United Church Ins. Assn. v Axis Design Group Intl., LLC
2015 NY Slip Op 32164(U)
November 13, 2015
Supreme Court, New York County
Docket Number: 151873/15
Judge: Paul Wooten

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN **PART** 7
Justice

UNITED CHURCH INSURANCE ASSOCIATION a/s/o CHURCH OF THE COVENANT PRESBYTERIAN,

Plaintiff,

- against-

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MOTION SEQ. NO. 001

AXIS DESIGN GROUP INTERNATIONAL, LLC, JOSEPH V. LIEBER, P.E. PERSONALLY AND AS MANAGING MEMBER OF AXIS DEISGN GROUP INTERNATIONAL LLC, and ULM II HOLDING CORP.,

Defendants.

The following papers were read on this motion by defendants to dismiss the complaint.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

Before the Court is a motion by defendants Axis Design Group International LLC (Axis) and Joseph V. Lieber, P.E. personally and as manager member of Axis (Lieber), to dismiss the complaint as asserted against them, pursuant to CPLR 3211(a)(1) and (7). Plaintiff United Church Insurance Association (United) and co-defendant ULM II Holding Corp. (ULM) are in opposition to the motion. In this matter discovery is not complete and the Note of Issue has not yet been filed.

BACKGROUND

This is an action for damages to property in which United is acting as a subrogee of Church of the Covenant Prebyterian (Covenant). United is seeking damages from defendants based on defendants' alleged negligence with respect to an inspection of the premises located

at 310 East 42nd Street, New York, New York, which is property under the ownership of defendant ULM II Holding Corp. (ULM).

Pursuant to Local Law 11 of the Administrative Code of the City of New York (Local Law 11), ULM was under an obligation to conduct periodic inspections of the facades of its structures to assure that said facades were safe as required by applicable industrial and professional standards. ULM hired Axis to inspect ULM's facades. On December 14, 2011, pursuant to an agreement between these entities, Axis conducted its inspection and subsequently issued a report containing its observations and conclusions, as well as numerous photographs of the building. The report identified two conditions requiring repair prior to the next inspection, though not immediate repair: hairline cracking of glazed brick at the east facade, and the cracking of cement plaster. The report found no unsafe conditions at the premises. Covenant's building was adjacent to ULM's building, at 300 East 42nd Street.

In October 2012, the greater New York area was struck by Hurricane Sandy. During that period, brick from the parapet on the upper east facade of ULM's building blew loose and fell onto the roof and rooftop mechanical equipment of an adjacent hotel and the Covenant property. United, which insured Covenant, paid Covenant for property damage based on its policy terms, and now seeks a recovery from defendants in its capacity as Covenant's subrogee.

United alleges that defendants failed to make an adequate inspection of the facades in compliance with Local Law 11, allowed a deteriorated structure to remain in place despite its potential danger, and exacerbated a defective condition by failing to correct or protect against a potential danger over a span of time during which the condition progressively worsened. United contends that Covenant relied on the inspection and maintenance of the facades by defendants, to its detriment, and suffered damages as a result.

Axis and Lieber move for dismissal of the complaint, on the grounds of documentary

evidence and failure to state a cause of action. These defendants argue that they have no duty of due care towards Covenant and are, thus, not liable to it. They claim no contractual relationship with Covenant, as well as no relationship based on privity or third-party beneficiary.

The motion to dismiss is opposed by United and co-defendant ULM. United argues that Covenant was an intended beneficiary of the facade inspection conducted by Axis. Since the inspection was done in close proximity to Covenant's property, United asserts that the property was within a zone of danger. Also, the inspection was safety-related and required by law, thus, according to United, defendants were subject to the public safety exception to the general rule, extending defendants' duty to non-contracting parties. United contends that by failing to recognize the dangerous condition present during the inspection, all the defendants in this action allowed the building to further deteriorate, exacerbating the already dangerous condition.

ULM also argues that Axis and Lieber owed Covenant an extra-contractual duty. Because the inspection was performed pursuant to a local law mandate, ULM contends that, as a matter of public law, these defendants, in their failure to perform competently, are liable for the consequences caused by the hurricane.

In reply, Axis and Lieber argue that in their capacity as inspectors, they did not have the authority to repair or maintain ULM's structure. They deny doing anything to exacerbate the conditions of the facades which would have led to the property damage caused by the hurricane. While performing a service pursuant to local law, they assert that their duty did not extend to parties like Covenant.

STANDARD

CPLR 3211(a), provides that:

> "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;
> [7] The pleading fails to state a cause of action"

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*see Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank,* 300 AD2d 226 [1st Dept 2002]).

Pursuant to CPLR 3211(a)(1), in order to prevail on a motion to dismiss based on documentary evidence, "the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership.*, 221 AD2d 248, 248 [1st Dept 1995]; *see Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180 [1st Dept 2006]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). A CPLR 3211(a)(1) motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *see also Sempra Energy Trading Co. v BP Prods. N. Am., Inc.*, 52 AD3d 350, 350 [1st Dept 2008]).

Upon a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). A court must ensure that the plaintiff's statements can *sustain* a cause of action, not whether the

plaintiff has "artfully drafted the complaint" (*Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 306 [1st Dept 1995]; *see Guggenheimer*, 43 NY2d at 275 ["the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one"]).

DISCUSSION

In support of their motion, Axis and Lieber submit a copy of their inspection contract with ULM, which is proof of defendants' contractual relationship with ULM. There is no evidence before the Court that Axis and Lieber had a contractual relationship with Covenant, nor is there any evidence of a pre-existing duty to Covenant.

With respect to the portion of the motion brought pursuant to CPLR 3211(a)(7), in *Espinal v Melville Snow Contrs.*, (98 NY2d 136 [2002]), the Court of Appeals held that a contractual relationship between two parties does not create liability in negligence to a third party. "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal*, 98 NY2d at 138; *see also All Am. Moving & Stor., Inc. v Andrews,* 96 AD3d 674, 675 [1st Dept 2012]). There are three exceptions to this rule. A party may be seen as having assumed a duty of care to a third party if: (1) the contracting party, in failing to exercise reasonable care in the performance of its duty, launches a force or instrumentality of harm; (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) the contracting party has entirely displaced the other party's duty to maintain a safe premises (*Espinal*, 98 NY2d at 140).

The Court finds that Axis and Lieber have met their prima facie burdens entitling them to dismissal of the complaint pursuant to CPLR 3211(a)(1) and (7). The parties opposing this motion emphasize their belief that defendants launched a force or instrumentality of harm in that they exacerbated a dangerous condition, assuming the condition of the facades was dangerous. This has not been established. Further, there is no evidence that Covenant detrimentally relied on the inspection of the facades, since Covenant was not aware of the

inspection at the time it was performed. Nor have these parties demonstrated that the inspectors displaced ULM's duty to maintain a safe premises.

Despite their arguments, the opposing parties have not shown that the exceptions mentioned in *Espinal* are applicable here. *Espinal* is the Court's standard for a public policy on the issue of the liability of contracting parties to third parties, there is no special "zone of danger" standard which would expand defendants' liability, and plaintiff's cases concerning public safety have no application here. As such Axis and Lieber's motion to dismiss is granted.

CONCLUSION

Accordingly, it is

ORDERED that the motion by defendants Axis Design Group International LLC and Joseph V. Lieber's to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) is granted and the complaint is dismissed as against these defendants, with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further,

ORDERED that the action is severed and continued against the remaining defendant; and it is further,

ORDERED that counsel for defendants Axis Design Group International LLC and Joseph V. Lieber is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 11/13/15

Enter:

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**