failing to state a cause of action pursuant to CPLR § 3211(a)(7), "the complaint must be liberally construed, the allegations therein taken as true, and all reasonable inferences must be resolved in plaintiff's favor" (*Gorelik*

v Mount Sinai Hosp. Ctr., 19 AD3d 319, 319 [1st Dept 2006]). The motion “must be denied if from the pleading’s four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*id.* [internal quotations omitted]). However, “factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently or clearly contradicted by documentary evidence are not entitled to such consideration” (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). Additionally, a “CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence . . . may be appropriately granted [] where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

In support of its motion Heliflite submits an affidavit by Heliflite’s COO, Francesco Lazzarini, disclaiming ownership of an aircraft matching the registration number referenced in the complaint (NYSCEF Doc No 204); and an affirmation by Heliflite’s counsel, refuting Air Pegasus’s claim that it has an agreement with Heliflite (NYSCEF Doc No 199). Lazzarini’s affidavit and counsel’s affirmation “do[] not constitute conclusive documentary evidence” warranting dismissal (*Melrose Assoc. L.P. v Floral Assoc. L.P.*, 212 AD3d 482, 483 [1st Dept 2023]; *Pineda v 525 SMA Owner LLC*, 216 AD3d 475 [1st Dept 2023]). The affidavit and affirmation, “which do no more than assert the inaccuracy of [Air Pegasus’s] allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint . . . and do not otherwise conclusively establish a defense to the asserted claims as a matter of law” (*Amsterdam Hosp. Grp., LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014] [internal quotation marks omitted]).

Plaintiff alleges that her injuries were “caused by the negligence of the defendant *and the helicopter companies and their employees* in the operation, management and control of the helicopters and heliport” (NYSCEF Doc No 1 [emphasis added]). Air Pegasus, as the only named defendant in plaintiff’s action, is entitled to seek contribution from any other party that may have been, in whole or in part, responsible for plaintiff’s accident (*Han v New York City Transit Auth.*, 200 AD3d 610 [1st Dept 2021]). However, the identity of the operator of the alleged negligently operated aircraft is yet to be determined. Air Pegasus alleges that Heliflite may be the responsible entity because it “owned, leased, operated and/or maintained a helicopter or such other aircraft with the registration and tail designation N760JE or such other identifier” and that such aircraft passed through the heliport around the time of plaintiff’s accident (NYSCEE Doc No 77). Since Heliflite’s only evidence to the contrary consists of an affidavit and affirmation stating that Heliflite owned no such aircraft, dismissal is unwarranted (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013] [“the case is not currently in a posture to be resolved as a matter of law on the basis of the parties’ affidavits”]).¹

Air Pegasus’s remaining claims against Heliflite sound in breach of contract (NYSCEF Doc No 77). Heliflite notes that Air Pegasus has not submitted the contract on which its claims are based (NYSCEF Doc No 199). In response, Air Pegasus points to the “written invoice agreement” as evidence of Heliflite’s contractual obligations (NYSCEF Doc No 227). The invoices² are only that; they itemize the charges for Heliflite’s use of the heliport but contain no

¹ Notably, even if Lazzarini’s affidavit could be considered documentary evidence, it does not “inherently or clearly contradict[]” plaintiff’s allegations (*Skillgames, LLC*, 1 AD3d at 250). He states that Heliflite “had no relationship [] whatsoever” with “the helicopter registered N760JE” (NYSCEF Doc No 204). However, qualified the helicopter registration number with of “N760JE [with] *such other identifier*” (NYSCEF Doc No 77 [emphasis provided]). Thus, Heliflite could be liable as the owner of the aircraft with the “such other identifier” that caused plaintiff’s injury.

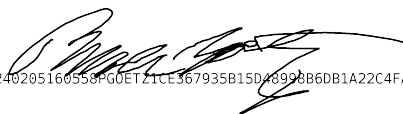
² Although the court on a motion to dismiss is “only concerned with the sufficiency of the plaintiff’s pleadings, and not evidentiary matters” (*Miglino*, 20 NY3d at 346 [internal quotation marks omitted]), it is noted that Air Pegasus submits invoices indicating that Heliflite aircrafts passed through the heliport at the date and time of plaintiff’s

provisions regarding its alleged obligations to indemnify Air Pegasus or to obtain insurance coverage and other liability policies for Air Pegasus’s benefit (NYSCEF Doc No 225). Nonetheless, Air Pegasus is not required to submit the contract itself at this stage; it need only allege a cognizable claim, and it has done so in its complaint (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-71 [1st Dept 2004] [on a motion to dismiss, the court need only determine “whether the facts as alleged fit within any cognizable legal theory”]).³ Since Heliflite’s only opposing evidence is in the form of an attorney affirmation denying that a contract existed, Air Pegasus’s contract claims will not be dismissed.

CONCLUSION

Accordingly, it is

ORDERED that Heliflite’s motion seeking dismissal of Air Pegasus’s third-party complaint as against it is denied in its entirety.



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<u>2/5/2024</u>				<u>PAUL A. GOETZ, J.S.C.</u>
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE

accident (NYSCEF Doc No 225). Though Heliflite challenges the authenticity of the invoices by pointing out that they are unsigned, it does not allege that the invoices inaccurately reflect its flight history (NYSCEF Doc No 230).³ But see *Int’l Fin. Corp. v Carrera Holdings Inc.*, 82 AD3d 641, 641 [1st Dept 2011] [counterclaim for “breach of contract was properly dismissed, since defendants failed to show the existence of an agreement with [the alleged] terms”]; *Fluhr v Goldscheider*, 264 AD2d 570, 570 [1st Dept 1999] [“The cause of action alleging an agreement . . . should have been dismissed absent a writing”]; *Summit Solomon & Feldsman v Lacher*, 623 NYS2d 210, 210 [1st Dept 1995] [contract claims were “properly dismissed since plaintiff failed to establish the existence of an enforceable contract upon which such causes of action were predicated”].