Pulgliano v Grand Baldwin Mgt. Corp.
2014 NY Slip Op 33840(U)
June 12, 2014
Supreme Court, Nassau County
Docket Number: 601525/13
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

TRIAL/IAS, PART 40
NASSAU COUNTY

MARIE PULGLIANO,

Plaintiff(s),

-against-

Index No. 601525/13

Motion Seq. No.: 001
Motion Submitted: 4/17/14

GRAND BALDWIN MANAGEMENT CORP., and DOLLAR TREE STORES, INC.,

Defendant(s).

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Defendant, Dollar Tree Stores, Inc., moves this court for an Order dismissing Plaintiff's Complaint, as it relates to Dollar Tree Stores, Inc. (Dollar Tree), upon the documentary evidence pursuant to CPLR §3211(a)(1). Defendant also seeks sanctions pursuant to 22 NYCRR 130-1.1 due to Plaintiff's failure to release Dollar Tree from the case prior to motion practice. Plaintiff opposes the motion.

Plaintiff commenced this action by the filing of an Amended Summons and Complaint dated December 2, 2013, against Grand Baldwin Management Corp., (Grand)

and Dollar Tree. Grand is Dollar Tree's landlord. On October 27, 2012, Plaintiff alleges she was in the parking lot of Dollar Tree and fell, causing her injury. Defendant Dollar Tree asserts it is not liable as its lease with Grand clearly indicates Grand is responsible for the parking lot.

A party seeking relief pursuant to CPLR 3211(a)(1) " 'on the ground that its defense is founded upon documentary evidence has the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim' " (*Flushing Sav. Bank, FSB v. Siunykalimi*, 94 AD3d 807, 808 [2d Dept 2012], *quoting Mazur Bros. Realty, LLC v. State of New York*, 59 AD3d 401, 402 [2d Dept 2009]; *see Leon v. Martinez*, 84 NY2d 83, 88 [1994]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v. John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010]).

A motion to dismiss a complaint pursuant to CPLR § 3211(a)(1) may be granted only if the documentary evidence submitted by the moving party "utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law" (*Kopelowitz & Co., Inc. v. Mann*, 83 AD3d 793, 796 [2d Dept 2011]; *Fontanetta v. John Doe* 1, 73 AD3d 78, 83 [2d Dept. 2010]).

In order for evidence to qualify as "documentary," it must be unambiguous, authentic, and undeniable (*Fontanetta v John Doe 1*, 73 AD3d 78, 84-86 [2d Dept 2010]). Neither affidavits, deposition testimony, nor letters are considered "documentary evidence" under CPLR § 3211 (a) (1) (*see Suchmacher v Manana Grocery*, 73 AD3d

1017 [2d Dept 2010]; *Fontanetta v John Doe* 1, 73 AD3d at 85-87 [2d Dept 2010]). Affidavits submitted by a defendant "will almost never warrant dismissal under CPLR 3211" (*Lawrence v Miller*, 11 NY3d 588, 595 [2008]). In the context of CPLR § 3211(a)(1), the narrow exception to this general rule might be affidavits used solely to establish the *bona fides* of other, genuinely documentary evidence.

"To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Tietler v Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; *see also, Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Museum Trading Co. v Bantry*, 281 AD2d 524 [2d Dept 2001]; *Jaslow v Pep Boys--Manny, Moe & Jack*, 279 AD2d 611 [2d Dept 2001])

The documentary evidence submitted by Dollar Tree utterly refutes the plaintiff's factual allegations and resolves all of the factual issues regarding the defendant's operation, maintenance, management and control of the parking lot in which the Plaintff allegedly fell. (*see* CPLR § 3211[a][1]; *Springer v. Almontaser,* 75 AD3d 539, 540 [2d Dept. 2010]).

The lease entered into between Dollar Tree, as tenant, and Grand, as landlord states that the parking lot falls within the definition of "Common Area". Section 7.05 of the lease states, in pertinent part, "Landlord shall, as between Landlord and Tenant, at all times during the Term have the *sole and exclusive control, management and direction* of

the Common Areas..." (Emphasis added). In light of the documentary evidence, there is no theory under which Dollar Tree can be liable to Plaintiff. As such, Dollar Tree has established its entitlement to dismissal pursuant to CPLR § 3211 (a)(1).

Dollar Tree further seeks sanctions as it requested that Plaintiff voluntarily release Dollar Tree from the case, in light of the language in the lease. The Court finds Plaintiff's actions do not rise to the level of being sanctionable.

Accordingly, it is therefore

ORDERED, that Dollar Tree's motion is GRANTED and the claims asserted against it are dismissed; and it is further

ORDERED, that Dollar Tree's motion for sanctions pursuant to 22 NYCRR 120-1.1 is DENIED.

This constitutes the decision and order of the court.

Dated: June 12, 2014
Mineola, N.Y.

HON. JAMES P. McCORMACK, A.J.S.C.