Weisberg v Mystic Bulk Carrier Northeast
2007 NY Slip Op 34600(U)
July 17, 2007
Supreme Court, New York County
Docket Number: 111102/04
Judge: Carol R. Edmead

[* 1]

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

PRESENT: EDMEAD Justice PART 35

JACK WEISBERG

- v -

MYSTIC BULK CARRIER NORTHEAST

INDEX NO. 111102/04

MOTION DATE 7/17/07

MOTION SEQ. NO. 2

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	
Answering Affidavits – Exhibits	
Replying Affidavits	

FILED

JUL 23 2007

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The only opposition to the instant motion is from defendant/third-party plaintiff Hess Corporation f/k/a and s/h/a Amerda Hess Corporation ("Hess").

Claims by plaintiff Jack Weisberg, co-defendant/third party plaintiff Hess and 229 Owners Corp. have been discharged in the bankruptcy of Mystic Tank Lines Corp. ("MTL"), pursuant to the Chapter 11 plan of reorganization, confirmed by the Honorable Raymond T. Lyons, United States Bankruptcy Judge for the United States Bankruptcy Court, District of New Jersey in case bearing index no. 04-28333 9RTL) (the "Discharge").

Mystic Transportation, Inc., which changed its name to New York Truck Leasing Corp. although not named as a party to this action, is likewise covered by the Discharge

However, said Discharge does not include defendant Mystic Bulk Carrier Northeast, LLC ("Northeast). Although the Complaint alleges that Hess entered into an agreement with Northeast, Northeast denies that any such agreement or arrangement existed. And, no such agreement has been provided to the court. Further, Northeast states that it is not a proper party because Northeast did not deliver fuel to the premises where plaintiff's accident occurred. It is

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

Dated: _____

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

uncontested the Northeast was a corporation that never did any business. Northeast was incorporated solely for the purpose of purchasing real estate. However, when a deal for the purchase of certain real estate fell through, Northeast was never utilized for any other business purpose.

Pursuant to CPLR 3211 [a] [l], 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." Thus, where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]). The test on a CPLR 3211 [a][1] motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" *(Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] *citing Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

Where documentary evidence and undisputed facts negate or dispose of the claims in the complaint or conclusively establish a defense, dismissal may be granted pursuant to CPLR 3211[a][1] (*Biondi v Beekman Hill Housing Apt. Corp.*, 257 AD2d 76, 692 NYS2d 304 [1st Dept 1999]; *Kliebert v McKoan*, 228 AD2d 232, 43 NYS2d 114 [1st Dept 1996]; *Gephardt v Morgan Guaranty Trust Co. of N.Y.*, 191 AD2d 229, 594 NYS2d 248 [1st Dept 1993]; *Juliano v McEntee*, 150 AD2d 524, 541 NYS2d 232 [1st Dept 1989]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 N.E.2d 511 [1994]; *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]).

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026). 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 into any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, in those circumstances where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*,

84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort].

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a] [7] where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]).

On a motion to dismiss directed at the sufficiency of the complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings: "The scope of a court's inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed" (*1199 Housing Corp. v International Fidelity Ins. Co.*, NYLJ January 18, 2005, p. 26 col.4, *citing P.T. Bank Central Asia v Chinese Am. Bank*, i 301 AD2d 373, 375 [2003]), the object being "to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action" (*id. at 376; see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]).

Defendant, by contrast, is subject to a strict pleading provision. In an action on a contract, the obligation to raise the issue of compliance with conditions precedent rests on the party disputing their performance or occurrence (*1199 Housing Corp. v International Fidelity Ins. Co.*, NYLJ January 18, 2005, p. 26 col.4, *citing* CPLR 3015[a]; *see* Siegal, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3015:2, at 52). Thus, the burden to plead "specifically and with particularity" that any condition precedent has not been fulfilled rests on the party resisting enforcement of the contract (*id.*). At trial, the proponent of the agreement is required to demonstrate fulfillment of the condition only to the extent specified by the party asserting noncompliance. An exception is made if the performance or occurrence of a condition precedent has been expressly pleaded in in the complaint, in which case a general denial will suffice to place satisfaction of the condition in issue (*see Allis-Chalmers Mfg. Co. v Malan Constr. Corp.*, 30 NY2d 225, 232-233 [1972]).

Based on the submissions before the court, and oral argument, it is hereby

ORDERED that the motion of defendant Mystic Bulk Carriers Northeast LLC and third-party defendant Bulk Carriers Leasing Corp. f/k/a Mystic Bulk Carriers, Inc. is granted to the extent of:

(1) discontinuing the action by plaintiff Jack Weisberg as to defendant Mystic Bulk Carriers Northeast LLC as said defendant is an improper party defendant;

(2) dismissing the cross claims of co-defendants Amerada Hess Corporation and 229 Owners Corp.;

(3) dismissing the third-party complaint of Hess Corp. f/k/a and s/h/a Amerada Hess Corporation against Bulk Carriers Leasing Corp. f/k/a Mystic Bulk Carriers, Inc.

(a) because the claims alleged in the action and third-party action are discharged pursuant to a Chapter 11 plan or reorganization, confirmed by the Honorable Raymond T. Lyons, United States Bankruptcy Judge for the United States Bankruptcy Court, District of New Jersey in case bearing index no. 04-28333 (RTL), and

(b) because Bulk Carriers Leasing Corp. is not a proper party defendant to this action. It is further

ORDERED that an inquest will be held on attorney's fees related to the third-party action only on September 24, 2007 in Part 35; and it is further

ORDERED that third-party defendant serve a copy of this order with notice of entry upon third-party plaintiff and the Clerk of the Trial Support Office (Room 158) within 20 days of entry, file of a note of issue and a statement of readiness and pay the proper fees, if any, for the assessment hereinabove directed.

ORDERED that counsel for third-party defendant shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties.

Dated 7/17/07 **ENTER:** _____, J.S.C.

HON. CAROL EDMEAD

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

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