

<b>Aspen Am. Ins. Co. v 35 1/2 Crosby St. Realty Corp.</b>
2018 NY Slip Op 33277(U)
December 18, 2018
Supreme Court, New York County
Docket Number:
Judge: Barbara Jaffe
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM**

*Justice*

-----X

ASPEN AMERICAN INSURANCE CO. a/s/o DAJ  
REALTY,

Plaintiff,

INDEX NO. 152639/2017

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

- v -

35 1/2 CROSBY STREET REALTY CORP., NEW  
YORK CONSTRUCTION AND RESTORATION,  
INC., ENGINEERING GROUP ASSOCIATES, P.C.,  
WALTER SEDOVIC ARCHITECT, P.C., YORAM  
FINKELSTEIN, FLAGSTAFF1 LLC, ICON REALTY  
MANAGEMENT LLC, ICON REALTY OPERATING  
LLC, 37 CROSBY REALTY LLC, and T&T REALTY  
MANAGEMENT LLC,

**DECISION AND ORDER**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 63, 64, 65, 66, 70, 71, 72, 73

were read on this motion to \_\_\_\_\_ dismiss \_\_\_\_\_.

By notice of motion, defendant 35 1/2 Crosby Street Realty Corp. moves pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the claims asserted against it. Plaintiff opposes.

I. VERIFIED COMPLAINT (NYSCEF 37)

DAJ Realty, plaintiff Aspen American Insurance Co.'s insured and subrogor, claims that in or about May 2014, its building at 35 Crosby Street in Manhattan was damaged by construction on an adjoining building at 37 Crosby Street. A party wall between 35 and 37 Crosby Streets had been damaged, along with the façade and chimney of 35 Crosby Street. Plaintiff thus brings this anticipatory subrogation action against defendants, owners, and property

managers of 37 Crosby Street, general contractors, contractors, subcontractors, architects, and engineers, claiming that they were negligent, violated the New York City Building Code, and trespassed onto 35 Crosby Street.

## II. CONTENTIONS

### A. Defendant (NYSCEF 33-45)

Defendant asserts that it cannot be liable because it does not own or manage 37 Crosby Street and had no role in performing the construction work on the premises. In support, it submits copies of tax maps which show that 35 Crosby Street corresponds with block 473, lot 30, that 37 Crosby Street corresponds with block 473, lot 31, and that 35 ½ Crosby Street corresponds with block 473, lot 130. (NYSCEF 38). Defendant also offers copies of deeds, mortgages, and UCC filings for 37 Crosby Street which show the premises is owned by defendant 37 Crosby Street Realty LLC and/or Flagstaff1 LLC (NYSCEF 39), and copies of deeds, mortgages, and UCC filings for 35 ½ Crosby Street which show that it is owned by defendant. (NYSCEF 40).

Defendant's expert, a professional land surveyor, states that 35½ Crosby Street is a free-standing building that is completely detached from both 35 and 37 Crosby Street and thus does not share a party wall with either building. (NYSCEF 41), and affidavits of each of its past and present board presidents in which they state that movant owns the property at 35½ Crosby Street, that 35½ Crosby Street is a free-standing building that is completely detached from both 35 and 37 Crosby Street and thus does not share a party wall with either building, and that movant had no ownership, management or other involvement in 37 Crosby Street and the construction performed there (NYSCEF 42).

### B. Plaintiff (NYSCEF 63-66)

Plaintiff contends that defendant's motion should be denied as untimely, observing that an answer had not been filed and that defendant filed the motion after the time for it to file an answer had expired. In addition, it maintains that there exists an issue of fact resulting from defendant's failure to show that it did not own the building in May 2014. And, as discovery has not yet been exchanged, plaintiff claims that defendant's motion is premature.

### C. Reply (NYSCEF 70-71)

Defendant argues that its motion is timely given the informal agreement between plaintiff and defendant granting defendant an extension of time to answer the complaint, and observes that plaintiff neither sent a letter of default nor sought a default judgment. In support, defendant offers the affidavit its former counsel who states that on January 2, 2018, her firm emailed plaintiff's counsel confirming the informal agreement to extend defendant's time to answer, and that plaintiff's counsel did not object. (NYSCEF 71). It also asserts that plaintiff is not entitled to discovery as the documentary evidence submitted establishes that it has no relation to 37 Crosby Street.

## III. ANALYSIS

Pursuant to CPLR 3211(a)(1), a party may move for an order dismissing a pleading on the ground that it has a defense based on documentary evidence. Such a motion may be granted where factual allegations in the complaint are flatly contradicted by documentary evidence. (*Kaisman v Hernandez*, 61 AD3d 565 [1<sup>st</sup> Dept 2009]; *Kliebert v McKoan*, 228 AD2d 232 [1<sup>st</sup> Dept 1996], *lv denied* 89 NY2d 802 [1996]).

A pleading may also be dismissed for failure to state a cause of action. (CPLR 3211[a][7]). In deciding the motion, the court must liberally construe the pleading, "accept the

alleged facts as true, accord [the non-moving party] the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable theory.” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). However, “[f]actual allegations presumed to be true on a motion pursuant to CPLR 3211 may be properly negated by affidavits and documentary evidence.” (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1<sup>st</sup> Dept 2005], quoting *Biondi v Beekman Hill House Apt., Corp.*, 257 AD2d 76, 81 [1<sup>st</sup> Dept 1999], *aff’d* 94 NY2d 659 [2000]).

#### A. Timeliness

Pursuant to CPLR 3012, defendant was required to respond to the complaint within 20 days of its filing. Although defendant’s motion to dismiss was untimely filed, courts are given broad discretion to consider untimely responses to pleadings, especially where the time is brief and causes no prejudice. (*Cirillo v Macy’s, Inc.*, 61 AD3d 538, 540 [1<sup>st</sup> Dept 2009] [accepting late answer where defendants claimed they unsuccessfully contacted plaintiff numerous times seeking an extension]; *Junior v City of New York*, 85 AD2d 683, 685 [2d Dept 1981] [court may accept answer where delay not prejudicial, and plaintiff had not filed motion for default]).

In light of plaintiff’s waffling as to whether it had agreed informally to permit defendant an extension of time to file an answer (NYSCEF 80), and absent a demonstration that plaintiff is prejudiced by the late submission, the motion is considered, also in light of New York’s policy in favor of litigating matters on their merits (*see Silverio v City of New York*, 266 AD2d 129, 129 [1<sup>st</sup> Dept 1999] [absent showing of prejudice, late filings may be accepted]).

#### B. Ownership and control

As plaintiff asserts that the damage to 35 Crosby Street was the product of work at 37 Crosby Street, liability may attach to defendant if it owned, managed, or controlled 37 Crosby

Street. (*See Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 459 [1<sup>st</sup> Dept 2016] [defendant owes duty when exercising a sufficient degree of control over an event]; *Pantazis v City of New York*, 211 AD2d 427, 427 [1<sup>st</sup> Dept 1995] [defendant liable for defective condition on property if it owns, maintains, operates, or controls property]).

The deed for 37 Crosby Street reflects that defendant held no ownership interest in the premises from December 2014 onward. Nor did it hold any ownership interest in the premises from early 2012 through December 2014, as reflected in the New York City Department of Finance records of which I take judicial notice. Thus, defendant may not be held liable as owner of 37 Crosby Street. (*See Forbes v Aaron*, 81 AD3d 876, 877 [2d Dept 2011] [deeds qualify as documentary evidence for purposes of CPLR 3211(a)(1)]; *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 20 [2d Dept 2009] [court may take judicial notice of location of real property recorded with clerk]).

In light of this result, there is no need to address plaintiff's wish for discovery. In any event, plaintiff offers no basis for finding that discovery would lead to relevant evidence. (*See e.g. Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189 [1<sup>st</sup> Dept 2011]).

#### IV. CONCLUSION

Accordingly, it is hereby


ORDERED, that the motion of defendant 35½ Crosby Street Realty Corp. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; it is further

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

ORDERED, that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED, that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/suptmanh](http://www.nycourts.gov/suptmanh)).

  
20181218170110B1AFFEA7F2D8B758874CB4A4C65918824D4DDA

12/18/2018  
DATE

\_\_\_\_\_  
BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE