

Barquin v Toast Control Corp.

2012 NY Slip Op 33234(U)

April 5, 2012

Sup Ct, New York County

Docket Number: 107299/10

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 107299/2010
BARQUIN, MARIA LUISA
vs.
TOOST CONTROL
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3, 4

Replying Affidavits _____ | No(s). 5, 6

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

APR 10 2012

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/9/12


_____, J.S.C.
HON. EILEEN A. RAKOWER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
MARIA LUISA BARQUIN,

Plaintiff,

- against -

TOOST CONTROL AND ORSID REALTY
CORP.,

Defendants.

-----X
TOOST CONTROL CORP. AND ORSID REALTY
CORP.,

Third-Party Plaintiffs,

-against-

DR. JONATHAN KHAN AND LENOX HILL
HOSPITAL,

Third-Party Defendants.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Index No.
107299/10

**DECISION
and ORDER**

Mot. Seq. 001

FILED

APR 10 2012

COUNTY CLERK'S OFFICE
NEW YORK

Maria Luisa Barquin (plaintiff) brought this action on June 4, 2010, for damages she suffered when a door closed on her hand at 301 East 63rd Street, City, County and State of New York at the entrance to the building. Plaintiff's complaint alleges that she was injured because of Toost Control Corp.'s and Orsid Realty Corp.'s (Defendants/Third-Party Plaintiffs) failure to keep a safe premises. Toost Control Corp. and Orsid Realty Corp. are the owner and managing agent of the building, respectively. On September 16, 2011, Defendants filed a Third-Party Summons and Complaint against Dr. Jonathan Khan (Khan) and Lenox Hill Hospital (Lenox Hill) seeking defense and indemnification in the First-Party action. Lenox Hill is a Shareholder and Proprietary Lessee of unit 15H in the building. Khan is the Sublessee of unit 15H.

Khan moves to dismiss the Third-Party Complaint against him pursuant to CPLR §3211(a)(1) and (7). Lenox Hill makes a cross-motion to dismiss the Third-Party Complaint against it pursuant to CPLR §3211(a)(1) and (7). Defendants/Third-Party Plaintiffs oppose both motions.

Khan argues that nothing in the "Occupancy Agreement" makes him liable as a result of his status as an "Occupant" nor holds him responsible to indemnify defendants for personal injury on defendant's property. Lenox Hill asserts that there are no facts alleged that could in any way be construed as attributing liability for the alleged incident to Lenox Hill. Defendants/Third-Party Plaintiffs allege that there are cognizable theories against both parties for breach of contractual obligations, as well as for Khans alleged involvement in the incident. It is alleged that Khan was the person who closed the door on plaintiff's hand.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR §3211(a)(1) "the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted) "When evidentiary material is considered, the criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]) (emphasis added). A movant is entitled to dismissal under CPLR §3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

The evidence submitted indicates that there are cognizable legal theories against both Khan and Lenox Hill. Toost, the Lessor, and Lenox Hill, the Lessee, entered into a Proprietary Lease whereby Lenox Hill agreed to indemnify Toost for damages resulting from injury. The lease stated in pertinent part,

Indemnity. The Lessee agrees to save the Lessor harmless from all liability, loss, damage and expense arising from injury to person or property occasioned by the failure of the Lessee to comply with any provisions hereof, or due wholly or in part to any act, default or

omission of the Lessee..

Moreover, the "Occupancy Agreement" between Lenox Hill, the Lessee, and Khan, the Sublessee, provides,

Objectionable Conduct. Occupant shall not (a) engage... in any illegal, noisy or disorderly conduct or any conduct annoying or disturbing to the other occupants or tenants of the building; (b) interfere with the rights of others to properly and peacefully enjoy the Building or their premises; or (c) cause any condition that is dangerous, hazardous, unsanitary or detrimental to other occupants or tenants of the Building.

The "Occupancy Agreement" also states,

Occupant shall reimburse Lenox Hill for all costs (including attorneys fees and expenses) and expenses due to any loss or damages suffered by Lenox Hill, the Premises or the Building related to Occupant's failure or the failure... to obey the housing rules, regulations or policies of Lenox Hill or the Building or any other provision of this Occupancy Agreement.

The agreements clearly provide for cognizable theories of breach of contract/indemnification against both Khan and Lenox Hill.

Wherefore it is hereby,

ORDERED that the motion of third-party defendant DR. JONATHAN KHAN to dismiss the complaint is denied; and it is further,

ORDERED that the motion of third-party defendant LENOX HILL HOSPITAL to dismiss the complaint is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: April 5, 2012


EILEEN A. RAKOWER, J.S.C

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APR 10 2012
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