

Collado v Babel NYC
2017 NY Slip Op 31313(U)
May 12, 2017
Supreme Court, Queens County
Docket Number: 700362/2016
Judge: Leslie J. Purificacion
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LESLIE J. PURIFICACION IA Part 39
Justice

-----X
JONATHAN COLLADO,
Plaintiff,

Index
Number 700362/2016

-against-

Motion Seq. 2

BABEL NYC and AVENUE C PARTNER,
LLC
Defendants.

-----X

The following papers numbered 1 to 9 read on this motion by defendant Avenue C Partner LLC pursuant to CPLR §3211(a)(1) and (a)(7) for an order dismissing the complaint.

	<u>PAPERS NUMBERED</u>
N.M., Aff., Exhibits and Service.....	1-4
Opp., Aff. and Service.....	5-7
Reply and Service.....	8-9

FILED
MAY 24 2017
COUNTY CLERK
QUEENS COUNTY

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Plaintiff commenced this action for personal injuries by filing of a summons and complaint on January 13, 2016. Defendant Babel NYC filed an answer on April 22, 2016. To date, defendant Avenue C Partners LLC (hereinafter "Avenue C") has not filed an answer. Avenue C now moves for an order dismissing the instant matter pursuant to CPLR §3211 (a)(1) upon a defense founded on documentary evidence and CPLR §3211 (a)(7) for plaintiff's failure to state a cause of action.

On February 15, 2015, plaintiff was a patron at Babel NYC which operates as a bar/restaurant and/or hookah lounge in a building owned by defendant Avenue C located at 131 Avenue C, New York. In his complaint, plaintiff alleges that he was lawfully in the premises when he was physically assaulted, struck and/or beaten and sustained serious and permanent injuries. Plaintiff further alleges that the assault was a result of negligence on the part of the defendants in their ownership, operation, management, supervision and control of the aforementioned premises and employees and/or patrons in the aforementioned premises.

In support of its application, Avenue C submits an affirmation from its attorney, a copy of pleadings; an affidavit in support from its principal, Al Rosenshein; a copy of the deed to the subject premises; and a copy of the lease agreement between B.A.B café and 765 Realty Corp., Avenue C's predecessor in interest, for the subject premises.

In his affidavit in support, Mr. Rosenshein states that in June of 2006, Avenue C purchased the premises located at and known as 129-133 Avenue C, New York, New York from 765 Realty Corp. Prior to the purchase, 765 Realty Corp. leased a commercial premises contained in the subject building to Defendant Babel NYC. A copy of the lease agreement is annexed as Exhibit "B". Mr. Rosenshein alleges that the lease agreement provides that defendant Babel NYC has complete dominion and control over the subject premises. In addition, he alleges that other than leasing the premise, Avenue C lacks any responsibilities pertaining to the location, including but not limited to hiring/firing employees of Babel NYC, workplace guidelines or managing Babel NYC employees.

To prevail on a motion to dismiss the complaint pursuant to CPLR §3211(a)(1), the documentary proof submitted must "utterly refute" the plaintiff's allegations and establish

a defense as a matter of law (*see Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314). In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR §3211(a)(7), the sole criterion is whether the pleading states a cause of action (*Cooper v 620 Prop. Assoc.*, 242 AD2d 359, *citing Weiss v Cuddy & Feder*, 200 AD2d 665). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144; *Cooper, supra*, 242 A.D.2d). The court's function is to "accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts" (*Cooper*, 242 AD2d, *quoting 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference (*511 West 232nd Owners Corp., supra*).

With respect to dismissal pursuant to CPLR §3211(a)(1), the court finds that the defendant has failed to conclusively refute plaintiff's allegations and establish a defense as a matter of law. It is well-settled case law that an out-of possession landlord can be held liable for injuries that occur on its premises if the landlord has retained control over the premises and if the landlord is contractually obligated to repair unsafe conditions (*see Mendoza v. Manila Bar & Restaurant Corp.*, 140 A.D.3d 934; *Reidy v. Burger King Corp.*, 250 A.D.2d 747). The lease agreement and affidavit submitted do not conclusively state who has control over the premises and who is obligated to repair unsafe conditions. The lease, as annexed to the moving papers, is incomplete as Article 7 through 13 of the agreement are missing. This is especially problematic in that Article 4 Repairs, which

delegates who is responsible for which portions of the premises, states in pertinent part, that its is subject to Article 8 and 9, which are missing from the document submitted. In addition, Article 4 Repairs states that the owner sre responsible for maintaining and repairing the public portions of the building. As such, there is some indication that Avenue C has retained some control over the subject premises. The court also finds the affidavit of Mr. Rosenshein is self-serving and in contradiction with the lease agreement. Mr. Rosenshein states that Avenue C does not have any responsibilities pertaining to the leased premises. However, a review of the lease agreement shows that the owner has several duties and responsibilities with respect to the subject premises.

With respect to that branch of the motion to dismiss the complaint pursuant to CPLR §3211 (a) (7), the court has reviewed the complaint and finds that it sufficiently sets forth a cause of action for negligence and premise liability.

Accordingly, those branches of the motion seeking an order dismissing the complaint are denied.

Defendant's time to serve an answer is hereby extended until 10 days after service of a copy of this decision and order upon them (CPLR §3211 (f)).

This is the decision and order of the court.

Hon. Leslie J. Purificacion, J.S.C.

Dated:

MAY 12 2017

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