

<b>Hyman v Black Sq. Bldrs. Corp.</b>
2018 NY Slip Op 33099(U)
December 3, 2018
Supreme Court, New York County
Docket Number: 151451/2018
Judge: William Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. W. FRANC PERRY** PART IAS MOTION 23EFM

*Justice*

-----X	INDEX NO.	151451/2018
SYDNEY HYMAN,	MOTION DATE	09/20/2018, 09/20/2018
Plaintiff,	MOTION SEQ. NO.	001 003
- v -		

BLACK SQUARE BUILDERS CORP., PETER MERELIS  
Defendant.

**DECISION AND ORDER**

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 23, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 42, 52, 53, 54, 55, 56, 65, 66, 67, 68 were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 57, 58, 59, 60, 61, 62, 63, 64 were read on this motion to/for DISMISSAL

In Motion Sequence 001 defendant, Peter Merelis (hereinafter Merelis) seeks an Order pursuant to CPLR 3211(a)(5) and CPLR 3211(a)(7) dismissing the Complaint on the grounds that plaintiff Sydney Hyman (hereinafter plaintiff) fails to state a valid cause of action, and the action is time-barred. Plaintiff opposes the motion. In Motion Sequence 003 Merelis seeks an Order pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) dismissing defendant Black Square Builders Corp.'s (hereinafter BSBC) cross claims on the grounds that BSBC's cross claims fail to state a valid cause of action, and are barred by documentary evidence, specifically, the contract between Merelis and BSBC. BSBC opposes the motion. The motions are consolidated for disposition.

## BACKGROUND

This action arises out of a fire that occurred during a gut renovation at Unit 4 of a cooperative apartment building located at 100 Grand Street, New York, New York. According to the allegations in the complaint, Merelis is the owner of the unit and on or about February 2015, Merelis hired BSBC to perform construction services at his residence. (NYSCEF Doc. No. 1). At that time, plaintiff rented the 5th Floor South Commercial Unit at 100 Grand Street, New York, New York and utilized the space for her art business. (id.). Plaintiff alleges that during the construction, defendants were negligent, and certain machinery caused a fire on February 19, 2015 within the building which spread into plaintiff's unit on the floor above. (id.).

Plaintiff alleges that as a result of defendants' negligence she sustained damages including, but not limited to, loss of the use of her unit for the remainder of the term of her lease and loss of use of a portion of her residence at 51 Greene Street, New York, New York, which she was forced to utilize as a space for her art business. (id.). Plaintiff asserts two causes of action in the complaint; the first cause of action alleges negligence against BSBC and the second cause of action alleges that Merelis was negligent in hiring, supervising, and monitoring BSBC in connection with construction services at 100 Grand Street and was negligent in the control, ownership and maintenance of his residence which contained certain machinery. (id.).

BSBC denied the essential allegations set forth in the complaint and in its answer asserted various affirmative defenses and cross claims against Merelis; one cross claim alleges negligence and seeks contractual indemnity, and the other seeks insurance coverage as an additional insured on the policy of liability insurance obtained by Merelis. (NYSCEF Doc. No. 40).

In his pre-answer motion seeking dismissal of plaintiff's second cause of action and dismissal of BSBC's cross claims, Merelis contends that BSBC was an independent contractor

and as such, was entirely responsible for any alleged damage to plaintiff resulting from the construction. In support of his motion, Merelis argues that the contract with BSBC establishes conclusively that the claims and cross claims asserted against him, must be dismissed, as a matter of law, for failure to state a valid claim. (NYSCEF Doc. No. 10).

#### STANDARD OF REVIEW/ANALYSIS

It is well established that “[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994], citing CPLR 3026).

Where dismissal of an action is sought, pursuant to CPLR 3211 (a) (1), on the ground that it is barred by documentary evidence, such relief may be warranted only where the documentary evidence “utterly refutes plaintiff’s factual allegations” and “conclusively establishes a defense to the asserted claims as a matter of law” (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept. 2014] [internal citations omitted]). The court is “not required to accept at face value every conclusory, patently unsupportable assertion of fact found in the complaint” and can “consider documentary evidence proved or conceded to be authentic” (*West 64th Street, LLC v Axis U.S. Ins.*, 63 AD3d 471, 471 [1st Dept. 2009], quoting *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 318 [1st Dept. 1987] [internal quotation marks omitted]).

Under CPLR §3211 (a) (7), a party may move for dismissal of one or more causes of action on the ground that the pleading fails to state a cause of action. On such a motion, the court is concerned with whether the plaintiff has a cause of action and not whether he has properly stated one. (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633,636 [1976]). The court will liberally construe the pleadings in plaintiff’s favor, accept the facts as true, and determine whether the

facts alleged fit within any cognizable theory. See (*Cron v. Hargro Fabrics*, 91 N.Y.2d 362, 366 [1998]). However, a court is not obliged to accept as true, legal conclusions or factual allegations that are either inherently incredible or flatly contradicted by evidence. See (*Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91 [1999]).

The Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking the allegations set forth in the complaint (see *Rovello*, 40 NY2d 633; *Guggenheimer*, 43 NY2d 268; see also *Board of Managers of Fairways at N. Hills Condominium v Fairways at N. Hills*, 150 AD2d 32, 545 NYS2d 343.[2d Dept. 1989]). When documentary evidence is submitted by a defendant "the standard morphs from whether the plaintiff stated a cause of action to whether it has one" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 135 [1<sup>st</sup> Dept. 2014]).

Based on well-established precedent, and contrary to the arguments advanced in opposition, the court can and will consider the documentary evidence submitted by Merelis in support of his motion to dismiss. (NYSCEF Doc. No. 10).

In motion sequence 003, Merelis seeks dismissal of BSBC's cross-claims on the basis that BSBC was hired as an independent contractor and controlled the means and method of the construction project. Merelis relies on various provisions of the contract which set forth the rights and obligations of the parties.

Article 13 of the contract is entitled "PROTECTION OF PERSONS AND PROPERTY" and provides: "The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs, including all those required by law in connection with performance of the Contract. The Contractor shall take reasonable precautions to prevent damage, injury or loss to employees on the Work, the Work and materials and equipment to be

incorporated therein, and other property at the site or adjacent thereto. The Contractor shall promptly remedy damage and loss to property caused in whole or in part by the Contractor, or by anyone for whose acts the Contractor may be liable.” (NYSCEF Doc. No. 10).

According to §8.3.1 of the contract, “[t]he Contractor shall supervise and direct the Work, using the Contractor’s best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work. §8.4.1 provides; “[u]nless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work.” §8.4.2 provides; “[t]he Contractor shall enforce strict discipline and good order among the Contractor’s employees and other persons carrying out the Contract Work. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.” (NYSCEF Doc. No. 10).

Notwithstanding the above provisions, BSBC argues that there is an issue of fact as to whether BSBC was an independent contractor. This argument must fail as the terms of the contract are clear and unambiguous and BSBC has not presented any evidence to the contrary, in opposition to the instant motion to dismiss.

As a general rule, a principal is not liable for the acts of an independent contractor because principals ordinarily do not control the manner in which independent contractors perform their work. *Chainani v. Board of Educ. of City of N.Y.*, 87 NY2d 370, 380-381, 639 NYS2d 971, 975, 663 NE2d 283, 287 [1995]. Control of the method and means by which work is to be performed, therefore, is a critical factor in determining whether a party is an independent contractor or an employee for the purposes of tort liability. *Harjes v. Parisio*, 1 AD3d 680, 680-

681, 766 NYS2d 270, 271 [2003], lv. denied, 1 NY3d 508, 777 NYS2d 17, 808 NE2d 1276 [2004]. Where the evidence on the issue of control presents no conflict, the matter may properly be determined by the court as a matter of law. *Lazo v. Mak's Trading Co.*, 199 AD2d 165, 166, 605 NYS2d 272, 273-274 [1st Dept 1993], aff'd, 84 NY2d 896, 620 NYS2d 794, 644 NE2d 1350 [1994].

Here, the evidence is the contract between BSBC and Merelis. Review of the contract provisions set forth above, clearly demonstrate that BSBC was hired as an independent contractor to complete the renovation in accordance with the terms and conditions of the contract. In opposing the motion to dismiss, BSBC does not argue that the contract is ambiguous or unenforceable. Rather, BSBC argues that the determination of whether BSBC was an independent contractor, presents an issue of fact and cites to several provisions of the contract, in an effort to demonstrate that the Owner and Architect had the right to supervise and control the work; specifically, BSBC cites sections 7.2, 7.3, 7.4, 7.4.1, 8.3.2, 9.2, 10.1, 14.3 and 16.2 of the contract. (NYSCEF Doc. No. 10).

BSBC also submits the affidavit of its owner, Jim Valouch, who argues that the Architect “was the eyes and ears of the project and as Agent of the Owner, exercised complete control of the work performed.” (NYSCEF Doc. No. 60, ¶15). In addition, BSBC submits a collection of emails between the Owner, Architect and BSBC to bolster its claim that there are issues of fact preventing this court from determining, as a matter of law, that BSBC was an independent contractor. (NYSCEF Doc. No. 61).

Careful review of the contract provisions and the emails submitted by BSBC in opposition, demonstrate that there are no issues of fact presented concerning control of the method and means by which the renovation work was performed in Merelis’ unit. To the

contrary, the contract provisions cited by BSBC simply demonstrate that the Owner and Architect retained general supervisory powers over the independent contractor; the collection of emails submitted, rather than creating an issue of fact, confirm that Merelis and the Architect were simply supervising the progress of construction consistent with the contractual provisions.

Moreover, §9.3 provides in unmistakable terms that the Architect “will not be responsible for, construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor’s responsibility. The Architect will not be responsible for the Contractor’s failure to carry out the Work in accordance with the Contract Documents.” (NYSCEF Doc. No. 10, §9.3).

While determination of whether the contractor acted as an independent contractor, typically involves a question of fact (*Malamood v Kiamesha Concord, Inc.*, 210 AD2d 26, 619 NYS2d 30 [1994]; *Lazo v Mak’s Trading Co.*, 199 AD2d 165, 166, 605 NYS2d 272 [1993], aff’d 84 NY2d 896, 644 NE2d 1350, 620 NYS2d 794 [1994]), in those instances where the evidence on the issue of control presents no conflict, the matter may properly be determined by the court as a matter of law (*Zedda v Albert*, 233 AD2d 497, 498, 650 NYS2d 301 [1996]; *Lazo v Mak’s Trading Co.*, 199 AD2d at 166). Moreover, the mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of liability against the principal (*Melbourne v New York Life Ins. Co.*, 271 AD2d 296, 297, 707 NYS2d 64 [2000]; *Santella v Andrews*, 266 AD2d 62, 63, 698 NYS2d 631 [1999], lv denied 94 NY2d 762, 729 NE2d 341, 707 NYS2d 622 [2000]). Accordingly, BSBC’s cross claim alleging negligence against Merelis is dismissed for failure to state a claim.

The cross claim seeking contractual indemnity against Merelis fails to state a claim and must be dismissed. §8.12 of the Contract specifically addresses BSBC’s indemnification obligation



as follows: “Contractor shall indemnify and hold harmless the Owner...from and against claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to ... destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor...regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.”

(NYSCEF Doc. No. 10, §8.12).

A review of the contract demonstrates that there is no provision that required Merelis to indemnify and/or assume the defense of BSBC. Rather, §8.12 requires BSBC, to indemnify Merelis, should plaintiff prevail on her underlying claims against BSBC. There is no reciprocal provision in which Merelis is contractually obligated to indemnify BSBC. The documentary evidence submitted in support of the motion to dismiss utterly refutes the allegations set forth in BSBC’s second cross claim and “conclusively establishes a defense to the asserted claims as a matter of law” (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept. 2014] [internal citations omitted]).

Similarly, BSBC’s third cross claim seeking Insurance Coverage/Indemnity from Merelis must be dismissed as the terms of the contract conclusively demonstrate a defense to this cross claim as a matter of law. §5.2 of the contract required Merelis to insure the value of the Unit and work performed by BSBC in the Unit. The contract does not state that Merelis is responsible for third-party claims arising from BSBC’s performance of the work. Rather, §5.3 provides: “[t]he Contractor shall obtain an endorsement to its general liability insurance policy to cover the Contractor’s [indemnification] obligations under Section 8.12. (NYSCEF Doc. No. 10. BSBC’s

third cross claim for insurance coverage and contractual indemnity is refuted by documentary evidence, and is dismissed as it fails to state a viable cause of action.

In motion sequence 001, Merelis seeks dismissal of plaintiff's second cause of action, alleging damages caused by "Merelis' negligence in hiring, supervising, and monitoring [BSBC] in connection with construction services at 100 Grand Street in addition to his negligence, carelessness, and recklessness in the control, ownership and maintenance of his residence which contained certain machinery". (NYSCEF Doc. No. 1, ¶19).

As noted above, the general rule is that a party who employs an independent contractor is not liable for the contractor's negligent acts since the party has no right to control the manner in which the work is done (see *Kleeman v Rheingold*, 81 N.Y.2d 270, 273, 598 N.Y.S.2d 149, 614 N.E.2d 712 [1993]; *Metzger v Yorktown Jewish Ctr.*, 283 A.D.2d 466, 724 N.Y.S.2d 644 [2001]; *Marino v City of New York*, 259 A.D.2d 469, 686 N.Y.S.2d 77 [1999]). A party may, however, be held liable for a contractor's negligence under theories of negligent hiring, negligent retention, and negligent supervision (see *Sato v Correa*, 272 AD2d 389, 707 N.Y.S.2d 371 [2000]). To hold a party liable under theories of negligent hiring, negligent retention, and negligent supervision, a plaintiff must establish that the party knew or should have known of the contractor's propensity for the conduct which caused the injury (see *Sato v Correa*, supra).

Accordingly, an essential element of a cause of action for negligent hiring and retention is that the party knew, or should have known, that the entity they were hiring exhibited a propensity for the sort of conduct which caused the injury (*Gomez v City of New York*, 304 A.D.2d 374, 758 N.Y.S.2d 298 [2003]; *Bellere v Gerics*, 304 A.D.2d 687, 688, 759 N.Y.S.2d 105 [2003]; *Yeboah v Snapple, Inc.*, 286 A.D.2d 204, 205, 729 N.Y.S.2d 32 [2001]). Plaintiff's complaint, however, is devoid of any allegations concerning this essential element, and, in

response to Merelis' motion to dismiss the second cause of action, plaintiff opted not to make any additional submissions to cure these deficiencies (see *Rovello v Orofino Realty Co., Inc.*, 40 N.Y.2d 633, 635, 357 N.E.2d 970, 389 N.Y.S.2d 314 [1976]; *Stephenson v Hotel Empls. & Rest. Empls. Union Local 100 of AFL-CIO*, 246 A.D.2d 457, 668 N.Y.S.2d 193 [1998]), or to identify additional discovery that is available to cure these deficiencies. (CPLR 3211 [d]; *Lancaster v Colonial Motor Frgt. Line, Inc.*, 177 A.D.2d 152, 155, 581 N.Y.S.2d 283 [1992]).

Instead, the only contention that could arguably sustain this essential pleading element is set forth in plaintiff's affirmation in opposition, wherein plaintiff's attorney states, "upon information and belief, in 2011, a state tax warrant was filed for [BSBC's] failure to pay New York state taxes." (NYSCEF Doc. No. 28, ¶4). This allegation does not cure plaintiff's pleading deficiency, nor does it demonstrate that Merelis knew, or should have known, that BSBC exhibited a propensity for the sort of conduct which caused the alleged injury here. (*Sheila C. v Povich*, 11 AD3d 120, 129-130, 781 NYS2d 342 [1st Dept. 2004]).

Similarly, plaintiff's allegations that Merelis' installation of a camera in the Unit to monitor the progress of construction and the fact that he himself took photographs and posted them to his Instagram account, do not create issues of fact, sufficient to refute the documentary evidence submitted in support of the instant motion. As noted above, the contract provides that BSBC controlled the method and means by which work was performed, and as such, BSBC is solely liable for any alleged damage that resulted from the performance of that work. *Lazo v Mak's Trading Co.*, 199 AD2d 165, 166, 605 NYS2d 272, 273-274 [1st Dept 1993], aff'd, 84 NY2d 896, 620 NYS2d 794, 644 NE2d 1350 [1994].

Moreover, as noted above, the mere retention of general supervisory powers over an independent contractor cannot form a basis for the imposition of liability against the principal. (*Melbourne v New York Life Ins. Co.*, 271 AD2d 296, 297, 707 NYS2d 64 [2000]). Accordingly, plaintiff's second cause of action fails to state a claim and is dismissed. The court has considered plaintiff's remaining contentions and finds them to be without merit. Accordingly, it is,

ORDERED that the motion of defendant Merelis, Motion Sequence 001, to dismiss the second cause of action in the complaint herein, is granted and the complaint is dismissed in its entirety as against said defendant, without costs and disbursements to said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant, Black Square Builders Corp.; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the Court bear the amended caption; and it is further

ORDERED that Motion Sequence 003 is granted and the cross claims of defendant Black Square Builders Corp. asserted against defendant Merelis are dismissed; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 307, 80 Centre Street, on March 5, 2019, at 9:30 AM; and it is further,

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

12/3/2018  
DATE

  
W. FRANC PERRY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE