

165 E. 82 LLC v Rees Roberts + Partners LLC
2017 NY Slip Op 31395(U)
June 26, 2017
Supreme Court, New York County
Docket Number: 157679/2016
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

**PRESENT: Hon. Robert D. Kalish
*Justice***

PART 29

165 East 82 LLC

**INDEX NO. 157679/2016
MOTION SEQ. 001**

- v -

**Rees Roberts + Partners LLC and
Blondie's Treehouse Inc.,**

The following papers, numbered 1-3 were read on the Defendants' motion to dismiss the Plaintiff's complaint pursuant to CPLR 3211(a)(1) and (7)

Defendant's motion ----- — Affirmations — Exhibits — Memorandums of law	No(s). <u>1</u>
Plaintiff's Opposition and Cross-Motion ----- — Affirmations — Exhibits — Memorandums of law	No(s). <u>2</u>
Defendant's Reply and Opposition to Cross Motion ----- — Affirmations — Exhibits — Memorandums of law	No(s). <u>3</u>

Upon the foregoing papers, the Defendant Blondie's Treehouse Inc.'s ("Blondie's") motion to dismiss the Plaintiff's action as against Blondie's pursuant to CPLR 3211(a)(1) & (7) and the Plaintiff's cross motion for costs and attorney's fees are both denied as follows:

Background

In the underlying property damage action, the Plaintiff claims in sum and substance that it sustained property damage to its townhouse due to the planters and irrigation systems on the terrace of said townhouse. Plaintiff alleges that the Defendants agreed to design, construct, install and/or maintain said planters and irrigation systems. Plaintiff alleges that said planters and irrigation systems were improperly and defectively designed, constructed, installed and maintained by the Defendants. The Plaintiff further alleges that the Defendants owed the Plaintiff a duty of care in the design, construction, installation and maintenance of the planters and

irrigation systems. Plaintiff alleges that the Defendants negligently failed to take reasonable and adequate precautions and measures to prevent said defective conditions. In addition, Plaintiff alleges that the Defendants' failure to adequately design, construct, install and/or maintain said planters and irrigation systems constituted a breach of contract.

The Defendant Blondie's now moves to dismiss the Plaintiff's action as against Blondie's pursuant to CPLR 3211(a)(1) & (7) based upon the documentary evidence and for failure to state a cause of action.

Parties' arguments on the instant motion

The Defendant argues in support of the instant motion that it performed the installation of the planters and irrigation systems, and that the Plaintiff's underlying action is untimely. The Defendant attached with the moving papers an affidavit by Howard Freilich, who attests that he is Blondie's President and Chief Executive Officer. Freilich states that Blondie's installed the subject planters and irrigation systems on the premises pursuant to two documents: a proposal dated October 14, 2009 and an executed change order dated July 12, 2010. He further states that Blondie's entered into the proposal with co-Defendant Reese Robert + Partners LLC ("RRP"). Freilich further states that Blondie's also performed certain work on the subject terrace pursuant to the change order, and that RRP accepted both the proposal and the change order on the date of execution listed on the change order. Freilich states that Blondie's was on site several times in order to complete the work listed in the proposal and change order, and that Blondie's generated invoices to allow for payment on an installment basis. He further states that Blondie's fully completed its work prior to the date of the last invoice, September 2, 2010.

Blondie's argues that the three year statute of limitation for negligence actions and the six year statute of limitation for breach of contract run from the date of the completion of installation, regardless of the date that the Plaintiff allegedly discovered the property damage. Blondie's argues that the Plaintiff had three years from September 2, 2010 to bring a negligence action and six year to bring an action for breach of contract, both of which the Plaintiff failed to do. As such, Blondie argues that the Plaintiff's action as against Blondie's should be dismissed as untimely.

In opposition and in support of its cross motion, the Plaintiff argues that its underlying action is not untimely since Blondie's continued to work on the planters and irrigation systems in 2011, 2012, 2013, 2014 and 2015. The Plaintiff attaches with its opposition papers copies of invoices, which Plaintiff argues shows that Blondie's performed work in 2011, 2012, 2014 and 2015. The Plaintiff further argues that since Blondie's motion is based upon a "false premise" inconsistent with the documentary evidence submitted by the Plaintiff, the Court should grant the Plaintiff's cross motion for costs and attorney's fees.

In reply and in opposition to the Plaintiff's cross motion, Blondie's argues that the Plaintiff has failed to submit any evidence to establish that the planters or irrigation systems were installed or constructed after 2010. Blondie's argues that the Plaintiff's complaint alleges solely that Blondie's improperly performed installation, construction and maintenance of the planters and irrigation systems on the terrace of the subject townhouse, and that the Plaintiff's attached invoices are not relevant to the installation or construction of the planters or irrigation systems. Blondie's further argues that it has a good faith basis to move for dismissal pursuant to CPLR 3211 and sanctions are unwarranted.

Analysis

"Pursuant to CPLR 3211 (a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that 'a defense is founded upon documentary evidence.' A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted 'only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law'...To be considered 'documentary', evidence must be unambiguous and of undisputed authenticity. To constitute documentary evidence, the papers must be 'essentially undeniable' and support the motion on its own" (*Allstate Ins. Co. v Lev Aminov, Internal Medicine, P.C.*, 2017 NY Slip Op 31172(U) (NY Sup Ct NY Cnty June 1, 2017) citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Mill Financial, LLC v Gillett*, 122 AD3d 98 [1st Dept 2014]; *Art and Fashion Group Corp v Cyclops Production, Inc.*, 120 AD3d 436 [1st Dept 2014]; *Fontanetta v Doe*, 73 AD3d 78 [2nd Dept 2010]; *Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y.*, Book 7B, CPLR C3211:10, at 21-22; *Raske v Next Mgt., LLC*, 40 Misc 3d 1240(A) (NY Sup Ct Ny Cnty 2013); *Philips South Beach, LLC v ZC Specialty Ins Co*, 55 AD3d 493 [1st Dept 2008]; *Amsterdam Hospitality Group, LLC v Marshall-Alan Associates, Inc.*, 120 A.D.3d 431, 992 N.Y.S.2d 2 [1st Dept 2014]).

Further “[i]n determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court’s role is deciding ‘whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail’. On a motion to dismiss made pursuant to CPLR § 3211, the court must ‘accept the facts as alleged in the complaint as true, accord plaintiffs ‘the benefit of every possible favorable inference,’ and ‘determine only whether the facts as alleged fit within any cognizable legal theory’. However, ‘allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not’ presumed to be true or accorded every favorable inference, and the criterion becomes ‘whether the proponent of the pleading has a cause of action, not whether he has stated one’”. (1046 *Madison Ave. Assoc., LLC v Bern*, 2017 NY Slip Op 30121(U) [NY Sup Ct Ny Cnty 2017] *citing African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]; *Nonnon v City of New York*, 9 NY3d 825,[2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *David v Hack*, 97 AD3d 437,[1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81[1st Dept 1999] *affd* 94 NY2d 659 [2000]; *Kliebert v McKoan*, 228 AD2d 232,[1st Dept 1996] *lv denied* 89 NY2d 802 [1996]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

Upon review of the submitted papers, this Court finds that the Defendant Blondie’s has failed to establish that the underlying action should be dismissed pursuant to CPLR 3211 (a)(1) and/or (7). Specifically, the invoices submitted by Blondie’s as “documentary evidence” do not establish that Blondie’s did not perform any additional work for the Plaintiff as to the planters and irrigation systems from 2010 through 2014. The Plaintiff’s claims against Blondie’s stems from installation, construction and maintenance of the planters and irrigation systems. Further, the Plaintiff has submitted additional invoices which show that the Defendant did perform work from 2010-2014 relating to the planters and irrigation systems. Based upon said additional invoices, the Court finds that the Plaintiff’s claims against Blondie’s does fit within a cognizable legal theory.

The Defendant has failed to establish that the Plaintiff’s claims against it stem solely from work that the Defendant complemented on or before September 2, 2010. As such, the Defendant has failed to establish that the statutes of limitation on the Plaintiff’s negligence and breach of contract claims ran from September 2, 2010 and are now untimely.

As such, the Court finds that Blondie's has failed to establish that it is entitled to dismissal of the Plaintiff's action pursuant to CPLR 3211 (a)(1) and/or (7).

Finally, the Court finds that the Plaintiff is not entitled to costs or attorney's fees. Although the Court is denying Blondie's' instant motion to dismiss, the Court does not find that the Blondie's made the instant motion in bad faith or otherwise acted in a manner warranting sanctions.

Accordingly and for the reasons so stated, it is hereby


ORDERED that the Defendant Blondie's motion to dismiss the underlying action pursuant to CPLR 3211 (a)(1) and (7) is denied. It is further

ORDERED that the Defendant Blondie's shall serve a copy of the underlying decision with notice of entry upon the Plaintiff within 20 days of the date of the instant decision. It is further

ORDERED that the parties shall appear before this Court for a preliminary conference on August 8, 2017 at 2:15 pm.

The foregoing constitutes the Order and Decision of the Court.

Dated: June 26, 2017


HON. ROBERT D. KALISH
J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check as appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE