

729 Third Ave Rest. LLC v DOLP 733 Props. II LLC

2025 NY Slip Op 32801(U)

August 13, 2025

Supreme Court, New York County

Docket Number: Index No. 156578/2022

Judge: Leslie A. Stroth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH PART 12M

Justice

-----X

729 THIRD AVE RESTAURANT LLC,

Plaintiff,

- v -

DOLP 733 PROPERTIES II LLC, ROYAL REALTY CORP.,
JAMES E. FITZGERALD INC., COASTAL
WATERPROOFING LLC, J.T. MAGEN & COMPANY
INC., JOHN GALLIN & SON INC., KING HOIST &
CONTRACTING, INC., S.T. RUD CONSTRUCTION
CORPORATION, XYZ CONTRACTORS 1-10,

Defendant.

-----X

JAMES E. FITZGERALD INC.

Plaintiff,

-against-

KING HOIST & SCAFFOLDING, INC.

Defendant.

-----X

COASTAL WATERPROOFING LLC

Plaintiff,

-against-

ALTAMINA CONSTRUCTION CORP.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 68, 69, 70, 71, 72,
73, 74, 75, 76, 77

were read on this motion to/for

DISMISSAL

DECISION + ORDER ON MOTION

Third-Party
Index No. 595793/2023

Second Third-Party
Index No. 595016/2024

Plaintiff, Rosie Dunn's, has possessed the premises located at 729 Third Avenue, New York, New York, since October 1, 2018, where it operates a restaurant in a two-story building with a basement. The adjacent property at 733 Third Avenue contains a 23-story mixed-use building. At all relevant times, defendant Durst owned 733 Third Avenue, and defendant Royal served as its managing agent and property manager.

The complaint alleges that DOLP 733 Properties, Royal Realty Corp., S.T. Rud Construction Corporation, Fitzgerald, Coastal Waterproofing, J.T. Magen & Company, John Gallin & Son ("Gallin"), and King Hoist & Contracting (collectively, "Construction Defendants") entered into contracts to perform construction work and services at 733 Third Avenue, including by hiring subcontractors and directing and controlling the work. Plaintiff alleges that, in connection with that work, agents, servants, and employees of the defendants entered the restaurant premises, erected scaffolding and sidewalk bridges on top of the restaurant and performed construction activities on its roof.

Plaintiff claims that the work was negligently performed, including by covering roof drain systems, improperly flashing waterproofing, and placing pipe scaffolding without proper roof protection. Plaintiff further alleges that the construction caused water damage, ceiling collapses, broken window and door frames, and other property damage, and that defendants unreasonably delayed completion of their work, interfering with plaintiff's use and enjoyment of the premises.

Plaintiff asserts causes of action for negligence, trespass, and nuisance against all defendants, including Gallin, and seeks compensatory damages for property damage and loss of business use.

Gallin moves in Motion Sequence 001 to dismiss the Complaint against it pursuant to CPLR 3211(a)(1) and (a)(7).

Pursuant to CPLR 3211 (a)(1) “dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Leon v Martinez*, 84 NY2d 83, 88 [1994])

However, the Work Order submitted by Defendant Gallin includes line items for Sidewalk Protection/Scaffolding. Moreover, the submitted evidence does not definitively show that Defendant Gallin had no part in the exterior work at 733 3rd Avenue. Accordingly, the documentary evidence does not conclusively establish a defense to the asserted claims, as Gallin has not met their prima facie burden based on the documentary evidence provided.

Pursuant to CPLR 3211 (a) (7), a party may move to dismiss a claim on the ground that the pleading fails to state a cause of action. Upon such a motion, the Court must accept the facts alleged as true and determine simply whether plaintiff’s facts fit within any cognizable legal theory. See CPLR 3026; *Morone v Morone*, 50 NY2d 481 (1980). The complaint shall be liberally construed, and the allegations are given the benefit of every possible favorable inference. (See *Leon v Martinez*, 84 NY2d 83, 87 (1994)).

Defendant Gallin’s motion is based on the premise that it conclusively had no part in the exterior work at 733 3rd Avenue. As discussed *infra*, Gallin has failed to make such a showing, and as such the court finds that dismissal at this early stage of the litigation is premature. As such, Gallin’s motion to dismiss is denied in its entirety.

The court has considered the remaining arguments and finds such unavailing.

Accordingly; it is hereby

ORDERED that Motion 001 by Gallin to dismiss the complaint is denied in its entirety.

The foregoing constitutes the decision and order of the court.

J. L. Frath

HON. JESSE L. FRATH, J.S.C.

8/13/2025
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE