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SHORT FORM ORDER

INDEX NO. 16926-2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 9-16-12
ADJ. DATE 2-19-13
Mot. Seq. # 001 - MD; 002 - MD

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KATHERINE CONROY, as Administrator of the Estate of THOMAS CONROY, deceased, and KATHERINE CONROY, individually,

Plaintiff(s),

- against -

DORMITORY AUTHORITY OF THE STATE OF NEW YORK, NEW YORK STATE UNIVERSITY CONSTRUCTION FUND, HUGHES ASSOCIATES, LANDSCAPE ARCHITECTS, PLLC d/b/a HMH SITE & SPORTS DESIGN, LASER INDUSTRIES, INC., BOHEMIA GARDEN CENTER, INC., MS CONSTRUCTION CORP. and WELSBACH ELECTRIC CORP. OF L.I.,

Defendant(s).

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Jakubowski, Robertson, Maffei, Goldsmith & Tartaglia, LLP
Attorneys for Plaintiff
969 Jericho Turnpike
St. James, New York 11780

Shein & Associates, P.C.
Attorneys for Defts **DASNY and Laser Industries**
575 Underhill Boulevard, Suite 112
Syosset, New York 11791

Tromello, McDonnel & Kehoe
Attorneys for Defts **Hughes Assoc, Landscape Architects d/b/a HMH Site & Sport Design**
Post Office Box 9038
Melville, New York 11747-9038

Law Office of Andrea G. Sawyers
Attorneys for Deft **Bohemia Garden Center**
Post Office Box 9028
Melville, New York 11747

London Fischer LLP
Attorneys for Deft **Welsbach Electric**
59 Maiden Lane
New York, New York 10038

Eric T. Schneiderman
Attorney General for the State of New York
Claims Bureau
Justice Building, the Capitol
Albany, New York 12224

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendant Hughes Associates, dated August 6, 2012, and supporting papers; (2) Notice of Motion by the plaintiff, dated January 9, 2013, and supporting papers; (3) Affirmation in Opposition by the state defendant, dated September 6, 2012, and supporting papers; (4) Affirmation in Opposition by the defendant Welsbach Electric, dated October 26, 2012, and supporting papers; (5) Affirmation in Opposition by the plaintiff, dated August 16, 2012, and supporting papers; (6) Reply Affirmation by the defendant Hughes Associates, dated September 14, 2012, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (001) by defendant, Hughes Associates Landscape Architects, PLLC d/b/a HMH Site & Sports Design, which seeks an order granting dismissal of plaintiff's complaint and any cross-claims against said defendant pursuant to CPLR 3211(a)(1) and (a)(7), is hereby denied; and it is further

ORDERED that the plaintiffs' motion (seq. #002), which seeks an Order for a default judgment, pursuant to CPLR §3215, against defendant MS Construction Corp. is hereby denied, without prejudice and with leave to resubmit upon proper proofs, for failure to establish evidentiary proof of compliance with the additional notice requirements of CPLR §3215(g)(4), which is required when a default judgment is sought against a corporation upon which service was made by the Secretary of State; and it is further

ORDERED that plaintiffs' counsel shall promptly serve a copy of this Order upon all appearing parties, or their attorney(s) if represented by counsel, by First Class mail and shall promptly thereafter file the affidavit(s) of such service with the County Clerk; and it is further

ORDERED that a copy of this Order and proof of service of same shall be annexed as exhibits to any motions resubmitted pursuant to this Order.

Plaintiff's complaint alleges that as a result of the defendants' negligence on May 21, 2011, the plaintiff/decedent, Thomas Conroy, was caused to fall to the ground while riding his bicycle within a construction zone located on the premises of the State University of New York at Farmingdale, Town of Babylon. The accident is said to have occurred at or about the Heating Plant on Perimeter Road East, on the Gleason Hall side of the roadway. Plaintiffs allege that as a result of his accident, Mr. Conroy sustained personal injuries and eventual death.

Generally, on a CPLR 3211 motion to dismiss, the court will accept the facts 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 (*Nonnon v City of New York*, 9 NY3d 825, 842 NYS2d 756 [2007]; *Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). 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 pursuant to CPLR 3211(a)(1) on the ground that the action is barred by documentary evidence may be appropriately granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 808 NYS2d 573 [2005]; *Goshen v Mutual Life Ins. Co. of New York*, 98

NY2d 314, 746 NYS2d 858 [2002]; *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *Thompsen v Baier*, 84 AD3d 1062, 923 NYS2d 607 [2d Dept 2011]; *Rietschel v Maimonides Medical Center*, 83 AD3d 810, 921 NYS2d 290 [2d Dept 2011]).

In other words, the documentary evidence must resolve all factual issues as a matter of law and conclusively dispose of the plaintiff's claim (*Palmetto Partners, L.P., v AJW Qualified Partners, LLC*, 83 AD3d 804, 921 NYS2d 260 [2d Dept 2011]; *Paramount Transp. Sys., Inc. v Lasertone Corp.*, 76 AD3d 519, 907 NYS2d 498 [2d Dept 2010]). In order for evidence to qualify as "documentary," it must be unambiguous, authentic, and undeniable (*Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 921 NYS2d 108 [2d Dept 2011]; *Granada Condominium III Assn.,v Palomino*, 78 AD3d 996, 913 NYS2d 668 [2d Dept 2010]). If the court does not find the submissions "documentary," the motion must be denied (*Fontanetta v John Doe*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010]).

On the question of whether the complaint states a cause of action sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the court is to liberally construe the pleadings, accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *Corsello v Verizon New York, Inc.*, 77 AD3d 344, 908 NYS2d 57 [2d Dept 2010]; *Lawlor Consultants, Ltd. v Shoreham-Wading Riv. Cent. School Dist.*, 40 AD3d 1048, 834 NYS2d 875 [2d Dept 2007]; *Fay Estates v Toys "R" Us, Inc.*, 22 AD3d 712, 803 NYS2d 135 [2d Dept 2005]).

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the allegations in the complaint should be accepted as true. Such a motion should be granted only where, viewing the allegations as true, the plaintiff cannot establish a cause of action; however, bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action. When the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one (*Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 795 NYS2d 68 [2d Dept 2005]; *Meyer v Guinta*, 262 AD2d 463, 464, 692 NYS2d 159 [2d Dept 1999]; *Mayer v Sanders*, 264 AD2d 827, 695 NYS2d 593 [2d Dept 1999]). On a motion made pursuant to CPLR §3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]).

Generally in construction matters, an entity retained to assure compliance with construction plans and specifications is not liable for injuries to a member of the general public unless that entity commits an affirmative act of negligence or such liability is clearly imposed by contract (*Hernandez v Yonkers Contracting Co., Inc.*, 306 AD2d 379, 760 NYS2d 865 [2d Dept 2003]; *Fecht v City of New York*, 244 AD2d 315, 663 NYS2d 891 [2d Dept 1997]). However, notwithstanding an express disclaimer of liability to third persons that may exist in an agreement in favor of a defendant, where an issue exists regarding the extent of supervision or control actually exercised by that defendant at a construction site, which could give rise to common-law or statutory liability, summary dismissal in favor of that defendant should be denied (see *Haden v Fenley & Nicol Environmental, Inc.*, 273 AD2d 273, 709 NYS2d 582 [2d Dept 2000]; *D'Andria v County of Suffolk*, 112 AD2d 397, 492 NYS2d 621 [2d Dept 1985]). Here, such issues exist, which precludes dismissal in favor of Hughes.

In its dismissal motion, Hughes asserts that it was neither retained nor responsible for site safety for the construction project at issue. By agreement dated October 8, 2008, Hughes entered into a written Consultant's Agreement ("the Agreement") with the State University Construction Fund ("the Fund") to provide certain design services related to the rehabilitation and expansion of the University campus. According to Hughes, the Agreement does not provide for, and Hughes did not undertake any responsibility for the means, methods, sequences or techniques of construction. In sum, Hughes asserts that the site safety, including protection of the construction area, and the moving and securing fences, was the sole responsibility of the contractor that was separately retained by the Fund.

In opposition to Hughes's motion, the plaintiff and the Fund point to the Consulting Agreement and raise questions as to whether any of Hughes's personnel or agents committed any affirmative act of negligence, thereby creating a dangerous condition that caused or contributed plaintiff's injuries. Despite Hughes's general assertion that the Agreement provides documentary evidence upon which the Court should dismiss the complaint and cross-claims pursuant to CPLR 3211, the Court notes various provisions of the Agreement that raise questions regarding Hughes's performance and potential contractual, common law and statutory liability. For Example, Article I, Section B(6)b. requires Hughes to:

> Furnish such field administration of each construction contract and inspection of the work of each contractor as may be necessary or appropriate to assure that materials and workmanship conform with the contract documents. [Hughes] shall use all reasonable care and diligence and exercise its best efforts to assure that the project is constructed in accordance with the drawings and specifications. [Hughes] shall use all reasonable care and diligence and exercise its best efforts to discover any breach of the construction contract, and if it becomes aware of any breach, it shall immediately notify the Fund thereof. In the event of such breach, [Hughes] shall submit to the Fund its recommendations for appropriate remedial action. . . .

Article I, Section B(6)d. requires Hughes to "[f]urnish a Field Representative and such assistants as are required . . . to provide full-time personal field administration of each construction contract and inspection of, and attention to, all the work to be performed by each contractor. . . ." Article I, Section B(6)h. requires Hughes to "[t]ake positive action, within the limits of the Consultant's authority hereunder and under the provisions of the applicable construction contract, to safeguard the interests of the Fund and the State University of New York whenever necessary or appropriate."

Article VII, which addresses the liability of Hughes, provides:

> In addition to any liability or obligations of [Hughes] to the Fund that may exist under any other provisions of this Agreement or by statute or otherwise, [Hughes] shall be liable for and hold harmless and indemnify the Fund from and against any damages, lawsuits, claims and liabilities . . . which the Fund may sustain, be subject to or be caused to incur by virtue of or as a result of any claim, demand, lawsuit, proceeding, action or cause of

> action in connection with the Project for . . . (2) any negligent act or omission of [Hughes], its agents, employees, officers, subconsultants or subcontractors.

These provisions in the Agreement present issues regarding the extent of supervision or control actually exercised by Hughes on the project, which may give rise to common-law or statutory liability on the part of Hughes (see *Haden v Fenley & Nicol Environmental, Inc.*, 273 AD2d 273, 709 NYS2d 582 [2d Dept 2000]; *D'Andria v County of Suffolk*, 112 AD2d 397, 492 NYS2d 621 [2d Dept 1985]). Furthermore, notwithstanding Hughes's arguments to the contrary, given these contractual provisions, the Agreement does not constitute documentary evidence that utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law upon which the plaintiff's complaint should be dismissed pursuant to CPLR 3211(a)(1) (see *AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 808 NYS2d 573 [2005]; *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 746 NYS2d 858 [2002]; *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *Thompsen v Baier*, 84 AD3d 1062, 923 NYS2d 607 [2d Dept 2011]; *Rietschel v Maimonides Medical Center*, 83 AD3d 810, 921 NYS2d 290 [2d Dept 2011]).

Paragraphs 26 through 30 of the plaintiffs' complaint essentially allege that Hughes: was hired and/or retained to perform construction work and/or repair work and/or installation work at the subject premises; entered into a contract to and/or agreement to perform construction work and/or repair work and/or installation work at the subject premises; was the general contractor for such work; and supervised, directed and controlled such work at the location where the decedent's accident happened. In considering Hughes's motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the Court accepts these allegations as true and finds that the complaint does state a cause of action sufficient to warrant denial of Hughes's dismissal motion under CPLR 3211(a)(7) (see *Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 795 NYS2d 68 [2d Dept 2005]; *Meyer v Guinta*, 262 AD2d 463, 464, 692 NYS2d 159 [2d Dept 1999]; *Mayer v Sanders*, 264 AD2d 827, 695 NYS2d 593 [2d Dept 1999]). Based upon the foregoing, dismissal in favor of Hughes is denied.

Plaintiffs' motion (002) for default judgment against MS Construction Corp., is also denied. As for the notice necessary on a motion for default against a corporation, CPLR 3215(g)(4)(i) requires, in pertinent part, that "[w]hen a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served [upon the Secretary of State] pursuant to [BCL §306(b)], an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment." In relevant part, CPLR §3215(g)(4)(ii) further provides that the "additional service of the summons by mail may be made simultaneously with or after the service of the summons on the defendant corporation pursuant to [BCL §306(b)], and shall be accompanied by a notice to the corporation that service is being made or has been made pursuant to that provision. An affidavit of mailing pursuant to this paragraph shall be executed by the person mailing the summons and shall be filed with the judgment." Since plaintiffs' motion fails to establish compliance with the additional mailing requirements of CPLR §3215(g), the motion for a default judgment against MS Construction Corp. must be denied at this time.

This constitutes the Order of the Court.

Dated: September 16, 2013

PETER H. MAYER, J.S.C.

[ ] FINAL DISPOSITION

[X] NON FINAL DISPOSITION