

Barnowitz v Marshall Hotels & Resorts, Inc.

2024 NY Slip Op 33358(U)

September 23, 2024

Supreme Court, New York County

Docket Number: Index No. 151433/2023

Judge: Mary V. Rosado

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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. MARY V. ROSADO PART 33M

Justice

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INDEX NO. 151433/2023

HOWARD BARNOWITZ,

MOTION DATE 08/27/2024

Plaintiff,

MOTION SEQ. NO. 002

- v -

MARSHALL HOTELS & RESORTS, INC., HOSPITALITY COVER PLUS, LLC, SJM 145 ASSOCIATES LLC., 145 EAST 47TH STREET LLC., HILTON MANAGEMENT LLC, HILTON WORLDWIDE LLC, BERNIC MANAGEMENT, LLC, C3D ARCHITECTURE PLLC, V&P ALTITUDE CORP., CMC CONCRETE AND MASONRY LLC

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 68, 69, 70, 71, 72, 73, 74

were read on this motion to/for DISMISS

Upon the foregoing documents, Defendant C3D Architecture PLLC's ("C3D") motion to dismiss Plaintiff Howard Barnowitz's ("Plaintiff") Third-Amended Complaint is denied.

I. Background

This is an action for personal injuries Plaintiff sustained on November 13, 2022 after allegedly being struck by a door at The Bernic Hotel NY located at 145-147 E. 47th Street, New York, New York (the "Premises") (see generally NYSCEF Doc. 44). It is alleged that C3D was responsible for the design of the Premises and performed work at the Premises (id. at ¶¶ 39 and 49). Plaintiff alleges that C3D's negligent design of and work performed at the Premises resulted in his injury (id. at ¶¶ 158-172).

C3D now moves to dismiss Plaintiff's Complaint on various grounds. First, C3D argues that Plaintiff fails to allege sufficiently a negligence claim and his Third Amended Complaint should therefore be dismissed pursuant to CPLR 3211(a)(7). Further, C3D argues that Plaintiff's

Third Amended Complaint violates the statute of limitations. C3D argues that the statute of limitations accrues when C3D's contract obligations were substantially complete. C3D submits that it was retained to coordinate architectural drawings for the Premises on September 10, 2007, and the final certificate of occupancy was issued on July 30, 2019 – which is when C3D argues the statute of limitations should begin to accrue. According to C3D, since this action was not commenced until February 2023, it is time barred. Finally, C3D argues that because it is a contracting party, it owed no duty to Plaintiff because it did not create the condition that caused Plaintiff's accident.

C3D's motion is opposed by numerous parties. Co-defendants Hospitality Cover Plus LLC; SJM 145 Associates, LLC; 145 East 47th Street, LLC; Hilton Management, LLC; Hilton Worldwide, LLC; and Bernic Management, LLC (collectively "Cross-Claimants") submitted opposition arguing that C3D's statute of limitations argument is misplaced. Cross-Claimants argue that in a personal injury action against a design professional, the cause of action accrues on the date of the injury, which was November 13, 2022.

They further argue that Plaintiff has sufficiently stated a negligence claim against C3D. Cross-Claimants argue that for purposes of a pre-answer motion to dismiss, Plaintiff has alleged that C3D created the defective condition which injured Plaintiff to fall within one of the three exceptions identified by the Court of Appeals in *Espinal v. Melville Snow Contractors*, 98 NY2d 136 (2002).

According to *Espinal*, there are three situations in which a party to a contract assumes a duty of care to third persons: (1) where the contracting party "launche[s] a force or instrument of harm," (2) where the plaintiff detrimentally relies on the contracting party's continued performance, and (3) where the contracting party has entirely displaced another party's duty to

maintain the premises safely (*see also Orea v NH Hotels USA, Inc.*, 187 AD3d 476 [1st Dept 2020]). A contracting party who negligently “creates or exacerbates” a dangerous condition has “launched a force or instrument of harm” and may be liable for any resulting injury (*Espinal* at 141-142). The opposition argues that C3D owes a duty under the first *Espinal* exception.

Plaintiff’s opposition largely mirrors that of the cross-claimants and argues that it is entitled to discovery prior to the Court conducting an *Espinal* analysis. Plaintiff further points out that C3D’s principal admitted in an affirmation that it designed the door which injured Plaintiff. In reply, C3D, for the first time, also seeks dismissal of the crossclaims asserted against it. C3D reasserts that pursuant to *Espinal*, it cannot be liable to Plaintiff because there are no factual allegations that C3D made the building less safe or more dangerous in the performance of its contractual duties.

II. Discussion

A. Standard

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determines only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

B. Statute of Limitations

C3D's motion to dismiss based on the statute of limitations is misplaced (*see generally Belunes v Minskoff Grant Realty Management Corp.*, 278 AD2d 143, 144 [1st Dept 2000]). A negligence cause of action against a design professional who the plaintiff did not contract with accrues on the date of the plaintiff's injury (*id.* citing *IFD Const. Corp. v Corddry Carpenter Dietz and Zack*, 253 AD2d 89 [1st Dept 1999]). Here, Plaintiff was injured on November 13, 2022, making his claim against C3D timely. C3D's concerns regarding "unending liability" to anyone who walks through the door C3D designed should be allayed by CPLR § 214-d, which requires a notice of claim to be submitted to the design professional if the claim accrues more than ten years after the completion of the professional's work. However, by C3D's own submissions, its work was not completed until sometime between 2016 and 2019, and therefore CPLR § 214-d is not applicable. Therefore, C3D's motion to dismiss based on the statute of limitations is denied.

C. Failure to State a Claim

C3D's motion to dismiss based on Plaintiff's failure to state a claim is denied. As a preliminary matter, the allegations in the Third-Amended Complaint sufficiently state a claim for

negligence against C3D. Plaintiff alleges that C3D was responsible for the design of the Premises and performed work at the Premises, and that C3D's negligent design and work caused his injury (NYSCEF Doc. 44 at ¶¶ 39, 49, and 158-172). On a pre-answer motion to dismiss, the Court must assess whether a plaintiff has stated a cause of action and does not take into consideration whether a plaintiff can ultimately establish its allegations (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]). Here, the allegations are sufficient to put C3D on notice that it is being sued for alleged negligence in its design of a door that allegedly injured Plaintiff. Whether C3D was actually negligent is not an issue to be determined on a pre-answer motion to dismiss but is to be assessed after further discovery.

Finally, as to C3D's contention that Plaintiff has failed to allege the existence of a duty within one of the *Espinal* exceptions, the Court disagrees. One of the instances in which the Court of Appeals has explicitly found a contracting party assumes a duty of care to a third-party is "where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm'" (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 141 [2002]). Here, it is alleged that as a result of C3D's negligent design and work on the Premises, a door on the Premises became defective and injured Plaintiff. At this pre-answer and pre-discovery stage, it would be premature for the Court to rule that C3D played no role in creating or increasing an unreasonable risk of harm to others in the discharge of its contractual obligation as a design professional for the Premises (*Church ex rel. Smith v Callanan Industries, Inc.*, 99 NY2d 104 [2002]). Thus, C3D's motion to dismiss is denied.

The portion of C3D's motion which seeks, for the first time in reply papers, dismissal of Cross-Claimants' cross-claims is likewise denied. An argument raised for the first time on reply should not be considered (*Simon v FrancInvest, S.A.*, 192 AD3d 565 [1st Dept 2021]).

Accordingly, it is hereby,

ORDERED that Defendant C3D Architecture PLLC’s motion to dismiss Plaintiff Howard Barnowitz’s Third-Amended Complaint is denied in its entirety; and it is further

ORDERED that Defendant C3D Architecture PLLC’s motion to dismiss any crossclaims asserted against it is denied;

ORDERED that within twenty days of entry of this Decision and Order, Defendant C3D Architecture PLLC shall serve an Answer to Plaintiff’s Third-Amended Complaint and any and all cross-claims; and it is further

ORDERED that on or before October 23, 2024, the parties shall meet and confer and submit a proposed preliminary conference order to the Court via e-mail at SFC-Part33@nycourts.gov. In the event the parties are for some reason unable to agree to a proposed preliminary conference order, the parties shall appear for an in-person preliminary conference on October 30, 2024 at 9:30 a.m. in Room 442, 60 Centre Street, New York, New York; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

9/23/2024
DATE

Mary V. Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE