

Zambrano v Katz
2024 NY Slip Op 35726(U)
January 14, 2024
Supreme Court, Rockland County
Docket Number: Index No. 035375/2023
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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MARIA LUCIA TIPANTUNA ZAMBRANO, as Proposed
Guardian for JOSE EDUARDO FAJARDO GUAMAN, and
MARIA LUCIA TIPANTUNA ZAMBRANO, Individually,

Plaintiffs,

-against-

MIRY KATZ, EASTGAGE BUILDERS SERVICE LLC,
EASTGATE MANAGEMENT SERVICE CORP., SUPER
PAINTERS CORP, DRUGIBE 311 LLC, KPJC REALTY
LLC, SIMCHA KATZ, ISAAC WEINBERGER and
ESTHER WEINBERGER,

Defendants.

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Sherri L. Eisenpress, J.S.C.

DECISION & ORDER

Index No.: 035375/2023

(Motions # 1-4)

The following papers, NYSCEF documents numbered 22-33, 38-56 and 58-72, were considered in connection with (i) Defendants Simcha Katz and Miry Katz' Notice of Motion for an Order, pursuant to CPLR § 3212(b), for an Order directing summary judgment in favor of Defendants and dismissal of the Complaint against them (Motion #1); (ii) Defendant Eastgate Builders Service LLC's Notice of Motion for an Order, pursuant to CPLR § 3212(b) directing summary judgment in favor of Defendant and dismissal of the Complaint against it (Motion #2); (iii) Plaintiffs' Notice of Cross-Motion, pursuant to CPLR § 3217(b) and § 1201, granting a voluntary discontinuance of the within action on the ground that as "Proposed Guardian" for Jose Eduardo Fajardo Guaman lacks capacity to bring this action (Motion #3); and (iv) Plaintiffs' Notice of Cross-Motion, pursuant to CPLR § 3217(b) and § 1201, granting a voluntary discontinuance of the within action on the ground that as "Proposed Guardian" for Jose Eduardo Fajardo Guaman lacks capacity to bring this action (Motion #4).

Upon the foregoing papers, the Court now rules as follows:

An action was commenced with the filing of a Summons and Complaint on the NYSCEF system on October 27, 2023, by "Maria Lucia Tipantuna Zambrano, as Proposed

Guardian for Jose Eduardo Fajardo Guaman." The Complaint alleges violations of the Labor Law arising out of a fall on June 27, 2023, when Jose Eduardo Fajardo Guaman ("Guaman") was working as a painter on the premises located at 17 Meron Drive, Monroe, New York. Issue was joined as to Defendants Miry Katz and Simche Katz (the "Katz Defendants") with the filing of a Verified Answer with cross-claims on January 3, 2024. Defendants Isaac Weinberg and Esther Weinberger (the "Weinberger Defendants") served a Verified Answer with cross-claims on January 17, 2024. Issue was joined as to Defendants Eastgate Builders Service LLC and Eastgate Management Service Corp. ("Eastgate Defendants") with the filing of an Answer with cross-claims on March 22, 2024. Although it appears that discovery demands were served, no preliminary conference was held and there appears to have been little to no discovery conducted.

On June 21, 2024, the Katz Defendants filed a summary judgment motion seeking dismissal of the action as against them based on their claim that they did not own the property where the work took place nor did the Katz defendants hire, supervise or control any of the work that was performed by Plaintiff or any of the contractors. On August 21, 2024, the Eastgate Defendants filed a summary judgment motion and argued that the action should be dismissed against them because they had no connection to the Weinberger residence or to the work of Plaintiff's employer, Premier, at that location.

In response, Plaintiffs cross-move to voluntarily discontinue the action. They contend that as a result of the subject occurrence, Guaman was paralyzed and rendered comatose, and although they intended to have Plaintiff Zambrano appointed as guardian ad litem, she has not been appointed, and as such, she lacks capacity to proceed with the action. Alternatively, Plaintiffs argue that the summary judgment motions must be denied as premature, as no discovery has taken place and the facts essential to oppose the motion are exclusively in the knowledge and control of moving defendants. Defendants oppose the application to grant a voluntary dismissal, arguing that an incapacitated individual who has not

been judicially declared incompetent may sue or be sued in the same manner as any other person.

Upon review of the papers, the Court hereby grants Plaintiffs' cross-motions to permit the voluntary discontinuance of the action. Pursuant to CPLR § 3217(b), "[E]xcept as provided in subdivision (a), an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper." While it is true that the Court is not required to dismiss an action where it has been commenced by a proposed guardian ad litem shortly before a guardianship motion has been made, Lighua Li v. Xiao, 175 A.D.3d 672, 106 N.Y.S.3d 137 (2d Dept. 2019), in the instant matter, Plaintiff's counsel has indicated that Zambrano may not be willing or qualified to be appointed, and they do not seek to have her appointed guardian at this juncture. Additionally, the parties have not yet engaged in any meaningful discovery, thus negating any substantial prejudice to defendants in the event the action is discontinued. Since the action shall be discontinued, the summary judgment motions are denied as moot.¹

Accordingly, it is hereby

ORDERED that Plaintiffs' Notices of Cross-Motion for an Order permitting a voluntary discontinuance of the action without prejudice is GRANTED (Motions #3 and #4); and it is further

ORDERED that the Notice of Motion by Defendants Simcha Katz and Miry Katz for summary judgment is DENIED as moot (Motion #1); and it is further

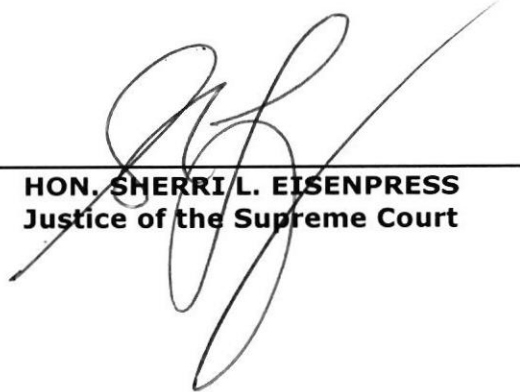
ORDERED that the Notice of Motion by Defendant Eastgate Builders Service for summary judgment is DENIED as moot (Motion #2).

¹ The Court notes that had it not permitted the discontinuance of the action, it would have nonetheless found the summary judgment motions to be pre-mature resulting in their denial.

The foregoing constitutes the Decision and Order of this Court on Motions # 1-

4.

Dated: New City, New York
January 14, 2024



HON. SHERRI L. EISENPRESS
Justice of the Supreme Court

TO: All counsel via NYSCEF