Flete v FC 80 DeKalb Assoc., LLC
2010 NY Slip Op 33815(U)
December 8, 2010
Sup Ct, Bronx County
Docket Number: 303289/09
Judge: Wilma Guzman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 7

Index No. **303289/09**
Motion Calendar No. 5
Motion Date: 10/13/10

WILSON FLETE,

Plaintiff,

-against-

FC 80 DeKALB ASSOCIATES, LLC.

Defendants.

DECISION/ ORDER

Present:
Hon. Wilma Guzman
Justice Supreme Court

FC 80 DeKALB ASSOCIATES, LLC.

Third-Party Plaintiff

-against-

SITE SAFETY, LLC.

Third-Party Defendant

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for to dismiss:

Papers	Numbered
Notice of Motion, Affirmation in Support, Exhibits thereto	**1**
Affirmation in Opposition	**2**
Reply Affirmation	**3**

After due deliberation upon the foregoing papers, the Decision/Order on this motion and cross-motion is as follows:

Third-Party Defendant Site Safety, Inc., (hereinafter referred to as "Site Safety") moves for summary judgment pursuant to C.P.L.R. §3211(a)(1) and C.P.L.R. §3211(a)(7) dismissing the third-party complaint of FC 80 Dekalb Associates, LLC. (hereinafter referred to as "FC 80 DeKalb"). Third-Party Plaintiff FC 80 DeKalb submitted written opposition.

Plaintiff Flete commenced this action seeking damages for injuries allegedly sustained as the result of injuries allegedly sustained on December 9, 2008 at 80 DeKalb Avenue, Brooklyn, NY,

when plaintiff was a construction worker engaged in dismantling a scaffold. FC 80 DeKalb was the owner of the property on which plaintiff was injured. FC 80 Dekalb commenced a third-party action against Site Safety, which was contracted to perform safety services related to the construction project. Third-Party Plaintiff FC DeKalb alleges that Site Safety failed to maintain safety compliance, that pursuant to a contract Site Safety agreed to indemnify and hold harmless FC 80 Dekalb from any and all claims arising out of the work of Site Safety and that Site Safety failed to procure, obtain and maintain insurance coverage which would provide liability coverage to FC 80 Dekalb Associates.

In support of the motion for summary judgment, Third-Party Defendant Site Safety submits, inter alia, a copy of the pleadings, the January 7, 2008 agreement between FC 80 Dekalb and Site Safety, the affidavit of Peter Amato, and the Certificate of Liability Insurance.

Peter Amato affirms that he is the President of Site Safety and indicates that all relevant documents were submitted in support of the motion. Mr. Amato further indicates that Site Safety's responsibilities are governed by NYC Building code and Chapter 26 of RCNY.

The Agreement indicates in pertinent part:

A) The Services. The scope of the services Safety Firm [or consultant or Site Safety] is obligated to perform under this Agreement (the "Services") is set forth more fully in Exhibit A. Safety Firm must provide all labor, equipment, and other work necessary to furnish the Services, whether expressly stated in this Agreement or reasonably implied herein as necessary to fully perform the Services.

Exhibit A of the Agreement indicates that the Consultant includes practicing and implementing all site safety measures as indicated on the NYC Approved drawing & Specifications in accordance with the requirements, including but not limited to, the following:

a) Provide Site Safety Manager for duration of the Project.

b) Provide full time NYC Certified Site Safety Manager (NYSSM) in accordance with the Building Code & Chapter 26 of the RCNY to monitor Project. There shall be a NYSSM on site during construction; there shall be not be a gap in coverage. Consultant shall always have a NYSSM on standby in case the Primary NYSSM has to leave the site or is ill.

c) Develop and draft a site safety specific health & safety plan (HASP)

d) Advise the Program manger of any Trades/Subcontractors who fail to comply with the Site Safety Program.

e) Consultant will conduct weekly safety meetings during the project and attend all meetings

required of the Program Manager or the Owner as it relates to the Consultant's Services.

f) Consultant will maintain a safety logbook with daily reports, and any detailed incident or accident reports on a form to be approved by the Owner. The logs and reports will include observations of safety compliance or non-compliance and are always available for Inspection during regular construction hours. The Consultant shall immediately notify the Program Manager and Owner of any incident or accident or occurrence that Consultant believes or should believe may result in a claim against the Owner or Project.

g) Design & Draft a safety & logistics plan.

e) Filing with B.E.S.T. squad.

A motion to dismiss pursuant to C.P.L.R. § 3211(a) can be made by a party seeking to dismiss one or more causes of action against him on the ground that:

1. a defense is founded upon documentary evidence;

7. the pleading fails to state a cause of action.

A motion to dismiss pursuant to C.P.L.R. § 3211(a)(1) should be granted only where the documentary evidence submitted absolutely resolves all factual allegations made in the plaintiff's complaint. Leon v. Martinez, 84 N.Y2d 83.

A site safety consultant can be held liable to a plaintiff for injuries allegedly sustained in a Labor Law cause of action where, pursuant to a contract or through its actions, controls or supervises the worker or his co-workers in his performance of duties, supplied safety equipment to the job site, or acts negligently or otherwise unreasonably as site consultant. Doherty v. City of New York, 16 A.D.3d 124 (1st Dept. 2005). See also, Greaves v. Obayashi Corp., 61 A.D.3d 570 (1st Dept. 2009); Waller v. Site Safety LLC., 28 A.D.3d 236 (1st Dept. 2006). Questions of fact exist as to the level of supervision and control third-party defendant had over the work of the plaintiff or the equipment. The contract itself indicates that the safety consultant must provide all "labor, equipment and other work necessary to furnish the services." Peter Amato's affidavit does not sufficiently clarify the role of Site Safety and interpret the contract as indicated. As such, questions of fact prevent the dismissal of this action based upon the documentary evidence alone. See also Gaspar v. LC Main, LLC., 27 Misc. 3d 1212(A) (2010).

Section Q indicates in pertinent part:

"To the fullest extent permitted by law, Safety Firm shall indemnify and hold harmless the Owner from and against any and all actions, liabilities, claims, losses, costs, injuries, damages, and

expenses, including reasonable attorney fees that may be incurred b y Owner . . . to the extent caused by the acts or omissions of Safety Firm or anyone for whom it is legally responsible. . ."

Based upon the foregoing and the questions of fact remaining as to Site Safety's liability, the issue of indemnification is premature.

Section R indicates in pertinent part:

"Safety Firm, shall before commencing Services under this Agreement, and throughout the term of the Agreement, obtain and maintain the following insurance policies at its own cost . . . e) nam[ing] the following as additional insured (with the exception of Workers Compensation). (I) FC DeKalb Associates, LLC."

The Certificate of Liability Insurance, which is dated December 22, 2008 and names FC 80 DeKalb as an additional insured, indicates in relevant part that the Commercial General Liability policy was effective March 3, 2008 to February 28, 2009.

A Certificate of Insurance, without more, is only evidence of a carriers intent to provide coverage and not proof that an insurance contract exists. Kermanshah v. Oriental Rugs, Inc.,47 A.D.3d 438 (1st Dept.2008). However, where as here, a Certificate of Insurance which indicates that it is provided as a matter of information and confers no rights upon the certificate holder, the certificate is notice to the insure that a police has been issued. Progressive Casualty Ins. Co. V. Yodice, 276 A.D.2d 540 (2nd Dept. 2000).

The Site Safety Manager's Log is dated Tuesday December 9, 2008 and indicates the unsafe acts and/or conditions including location, who was notified, and when corrected.

Based upon the foregoing, third-party defendants motion to dismiss under C.P.L.R.§ 3211(a)(1) is denied.

Defendant's motion to dismiss under C.P.L.R. §3211(7) is likewise denied. A motion to dismiss pursuant to C.P.L.R. § 3211(a)(7) requires that the Court favorably view the pleadings to determine whether a valid cause of action exists. Leon v. Martinez, 84 N.Y.2d 83 (1994). On a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the pleading is to be afforded a liberal construction (*see* CPLR § 3026). The court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.(See, Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.2d 972 [1994]; *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425, 754 N.E.2d 184 [2001]). A CPLR § 3211 motion should be

granted only where "the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted." Biondi v. Beekman Hill House Apartment Corp., 257 A.D.2d 76 (1st Dept. 1999). Factual claims either inherently incredible or flatly contradicted by documentary evidence are not presumed to be true or accorded favorable inference. Biondi v. Beekman Hill House Apartment Corp., supra, citing Kliebert v. McKoan, 228 A.D.2d 232, lv denied, 89 N.Y.2d 802. However, unless it has been shown that a claimed material fact as pleaded is not a fact at all and there exists no significant dispute regarding it, dismissal is not warranted. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977). A liberal reading of the pleadings, in addition to the record before the Court which includes the promissory notes and the defendant's submission of partial payment, not complete payment, warrants denial of the defendant's motion. See also, New York State Higher Education Services Corp. v. Barry, 267 A.D.2d 567 (1999). Furthermore, the Pleading may be amplified by the Bill of Particulars. Nelson v. New York University Medical Center, 51 A.D.2d 352(1st Dept. 1976); *See generally*, East Hampton Free School Dist. v. Sandpebble Builders Inc., 66 A.D.3d 122 (2nd Dept. 2009).

Based upon the foregoing, third-party defendant's motion under C.P.L.R. §3211(a)(7) is denied.

Accordingly, it is

ORDERED that third-party defendant's motion to dismiss is denied in its entirety. It ifurther

ORDERED that third-party defendant defendants shall serve a copy of this Order with Notice of Entry upon plaintiff within thirty (30) days of entry of the Order.

This constitutes the decision and Order of the Court.

Date DEC 08 2010

HON. WILMA GUZMAN,
Justice Supreme Court