

Vera v BH Broadway Owner LLC

2024 NY Slip Op 33410(U)

September 25, 2024

Supreme Court, New York County

Docket Number: Index No. 159631/2023

Judge: Mary V. Rosado

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alleges that the Bloch Defendants' negligent design of and work performed at the Premises resulted in their injury (*id.* at ¶¶ 65-70).

The Bloch Defendants move to dismiss Plaintiff's Complaint on various grounds. First, the Bloch Defendants argue that the underlying facts coupled with documentary evidence establishes that Plaintiff lacks legal capacity to sue pursuant to CPLR 3211(a)(3). The Bloch Defendants argue that the documentary evidence they have provided directly refutes Plaintiff's allegations warranting dismissal of Plaintiff's Amended Complaint pursuant to CPLR 3211(a)(1). The Bloch Defendants further argue that Plaintiff failed to allege sufficiently a negligence claim and that Plaintiff's Amended Complaint should be dismissed pursuant to CPLR 3211(a)(7). Finally, the Bloch Defendants argue that there are no factual allegations that they created or exacerbated the condition that caused Plaintiff's accident. Therefore, they owed no duty to Plaintiff Plaintiff's Amended Complaint should be dismissed pursuant to CPLR 3211(a)(3).

The Bloch Defendants rely heavily on *Espinal v Melville Snow Contractors*, 98 NY2d 136 (2002), to argue that Plaintiff has failed to assert a tort theory that imposes third-party liability on the Bloch Defendants. There are three situations in which a party to a contract for services 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 (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002]; *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 Bloch Defendants' motion is opposed by multiple parties. Co-defendants BH Broadway Owner LLC, The Vorea Construction Companies, LLC, NNJ Restaurant LLC d/b/a/ Shuko, and Eclipse Management LLC (collectively "Opposing Co-Defendants") submitted opposition alleging that Plaintiff has stated sufficiently a negligence claim against the Bloch Defendants. Opposing Co-Defendants further argue that the instant motion to dismiss is premature, as discovery is required to determine the scope of the Bloch Defendants' involvement in the construction and design of the Premises. Opposing Co-Defendants additionally argue that the Bloch Defendants have not established conclusively that Plaintiff lacks legal capacity to sue, or documentary evidence defense sufficient for pre-answer motion purposes. Lastly, Opposing Co-Defendants argue that Plaintiff has adequately alleged that the Bloch Defendants created the defective condition which injured Plaintiff and that such involvement falls within one of the *Espinal* exceptions. Plaintiff's submitted opposition largely mirrors that of Opposing Co-Defendants and argues that they are entitled to discovery prior to the Court conducting an *Espinal* analysis.

II. Discussion

A. Legal Capacity to Sue

The Bloch Defendants' motion to dismiss pursuant to CPLR 3211(a)(3) based on Plaintiff's legal capacity to sue is denied. Prior to this action, on March 2, 2023, The Honorable Alturric Kenney appointed Plaintiff Helen V. Vera executor of the estate of Decedent and issued Letters Testamentary (*see* NYSCEF Doc. 87).

B. 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]).

C. Documentary Evidence

In support of their motion, the Bloch Defendants attach, as documentary evidence, an affirmation of defendant Richard Bloch in the form of an affidavit, including structural plans, and a proposal for architectural services. Upon review, the Court finds that the affidavit does not constitute sufficient documentary evidence for purposes of a pre-answer CPLR 3211(a)(1) motion (*J.D. v Archdiocese of New York*, 214 A.D.3d 561 [1st Dept 2023]; *Patterson Belknap Webb & Tyler LLP v Marcus & Cinelli LLP*, 227 A.D.3d 505, 506 [1st Dept 2024]). Furthermore, the

proposal for architectural services and structural plans provided do not, without more, constitute an irrefutable agreement between the parties and thus fail to refute Plaintiff's factual allegations and establish conclusively a defense as a matter of law against co-defendants' cross-claims or against Plaintiff's complaint.

D. Failure to State a Claim

The Bloch Defendants' motion to dismiss based on Plaintiff's failure to state a claim is denied. As a preliminary matter, the allegations in the Amended Complaint sufficiently state a claim for negligence against the Bloch Defendants. Plaintiff alleges that the Bloch Defendants were responsible for the design of the Premises and performed work at the Premises, and that the Bloch Defendants' negligent design and work caused Decedent's injury and death (NYSCEF Doc. 21 at ¶¶ 43-62, 65-68). On a pre-answer motion to dismiss, the Court must merely 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, Plaintiff's allegations are sufficient to put the Bloch Defendants on notice that they are being sued for negligence in their design and work of a staircase on the Premises, and that their negligence caused Plaintiff's injuries and death. Whether the Bloch Defendants were actually negligent is not an issue to be determined on a pre-answer motion to dismiss but is to be assessed after further discovery.

As to the Bloch Defendants' 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, 'lanche[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 the Bloch Defendants' negligent design and work on the Premises, a staircase on the Premises was defective and injured Plaintiff. At this pre-answer and pre-discovery stage, it would be premature for the Court to rule that the Bloch Defendants 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]). The Court has considered the Bloch Defendants' remaining arguments and finds them to be unavailing. Thus, the Bloch Defendants' motion to dismiss is denied.

Accordingly, it is hereby,

ORDERED that Defendants Richard Bloch and Richard Bloch d/b/a Richard Bloch Architect i/p/a Richardblocharchitect P.C.'s motion to dismiss Plaintiff Helen V. Vera's, as executor of the estate of Kent A. Clark and individually, Amended Complaint is denied in its entirety; and it is further

ORDERED that within twenty days of entry of this Decision and Order, Defendants Richard Bloch and Richard Bloch d/b/a Richard Bloch Architect i/p/a Richardblocharchitect P.C. shall serve an Answer to Plaintiff's Amended Complaint and any and all cross-claims; and it is further

ORDERED that on or before October 20, 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 23, 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.

<u>9/25/2024</u> DATE					<u>Mary V Rosado JSC</u> HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/> OTHER
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