Borrerro v Haks Group, Inc.
2017 NY Slip Op 32972(U)
March 6, 2017
Supreme Court, Kings County
Docket Number: 58/16
Judge: Pamela L. Fisher
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At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of March, 2017.

PRESENT:

HON. PAMELA L. FISHER,
Justice.

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OSCAR BORRERRO,
Plaintiff,

- against -

HAKS GROUP, INC.,
THE ASBESTOS CONTRACTOR, INC.,
GENNADIY DOMNITSER, and
FRANK ROBINSON,
Defendants.

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DECISION AND ORDER

Index No. 58/16

Mot. Seq. No. 1-3

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The following papers numbered 1 to 14 read herein:	Papers Numbered
Notice of Motion/Cross Motion and Affirmations (Affidavits) Annexed	1-3, 4-6, 7-9
Affirmation in Opposition	10
Affirmations in Reply	11, 12, 13
Letter to the Court, dated Dec. 1, 2016	14

In this action arising from personal injuries, defendant HAKS Group, Inc. (HAKS) moves, pre-answer, to dismiss the complaint, dated January 4, 2016 (the original complaint), as against it on several grounds, including, as most relevant herein, that it had nothing to do with the underlying incident. Defendant Gennadiy Domnitser (Domnitser) cross-moves, pre-answer, to dismiss the original complaint as against him, pursuant to CPLR 215 (3) and CPLR 3211 (a) (5), or, in the alternative, pursuant to CPLR 3211 (a) (1), or, in the alternative, pursuant to CPLR 3211 (a) (7). Plaintiff Oscar Borrerro (the plaintiff) opposes the motions/cross motions of defendants HAKS and Domnitser (collectively, the moving

defendants), and cross-moves for leave, pursuant to CPLR 3025 (b), to serve the amended complaint, dated July 6, 2016 (the amended complaint). The remaining defendants, The Asbestos Contractor, Inc. and Frank Robinson (collectively, the non-moving defendants), have answered the original complaint but interposed no response to the pending motions/cross motions.

PLAINTIFF'S CROSS MOTION FOR LEAVE TO AMEND

The defendants' motions, pursuant to CPLR 3211 (a), to dismiss the original complaint extended the defendants' time to answer (*see* CPLR 3211 [f]) until ten days after service of notice of entry of the order determining their motions, and similarly extended the time within which the plaintiff could serve an amended complaint *as of right* (*see* CPLR 3025 [a]; *Poly Mfg. Corp. v Dragonides*, 109 AD3d 532, 534-535 [2d Dept 2013]). The plaintiff interposed the amended complaint on July 21, 2016, before the Court determined the defendants' instant motions/cross motions to dismiss. Since the plaintiff served an amended complaint as of right pursuant to CPLR 3025 (a), his cross motion for leave, pursuant to CPLR 3025 (b), to serve an amended complaint is denied as academic. The amended complaint supersedes the original complaint (*see Gotlin v City of New York*, 90 AD3d 605, 608 [2d Dept 2011]). Considering that the moving defendants, following the service of the plaintiff's cross motion which included the amended complaint, submitted additional papers on their motions, also seeking dismissal of the amended complaint, it is proper for the Court to consider their motions as directed against the amended complaint (*see Sobel v Ansanelli*, 98 AD3d 1020, 1022 [2d Dept 2012]).

One caveat is in order. The amended complaint pleads an additional (the fifth) cause of action, which is against HAKS. Starting with the fifth cause of action in the amended complaint, the remaining causes of action in the amended complaint shift by one the count of the corresponding causes of action in the original complaint. Thus, the sixth, seventh, eighth, and ninth causes of action in the *amended* complaint represent the fifth, sixth, seventh, and eighth causes of action in the *original* complaint, respectively.

HAKS' MOTION TO DISMISS

Background

The plaintiff commenced this action against defendant HAKS and others seeking damages for injuries he allegedly sustained as a result of his union activities at the job site. Although the plaintiff alleges in the amended complaint that HAKS, under a written contract with the NYCHA, was a construction manager of the project at the job site, the contractor at the job site was actually HAKS Engineers, Architects and Land Surveyors, P.C. (HAKS-EALS). In the amended complaint, the plaintiff alleges causes of action against HAKS for, inter alia, (1) its alleged failure to supervise the job site generally and in particular its alleged employee defendant Domnitser, (2) vicarious liability for the acts of Domnitser, and (3) direct liability for its alleged failure to investigate Domnitser's background before hiring him and for its alleged negligent training of him. Pre-answer, HAKS moves to dismiss the amended complaint alleging, inter alia, that it merely administers expenses for its various affiliates, is not authorized to perform professional engineering services, and did not enter into any contract to perform work for the NYCHA at the job site (*see* Affidavit of Shahid

Akhtar, dated Feb. 19, 2016, ¶ 3). The record reflects that the contract with the NYCHA for the job site was with HAKS-EALS, which is a professional corporation that is authorized to perform professional engineering services. The affidavit of service of process by the State of New York – Department of State indicates that process was served on HAKS pursuant to the Business Corporation Law. Nothing in the record indicates that HAKS-EALS, a limited liability company that may be served pursuant to the Limited Liability Law, was served with process.

Applicable Law

"Under CPLR 305 (c), an amendment to correct a misnomer will be permitted if the court has acquired jurisdiction over the intended but misnamed defendant . . . provided that . . . the intended but misnamed defendant was fairly apprised that [he] was the party the action was intended to affect ... [and] would not be prejudiced by allowing the amendment" (*Smith v Garo Enters., Inc.*, 60 AD3d 751, 751-752 [2d Dept 2009] [internal quotation marks and citations omitted; alterations in the original], *lv dismissed* 13 NY3d 756 [2009]). "[W]hile CPLR 305 (c) may be utilized to correct the name of an existing defendant, *it cannot be used by a party as a device to* add or *substitute a party defendant*" (*id.* at 752 [internal quotation marks and citations omitted; emphasis added]).

Discussion

In its pre-answer motion to dismiss, HAKS timely raised the point that it was not a proper defendant. The plaintiff's opposition to HAKS' motion completely ignores this point.

The Court may not utilize CPLR 305 (c) or 2001 to substitute HAKS-EALS for HAKS as a party defendant. The defect is jurisdictional. The plaintiff's service on HAKS did not constitute service on HAKS-EALS. This is not a case where a party is misnamed; rather, it is a case where a party defendant would be substituted. The record contains no evidence that HAKS is a designated agent for HAKS-EALS. The unrefuted evidence submitted by HAKS establishes that it is a separate and distinct entity from HAKS-EALS. Accordingly, the branch of HAKS' motion for dismissal of the amended complaint because it (HAKS) had no connection with the incident or the job site at issue is *granted* and the amended complaint is dismissed against HAKS (*see Smith*, 60 AD3d at 752; *Ito v Marvin Windows of New York, Inc.*, 54 AD3d 1002, 1004 [2d Dept 2008]; *Achtziger v Fuji Copian Corp.*, 299 AD2d 946, 947 [4th Dept 2002], *rearg denied* 753 NYS2d 417 [4th Dept 2003], *lv dismissed in part, denied in part* 100 NY2d 548 [2003]). In light of this ruling, the Court need not address the remaining branches of HAKS' motion to dismiss.

DOMNITSER'S CROSS MOTION TO DISMISS

Background

The amended complaint alleges that on August 22, 2014, the plaintiff, a labor union representative, was injured at the NYCHA job site in a scuffle involving, among others, defendant Domnitser. The plaintiff's affidavit elaborates as to what occurred on that date:

> [¶ 8] "I, along with three other representatives of [Asbestos, Lead and Hazardous Waste Laborers'] Local 78 [the union for which I am employed as an organizer], appeared at the job site on [the date of the incident] to address members of my union who were performing hazardous work for HAKS and [the non-moving defendant The Asbestos Contractor, Inc.] TAC [, a non-union contractor]. This was not the first time I appeared at the site. I had been there on previous occasions and had spoken to

HAKS employees as well as NYCHA employees. They knew who I was and that I represented Local 78. They were always aggressive.

[¶ 9] It was my intention to speak to my union members and to make sure that TAC and HAKS were abiding by minimal safety requirements. We were trying to film and record our interactions. While there, representatives of HAKS, including Domnitser, confronted us.

[¶ 10] When TAC and HAKS employees saw us, they began screaming, stating that we should put down our cameras and phones and leave the [job site]. They called for other[s] of their employees for back-up in an attempt to confront us. We told them that we simply wished to peacefully address our union members. They yelled. [They] [b]ecame aggressive and, as a result, I became quite fearful that I would be attacked.

[¶ 11] Pushing and shoving ensued as between TAC and HAKS employees, union and non-union members working at the job site and the union representatives with whom I appeared at the job site. It was a free-for-all. HAKS lacked any control over the job site or the workers it was obligated to control[.]

[¶ 12] I was attempting to film this with my cell phone and at first, I was not being physically confronted. TAC and HAKS employees were pushing and shoving many people, including workers and other union representatives. Workers who were involved in the melee, whose names I do not know, were being pushed and grabbed. At least two collided into me, knocking me to the ground on more than one occasion. I was bumped, jostled, thrown to the ground and trampled as a result of this, which was *not* conduct directed at me, but, rather, the consequence of defendants' conduct directed at others.

[¶ 13] There did come a point in time that defendants [*i.e.*, the moving defendants and the non-moving defendants, collectively] directed physical conduct to me, but such conduct does not form the sole basis of my complaint. *Domnitser had been involved in the ruckus I described above and was the cause of at least one of the workers colliding with me.* Contrary to

> defendants' statements, *it was their lack of control coupled with their conduct directed at others that directly affected and injured me and that, therefore, forms a basis of my negligence claims.*
>
> [¶ 14] The effects of defendants['] violence toward third parties involved in the melee upon me was foreseeable, albeit perhaps unintended.
>
> [¶ 15] *At one point, Domnitser attempted to dislodge my cell phone from my hands in order to stop me from memorializing defendants' conduct. This also resulted in certain physical contact, the apparent intention of which was to halt recording, not to cause personal injuries.*
>
> [¶ 18] Defendants['] attempt to limit the causes of my injuries solely to the intentional conduct directed at me fails to address their conduct directed at other union members that caused some or all of my injuries as well as their intentional conduct which, albeit not directed at physical contact with me, resulted in or exacerbated the injuries I sustained.
>
> [¶ 19] The only thing Defendants intended to do was to squelch union activity, interfere with our free speech and assembly rights and to create a melee in order to accomplish these results.
>
> [¶ 20] [T]he facts predicating this action are far more complicated and nuanced than the motions before the court would suggest and, *while intentional conduct plays a role, it is not the sole and exclusive causative basis of the injuries I sustained*" (italics and underlying in ¶ 12 in the original; italics in ¶¶ 13-15 and 20 added]).

The amended complaint pleads the following causes of action against Domnitser: (1) negligence, (2) assault and battery, (3) negligent infliction of emotional distress, (4) prima facie tort, and (5) interference with the plaintiff's constitutional rights to exercise free speech and assembly (the first, sixth, seventh, eighth, and ninth causes of action of the amended

complaint, respectively). Domnitser cross-moves, pre-answer, to dismiss the amended complaint as either time-barred pursuant to CPLR 3211 (a) (5), or as precluded by documentary evidence pursuant to CPLR 3211 (a) (1), or for failure to state a claim pursuant to CPLR 3211 (a) (7).[1]

Statute of Limitations (CPLR 215 [3] and 3211 [a] [5])

The branch of Domnitser's cross motion for dismissal of the amended complaint as time-barred, pursuant to CPLR 215 (3) and 3211 (a) (5), is denied. It is true, as Domnitser contends, that the causes of action for assault and battery are governed by the one-year statute of limitations under CPLR 215 (3). What he overlooks, however, is that the one-year statute of limitations is subject to the tolling exception of CPLR 215 (8) (a). The tolling exception states, in relevant part, that:

> "Whenever it is shown that a criminal action against the same defendant has been commenced with respect to the event or occurrence from which a claim governed by this section arises, *the plaintiff shall have at least one year from the termination of the criminal action . . . in which to commence the civil action,* notwithstanding that the time in which to commence such action has already expired or has less than a year remaining" (emphasis added).

The record indicates that, in connection with the incident, a criminal action was commenced against Domnitser with his arrest on August 22, 2014 (*i.e.*, the date of the incident) (see *People v Domnitser*, Docket No. 2014KN064201 [Crim Ct, Kings County]),

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[1] Domnitser also contends (in ¶ 2 of his supporting affidavit) that he was not served with process. As the plaintiff's affidavit of service indicates, however, process was served on a person of suitable age and discretion at Domnitser's residence, as listed in his driver's license registration with the New York State Department of Motor Vehicles.

and that the criminal action was dismissed on April 9, 2015 (*see* Certificate of Disposition No. 52712). Because this action was commenced on January 5, 2016, a date within one year after the dismissal of the criminal action, said claim is timely as against Domnitser pursuant to CPLR 215 (8) (a) (*see Walker v Estate of Lorch*, 136 AD3d 805, 807 [2d Dept 2016]). Accordingly, the branch of Domnitser's motion, pursuant to CPLR 215 (3) and 3211 (a) (5), for dismissal of the amended complaint as against him as time-barred is *denied.*

Documentary Evidence (CPLR 3211 [a] [1])

The branch of Domnitser's cross motion, pursuant to CPLR 3211 (a) (1), for dismissal of the amended complaint as against him as barred by documentary evidence is also denied. On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (1), the moving defendant has the burden of providing documentary evidence that utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*see Matter of Palmore v Board of Educ. of Hempstead Union Free School Dist.*, 145 AD3d 1072, 1073 [2d Dept 2016]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010]).

Here, Domnitser's affidavit describing his version of the incident is insufficient to utterly refute the plaintiff's factual allegations (*see Hartnagel v FTW Contr.*, ___ AD3d ___, 2017 NY Slip Op 00961, *2 [2d Dept 2017]; *see also Crepin v Fogarty*, 59 AD3d 837, 838 [3d Dept 2009] ["affidavits submitted by a defendant do not constitute documentary evidence upon which a proponent of dismissal can rely"]). Likewise, the plaintiff's notice of claim

which he served on the NYCHA[2] is not "documentary evidence" under CPLR 3211 (a) (1) because it does not conclusively establish that a fact alleged in the amended complaint was undisputedly not a fact at all (*id.*). Accordingly, the branch of Domnitser's motion, pursuant to CPLR 3211 (a) (1), to dismiss the amended complaint as against him as barred by documentary evidence is *denied*.

Failure to State a Claim (CPLR 3211 [a] [7])

The remaining branch of Domnitser's cross motion, pursuant to CPLR 3211 (a) (7), for dismissal of the amended complaint as against him for failure to state a claim is decided as follows.

Standard of Review

"On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Ingvarsdottir v Gaines, Gruner, Ponzini & Novick, LLP*, 144 AD3d 1099, 1101 [2d Dept 2016]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be

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[2]. The record indicates that the plaintiff served the NYCHA with a notice of claim, dated February 27, 2015, describing the nature of his claim as:

> "[¶ 2] Negligence in the maintenance, operation, supervision, hiring and training of agents and contractors performing work, labor and services at the [job site]. Specifically, on August 22, 2014, while [on the job site] for a legitimate purpose, agents and contractors of NYCHA surrounded, set upon and injured [the plaintiff] while said agents and contractors were performing services for NYCHA pursuant to contract and under the supervision and direction of NYCHA. Said conduct was within the scope of the foreseeable services to be performed by said agents and contractors."

able to prove its claims . . . plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss" (*Shaya B. Pacific, LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

Negligence (First Cause of Action of the Amended Complaint)

This cause of action alleges that "Domnitser negligently and wrongfully made physical contact with Plaintiff and caused others to negligently and wrongfully ma[k]e physical conduct with Plaintiff" (¶ 26). As Domnitser correctly points out, "no cause of action to recover damages for negligent assault exists in New York, because once intentional offensive conduct has been established, the actor is liable for assault and not negligence" (*Wertzberger v City of New York*, 254 AD2d 352, 352 [2d Dept 1998] [internal quotation marks and citations omitted]; *see also Yasuna v Big V Supermarkets*, 282 AD2d 744, 745 [2d Dept 2001] ["Once intentional offensive conduct has been established, the actor is liable for assault and not negligence."]). It is true, as the plaintiff asserts, that "[a] single act or default causing a single injury may constitute a breach of different duties and may give rise to causes of action based upon different grounds of liability" (*Jarvis v Nation of Islam*, 251 AD2d 116, 117 [1st Dept 1998]). That rule, however, applies only when *multiple* defendants are joined; for example, an employee and his employer (*see Yasuna*, 282 AD2d at 745; *Jarvis*, 251 AD2d at 117). Thus, the alleged assault and battery by Domnitser may give a rise to a claim for negligent supervision against his employer; however, his conduct may not, *at the same time*, give rise to a *negligence* claim against *him*. In other words, an intentional tort by a defendant may not be pleaded, in the alternative, as a negligence claim against him. It's either an intentional act or it's a negligent act, but not some combination

of the two. Accordingly, the branch of Domnitser's motion, pursuant to CPLR 3211 (a) (7), to dismiss the first cause of action in the amended complaint as against him is *granted*, and such claim is dismissed.

Assault and Battery (Sixth Cause of Action of the Amended Complaint)

"To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact" (*Butler v Magnet Sports & Entertainment Lounge, Inc.*, 135 AD3d 680, 681 [2d Dept 2016] [internal quotation marks omitted]). "The elements of battery are bodily contact, made with intent, and offensive in nature. The intent required for battery is intent to cause a bodily contact that a reasonable person would find offensive" (*Thaw v North Shore Univ. Hosp.*, 129 AD3d 937, 942-943 [2d Dept 2015] [internal quotation marks and citations omitted]).

Here, the amended complaint, as amplified by the plaintiff's affidavit, states a claim against Domnitser for assault and battery (*see Butler*, 135 AD3d at 681; *O'Reilly v Executone of Albany, Inc.*, 121 AD2d 772, 774 [3d Dept 1986]). Accordingly, the branch of Domnitser's motion, pursuant to CPLR 3211 (a) (7), for dismissal of the sixth cause of action of the amended complaint as against him is *denied*.

Negligent Infliction of Emotional Distress
(Seventh Cause of Action of the Amended Complaint)

"[T]here is no duty to protect from emotional injury a bystander to whom there is otherwise owed no duty, and, even as to a participant to whom a duty is owed, such injury

is compensable only when a direct, rather than a consequential, result of the breach" (*Kennedy v McKesson Co.*, 58 NY2d 500, 506 [1983]).

Here, the claim for negligent infliction of emotional distress is deficient, in that it fails to adequately allege facts that would establish that the plaintiff's alleged mental injury was a direct, rather than a consequential, result of the breach. Indeed, the plaintiff's affidavit attests (in ¶ 18) that the conduct of Domnitser and the other defendants, "*[as] directed at other* union members," "caused some or all of [his] injuries" (emphasis added). Accordingly, the branch of Domnitser's cross motion, pursuant to CPLR 3211 (a) (7), for dismissal of the seventh cause of action of the amended complaint as against him is *granted*, and such claim is dismissed.

Prima Facie Tort (Eighth Cause of Action of the Amended Complaint)

"The elements of a cause of action alleging prima facie tort are: (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or a series of acts which would otherwise be lawful" (*Berland v Chi*, 142 AD3d 1121, 1123 [2d Dept 2016]). "To make out a claim sounding in prima facie tort, the complaining party must have suffered specific and measurable loss, which requires *an allegation of special damages, i.e., the loss of something having economic or pecuniary value*" (*id.* [internal quotation marks omitted; emphasis added]). "Special damages . . . must be pleaded with sufficient specificity" (*DiSanto v Forsyth*, 258 AD2d 497, 498 [2d Dept 1999]). Because the plaintiff's general allegations of "severe, permanent and lasting injuries" (¶ 65) are insufficient, the branch of Domnitser's cross motion, pursuant to

CPLR 3211 (a) (7), for dismissal of the plaintiff's eighth cause of action of the amended complaint as against him is *granted*, and such claim is dismissed.

Interference with Plaintiff's Constitutional Rights to Exercise Free Speech and Assembly (Ninth Cause of Action of the Amended Complaint)

"[A]ctions of private individuals . . . become subject to scrutiny for violations of constitutional limitations when those individuals act as agents of the government or when government officials participate in those actions" (*People v Johnson*, 196 AD2d 887, 888 [2d Dept 1993]). The test here is whether the private conduct of Domnitser, an employee of a private entity, at the job site owned and operated by the NYCHA became "so pervaded by governmental involvement that it los[t] its character as such and invoke[d] the full panoply of constitutional protections" (*id.*).

The plaintiff's argument that Domnitser was an agent of the NYCHA at the time of the incident is belied by the record. By way of background, the Court notes that the plaintiff had previously commenced a proceeding under Index No. 2814/15 (Sup Ct, Kings County) for leave to serve his belated notice of claim on the NYCHA. Though his application was granted by the lower court, the appellate court reversed in *Matter of Borrero v New York City Hous. Auth.*, 134 AD3d 1104 (2d Dept 2015).[3] As is relevant herein, the appellate court held (at page 1105) that:

> "[The plaintiff] failed to establish that the [NYCHA] had actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter.

[3] The decision in that proceeding spells the plaintiff's name as "Borrero," rather than as "Borrerro" in the caption of this case.

> *The [plaintiff's] assertion that an unspecified representative of . . . Haks, the company retained by the [NYCHA] to oversee the restoration project of the buildings owned by the [NYCHA], was present at the site when the incident occurred, was insufficient to provide the [NYCHA] with actual knowledge of the essential facts constituting the claim*" (emphasis added).

As quoted above, the appellate court ruled that the presence at the job site of a private company representative who was not employed by the NYCHA was insufficient to impute knowledge of the incident to the NYCHA. In other words, because a private company representative was not employed by the NYCHA, he or she was not an agent of the NYCHA. Domnitser has now been identified as the private company representative at the job site at the time of the incident. Under the appellate court's reasoning, since Domnitser was not employed by the NYCHA, he was not its agent. Not being an agent of the NYCHA, Domnitser could not have violated the plaintiff's constitutional rights. Therefore, the remaining branch of Domnitser's cross motion, pursuant to CPLR 3211 (a) (7), for dismissal of the ninth cause of action in the amended complaint as against him is *granted*, and such claim is dismissed.

Conclusion

Accordingly, it is

ORDERED that in Seq. No. 3 the plaintiff's cross motion for leave, pursuant to CPLR 3025 (b), to serve the amended complaint is denied as academic; and it is further

ORDERED that the amended complaint, annexed as Exhibit A to the plaintiff's cross motion, is deemed to supersede the original complaint; and it is further

ORDERED that the amended complaint is deemed to have been served on all defendants when the plaintiff served his cross motion for leave to amend; however, for the sake of clarity, the plaintiff's counsel is directed to file a copy of the amended complaint with the Kings County Clerk and, in addition, to concurrently serve a separate copy thereof on defendants The Asbestos Contractor, Inc., Gennadiy Domnitser, and Frank Robinson; and it is further

ORDERED that in Seq. No. 1 the branch of the motion of defendant HAKS Group, Inc. to dismiss the amended complaint as against it for failure to name and serve the correct entity is granted, and the amended complaint is dismissed as against it, and the remaining branches of its motion are denied as moot; and it is further

ORDERED that in Seq. No. 2 the branch of the cross motion of defendant Gennadiy Domnitser to dismiss the amended complaint as against him, pursuant to CPLR 3211 (a) (7), for failure to state a claim, is *granted* as to the plaintiff's claims of negligence, negligent infliction of emotional distress, prima facie tort, and interference with the plaintiff's constitutional rights to exercise free speech and assembly (the first, seventh, eighth, and ninth causes of action of the amended complaint, respectively); and his cross motion is otherwise denied; and it is further

ORDERED that the action shall proceed as against defendant Gennadiy Domnitser solely on the plaintiff's claim for assault and battery as against him in the sixth cause of action of the amended complaint; and it is further

ORDERED that, in light of the dismissal of HAKS Group, Inc., the action is severed and continued against the remaining defendants: The Asbestos Contractor, Inc., Gennadiy Domnitser, and Frank Robinson; and it is further

ORDERED that defendant Gennadiy Domnitser shall answer the extant portions of the amended complaint within ten days after service of a copy of this decision and order with notice of entry on his counsel, Sean T. Burns, at Carroll McNulty & Kull, Inc., 570 Lexington Avenue, Eighth Floor, New York, NY 10022; and it is further

ORDERED that the non-moving defendants The Asbestos Contractor, Inc. and Frank Robinson shall have ten days after service of a copy of this decision and order with notice of entry on their counsel within which to amend, file, and serve their answer to the amended complaint.

This constitutes the decision and order of the Court.

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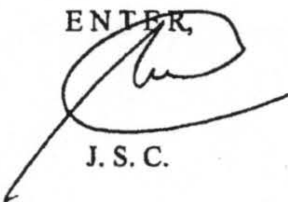

J. S. C.

HON. PAMELA L. FISHER

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