

**Muboyayi v A/R Retail LLC**

2014 NY Slip Op 34047(U)

May 23, 2014

Supreme Court, Bronx County

Docket Number: 23075/2013E

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

X

DIEUDONNE MUBOYAYI,

**DECISION/ORDER**

Plaintiff,

-against-

Index No.: 23075/2013E

A/R RETAIL LLC, AOL TIME WARNER REALTY INC.,  
THE BOARD OF MANAGERS OF TIME WARNER  
CENTER CONDOMINIUM, THE RELATED COMPANIES, L.P.,  
TIME WARNER CENTER CONDOMINIUM, and  
TIME WARNER REALTY, INC., and WHOLE FOODS  
MARKET GROUP, INC.,

Defendants.

X

The following papers numbered 1 to 16 read on the below motion noticed on **December 20, 2013** and duly submitted on the Part IA15 Motion calendar of **February 10, 2014**:

<u>Papers Submitted</u>	<u>Numbered</u>
Def Whole Foods Motion, Memo of Law, Exh.,	1,2,3
Pl. Aff. In Opp., Exh.	4,5
Time Warner Aff. In Partial Opp., Exh.	6,7
A/R Retail Aff. In Partial Opp., Exh.	8,9
Whole Foods Aff. In Reply, Exh., Memo of Law	10,11,12
Time Warner Aff. In Further Opp. Exh.	13,14
A/R Retail Aff. In Further Opp. Exh.	15,16

Upon the foregoing papers, the defendant Whole Foods Market Group, Inc. ("Whole Foods"), moves for an order extending time to file its motion to dismiss, and to dismiss the complaint of the plaintiff Dieudonne Muboyayi ("Plaintiff"), pursuant to CPLR 2004, 3211(a)(1) and (7). Plaintiff opposes the motion. Defendants A/R Retail LLC., The Related Companies, LP, Time Warner Center Condominium, and the Board of Managers of Time Warner Center Condominium (collectively "A/R Retail"), as well as defendant Time Warner Realty, Inc. ("Time Warner") submit partial opposition to the motion.

## I. Background

Plaintiff is a former employee of Whole Foods who was allegedly injured by an elevator while working at Whole Foods within the scope of his employment. Plaintiff signed an incident report wherein he stated that he suffered an accident in the receiving elevator while working for Whole Foods on August 28, 2010. On October 7, 2011, Plaintiff participated in a Workers' Compensation Hearing, wherein Plaintiff was awarded benefits from Whole Foods totaling \$8,515.73 for injuries sustained in the course of his employment. Whole Foods fully compensated Plaintiff for his workers' compensation award in October 2011.

Whole Foods now seeks an extension of time to respond to Plaintiff's complaint, and dismissal of this action on the basis that it is barred by Workers' Compensation Law's exclusivity provision. Counsel assert that prior to Whole Foods' deadline to respond to the complaint, he reached out to Plaintiff's counsel multiple times to secure a stipulation to extend time to answer. Plaintiff's counsel would only agree to an extension if Whole Foods waived their right to make a motion to dismiss. Whole Foods rejected this condition and thereafter made the instant motion.

In partial opposition, co-defendants A/R Retail and Time Warner argue that they have asserted cross-claims against Whole Foods for contractual indemnification and breach of contract. Accordingly, should the Court grant the motion dismissing Plaintiff's complaint as to Whole Foods (relief that the co-defendants do not oppose), they argue that the cross-claims be converted into a third-party cause of action. Plaintiff argues in opposition papers that Whole Foods has failed to demonstrate excusable default. In the alternative, Plaintiff requests that Whole Foods be directed to interpose an answer and proceed with discovery, "and/or" that the Court allow the co-defendants' cross-claims to be converted into a third-party complaint.

In reply, Whole Foods argues that it is undisputed that Plaintiff's sole and exclusive remedy against them is workers' compensation. Whole Foods also notes that its motion only sought dismissal of Plaintiff's claims, not the cross-claims, since Whole Foods was never served with co-defendants' verified answers containing those cross-claims. Nevertheless, Whole Foods also offers substantive arguments for dismissal of those cross-claims in its reply papers.

## II. Standard of Review

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 A.D.2d 118 [1<sup>st</sup> Dept. 2002]). In other words, the determination 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 A.D.2d 46 [1<sup>st</sup> Dept. 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 [1<sup>st</sup> 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*). 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 N.Y.2d 83, 87-88 [1994]). The motion should be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*McGill v. Parker*, 179 A.D.2d 98 [1<sup>st</sup> Dept. 1992]).

Factual allegations normally presumed to be true on a motion pursuant to *CPLR 3211(a)(7)* may properly be negated by affidavits and documentary evidence (*CPLR 3211[a][1]*, *Wilhemlina Models, Inc. v. Fleisher*, 19 A.D.3d 267 [1<sup>st</sup> Dept. 2005]). Indeed, such a motion may be granted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Id.*, citing *Leon v. Martinez., supra.*) Evidentiary material may also be considered on a motion to dismiss for failure to state a cause of action to remedy defects in a complaint (*Beyer v. DaimlerChrysler Corp.*, 286 A.D.2d 103 [2<sup>nd</sup> Dept. 2001]). On a motion to dismiss for failure to state a cause of action, any deficiency on the part of the complaint because of detailed pleadings of the facts and circumstances relied upon may be cured by details supplied in the affidavits submitted by plaintiff, resort to which is proper for the limited purpose of sustaining a pleading against a motion under *CPLR 3211(a)(7)* (*Ackerman v. Vertical Club Corp.*, 94 A.D.2d 665 [1<sup>st</sup> Dept. 1983]).

### III. Applicable Law and Analysis

At the outset, Whole Foods' request to extend its time to answer or otherwise plead is granted. Whole Foods demonstrated an intent to defend this action by proffering a stipulation seeking to extend time to answer before the period expired, and has further detailed a meritorious defense (*see, Spira v. New York City Transit Authority*, 49 A.D.3d 478 [1<sup>st</sup> Dept. 2008]). Moreover, there is no evidence that Plaintiff was prejudiced by the delay (*see Cirillo v. Macy's, Inc.*, 61 A.D.3d 538, 540 [1<sup>st</sup> Dept. 2009]), and New York's public policy strongly favors litigating matters on the merits (*see Silverio v. City of New York*, 266 A.D.2d 129 [1<sup>st</sup> Dept. 1999]).

Where an employee is injured in the course of employment, his exclusive remedy against his employer is ordinarily a claim for workers' compensation benefits. *Workers' Compensation Law § 11*. The exclusivity rule of *Workers' Compensation Law § 11* applies to insulate a person or entity from liability to a worker for tortious conduct, where the person or entity is the alter ego of the worker's direct employer or exercises such control over that employer as to retain ultimate decision-making authority and financial responsibility over it. ( *See e.g., Kudelski v. 450 Lexington Venture*, 198 AD2d 157 (1st Dept 1993). Upon the papers submitted, Whole Foods has established that it was Plaintiff's employer at the time of his alleged incident. The movant also submitted evidence that after the accident, Plaintiff accepted benefits pursuant to the Workers' Compensation Law. Plaintiff submits no evidence in opposition to refute these assertions, and does not allege that he has suffered a "grave injury" within the meaning of the statute. Plaintiff also failed to specify what facts warrant discovery, or how those facts would be relevant to oppose Whole Foods' motion to dismiss (*see Warshaw Burstein Cohen Schlesinger & Kuh, LLP. v. Longmire*, 106 A.D.3d 536 [1<sup>st</sup> Dept. 2013]). Accordingly, Plaintiff's complaint against Whole Foods must be dismissed as barred by the exclusivity provisions of Workers' Compensation Law (*Torre v. Schmucker*, 275 A.D.2d 365 [2<sup>nd</sup> Dept. 2000]).

Plaintiff and co-defendants Time Warner Realty and A/R Retail, LLC have argued in partial opposition that the motion should be denied to the extent that it seeks dismissal of their

cross-claims against Whole Foods. As noted in their reply papers, however, Whole Foods' motion only sought dismissal of Plaintiff's claims, and not co-defendants' cross-claims. Whole Foods cannot seek dismissal of those cross-claims for the first time in reply papers (*see, e.g., Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560 [1<sup>st</sup> Dept. 1992]). Accordingly, at this juncture, those cross-claims remain. The Court, however, will convert the cross-claims from Time Warner Realty and A/R Retail, LLC into third-party causes of action, since there is no longer a direct action pending against Whole Foods. The defendants will be directed to re-serve their verified answers containing those cross-claims upon Whole Foods, who may thereafter answer or otherwise move, in accordance with the CPLR.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Whole Foods' motion is granted to the extent that leave to answer or otherwise move has been granted, and that Plaintiff's claims asserted against Whole Foods are dismissed with prejudice, and it is further,

ORDERED, that the cross-claims of A/R Retail and Time Warner are converted to third-party claims against Whole Foods, and it is further,

ORDERED, that the caption is hereby amended as follows:

\_\_\_\_\_ X  
DIEUDONNE MUBOYAYI,

Plaintiff,

-against-

Index No.: 23075/2013E

A/R RETAIL LLC, AOL TIME WARNER REALTY INC.,  
THE BOARD OF MANAGERS OF TIME WARNER  
CENTER CONDOMINIUM, THE RELATED COMPANIES, L.P.,  
TIME WARNER CENTER CONDOMINIUM, and  
TIME WARNER REALTY, INC.

Defendants.

\_\_\_\_\_ X

A/R RETAIL LLC, AOL TIME WARNER REALTY INC., Index No.:  
THE BOARD OF MANAGERS OF TIME WARNER  
CENTER CONDOMINIUM, THE RELATED COMPANIES, L.P.,  
TIME WARNER CENTER CONDOMINIUM, and  
TIME WARNER REALTY, INC.

Third-Party Plaintiffs,

-against-

WHOLE FOODS MARKET GROUP, INC.

Third-Party Defendant.

X

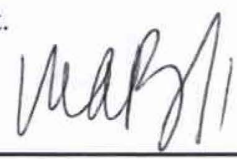
The Third-Party Plaintiffs as listed in the caption shall serve a copy of this Order with Notice of Entry upon the Clerk of the Court and the Clerk of the Trial Support Office who shall amend their record accordingly upon payment of the appropriate fee for a third-party index number, and it is further,

ORDERED, that the Third-Party Plaintiffs are directed to serve their verified answers with cross-claims upon Whole Foods within thirty (30) days of entry of this Order, and it is further,

ORDERED, that upon service of those cross-claims, Whole Foods may answer or otherwise move pursuant to the CPLR.

This constitutes the Decision and Order of this Court.

Dated: 5/23, 2014



Hon. Mary Ann Brigantti-Hughes, J.S.C.