Phebe v One Hundred Sixty Fifth St. Mall Improvement Assn., Inc.
2024 NY Slip Op 35330(U)
March 21, 2024
Supreme Court, Queens County
Docket Number: Index No. 701997/2022
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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DANNY PHEBE,

Plaintiff,

-against-

ONE HUNDRED SIXTY FIFTH STREET MALL IMPROVEMENT ASSOCIATION, INC. (d/b/a 165th STREET MALL IMPROVEMENT ASSOCIATION) and THE CITY OF NEW YORK

Defendants.

Index No.: 701997/2022

Motion Date: 1/29/2024

Motion Cal. No.: 26

Motion Sequence No.: 2

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ONE HUNDRED SIXTY FIFTH STREET MALL IMPROVEMENT ASSOCIATION, INC. (d/b/a 165th STREET MALL IMPROVEMENT ASSOCIATION)

Third-Party Plaintiff,

-against-

ATLANTIC MAINTENANCE CORPORATION d/b/a STREET PLUS and STREETPLUS COMPANY LLC,

Third-Party Defendants.

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The efiling papers numbered 55-63, 68-79 submitted and considered on this motion by Third-Party Defendant Atlantic Maintenance Corp. i/s/h/a Atlantic Maintenance Corporation (hereinafter "Atlantic") d/b/a StreetPlus Company LLC (hereinafter "StreetPlus"), seeking to dismiss Third-Party Plaintiff One Hundred Sixty Fifth Street Mall Improvement Association, Inc (hereinafter "Mall"), third-party (amended) complaint pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (7).

	Papers Numbered
Notice of Motion-Affidavits-Exhibits.............	EF 55-63
Affirmation in Opposition-Affidavits-Exhibits......	EF 68-76
Affirmation in Reply-Affidavits-Exhibits.............	EF 77-79

Relevant Factual and Procedural Background

This action originated out of a Complaint filed by Plaintiff Danny Phebe on January 27, 2022, alleging a trip and fall (hereinafter subject accident) due to a defective condition on streets between 164-17A Jamaica Avenue and 165-01 Jamaica Avenue in Queens, NY on August 6, 2021. The Mall responded with a denial on March 10, 2022. Later, on April 17, 2023, the Mall filed a Third-Party Complaint, naming Atlantic, claiming a breach of contract among other things. On or about July 17, 2023, Atlantic filed a motion to dismiss based on CPLR 3211(a)(1) and (7), seeking for the dismissal of the Mall's third-party complaint. The motion was returnable before the undersigned on September 25, 2023. Prior to motion sequence 1 being returnable before this Court, Atlantic filed a supplemental summons and amended third party complaint on August 31, 2023, adding StreetPlus as a third-party defendant, which was served on StreetPlus on September 22, 2023. The undersigned decided sequence 1 on November 20, 2023, denying the motion as moot based upon Mall's filing of a supplemental summons and amended third-party complaint. Instead of withdrawing sequence 1 on the return date of the motion or thereafter, while it was still pending, StreetPlus filed the instant motion under sequence 3 on October 30, 2023, seeking to dismiss the amended complaint under CPLR 3211 (a) (1) and CPLR 3211 (a) (7).

In support of their motion, Atlantic and StreetPlus contend that Atlantic was dissolved as a corporation before the subject accident, having filed its Certificate of Dissolution on April 30, 2021, that evidence suggests another entity made repairs between 164-17A Jamaica Avenue and 165-01 Jamaica Avenue in Queens, NY (hereinafter accident area), and Atlantic and StreetPlus claim they were not connected to the site or contracted by the Mall at the time of the subject accident. Given these facts and the supporting Goldberg Affidavit, Atlantic and StreetPlus assert that the Mall has no valid case against them and requests the Court to dismiss the Amended Third-Party Complaint based on CPLR Rules 3211(a)(1) and (7). Atlantic and StreetPlus allege that they did not have notice of the defect; that the Mall didn't specifically request the repair; and that there is evidence showing other work previously being done at the accident area. Atlantic and StreetPlus further contend the assertion that StreetPlus assumed the contract from Atlantic lacks validity because there was no written documentation of such an assumption, a requirement under the contract terms. Additionally, StreetPlus was not performing brick repair work at the subject location but rather cleaning and garbage removal, further distancing them from any potential liability related to Plaintiff Danny Phebe's fall.

In his affidavit in support, David Goldberg (hereinafter Goldberg), the former CEO of Atlantic and the Chief Executive of StreetPlus attested that Atlantic filed its Certificate of Dissolution on April 30, 2021, and ceased all operations, thus not being a recognized legal entity by the time of the Plaintiff's alleged trip and fall on August 6, 2021. Despite claims from the Mall, there was no valid contract or maintenance agreement between the two parties on the date of the subject accident, nor does StreetPlus and Mall have an assumption agreement. The verbal contract between the Mall and StreetPlus included only cleaning services and garbage removal, and not brick repair work. Additionally, while Atlantic did not conduct any repairs or work at the accident location, there was previous work being performed by others at the accident location, as evidenced by photographs showing repairs with asphalt and concrete where the subject accident purportedly occurred.

In opposition, Mall first claimed that the amended third-party complaint shows that StreetPlus, taking over from Atlantic, is bound by a "Maintenance Agreement" to indemnify 165th Street for the Plaintiff's injuries, which were allegedly caused by defective brick pavers that Atlantic was contractually obligated to maintain or repair. The agreement specifically obligated Atlantic to address broken brick pavers, where the Plaintiff claims she tripped due to these broken pavers within this district. Atlantic presents evidence of its dissolution and an affidavit from Goldberg to support their claim. Yet, the Mall argues that this evidence, along with the allegations that Atlantic did not have notice; the assertion that Mall did not specifically request the repair; and evidence of other work previously being done are not acceptable for the motion to dismiss based on the rules of CPLR 3211(a)(1) and CPLR 3211(a)(7), since they do not constitute documentary evidence and/or irrelevant. Regarding Atlantic's dissolution argument, the Mall counters that a corporation cannot simply escape contractual obligations just by voluntarily dissolving.

The Mall further submits the affidavits of Derek "Irby" (hereinafter Irby), the executive director of the Mall, which provided details regarding the agreement between the Mall and Atlantic. Irby alleges that In 2015, 165th Street entered a written agreement with Atlantic. Pursuant to the agreement, Atlantic was responsible for resetting loose brick pavers and replacing broken ones at the accident area between 164-17A Jamaica Avenue and 165-01 Jamaica Avenue in Queens, NY. Atlantic agreed to defend and cover 165th Street for personal injury claims arising from breaches or their service provision. Irby was the main communicator with Atlantic, and Goldberg was the representative from Atlantic. The contract had an automatic renewal clause, unless either party terminated it in writing. However, neither party terminated the agreement prior to Plaintiff's accident on August 6, 2021. In 2019, Goldberg informed Irby that another company they owned, StreetPlus would assume the contract responsibilities, which the Mall claims they relied on detrimentally. Payments from the Mall to Atlantic stopped in March 2019, and started being direct to StreetPlus from April 2019. The Mall contends that it has always been its position, and its belief, that the terms of the agreement entered into with Atlantic remained in effect until and beyond the date of Plaintiff's accident on August 6, 2021, and that it was not aware of Atlantic's dissolution in April 2021, and would not have continued under the contract if they knew. The Mall alleges that both Atlantic and StreetPlus seem to have ratified StreetPlus's assumption of Atlantic's contractual obligations, these two companies share the same address and are owned by the same people: Goldberg and Patrick

Desimone. The record of Department of State also show that Atlantic had filed to operate under the name "Street Plus Company" since December 2015. Finally, The Mall has filed an amended third-party complaint naming both Atlantic and StreetPlus as defendants for breach of contract. Irby contends that either StreetPlus assumed Atlantic's contractual obligation or that Atlantic remained obligated since Atlantic never terminated the agreement.

In reply, Atlantic and StreetPlus contends that the Mall could not have justifiably relied on verbal assertions made by Atlantic or StreetPlus about assuming maintenance responsibilities, especially for the public thoroughfare where Plaintiff's fall occurred. This point is underscored by the fact that it was actually the City of New York (hereinafter "City") that undertook significant repairs in the subject area, not StreetPlus or Atlantic. Atlantic and StreetPlus emphasize the contract's clear stipulation that any modifications or assignments must be made in writing and signed by all parties involved. The absence of any such written agreement or consent directly contradicts Mall's claim of a verbal assignment of the contract from Atlantic to StreetPlus. Atlantic and StreetPlus defend the use of the Goldberg affidavit as an appropriate means to introduce relevant documentary evidence, including Atlantic's Certificate of Dissolution. This certificate conclusively demonstrates that Atlantic had been dissolved well before the incident in question, negating any ongoing contractual obligations or the possibility of an effective assignment to StreetPlus. Even if the Court were to entertain the notion that Atlantic remained active or that StreetPlus assumed the contract, neither party had any liability regarding the location where the Plaintiff fell. This assertion is based on the lack of requests made to either Atlantic or StreetPlus for repairs in the subject area, coupled with evidence that the City was actively involved in maintenance and repairs. StreetPlus also argues that it had no notice of any defective condition or the need for repairs at the subject location prior to Plaintiff's incident. This is supported by evidence that the City had control over the area and had undertaken repairs, not StreetPlus.

<u>Law and Application</u>

CPLR 3211 (a) motion to dismiss provides:

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> 1. a defense is founded upon documentary evidence; or
> 2. the court has not jurisdiction of the subject matter of the cause of action; or
> 3. the party asserting the cause of action has not legal capacity to sue; or
> 4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or

> 5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or
> 6. with respect to a counterclaim, it may not properly be interposed in the action; or
> 7. the pleading fails to state a cause of action; or...

Business Corporation Law 1005 provides:

> (a) After dissolution:
>
> 1. The corporation shall carry on no business except for the purpose of winding up its affairs.
> 2. The corporation shall proceed to wind up its affairs, with power to fulfill or discharge its contracts, collect its assets, sell its assets for cash at public or private sale, discharge or pay its liabilities, and do all other acts appropriate to liquidate its business...

Business Corporation Law 1006 provides:

> (a) A dissolved corporation, its directors, officers and shareholders may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place, except as otherwise provided in this chapter or by court order. In particular, and without limiting the generality of the foregoing:...
>
> (b) The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution, except as provided in sections 1007 (Notice to creditors; filing or barring claims) or 1008 (Jurisdiction of supreme court to supervise dissolution and liquidation).

StreetPlus and Atlantic first seeks to dismiss under CPLR 3211 (a). "A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*see S & J Serv. Ctr., Inc. v Commerce Commercial Group, Inc.*, 178 AD3d 977, 978 [2d Dept 2019]; citing *Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]; *Rodolico v Rubin & Licatesi, P.C.*, 114 AD3d 923, 924 [2d Dept 2014]). "The evidence submitted in support of such motion must be documentary or the motion must be denied" (*see Id* at 977, 978; citing *Cives Corp. v George A.*

Fuller Co., Inc., 97 AD3d 713, 714 [2d Dept 2012]; *Attias v Costiera*, 120 AD3d 1281, 1283 [2d Dept 2014]; *Fontanetta v Doe*, 73 AD3d 78, 84 [2d Dept 2010]). "In order for evidence submitted in support of a CPLR 3211(a)(1) motion to qualify as "documentary evidence," it must be unambiguous, authentic, and undeniable" (*see Id* at 977, 978; citing *Granada Condominium III Ass'n v Palomino*, 78 AD3d 996, 997 [2d Dept 2010]; *Attias v Costiera*, 120 AD3d 1281, 1282 [2d Dept 2014]; *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012]). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (*see Id* at 977, 978; citing *Fontanetta v Doe*, 73 AD3d 78, 84 [2d Dept 2010]; quoting David D. Siegel, Prac Commentaries, McKinney's Cons Laws of NY, CPLR C3211:10; *see also Attias v Costiera*, 120 AD3d 1281, 1283 [2d Dept 2014]). "[N]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)" (*see Id* at 977, 978; citing *Granada Condominium III Ass'n v Palomino*, 78 AD3d 996, 997 [2d Dept 2010]; *Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012]). Here, this court finds that the contents in the certificate of dissolution, as well as the agreement between Atlantic and the Mall, submitted and filed by Atlantic are essentially undeniable, and would qualify as documentary evidence. Furthermore, "[a]n affidavit is an appropriate vehicle for authenticating and submitting relevant documentary evidence" (*see Muhlhahn v Goldman*, 93 AD3d 418, 418 [1st Dept 2012]; citing *Suss v New York Media, Inc.*, 69 AD3d 411, 412 [1st Dept 2010]), "and may provide connecting link[s] between the documentary evidence and the challenged statements" (*see Id* at 418; citing *Std. Chartered Bank v D. Chabbott, Inc.*, 178 AD2d 112, 112 [1st Dept 1991]). This Court finds that the affidavit of Goldberg is submitted as a vehicle to authenticate and introduce documentary evidence, namely the certificate of dissolution, which established that Atlantic is dissolved at the time of the accident, and hence can be considered here in the context of CPLR 3211 (a) (1).

However, while the certificate of dissolution and the affidavit of Goldberg does properly establish that Atlantic voluntarily dissolved on or about April 30, 2021, before the subject accident occurred, it failed to "utterly refute [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law". For StreetPlus, the crux of the problem lies in whether the alleged verbal agreement that StreetPlus will assume the duties of Atlantic invokes promissory estoppel, and whether the Mall detrimentally relied on that promise. In light most favorable to the Mall, this Court finds that the certificate of dissolution and the affidavit of Goldberg did not utterly refutes the Mall's allegations, as there are no documentary evidence showing that StreetPlus did not assume the contractual obligations of Atlantic. For Atlantic, the crux of the problem here is whether Atlantic's obligation to maintain the accident area pursuant to the agreement survives its voluntary dissolution. "[Corporation] continued to exist as a legal entity, after its dissolution, for as long as was necessary to wind up its business affairs and discharge its existing obligations." (*See Milton L. Ehrlich, Inc. v Unit Frame & Floor Corp.*, 5 NY2d 275 [1959].) Importantly, "[i]ncluded as corporate liabilities are contractual obligations and contingent claims." (*See Rodgers v Logan*, 121 AD2d 250, 253 [1st Dept 1986]; citing *Milton L. Ehrlich, Inc. v Unit Frame & Floor Corp.*, 5 NY2d 275 279, 280 [1959]; *United States v Oscar Frommel & Bro.*, 50 F2d 73, 74 [2d Cir 1931]). The court in *Milton* also stated that " the Legislature of this State did not intend voluntary dissolutions to be a vehicle for the avoidance of pre-existing contractual obligations and liabilities". Here, the agreement requires a written notice no less than 30 days in advance to be properly terminated, and the parties discharged from their obligations. Atlantic provides no evidence showing that they have discharged their obligations. Although the subject accident happened after the dissolution, Atlantic's obligation from the agreement existed long before. This Court finds that Atlantic continued to exist as a legal entity after its dissolution so long as necessary to wind up its existing obligations, including the contractual obligation at hand. Atlantic's argument that they are barred from carrying on any business after the dissolution is without merit, since pursuant to Business Corporation Law 1005, Atlantic was permitted to do business for the purpose of winding up its pre-existing contractual obligation. Accordingly, this Court finds that StreetPlus and Atlantic failed to utterly refute the Mall's factual allegations, and hence StreetPlus and Atlantic's motion to dismiss based on CPLR 3211 (a) (1) is denied in its entirety.

Next, StreetPlus and Atlantic seek to dismiss the Mall's third-party complaint pursuant to CPLR 3211 (a) (7). "On a motion to dismiss pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action and, [i]n considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*see Houtenbos v Fordune Assn., Inc.*, 200 AD3d 662 [2d Dept 2021]; citing *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*see Silvers v Jamaica Hosp.*, 218 AD3d 817, 818 [2d Dept 2023]; citing *EBC I, Inc. v Goldman*, Sachs & Co., 5 NY3d 11, 19 [2005]). However, "On a motion to dismiss for failure to state a cause of action, bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true" (*see Brightside Home Improvements, Inc. v Northeast Home Improvement Services*, 208 AD3d 446, 449 [2d Dept 2022]; citing *Dubon v Drexel*, 195 AD3d 991, 993 [2d Dept 2021]; *Maas v Cornell Univ.*, 94 NY2d 87, 91 [1999]). The Mall alleged in its amended third-party complaint that "it has always been 165th street's position, and its belief, that the terms of the agreement entered into with Atlantic remained in effect until and beyond the date of plaintiff's accident on August 6, 2021". Contrary to StreetPlus and Atlantic's contentions, this allegation is not a bare legal conclusion that is lacking in any fact or explanation. The Mall contended that neither party terminated the agreement while the contract had an automatic renew clause; that they are not aware of Atlantic's dissolution; that Atlantic informed them StreetPlus will assume the agreement while the Mall started paying StreetPlus and continued to perform under the agreement. These explanations supported the alleged statement that the Mall believed the agreement entered into with Atlantic remained in effect until and beyond the date of plaintiff's accident. The Court here must interpret these allegations, as well as other allegations in the Mall's amended third-party complaint as true and accord the Mall the benefit of every possible favorable inference.

Atlantic also submitted the certificate of dissolution as evidence. "Where a party offers evidentiary proof on a motion pursuant to CPLR 3211(a)(7), and such proof is considered but the motion has not been converted to one for summary judgment, the criterion is whether the proponent of the pleading has a cause of action, not whether [the proponent] has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it[,] ... dismissal should not eventuate" (*see Liu v Gabbay*, 219 AD3d 459, 460 [2d Dept 2023]; citing *Marinelli v Sullivan Papain Block McGrath & Cannavo, P.C.*, 205 AD3d 714, 715 [2d Dept 2022]; quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). However, while Atlantic's certificate of dissolution does establish that they were dissolved on the date of the accident, as stated above, the voluntary dissolution does not automatically void the contract and obligation that existed prior to such dissolution. In light most favorable to the Mall, they alleged sufficient facts, including that the agreement was never terminated; that they were never notified of Atlantic's dissolution; that StreetPlus made a misrepresentation on assumption of obligation, and thereby demonstrating the Mall have a cause of action based on the agreement. Atlantic failed to show, with their sole evidence of their certificate of dissolution, that the material facts alleged by the Mall are flatly not true, or in the least, with no significant dispute.

On the other hand, StreetPlus also failed to show that they did not assume the agreement between the Mall and Atlantic. Although it is true that no written agreement is signed, the Mall claims that an oral agreement existed and promissory estoppel bar StreetPlus from alleging the statute of frauds. "[W]here the elements of promissory estoppel are established, and the injury to the party who acted in reliance on the oral promise is so great that enforcement of the statute of frauds would be unconscionable, the promisor should be estopped from reliance on the statute of frauds" (*see In re Estate of Hennel*, 29 NY3d 487, 494 [2017]). "The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise" (*see Bent v St. John's Univ., New York*, 189 AD3d 973 [2d Dept 2020]). Here, Irby's attested that Goldberg informed the Mall that StreetPlus, another company they own, will take over the contractual responsibility of Atlantic. This Court finds it sufficiently clear that StreetPlus is supposed to take over all the contractual responsibilities between the Mall and Atlantic, considering the long-standing agreement and the relationship between Atlantic and StreetPlus. Furthermore, the Mall started paying StreetPlus the same amount they used to pay Atlantic, this Court finds StreetPlus' claim that they were only covering cleaning services and garbage removal and not the full responsibility of Atlantic to be unlikely since a change in duty should result in a change in payment due. In a light most favorable to the Mall, there is still significant dispute as to whether StreetPlus assumed Atlantic's contract responsibilities.

With regard to StreetPlus and Atlantic's remaining defenses, including that they did not have notice of the defect; that the Mall did not specifically request the repair; and that there is evidence showing other work previously being done at the accident area by the City, this Court finds these arguments to be without merit. "Contrary to the defendant's contention, on a motion made pursuant to CPLR 3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party" (*see Bianco v Law Offices of Yuri Prakhin*, 189 AD3d 1326 [2d Dept 2020]; citing *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept 2010]). "[A] plaintiff will not be penalized because he [or she] has not made an evidentiary showing in support of his [or her] complaint" (*see E & D Group, LLC v Vialet*, 134 AD3d 981, 982 [2d Dept 2015]). Moreover, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*see Jeffrey v Collins*, 218 AD3d 451, 453 [2d Dept 2023]). Here, the Mall does not have to rebut StreetPlus and Atlantic's defenses, it is StreetPlus and Atlantic's burden to prove with evidence that the Mall is without a cause of action, which they failed to do. Accordingly, it is hereby

ORDERED, that the motion of Third-Party Defendant Atlantic Maintenance Corp. i/s/h/a Atlantic Maintenance Corporation d/b/a StreetPlus Company LLC seeking to dismiss Third-Party Plaintiff One Hundred Sixty Fifth Street Mall Improvement Association, Inc.'s Amended Third-Party complaint pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (7) is denied in its entirety; and it is further

ORDERED, that Third Party Defendants are directed to file an answer to the amended Third-Party Complaint within thirty (30) days of the date of this Order served with Notice of Entry.

Dated: March 21, 2024

Hon. Chereé A. Buggs, JSC

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COUNTY CLERK
QUEENS COUNTY