

Negmatov v Brewran N.Y. Corp.

2024 NY Slip Op 34605(U)

December 20, 2024

Supreme Court, Kings County

Docket Number: Index No. 512817/2023

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 512817/2023
Seqs. 003, 004, 005

Part LLM

DECISION/ORDER

FIRDAVS NEGMATOV,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Plaintiff,

Papers Numbered

against

Notice of Motion and Affidavits Annexed	<u>1-3</u>
Order to Show Cause and Affidavits Annexed	<u> </u>
Answering Affidavits	<u>4-5</u>
Replying Affidavits	<u>6</u>
Exhibits	<u> </u>
Other	<u> </u>

BREWREN NEW YORK CORP., CLAREMONT HOUSE
CONDOMINIUM, BREND RESTORATION LLC, EUGENE
Y. SOHN, ELLEN H. KIM, HYEKYUNG L. KIM, NYC
REMODELING INC., AND ALMA PLUMBING SPRINKLER
INC.,

Defendants.

EUGENE Y. SOHN, ELLEN H. KIM, AND HYEKYUNG L.
KIM,

Third-Party Plaintiffs,

against

ALMA DESIGN, INC. AND ALMA DESIGN INC. D/B/A NY
CITY REMODELING, INC.,

Third-Party Defendant.

Upon the foregoing papers, defendant Alma Plumbing Sprinklers (APS)'s motion to dismiss (Seq. 003), defendants/third-party plaintiffs Eugene Sohn, Ellen Kim, and Hyekyung Kim (Sohn et al.)'s cross-motion to strike (Seq. 004), and plaintiff's motion to consolidate (seq. 005) are decided as follows:

Procedural History and Factual Background

Plaintiff commenced this action to recover for damages he claims to have sustained when he fell from a ladder on April 14, 2023 while performing plumbing work. The following is undisputed: Eugene Sohn owned an apartment on the tenth floor of 52 East 72nd Street, Brooklyn, NY. Mr. Sohn hired Alma Design, Inc. (Alma Design) to provide construction, remodeling, renovation, electrical, and plumbing work. Alma Design hired APS to do the plumbing portion of the work.

Plaintiff has indicated willingness to discontinue his direct action against APS; however, a stipulation has not been executed because the co-defendants object. APS thereafter filed the instant motion to dismiss, and its co-defendants filed the cross-motion to to strike APS' affirmative defense predicated upon the Workers' Compensation Law. Plaintiff did not file opposition to APS's motion.

In support of its motion, APS submits an affidavit from Amir Faizullin, the full-owner of Alma Design and 49% owner of APS. Mr. Faizullin states that plaintiff was employed by APS on the date of his accident (Faizullin aff. at ¶¶ 4–5).

Plaintiff's Workers' Compensation C-3 lists Alma Design as his employer. Additionally, page one of the Workers' Compensation Board's decision from August 29, 2023, lists "Alma Design, Inc." as the plaintiff's employer. However, page two of the decision reads, "Corvell [sic] accepting claim. Remove and drop from notice Technologies and Alma Design. Reset with payroll." APS produced a certificate of insurance, claiming that it shows that Corvel Enterprises was APS's Workers' Compensation insurance carrier. The certificate of insurance does not, however, list Corvel. Corvel is listed as the claim administrator and APS is listed as the employer on the First Report of Injury, which APS includes with its papers. APS also provides a

Reprinted Notice of Indexing from the Workers' Compensation Board related to the August 29, 2023 decision, which does list Alma Plumbing Sprinkler Inc. as plaintiff's employer.

Analysis

APS's Motion to Dismiss and for Summary Judgment

Under Workers' Compensation Law §11, employers who provide workers' compensation coverage to their employees are immune from tort liability. Once the employer's liability for providing workers' compensation benefits is established, the employee cannot sue the employer for damages sustained from the injury (*NY Hosp. Med. Ctr. of Queens v Microtech Contr. Corp.*, 22 NY3d 501 [2014]). In 2023, a new subsection was added to Workers Compensation Law § 11, titled the "Justice for Injured Workers Act." Workers Compensation Law § 11 [2] states that determinations by the Workers' Compensation Board "shall only have a collateral estoppel effect as to the existence of an employer employee relationship."

CPLR 3211 (a) (1) Motion to Dismiss

To dismiss a claim pursuant to CPLR 3211 (a) (1), the movant must produce documents that resolve "all factual issues as a matter of law, and conclusively [dispose] of the plaintiff's claim" (*534 K, LLC v Flagstar Bank, FSB*, 187 AD3d 971 [2d Dept 2020]; *see also Braun Soller v Dahan*, 173 A.D.3d 803, 805 [2d Dept 2019]). Documentary evidence for the purpose of this statute includes "out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable" (*McDonald v O'Connor*, 189 AD3d 1208, 1210 [2d Dept 2020]). Affidavits are neither anticipated nor intended by the CPLR as substitutes for testimony, and rarely warrant dismissal of a plaintiff's claims (*Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2d Dept 2003]).

Because testimonial affidavits are inappropriate on a motion to dismiss, Mr. Faizullin's affidavit is insufficient to support dismissal of the claims against APS. The remaining submissions from APS are ambiguous and require further explanation—the Workers' Compensation decision lists plaintiff's employer as "Alma Design" on the first page, and "Corvel" is not named on APS's certificate of insurance. Therefore, APS's motion to dismiss is denied.

Summary Judgment

APS moves, alternatively, for summary judgment. On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

APS relies on Mr. Faizullin's affidavit that the plaintiff worked for APS on the date of the accident, the Reprinted Notice of Indexing from the WCB which indicates that APS was the plaintiff's employer, and the documents clarifying that plaintiff received Workers' Compensation Benefits from APS's insurance carrier. Notably, plaintiff does not contest APS's contentions or oppose APS's motion.

Co-defendants Sohn et al. oppose, arguing that there is ambiguity about whether plaintiff was employed by APS or by Alma Design, and that the motion should therefore be denied. However, co-defendants do not produce evidence that Alma Design ever provided plaintiff with Workers' Compensation Benefits and do not provide any evidence that contradicts the amended notice of indexing for the WCB decision which determined that APS was the plaintiff's

employer. Furthermore, co-defendants' argument that plaintiff may have received benefits from APS under Workers' Compensation Law § 56 is unavailing. That provision would only apply if APS was the general contractor and Alma Design was the sub-contractor; the reverse is true here (*contra Joyce v McKenna Associates, Inc.*, 2AD3d 592 [2d 2003]).

In light of the foregoing analysis, Sohn et al.'s motion to strike APS's affirmative defense under the Workers' Compensation Law is denied; APS has demonstrated its entitlement to summary judgment on this defense.

Consolidation

Finally, plaintiff moves to consolidate this action with the action bearing Index Number 507735/2024. The motion is unopposed and it is clear from a review of the underlying papers that they arise from a common nexus of facts and implicate the same body of law (CPLR 602). Plaintiff, by letter, withdrew the portion of the motion seeking default judgment against Alma Design and accepted Alma Design's untimely answer. Therefore, plaintiff's motion to consolidate is granted.

Conclusion

APS's motion (Seq. 003) is granted as to summary judgment dismissing the complaint against it. The motion is otherwise denied.

Eugene Y. Sohn, Ellen H. Kim, and Hyekyung L. Kim's cross-motion (Seq. 004) is denied.

Plaintiff's motion to consolidate (Seq. 005) is granted without opposition. A form consolidation order will be issued contemporaneously with this decision.

This constitutes the decision and order of the court.

December 20, 2024

DATE



DEVIN P. COHEN

Justice of the Supreme Court