

Baitz v New York & Presbyt. Hosp.

2024 NY Slip Op 31697(U)

May 13, 2024

Supreme Court, New York County

Docket Number: Index No. 160637/2022

Judge: Hasa A. Kingo

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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. HASA A. KINGO PART 05M

Justice

-----X

ASNAT MICHAL BAITZ, RIVKAH TEITELBAUM,

Plaintiff,

- v -

THE NEW YORK AND PRESBYTERIAN HOSPITAL,
TURNER CONSTRUCTION COMPANY, THE CITY OF
NEW YORK

Defendant.

-----X

INDEX NO. 160637/2022

MOTION DATE 02/06/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 32, 33

were read on this motion to/for DISMISS

Upon the foregoing documents, Defendant Turner Construction Company ("Turner") moves for an order pursuant to CPLR § 3211(a)(3), dismissing Plaintiffs, Asnat Michal Baitz' and Rivkah Teitelbaum's ("Plaintiffs") complaint because Plaintiffs do not have the legal capacity necessary to bring claims on behalf of decedent Aron Baitz's (the "Decedent") estate. Alternatively, Turner moves for an order of dismissal pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7) because Turner did not perform work at the premises where the accident is alleged to have occurred and did not cause the Decedent's demise. Turner also moves under CPLR § 3211(c) to treat the instant motion as one for summary judgment. Plaintiffs oppose the motion and cross-move to amend the complaint pursuant to CPLR § 3025. For the reasons stated herein, Defendant's motion is granted as to the cause of action for wrongful death and denied as to the cause of action for negligence. Plaintiffs' cross-motion to amend the complaint as drafted is denied with leave to serve and file a second proposed amended complaint.

BACKGROUND

As alleged in the complaint, on September 17, 2021, the Decedent sustained personal injuries after he tripped and fell over a manhole cover and uneven sidewalk located at 1283 York Avenue, New York, New York, in front of the New York Presbyterian David H. Koch Center (NYSCEF Doc No. 10, Ruggiero affirmation ¶ 2).¹ On November 5, 2021, the decedent passed away (id. ¶ 3). Plaintiffs commenced this action on December 13, 2022, as proposed executors of the estate of Aron Baitz against the New York and Presbyterian Hospital, Turner Construction Company, and the City of New York (id. ¶ 12). On February 1, 2023, Plaintiffs were appointed

¹ Except where otherwise noted, the facts are recited here as alleged in the complaint and are accepted as true for the purpose of this motion, as required on a motion to dismiss pursuant to CPLR § 3211(a)(7).

executors of the Decedent's estate (NYSCEF Doc No. 25, Albani letter; NYSCEF Doc No. 29, Certificate of Appointment of Executors). On February 6, 2023, Turner filed the instant motion to dismiss (NYSCEF Doc No. 9, Notice of Motion).

Turner contends that Plaintiffs' complaint should be dismissed because Plaintiffs lack the legal capacity necessary to bring claims on behalf of the Decedent, that Turner's documentary evidence establishes that the Decedent did not die as a result of injuries allegedly sustained because of the accident, and that Turner was not performing work in the subject area at the time of the Decedent's accident. Lastly, Turner contends that Plaintiffs did not sufficiently plead that Turner proximately caused the Decedent's injuries or death. Turner proffers pleadings, affidavits, Google map images, Decedent's death certificate, and public announcements regarding the Decedent's passing in support of its motion. Turner contends that Plaintiff lack the capacity necessary to sustain this action because they were not properly substituted as administrators of the Decedent's estate when the action was commenced (NYSCEF Doc No. 10, Ruggiero affirmation ¶ 26). Further, Turner avers that documentary evidence conclusively establishes that Turner cannot be liable to Plaintiffs on any theory of law, including wrongful death, because the Decedent's cause of death was "liver failure due to post-covid complications" and not his alleged trip and fall (*id.* ¶¶ 44, 45). Additionally, Turner contends that the evidence proffered establishes that Turner's work at or near the subject premises concluded January 2019 and August 2020 respectively (*id.* ¶¶ 49, 50).

Plaintiffs oppose Turner's motion and cross-move to amend the complaint pursuant to CPLR § 3025 to amend the caption and substitute themselves as plaintiffs in their capacity as executors of the estate of the Decedent. Plaintiffs contend that the cross-motion should be granted and that Turner's motion to dismiss for lack of capacity should be denied because Plaintiffs were appointed executors of decedent's estate on February 1, 2023, five days prior to Turner's motion to dismiss (NYSCEF Doc No. 28, Albani affirmation ¶ 4). Plaintiffs also contend that Turner failed to establish its entitlement to dismissal or judgment as a matter of law because Turner did not produce evidence that conclusively establishes that its negligence did not cause the accident (*id.* ¶ 10). Plaintiffs aver that the affidavit proffered by Turner admits that Turner performed work on the subject premises in 2019 and was responsible for another job in the area from January 2018 through August 2020 (*id.* ¶¶ 10, 11). Finally, Plaintiffs contend that Turner is not entitled to dismissal of the wrongful death cause of action because Turner has not produced medical records, autopsy report, or other evidence that actually reflects the Decedent's cause of death, and that Turner failed to proffer any evidence that the Decedent's weakened and compromised medical condition did not contribute to the severity of his illness and demise (*id.* ¶ 22).

Turner opposes Plaintiffs' cross-motion on the grounds that Plaintiffs' appointment as executors did not cure the initial defect of lack of capacity, and that its evidence establishes that Turner last performed work at the subject premises more than one year prior to the Decedent's accident and did not involve any pavement work (NYSCEF Doc No. 32, Ruggiero affirmation ¶¶ 14, 22). Additionally, Turner contends it did not receive any complaints about the area where Decedent fell (*id.* ¶ 23). Finally, Turner avers that Decedent's death certificate is *prima facie* evidence as to the cause of death by natural causes (*id.* ¶ 33).

DISCUSSION

A. Plaintiff's Cross Motion to Amend

Pursuant to CPLR § 3025, a party may amend or supplement their pleading “at any time by leave of court” (CPLR § 3025 [b]). “Leave shall be freely given upon such terms as may be just” absent prejudice or surprise (*id.*; *Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]). Prejudice is more than “the mere exposure to greater liability” and “requires some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position” (*Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 [2014]; *Cherebin*, 43 AD3d at 365). “In the absence of prejudice, mere delay is insufficient to defeat the amendment” unless the proposed amendment is “palpably insufficient or patently devoid of merit” (*Ferrer v Go New York Tours Inc.*, 221 AD3d 499, 500 [1st Dept 2023]; *Sheppard v Blitman/Atlas Bldg. Corp.*, 288 AD2d 33, 34 [1st Dept 2001]). The party opposing the amendment has the burden of establishing prejudice (*Kimso Apartments, LLC*, 24 NY3d at 411).

Here, Plaintiffs move to amend the complaint by substituting themselves as plaintiffs in their capacity as executors of the estate of the Decedent, rather than as proposed executors. Whereas the original complaint plainly states that the Plaintiffs commenced the action as “proposed” executors of the estate and that there was a pending application to appoint them as executors of the estate in the Surrogate’s Court of Kings County, Turner was on notice of the pending application to appoint the Plaintiffs as executors and will suffer no prejudice as a result of the amendment. The cases cited by Turner in opposition to the amendment are inapposite and do not support Turner’s position. On the contrary, courts routinely grant similar requests to amend where there is no prejudice (*D’Angelo v Kujawski*, 164 AD3d 648, 649 [2d Dept 2018]; *Cornhusker Farms, Inc. v Hunts Point Co-op. Mkt., Inc.*, 34 AD3d 309, 309 [1st Dept 2006]; *New York State Thruway Auth. v CBE Contracting Corp.*, 280 AD2d 390, 390 [1st Dept 2001]). Therefore, the cross-motion to amend is granted.

B. Turner’s Motion to Dismiss – Legal Capacity

A motion to dismiss under CPLR § 3211(a)(3) is based on lack of legal capacity to sue (see *Cnty. Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 [1994] [Capacity “concerns a litigant’s power to appear and bring its grievance before the court”]). A personal representative who has obtained Letters of Administration to administer the estate of a decedent is the only party who is authorized to commence an action to recover damages for conscious pain and suffering or a wrongful death action to recover pecuniary loss sustained by the decedent’s distributees on account of his or her death (EPTL 1-2.13, 5-4.1[1], 11-3.2[b]; *Rodriguez v River Valley Care Ctr., Inc.*, 175 AD3d 432, 433 [1st Dept 2019]; *Sam Kyung Cho v Yongshin Cho*, 45 AD3d 388, 389 [1st Dept 2007]). While “a proposed administrator lacks the capacity necessary to commence an action on behalf of a decedent[,] courts have denied motions to dismiss for lack of capacity when the defect is cured by the appointment of plaintiff as administrator prior to the filing of a motion to dismiss” (*Burwell v Yonkers Gen. Hosp.*, 6 AD3d 478, 481 [2d Dept 2004]; *Rothstein v Dewitt Rehabilitation & Nursing Ctr., Inc.*, 2021 NY Slip Op 30358[U] [Sup Ct, NY County 2021]).

Here, Plaintiffs do not dispute that at the time this action was commenced, they lacked the capacity necessary to bring the suit. Plaintiffs were however appointed as administrators of the Decedent's estate on February 1, 2023, five days prior to the filing of the instant motion to dismiss, and the complaint has now been amended to reflect this appointment. Therefore, Plaintiffs have cured the defect and Turner's motion to dismiss under CPLR § 3211(a)(3) is denied (*Burwell*, 6 AD3d at 481; *Plotkin v New York City Transit Auth.*, 220 AD2d 653, 654 [2d Dept 1995]).

C. Turner's Motion to Dismiss – Documentary Evidence

Next, Turner moves to dismiss under CPLR § 3211(a)(1) on the basis of documentary evidence. Dismissal under CPLR § 3211(a)(1) is warranted “only 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]). “To be considered ‘documentary’ under CPLR 3211(a)(1), evidence must be unambiguous and of undisputed authenticity” (*Fontanetta v John Doe I*, 73 AD3d 78, 86 [2d Dept 2010] [internal citation omitted]). Affidavits and deposition testimony do not qualify as documentary evidence for the purposes of CPLR § 3211(a)(1) (*Lowenstern v Sherman Sq. Realty Corp.*, 143 AD3d 562, 562 [1st Dept 2016]; *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 651 [1st Dept 2011]), but judicial records, mortgages, deeds and contracts (*Fontanetta*, 73 AD3d at 84), and email and letter correspondence (*Kolchins v Evolution Mkts, Inc.*, 31 NY3d 100, 106 [2008]) may be considered.

In support of the motion, Turner proffers affidavits, Google map images, Decedent's death certificate, and public announcements regarding the Decedent's passing to establish that it was not performing work at the subject premises at the time of the accident and did not cause the Decedent's demise. While the Decedent's death certificate is “*prima facie* evidence of the facts therein stated,” Turner's remaining evidence is not documentary evidence for the purposes of a motion to dismiss under CPLR § 3211(a)(1) (Public Health Law § 4103[3]; CPLR § 4520; *Brownrigg v Bos. & Albany R. Co.*, 8 AD2d 140, 142 [1st Dept 1959]; *see W & G Wines LLC v Golden Chariot Holdings LLC*, 46 Misc 3d 1202(A) [Sup Ct, NY County 2014][CPLR 3211[a][1] motion cannot be granted based on internet printouts from Facebook, Yelp, and other sources because they are “are subject to interpretation and their reliability and authenticity have not been sufficiently established”). Thus, the only evidence to be considered as documentary is the Decedent's death certificate. However, considering the early stage of this case and the lack of discovery exchanged, there are factual questions as to Turner's involvement in the subject premises, and the extent to which the Decedent's injuries contributed to his demise. As such Turner's motion is premature (*see Wright v City of New York*, 223 AD3d 547, 548 [1st Dept 2024] [defendant's motion to dismiss was premature where further discovery was necessary to resolve existing factual questions], and the motion to dismiss for a defense founded upon documentary evidence is denied.

D. Turner's Motion to Dismiss – Failure to State a Cause of Action

Lastly, Turner moves to dismiss for failure to state a cause of action. On a motion to dismiss brought under CPLR § 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord the plaintiff 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, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of "bare legal conclusions" is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *aff'd* 9 NY3d 836 [2007], cert denied 552 US 1257 [2008]) and "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

To state a cause of action for negligence, Plaintiff must plead that Turner owed a duty to Plaintiffs, that Turner breached its duty, and the breach proximately caused Plaintiffs' injuries (*Pasternack v Lab'y Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]). Here, Plaintiffs allege that Turner "was performing construction work in the aforementioned vicinity," "create[ed] a trap, hazard and nuisance," and the Decedent "was caused to trip and fall" and "suffered severe and permanent personal injuries" (NYSCEF Doc No. 30, Proposed amended verified complaint ¶¶ 9, 16, 24, 25) are sufficient to state a cause of action for negligence. Therefore, Turner's motion to dismiss the cause of action sounding in negligence is denied.

To state a cause of action for wrongful death, Plaintiffs must allege "(1) the death of a human being, (2) the wrongful act, neglect or default of the defendant by which the decedent's death was caused, (3) the survival of distributees who suffered pecuniary loss by reason of the death and (4) the appointment of a personal representative of the decedent" (*Proano v Gutman*, 211 AD3d 978, 982-83 [2d Dept 2022]). Plaintiffs plead the first and last elements to state a cause of action for wrongful death in their amended complaint by alleging that "the Decedent died on November 5, 2021" and "[p]ursuant to the issuance of a Certificate of Appointment of Executors issued by the Surrogate's Court . . . dated February 1, 2023, Plaintiffs Asnat Michal Baitz and Rivkah Teitelbaum are the executors of the estate of Aron Baitz, deceased" (NYSCEF Doc No. 30, Proposed amended verified complaint ¶¶ 1, 3). However, they also allege that the Decedent "will require such care and treatment in the future" and "will require extensive rehabilitative care and physical therapy" (*id.* ¶ 25). These allegations regarding future medical care are insufficient to allege the second and third elements for wrongful death. Therefore, Turner's motion to dismiss the cause of action for wrongful death is granted, with leave to file a subsequent motion to amend with a proposed amended cause of action for wrongful death.

Accordingly, it is hereby

ORDERED that the cross-motion is granted, and that Asnat Michal Baitz and Rivkah Teitelbaum, as executors of the estate of Aron Baitz, deceased, be substituted as plaintiffs in the above-entitled action in the place and stead of the plaintiff, Aron Baitz, without prejudice to any proceedings heretofore had herein; and it is further

ORDERED that all papers, pleadings, and proceedings in the above-entitled action be amended by substituting the names of Asnat Michal Baitz and Rivkah Teitelbaum, as executors of the estate of Aron Baitz, deceased, as plaintiffs in the place and stead of said decedent, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk’s Office, who are directed to amend their records to reflect such change in the caption herein; and it is further

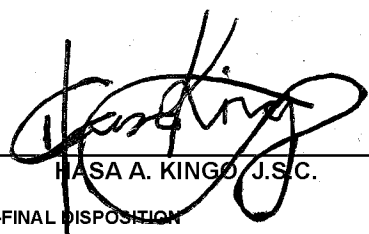
ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website)]; and it is further

ORDERED that the defendant Turner Construction Company’s motion to dismiss is granted with respect to the cause of action alleging wrongful death, and the second cause of action is dismissed; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that plaintiffs are granted leave to file a second motion to amend in compliance with CPLR Rule 3025 within 60 days of entry of this order.

This constitutes the decision and order of the court.

5/13/2024				
DATE			HASA A. KINGO, J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE