

Shaw v Camba Inc.

2018 NY Slip Op 31332(U)

May 7, 2018

Supreme Court, Bronx County

Docket Number: 304948/2015

Judge: Donald A. Miles

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 8**

Index No.: **304948/2015**
Motion Calendar No.
Motion Sequence No.

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JUANITA SHAW,

Plaintiff(s),

-against-

DECISION/ ORDER

Present:

Hon. Donald Miles

Justice, Supreme Court

CAMBA INC., HIGHBRIDGE OVERLOOK
PARTNERSHIP HOUSING DEVELOPMENT FUND
COMPANY, INC., HIGHBRIDGE OVERLOOK, LLP,
DUNN DEVELOPMENT CORP., HLS BUILDERS
CORP., THE CITY OF NEW YORK, NEW YORK
CITY HOUSING AUTHORITY, NEW YORK CITY
ECONOMIC DEVELOPMENT CORPORATION, NEW
YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT, and JM3
CONSTRUCTION LLC,

Defendant(s).

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to Dismiss:

Papers	Numbered
Notice of Motion, Affirmation in Support and Exhibits thereto.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Upon the foregoing papers, and following oral argument, the Decision/Order on this Motion is as follows:

In this action plaintiff seeks to recover for personal injuries allegedly sustained as a result of exposure to toxic substances within the building located at 240 West 167th Street, County of Bronx, City and State of New York. Plaintiff alleges her exposure began on or about July 23, 2014 and resulted in her illness on August 26, 2014. THE CITY OF NEW YORK, THE CITY OF NEW YORK s/h/a NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, and NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, (“Municipal Defendants”) move to dismiss the complaint on the grounds that at the time of plaintiff’s

exposure they did not have a property interest in the land, designated Tax Block 2527, Lot 50, and upon which the subject building rests. Plaintiff opposes the motion.

In support of the motion, the Municipal Defendants rely on the Order of the Honorable Justice Sherman dated August 18, 2016 (Ex. F) which dismissed plaintiff's complaint and all cross-claims as to the former co-defendant NEW YORK CITY HOUSING AUTHORITY (hereinafter "NYCHA") who demonstrated it had no ownership interest in the property by submitting a deed in which it conveyed the property to co-defendant HIGHBRIDGE OVERLOOK PARTNERSHIP HOUSING DEVELOPMENT FUND COMPANY, INC., (hereinafter "HIGHBRIDGE") prior to the construction of the subject apartment building and plaintiff's alleged mold exposure therein. The Municipal defendants argue that similar to NYCHA their documentary proof refutes plaintiff's allegations by showing that they too were not responsible for the apartment building and had no landlord/tenant relationship with the plaintiff as no municipal defendant held record title to the subject premises at the time of the alleged exposure. The Municipal Defendants allege that the premises were owned and operated by co-defendant HIGHBRIDGE, a separate and independent corporation.

In this regard, the Municipal defendants submit the affidavit of David Schloss, Senior Title Examiner, as to the conduct of a title search confirming that co-defendant HIGHBRIDGE held record title to the subject premises from March 22, 2012 up through the time of the alleged exposure and resulting illness, beginning on or about July 23, 2014. The deed indicates that the former co-defendant NYCHA conveyed title to HIGHBRIDGE. The defendants further rely on the affidavit of Rosalie Cuomo-Zaharias of New York City Department of Citywide Administrative Services (hereinafter "DCAS") concerning her search of the records, which reflect that at the time of the alleged exposure, the subject property was not owned or leased by the City of New York or any of its agencies. As to the New York City Economic Development Corporation ("NYCEDC"), an affidavit from its Assistant Vice President Richard Tom regarding his search, indicates the Municipal defendants had no ownership interest in the premises. The New York City Housing Development Corporation (NYCHDC) held a mortgage to the property with co-defendant HIGHBRIDGE, as mortgagor. Movants contend that as an out-of-possession mortgagee, NYCHDC had no proprietary interests and cannot be held liable for any alleged injuries claimed by plaintiff.

A motion to dismiss based on documentary evidence will be granted only if the documentary evidence resolves all factual issues as a matter of law and conclusively disposes of plaintiff's claims. The documentary evidence must utterly refute plaintiff's allegations and conclusively establish the defense as a matter of law (see *Fontanetta v. Doe*, 73 A.D. 3d 78 898 N.Y.S. 2d569 [2nd. Dept. 2010]; *Crepin v. Fogarty*, 59 A.D.3d 837, 874 N.Y.S. 278; *Levenherz v. Povinelli*, 14 A.D. 3d 658, 789 N.Y.S. 2d 295 [2nd. Dept. 2005]).

The plaintiff's claim essentially against the Municipal defendants is that they were negligent in the construction, management, ownership, maintenance, inspection and repair of the apartment building. The evidence presented by the Municipal Defendants utterly refutes plaintiff's allegations and shows that the Municipal Defendants did not own, operate or maintain the premises where plaintiffs' alleged toxic exposure and subsequent illness occurred.

In reviewing the plaintiff's opposition, it appears similar to that advanced in opposition to the NYCHA motion to dismiss. Plaintiff has not offered any evidence in rebuttal that would show the Municipal defendants had anything to do with the building or plaintiff's alleged mold exposure. Therefore the motion must be granted and plaintiff's complaint dismissed as against the Municipal defendants who are not proper parties to the action.

Accordingly it is

ORDERED that the complaint is dismissed in its entirety as against the Municipal defendants and the clerk is directed to enter judgment accordingly in favor of said defendants, and it is further

ORDERED that the action is severed and continued against the remaining defendants, and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption, and it is further

ORDERED that the caption shall read as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

JUANITA SHAW,

Index No.: **304948/2015**

Plaintiff(s),

-against-

CAMBA INC., HIGHBRIDGE OVERLOOK
PARTNERSHIP HOUSING DEVELOPMENT FUND
COMPANY, INC., HIGHBRIDGE OVERLOOK, LLP,
DUNN DEVELOPMENT CORP., HLS BUILDERS
CORP. and JM3 CONSTRUCTION LLC,

Defendant(s).



and it is further

ORDERED that the within 30 days of entry of this order, counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk, who is directed to mark the court's records to reflect the dismissal of the Municipal defendants, and the amendment to the caption.

This constitutes the decision and order of the Court.

MAY 07 2018

DATE

HON. DONALD MILES
Justice Supreme Court