

**Basko v Civic Sherman LLC**

2025 NY Slip Op 33766(U)

September 18, 2025

Supreme Court, Kings County

Docket Number: Index No. 534991/2023

Judge: Devin P. Cohen

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**Supreme Court of the State of New York  
County of Kings**

**Index Number** 534991/2023  
**Seq.** 004

Part LL1M

**DECISION/ORDER**

MAKSIM BASKO,

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</u>
Order to Show Cause and Affidavits Annexed . . . . .	<u>2-3</u>
Answering Affidavits . . . . .	<u>4</u>
Replying Affidavits . . . . .	<u>4</u>
Exhibits . . . . .	<u>    </u>
Other . . . . .	<u>    </u>

CIVIC SHERMAN LLC, NOBLE CONSTRUCTION GROUP, LLC, AF GLENMORE AVENUE, LLC, ACHIEVEMENT FIRST BROOKLYN CHARTER SCHOOLS, ACHIEVEMENT FIRST, WAVERLY, LLC, HEADQUARTERS MECHANICAL INC., AND WWI CONTRACTING, CORP.

Defendants.

CIVIC SHERMAN, LLC AND NOBLE CONSTRUCTION GROUP, LLC,

Third-Party Plaintiff,

against

HEADQUARTERS MECHANICAL, INC. AND WWI CONTRACTING CORP.,

Third-Party Defendants.

Upon the foregoing papers, defendants AF Glenmore Avenue LLC, Achievement First Brooklyn Charter Schools, and Achievement First Waverly LLC (AF Defendants)'s motion to dismiss all claims and cross-claims pursuant to CPLR 3211 and for summary judgment against plaintiff and all claims/cross-claims pursuant to 3212 (Seq. 004) is decided as follows:

**Facts and Procedural History**

Plaintiff commenced this action to recover from damages he claims to have sustained on March 27, 2023, while working on a construction project at 2400 Pitkin Avenue, Brooklyn, New

York (the premises). Plaintiff's complaint alleges that Civic Sherman LLC (Civic) owned the premises. In its answer, Civic denied ownership. AF Defendants "deny having knowledge or information sufficient to form a belief" as to ownership of 2400 Pitkin Avenue (AF Defendants Answer at ¶ 1). AF Defendants contend in their moving papers that AF Glenmore Avenue LLC (Glenmore) was to be the tenant of the premises "pending the completion of the subject construction," but emphasize said tenancy was to begin seven months after plaintiff's alleged incident (AF Defendants aff. in sup. at ¶ 5).

### Analysis

#### CPLR 3211 (a) (1)

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 AD3d 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]).

AF Defendants argue that they were not involved and had no legal relationship to the premises' construction project. In support, AF Defendants submit multiple lease agreements and an amended lease between defendant Civic as landlord and Glenmore as tenant. The original lease dated November 6, 2020, notes that Glenmore as "purchaser" executed a Purchase and Sale

Agreement (PSA) on May 20, 2020 (lease at 5). Glenmore simultaneously assigned Civic the PSA to design, develop and complete construction on the premises (*id.*). Depending on the timeliness of the construction completion, Glenmore would reoccupy the premises on a corresponding commencement date (*id.* at 9). A Landlord's Certificate dated October 31, 2023, confirms that the lease was scheduled to commence on November 2, 2023 (AF Defendants Exhibit S at 1). AF Defendants also provide an affidavit from Ketki Harale, Administrative Chief of Facilities for non-party Achievement First Inc., a company that operates charter schools in multiple states, including New York (Harale aff. at ¶ 1). Harale's affidavit states that such charter schools are created and owned by other entities, including AF Defendants, and that the premises at 2390 Pitkin Avenue was to be a charter school (*id.*). Further, Harale contends that, on the date of plaintiff's alleged accident, AF Defendants "did not control, supervise or manage the work, the work site [or] the contractors and/or subcontractors" on the premises (Harale aff. at ¶17).

Since testimonial affidavits are inappropriate on a motion to dismiss, Ketki Harale's affidavit is insufficient to support dismissal of plaintiff's claims or defendant's cross-claims. The remaining exhibits, including the lease and amended lease, contain ambiguous information that require further explanation. For example, despite assigning its purchaser rights to Civic, Glenmore appears to have had possessory rights to the premises prior to plaintiff's alleged accident. Additionally, there are paragraphs in the amended lease which allude to Glenmore's ability to participate in bi-weekly on-site construction meetings, and visually inspect the premises during construction (amended lease at ¶ 2.B [a] [ii]). Under the Labor Law, the term "owner" does not exclusively refer to the titleholder of the property, but also encompasses those who had "an interest in the property and . . . fulfilled the role of owner by contracting to have

work performed for his benefit” (*Cruz v 1142 Bedford Avenue, LLC*, 192 AD3d 859, 865 [2d Dept 2021], quoting *Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]). AF Defendants’ documentary submissions do not, and cannot, prove that AF Defendants did not have representatives on the premises interacting with, and perhaps controlling, the construction work being performed. These issues require discovery and are not resolved by the documents submitted to the court.

Therefore, AF Defendants’ motion to dismiss is denied.<sup>1</sup>

### CPLR 3212

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 Citybank*, 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]).

AF Defendants contend they are not proper Labor Law statutory defendants and cannot be held liable for negligence. AF Defendants rely on the lease/amended lease documentation to demonstrate that they had no involvement with the premises’ construction project and thereby cannot be charged with the nondelegable duty that “owners and general contractors” are subject to under the Labor Law.

As explained above, AF Defendants’ contractual documents alone are insufficient. Depositions are necessary to determine whether AF Defendants’ relationship(s) with the premises exposes them to liability under the Labor Law. As of this motion’s submission, no

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<sup>1</sup> Although AF Defendants’ papers only cite CPLR 3211 (a) (7), their argument is entirely based on CPLR 3211 (a) (1). Therefore, AF Defendants’ motion purportedly made under CPLR 3211 (a) (7) is denied as it is not supported by the moving papers.

party in this action has been deposed<sup>2</sup> (CPLR 3212 [f]; *see e.g. Groves v Land's End Hous. Co.*, 80 NY2d 978 [1992]). In the absence of any depositions, there are triable issues of fact concerning, *inter alia*, AF Defendants' relationship with work performed at the premises and whether it owed any kind of indemnification obligation to another party. Therefore, AF Defendants' motion is denied.

In their reply papers, AF Defendants provide what appears to be a fictitious citation, including what appears to be a fabricated holding in the citation's parenthetical.<sup>3</sup> "Many harms flow from the submission of fake opinions. . . . The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system" (*Mata v Avianca, Inc.*, 678 FSupp3d 443, [SDNY 2023]).

Pursuant to 22 NYCRR 130-1.1 (a),

[T]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in

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<sup>2</sup> Opposition was filed by both co-defendant/third-party plaintiff Headquarters Mechanical Inc. and plaintiff. While plaintiff's papers were untimely, defendants did not meet their prima facie burden, thus the court need not consider the sufficiency of the opposing parties' papers.

<sup>3</sup> AF Defendants cited "*Torres v. New York City Hous. Auth.*, 199 A.D.3d 1002, 1003 (2d Dept. 2021) (out-of-possession owner with right to reenter and inspect not liable under Labor Law where no supervision or control exercised)." The proper citation for the case is *Torres v. New York City Hous. Auth.*, 199 A.D.3d 852 (2d Dept. 2021), and the decision is only two pages long. The decision's holding does not involve the Labor Law liability of an out-of-possession landlord. Page 1002 of the reporter contains *Matter of Cardona v McNeill*, a denial of parental access petition. The court is, therefore, not convinced that this was a mere scrivener's error.

this Part, which shall be payable as provided in section 130-1.3 of this Part (*see also* NY RPC 3.3 [a] [1]).


Therefore, the Court is well within its discretion to sanction counsel for such conduct.

**Conclusion**

Defendants' motion (Seq. 004) is denied. All sides are directed to appear on October 1, 2025 at 10:00am for a hearing to address the question of appropriate costs and/or sanctions:

This constitutes the decision and order of the court.

September 18, 2025  
DATE

  
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DEVIN P. COHEN  
Justice of the Supreme Court