Russell v Hudson River Park
2007 NY Slip Op 34503(U)
December 11, 2007
Supreme Court, Bronx County
Docket Number: 0007367/2007
Judge: Nelson S. Roman
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[* 1]

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 26

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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RUSSELL,JOHN Index Nº. **0007367/2007**

-against- Hon. **NELSON S. ROMAN** ,

HUDSON RIVER PARK Justice.

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The following papers numbered 1 to _____ Read on this motion, **DISMISSAL**
Noticed on **July 23 2007** and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers ~~this~~ The motion is resolved in accordance w. the annexed decision/order dated 12/11/07

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 1/1

Hon. NR 12/11/07
NELSON S. ROMAN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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JOHN RUSSELL,

Plaintiff(s),

- against -

HUDSON RIVER PARK TRUST OF NEW YORK, PILE FOUNDATION CONSTRUCTION CO., INC. OF NEW HYDE PARK, N.Y., WEEKS MARINE INC. OF CRANFORD, N.J., DMJM & HARRIS OF NEW YORK, BOVIS LEND LEASE LMB, INC., SKANSA USA, INC., AND SKANSKA USA BUILDING.

Defendant(s).

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DECISION AND ORDER

Index No: 7367/2007

Defendant DMJM+HARRIS, INC s/h/a DMJM & HARRIS OF NEW YORK (DMJM) moves seeking an order dismissing the within action pursuant to CPLR §§ 3211(a)(1) and 3211(a)(7). DMJM avers that dismissal pursuant to CPLR §3211(a)(1) is warranted insofar as the documentary evidence submitted establishes that DMJM's role was nothing more than the architect in the instant construction project and it did not nor did it have the ability to control, supervise, or direct the work giving rise to plaintiff's alleged accident. Alternatively, DMJM seeks dismissal pursuant to CPLR §3211(a)(7) averring that inasmuch as plaintiff neglected to plead that DMJM had the ability and did in fact control, supervise, or direct the work giving rise to plaintiff's alleged accident, plaintiff has failed to state a cause of action against DMJM given its role as architect. Plaintiff opposes the instant motion pursuant to CPLR §3212(f) asserting that the to the extent that discovery has scarcely been

conducted, the instant motion is premature. Plaintiff also argues that to the extent that the contracts relevant to the instant construction project grant DMJM some control over the work at the construction site, the instant motion must be denied.

For the reasons that follow hereinafter, DMJM's motion is hereby denied.

The instant action is for personal injuries allegedly sustained by plaintiff stemming from purported violations of Labor Law §§200, 240(1), and 241(6). The complaint alleges that defendant HUDSON RIVER PARK TRUST OF NEW YORK (Trust) was the owner fo premises under construction located at 26th Street and Eighth Avenue, New York, NY. (Plaintiff's complaint at ¶9). Defendants PILE FOUNDATION CONSTRUCTION CO., INC. OF NEW HYDE PARK (Pile), N.Y., WEEKS MARINE INC. OF CRANFORD, N.J. (Marine), BOVIS LEND LEASE LMB, INC. (Bovis), SKANSA USA, INC. (Skansa), AND SKANSKA USA BUILDING (Skansa USA) and DMJM were general contractors and/or construction managers at the aforementioned premises. (¶10-15). Trust retained Pile, Marine, DMJM, Bovis, Skansa, and Skansa USA to act as general contractor, construction manager, and/or bulkhead manager. (¶16-24). Trust, Pile, Marine, DMJM, Bovis, Skansa, and Skansa USA retained UNITED IRON (United) to perform work and labor at the aforementioned premises. (¶25, 26, 31, 36, 37, 42, 43, 44). Bovis and Skansa USA retained Pile to perform work and labor at the aforementioned premises. (¶27, 38). Bovis and SkansaUSA retained Weeks to perform work and labor at the aforementioned premises. (¶28, 33). Bovis and Skansa USA retained DMJM to perform work and labor at the aforementioned

premises. (¶29, 34). Bovis retained Skansa USA to perform work and labor at the aforementioned premises. (¶30). Skansa USA retained Pile, Weeks, DMJM, and Bovis to perform work and labor at the aforementioned premises. (¶32, 35, 40, 41). On August 25, 2006, plaintiff was injured while working at the instant premises as an employee of United. (¶45). It is alleged that plaintiff was injured as a result of defendants' negligence, in the ownership, operation, management, and control of the instant premises. (¶46). It is alleged that defendants failed to properly ensure that materials were properly secured, raised, tied in, and otherwise secured against slippage. (¶46). It is alleged that defendant's violated Labor Law §§200, 240(1), and 241(6).

In support of the instant motion DMJM submits an affidavit from William Demuth (Demuth), structural engineer, employed by DMJM. Demuth states that he was project engineer for DMJM in relation to the construction project at the premises herein. With regard to the project herein, DMJM was not construction manager, project manager, nor general contractor. DMJM was a sub-consultant hired by Joint Venture of Richard Dattner & partners Architects/ Miceli Kulik Williams & Associates (Architect). Architect was hired by Trust as the architect for the instant project and Architect hired DMJM as a consultant and engineer. Architect did not have the authority to perform work at the project herein. DMJM did not have the authority to perform work at the project herein and its role was limited to performing reviews of shop drawings and attending bi-weekly meetings. DMJM did not hire

United and did not have authority to control or direct the work at the project herein.

DMJM submits a copy of a consultant agreement between Trust and Architect. Said agreement is dated January 15, 2001 and Page 1 evinces that Architect was retained to provide services related to Trust's development of the Hudson River Park. Page 3 of the agreement allows Trust to increase or decrease the scope of Architect's work. Page 13 of the agreement defines Architect's status as that of consultant and not that of servant, agent, or an employee of Trust. Pages 38-58 of the contract list the services Architect is to provide. Said services are by and large limited to review of documents, drawings, design, analysis, and the attendance of meetings.

DMJM submits a copy of the agreement between itself and Architect. Said agreement is dated January 15, 2001. Page 1 of the agreement states that Architect was retained for the project herein and that DMJM is being retained to perform services outside Architect's general area of professional practice such as marine engineering. Page 2 of the contract prohibits communication between DMJM and the owner or contractor.

In opposition to the instant motion, plaintiff submits a copy of the contract between Trust and Pile wherein paragraph 4.6.1, Architect is given the authority to administer the contract herein and act as the owner's representative during construction. Paragraph 4.6.8 gives Architect the authority to reject work and

paragraph 4.6.14 authorizes Architect to order minor changes in the work.

Motion to Dismiss for Failure to State a Cause of Action

When deciding a motion to dismiss a plaintiff's complaint pursuant to CPLR §3211(a)(7), the Court must take all the allegations within the complaint as true. Sokoloffv. Harriman Estates Development Corp., 96 N.Y.2d 409 (2001); Cron v. Hargro Fabrics, Inc., 91 N.Y.2d 362 (1998). All reasonable inferences which can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiff. Id. In opposition to such a motion a plaintiff may submit affidavits to remedy defects in the complaint. Id. If an affidavit is submitted for that purpose, it shall be given its most favorable intendment. Id. The court's role when analyzing the complaint in the context of a motion to dismiss, is to determine whether the facts as alleged fit within any cognizable legal theory. Sokoloff v. Harriman Estates Development Corp., 96 N.Y.2d 409 (2001). In fact, the law mandates that the Court's inquiry not be limited to deciding whether plaintiff has pled the cause of action intended. Leon v. Martinez, 84 N.Y.2d 83 (1994). Instead, the Court must determine whether the plaintiff has pled any cognizable cause of action. Id. "(T)he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." Id. at 88. As Judge Cook in Guggenheimer v. Ginzburg, stated

> Initially, the sole criterion is whether the pleading

> states a cause of action, and from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion to dismiss will fail***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, and, unless it has been shown that a material fact as claimed by the pleader to be one is not fact at all and unless it can be said that no significant dispute exists regarding it again dismissal should not eventuate.

Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977).

Thus, on a motion to dismiss, particularly where it is alleged that plaintiff has failed to state a cause of action pursuant to CPLR §3211(a)(7), the Court must examine the pleadings against the backdrop of cognizable causes of action. If it appears that the plaintiff has no cognizable cause of action either because plaintiff has failed to articulate facts amounting to a cause of action or because the law bars such an action based on the factual circumstances wherein the cause action arose, the Court must dismiss the cause of action.

The Court can consider evidentiary material submitted by the defendant and may use the same to assess the viability if a complaint. Id. As such,

> 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, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate.

Id. at 275. Stated differently, if the evidentiary material submitted indicates that the facts pled in the complaint are not facts at all and no dispute regarding the same exists, the complaint should be dismissed. Id.; Mayerhoff v. Timenides, 269 A.D.2d 369 (2nd Dept. 2000); Adams v. O'Connor, 245 A.D.2d 537 (2nd Dept. 1997).

CPLR §3013, requires that

> (s)tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

As such, a complaint must contain facts essential to give notice of a claim or defense. DiMauro v. Metropolitan Suburban Bus Authority, 105 A.D.2d 236 (2nd Dept. 1984). Vague and conclusory allegations will not suffice. Id.; Fowler v. American Lawyer Media, Inc., 306 A.D.2d 113 (1st Dept. 2003); Shariff v. Murray, 33 A.D.3d 688 (2nd Dept. 2006); Stoianoff v. Gahona, 248 A.D.2d 525 (2nd Dept. 1998); Washington Avenue Associates, Inc. v. Euclid Equipment, Inc., 229 A.D.2d 486 (2nd Dept. 1996). When the allegations in a complaint are vague or conclusory, dismissal for failure to state a cause of action is warranted. Schuckman Realty, Inc. v. Marine Midland Bank, N.A., 244 A.D.2d 400 (2nd Dept. 1997); O'Riordan v. Suffolk Chapter, Local No. 852, Civil Service Employees Association, Inc., 95 A.D.2d 800 (2nd Dept. 1983).

CPLR 3211(a)(1)

The proponent of a motion to dismiss plaintiff's complaint pursuant to CPLR

§3211(a)(1), that a defense is founded upon documentary evidence, bears the burden of coming forward with documentary evidence, which utterly refutes the factual allegations contained in plaintiff's complaint thereby conclusively establishing a defense to the asserted claims as a matter of law. Goshen v. Mutual Life Insurance Company of New York, 98 N.Y.2d 314 (2002); Leon v. Martinez, 84 N.Y.2d 83 (1994); IMO Industries, Inc., v. Anderson Kill & Olick, P.C., 267 A.D.2d 10 (1st Dept. 1999); Saxony Ice Co., division of Springfield Ice Co., Inc. V. Ultimate Energy Restaurant Corp., 810 N.Y.2d 344 (2nd Dept. 2006). Documentary evidence means judicial records, judgments, orders, contracts, deeds, wills, mortgages and " a paper whose content is essentially undeniable and which, assuming the verity of it's contents and the validity of its execution, will itself support the ground upon which the motion is based." Webster v. State of New York, 2003 WL 728780 (Court of Claims 2003). Affidavits and deposition transcripts are not documentary evidence establishing relief under CPLR §3211(a)(1). Fleming v. Kamden Properties, LLC, 41 A.D.3d 781 (2nd Dept. 2007); Berger v. Temple Beth-El of Great Neck, 303 A.D.2d 346 (2nd Dept. 2003); Brown v. Solomon and Solomon, P.C., 181 Misc.2d 461 (City Court, Albany County 1999).

Labor Law and Architects

It is well settled that absent the ability to control, direct, and/or supervise the work at a construction site, an architect is not liable under sections 200, 240(1), or 241(6) of the Labor Law. Fox v. Jenny Engineering Corporation, 122 A.D.2d 532 (3rd

Dept. 1986), Affd, 70 N.Y.2d 761 (1987); Walker v. Metro-North Commuter Rail Road, 11 A.D.3d 339 (1st Dept. 2004); Zolotar v. Krumpinski, 36 A.D.3d 802 (2nd Dept. 2007); Boyd v. Lepera and War P.C., 275 A.D.2d 562 (3rd Dept. 2000). To the extent that architects seldom have the aforementioned authority, it is generally accepted that architects do not bear any liability in cases asserting violations of §§240(1) and 241(6) of the Labor Law. Walls v. Turner Construction Company, 4 N.Y.3d 861 (2005), R.S. Smith, J dissenting, Thompson v. St. Charles, 303 A.D.2d 152 (1st Dept. 2003); Gonzalez v. Pon Lin Realty Corp., 34 A.D.3d 638 (2nd Dept. 2006).

Discussion

DMJM's motion seeking dismissal pursuant to CPLR §3211(a)(1) is hereby denied. It is well settled that the proponent of a motion to dismiss pursuant to CPLR §3211(a)(1) bears the burden of coming forward with documentary evidence, which utterly refutes the factual allegations contained in plaintiff's complaint thereby conclusively establishing a defense to the asserted claims as a matter of law. It is equally well settled that only certain documents will suffice, namely "those whose content is essentially undeniable and which, assuming the verity of it's contents and the validity of its execution." Affidavits and deposition transcripts are not documentary evidence establishing relief under CPLR §3211(a)(1). DMJM has failed to meet the requisite burden.

In order to establish entitlement to dismissal, DMJM correctly avers that absent authority to direct, control, or supervise work, architects are generally not

liable under the Labor Law. Accordingly, in order to establish entitlement to summary judgment pursuant to CPLR §3211(a)(1), DMJM needs to establish, using admissible documents, that it was merely an architect with regard to the project herein who neither directed, supervised, nor controlled plaintiff's work. In support of its motion, DMJM submits an affidavit, the contract between Trust and Architect, and the contract between itself and Architect. While the affidavit is probative and actually establishes DMJM's defense, it is nonetheless inadmissable and cannot be considered on a motion to dismiss pursuant to CPLR §3211(a)(1). Thus, the only admissible documentary evidence are the contracts. To the extent that said contracts fail to conclusively establish that DMJM had no authority to control, supervise, or direct plaintiff's work, the instant motion must be denied. The contracts provided merely outline Architect and DMJM's responsibilities, which the Court acknowledges do not include supervision of plaintiff's work. However, said contracts do not specify that DMJM was in anyway restricted from engaging in supervision, direction or control of work and no admissible evidence provided establishes that DMJM did not engage in such conduct or was proscribed from doing so. As such, the motion, to the extent that it seeks dismissal pursuant to CPLR §3211(a)(1) is hereby denied.

DMJM's motion seeking dismissal pursuant to CPLR §321(a)(7) for plaintiff's failure to state a cause of action, is hereby denied. When deciding a motion to dismiss a plaintiff's complaint pursuant to CPLR §3211(a)(7), the court must deem

all the allegations within the complaint as true. Thereafter, the test is whether deeming all assertions as true, plaintiff states any cause of action. Contrary to DMJM's assertion, the law is not all akin to the law on summary judgment. To that extent, the court is not concerned with defendant's evidence and is instead concerned with the facial sufficiency of plaintiff's pleading. To the extent that plaintiff pled violations of Labor Law §§200, 240(1), and 240(6), that DMJM was the construction manager and/or general contractor in the instant project, and that DMJM exercised control over the site, assertions that must be taken as true, plaintiff has stated a cause of action. To the extent that all reasonable inferences which can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiff, that plaintiff pled control is enough, even if he didn't specifically plead supervision, or direction over plaintiff's work. As such, the motion herein is hereby denied.

ORDERED that plaintiff serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : December 11, 2007
Bronx, New York

12/11/07
Nelson S. Roman, J.S.C.