

Delgrange v Madison Immobilier, LLC

2013 NY Slip Op 33602(U)

October 18, 2013

Supreme Court, New York County

Docket Number: 151651/13

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOAN A. MADDEN PART 11
Justice

Philippe Delgrange,

INDEX NO.: 151651/13

Plaintiff,

MOTION DATE: 10/27/13

- v -

MOTION SEQ. NO.: 001

Madison Immobilier, LLC

MOTION CAL. NO.:

Defendant.

The following papers, numbered 1 to _____ were read on this motion to/for attachment & cross motion to dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion & cross motion are decided in accordance with the answered memorandum Decision & order.

Dated: October 18, 2013

[Signature]
J.S.C.

HON. JOAN A. MADDEN
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
PHILIPPE DELGRANGE,

Plaintiff,

-against-

INDEX NO. 151651/13

MADISON IMMOBILIER, LLC, ROBERT CAVALLI,
INC., ROBERT CAVALLI, USA, INC., JEAN-PIERRE
LEHMANN, ART FASHION CORP., JOHN DOES 1-25,

Defendants.

-----X
JOAN A. MADDEN, J.:

Plaintiff Philippe Delgrange (Delgrange or plaintiff) moves, by order to show cause, for (i) an order pursuant to CPLR 6201(1) and 6212(a) attaching funds from the upcoming sale of the building situated at 25 East 63rd Street, New York, NY (“Building”), and (ii) an order granting expedited discovery within seven days, and immediate access to the Building to permit plaintiff to inspect, take measurements, sample and otherwise record the air and other conditions in the Building to determine whether, and how much, airborne asbestos is present. Defendants Madison Immobilier, LLC (“Madison”) and Jean-Pierre Lehmann (“Lehmann”) opposes the motion and cross move to dismiss the complaint based on documentary evidence. Defendants Roberto Cavalli, Inc., Robert Cavalli, USA, Inc. and Art Fashion Corp. (together “the Cavalli defendants”)¹ oppose the motion.

This action arises out of certain construction work performed at the Building beginning on or about December 2012, which resulted in the release of asbestos in the air and caused the New York City Department of Environmental Protection (“DEP”) to shut down the project by order dated February 7, 2013, but work was subsequently permitted to proceed when asbestos

¹On April 30, 2013, while this motion was pending, the parties entered into a stipulation discontinuing the action as against defendants Roberto Cavalli, Inc. and Robert Cavalli, USA.

abatement was completed on February 19, 2013. Delgrange is a residential tenant in the Building and asserts that he was exposed to asbestos as the result of defendants' allegedly negligent, reckless and dangerous conduct.

Madison, which is a New York limited liability company, owns the Building, and Lehmann is Madison's Chief Executive and the sole owner of the two members that own Madison. Art Fashion has leased space in the Building since 1999, and in December 2010, it entered into a new lease agreement with Madison to expand the size of its retail store to include space formerly leased by Delgrange.

The Amended Verified Complaint alleges that the work at issue involves extensive renovation and demolition work to convert the Space from a restaurant and apartment into a retail store. It is further alleged the certain DOB permits were required to perform the work, including an application to change to Certificate of Occupancy, and that such application was denied, but that a permit was granted with respect to certain demolition work. In addition, it is alleged that as part of the process of obtaining permits defendants were required to obtain the services of a certified asbestos inspector, file an Asbestos Assessment Report ("ACP-5") and other plans and reports with DOB. It is alleged "on information and belief" that on or about December 19, 2012, defendants caused to be filed a ACP-5 which falsely stated the area of the Building affected by the work was free of asbestos containing material, and that on or about January 4, 2013, defendants began the demolition work without following proper procedures to protect the building tenants from asbestos exposure. It is also alleged that Lehmann was personally involved in the project including, but not limited to, directing that the demolition and construction continue, without filing the appropriate documents, and that he knew or should have known and/or recklessly disregarded that there was asbestos on the premises.

The Verified Amended Complaint next alleges that on February 5, 2013, a DEP inspector visited the Building and inspected the area where the demolition work was being performed and issued a stop work order on or about February 7, 2013, which is annexed to the complaint. The stop work order requires that for work to resume, an amended ACP-5 must be submitted and approved by DEP, and that the ACP-5 be accompanied by an official laboratory bulk sample result(s). It is alleged “upon information and belief” that the work is continuing in the Space despite the stop work order issued by DEP.

The Verified Amended Complaint asserts causes of action for (1) an injunction enjoining defendants from proceeding with the work until such time as the Stop Work Order has been lifted and the asbestos properly abated, (2) interference with plaintiff’s rights of quiet enjoyment of his apartment and nuisance for which plaintiff seeks compensatory and punitive damages, (3) negligence for which plaintiff seeks compensatory and punitive damages, and (4) breach of the warranty of habitability for which plaintiff seeks a rent abatement.

In the attachment motion, plaintiff seeks order attaching the funds from an upcoming sale of the Building based the assertion, upon information and belief, that the Building is the sole asset of Madison and that the funds will be disbursed outside of New York to Lehmann who is a resident of Switzerland.

This motion and cross motion were originally scheduled for oral argument on April 11, 2013. By interim order dated April 11, 2013, Delgrange was permitted to withdraw his motion for an attachment conditioned on Madison providing to him “written notice of the following evidence whichever is earliest to occur; (1) the date of execution of a contract for sale of the subject building, or (2) three months notice of the closing date of such sale.” The order also provided, *inter alia*, that Delgrange be permitted to test and inspect those parts of the Building

under construction, and, that on the date Delgrange conducts testing Madison be permitted to inspect and test the Apartment. The balance of Delgrange's motion was denied without prejudice, and the order permitted the motion to be renewed and restored to the calendar upon stipulation. The cross motion was adjourned to June 27, 2013.

By letter dated April 29, 2013, John Simoni, Jr., Esq., counsel for Madison and Lehmann, wrote to Richard Wasserman, Esq., counsel for Delgrange, that a Stock Purchase Agreement was executed and effective on April 26, 2013; that it is not a contract of sale of the Building but instead the sale of stock of the two corporations (Madison Immobilier Corp. and Nosidan Realty Corp) which own 100% of the membership interest in Madison; that following the closing of the transaction, Madison will remain the 100% fee owner of the Building. The letter also stated that a portion of the SPA closed in an "Initial Closing" on April 26, 2013 "with 19% of the shares of Madison Immobilier Corp. and Nosidan Realty Corp sold for a fixed sum of money, [and that] at the Final Closing Date² ...the balance of the two corporations would be sold or by which the 19% stock interests would be returned as part of the cancellation of the entire transaction." The letter also advised Mr. Wasserman that the SPA was subject to the Confidentiality Order and should be kept confidential.

On April 30, Mr. Wasserman wrote a letter in response requesting information as to how the deal underlying the SPA was structured and seeking a copy of the SPA. Mr. Wasserman also denied that any confidentiality agreement applied so the SPA, which is public information.

When Madison refused Delgrange's request to provide it with a copy of the SPA, Delgrange moved, by order to show cause, to require Madison to provide it with a copy of the

²The letter indicated that no Final Closing date had been set but that the buyer had a right to terminated the SPA if there was no closing on or before June 26, 2013.

SPA, arguing that the structure of the sale is crucial to determining whether there will be assets to satisfy a potential judgment in favor of Delgrange. Delgrange also argued that the SPA and expedited discovery is needed to that it can renew its motion for an order of attachment.

By decision and order dated June 11, 2013, the court denied Delgrange's motion to compel and for expedited discovery finding, *inter alia*, that "[a]s Madison was the owner of the Building at the time of the underlying events, and will still be the owner if the transaction anticipated by the SPA closes, [and] it remains potentially liable for damages," and therefore grounds for an attachment do not exist. Accordingly, as the conditions for withdrawal of the motion for attachment have been satisfied, and as there are no grounds for granting an attachment, the motion must be denied.

The remaining issues pertain to the cross motion to dismiss by Madison and Lehmann. In support of the cross motion these defendants submit evidence that the asbestos containing material which consisted of material on pipe insulation in the basement was lawfully abated and that as of February 28, 2013, the DEP certified that the abatement was complete and no asbestos remained. These defendants also assert that all air monitoring reports taken before and after the abatement no asbestos exposure and that no false ACP-5 was filed in December 2012. In support of their arguments, Madison and Lehmann submit, *inter alia*, the affidavits of Robert Jordan, a certified asbestos inspector, retained by the project manager to perform an asbestos inspection of the Space; Dennis Rivera, a president of a company licensed and approved in New York State to provide asbestos monitoring and sampling; and Brian Donohue of Continental Group, the project manager involved in the site, together with various documentary evidence. Defendants also maintain that the action was commenced not due to any asbestos issue but as the result of Madison's refusal to renew the lease of a restaurant owned by plaintiff and financed by Ronald

Perelman, and submit an affidavit from the president of their managing agent in support of their position.

In opposition to the cross motion, plaintiff argues that the air sampling tests relied on by defendants were conducted five months after the claimed initial asbestos exposure. Plaintiff also submits asbestos testing results received from samples taken from the Building, and a covering letter from an asbestos testing company, indicating that the ceiling plaster at the third floor of the Building contains 5% asbestos. Plaintiff also submits a photograph taken by his attorney on June 12, 2013, of construction work in an area on the third floor where the bulk sample containing asbestos was allegedly taken.

In reply, defendants Madison and Lehmann submit results from its asbestos testing consultant from tests performed at plaintiff's apartment and other areas of the Building on June 13, 2012 which shows that there was no asbestos present in the Building or in plaintiff's apartment.

A motion to dismiss pursuant to CPLR 3211(a)(1), "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). "To be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity." Fontanetta v. Doe, 73 A.D.3d 78, 86 (2nd Dept 2010), *citing*, Siegel's Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, at 21-22, CPLR 3211(a)(1), C3211:10; see also Tsimerman v. Janoff, 40 A.D.3d 242 (1st Dep't 2007). Thus, affidavits, emails and letters are not considered documentary evidence. Fontanetta v. Doe, 73 A.D.3d at 86. Likewise, records of a governmental department, such as the Department of Transport have been held to be not "essentially undeniable" and thus "not good documentary evidence." Id.

Under this standard, the affidavits and attached documents submitted by Madison and Lehmann do not provide a basis for dismissing the complaint based on documentary evidence under CPLR 3211(a)(1).³ In any event, even if certain of the documents qualify as documentary evidence, on consideration of such evidence the court finds that such documents are insufficient to establish a defense as a matter of law, particularly in light of the testing results submitted by plaintiff in opposition to the cross motion.

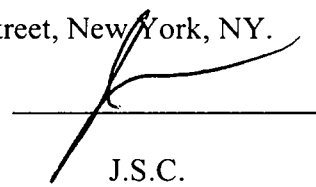
In view of the above, it is

ORDERED that the motion for an attachment is denied; and it is further

ORDERED that cross motion to dismiss is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on November 14, 2013, at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: October 18, 2013



J.S.C.

HON. JOAN A. MADDEN
J.S.C.

³To the extent defendants argue that the Amended Verified Complaint is not properly verified, any such defect is insufficient to provide a basis for dismissing the complaint. See Reply Affirmation of Suzan Arden.