

Sullivan v Arthritis Health Assn. PLLC
2018 NY Slip Op 34251(U)
December 3, 2018
Supreme Court, Tioga County
Docket Number: Index No. 2018-60000
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 28th day of September, 2018.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF TIOGA

TERESA SULLIVAN,

Plaintiff,

vs.

ARTHRITIS HEALTH ASSOCIATION PLLC,
HUB PROPERTIES TRUST,
CROWN PROPERTIES, and
TROU MANAGERS LLC,

Defendants.

DECISION AND ORDER

Index No. 2018-60000
RJI No. 2018-0198-M

APPEARANCES:

Counsel for Plaintiff:

Law Office of Dominick W. Lavelle
By: EMILY K. LAVELLE, ESQ.
100 Herricks Road, Suite 201
Mineola, NY 11501

Counsel for Defendant,
Crown Properties:

Law Offices of Theresa J. Puleo
By: MICHELLE M. DAVOLI, ESQ.
Salina Meadows Office Park
301 Plainfield Road, Suite 210
Syracuse, NY 13212

EUGENE D. FAUGHNAN, J.S.C.

There are two motions pending before the Court in regard to this case. The first is a motion by Plaintiff, Teresa Sullivan (“Sullivan”), for Default Judgment against the non-answering Defendants, Hub Properties Trust and Trou Managers LLC, and for an assessment of damages. The second is a cross-motion by Defendant Crown Properties (“Crown”) for Summary Judgment pursuant to CPLR §3212. For the reasons outlined below, Sullivan’s motion is granted, and Crown’s motion is denied without prejudice to renewal.

BACKGROUND FACTS

Sullivan commenced this action by the filing of a Summons and Complaint on May 23, 2018, alleging that she sustained injuries as the result of a trip and fall on May 19, 2017 on a defective sidewalk located at property located at 5794 Widewaters Parkway, Dewitt, New York. Her Complaint contains separate causes of action against each Defendant for negligence, and also separate causes of action against each Defendant on the basis that the defective sidewalk was a nuisance which each Defendant failed to abate. Crown interposed its Answer on June 28, 2018, and, among other things, Crown denied that it owned, maintained or controlled the premises. Defendant Arthritis Health Association interposed an Answer on July 13, 2018, which included a Cross Claim for apportionment against the other Co-Defendants.

DISCUSSION AND LEGAL ANALYSIS**1) SULLIVAN’S MOTION FOR DEFAULT JUDGMENT**

Sullivan has moved for Default Judgment against Hub Properties and also against Trou Managers, LLC. Pursuant to CPLR 3215(a), “[w]hen a defendant has failed to appear, plead or proceed to trial of an action ... the plaintiff may seek a default judgment against him.” Sullivan has provided evidence that Hub Properties Trust and Trou Managers, LLC were both served with

the Summons and Complaint, as well as the additional notice required under CPLR §3215(g)(4)(i). Per the attorney's affirmation, neither of those Defendants has appeared or answered, and neither has opposed the motion. Accordingly, Sullivan's motion for Default Judgment against Hub Properties and against Trou Managers LLC is GRANTED.

2) CROWN'S CROSS MOTION FOR SUMMARY JUDGMENT

On August 23, 2018, Crown filed a cross-motion for Summary Judgment pursuant to CPLR 3212, seeking dismissal of the Complaint, and all Cross Claims against Crown. In support of its cross-motion, Crown submitted an affidavit of Eveline S. Brown ("Brown"), the Vice President of Finance for Crown. Brown averred that Crown has absolutely nothing to do with the subject property, and that Crown does not own, operate, maintain, manage or lease any portion of the property, nor does it employ anyone working on the premises, or contract with anyone to work on the physical part of the premises. Brown further asserts that Crown has no lien or proprietary interest in the property.

Crown also submitted an attorney's affirmation in support of its cross-motion, arguing that based on the Brown affidavit, there is evidence that Crown has nothing to do with this property and should have no involvement in this lawsuit. The attorney's affirmation also acknowledges that the motion is made in advance of any discovery, but claims that nothing will be uncovered during discovery that will support any claim against Crown. Neither the affirmation nor Brown affidavit contains any documentary evidence concerning the ownership of the property, such as a deed or mortgage, identifying the actual record owner.

Crown's application clearly states that this is a Summary Judgment motion under CPLR 3212. Sullivan's opposition argues that Crown has not established an entitlement to dismissal under CPLR 3211(a)(1) [a defense founded upon documentary evidence], and that Crown has not made a prima facie showing of entitlement to judgment under CPLR 3212, or in the alternative, Crown's cross-motion should be denied as premature under CPLR 3212(f).

Crown did not make reference to CPLR 3211(a)(1) in its Answer or cross-motion. The reference to CPLR 3211(a)(1) is actually made in Sullivan's opposition papers.

Crown's motion was made after its Answer was filed, and therefore it is a motion for summary judgment, as opposed to a pre-Answer motion to dismiss. *See Chenango Contr., Inc. v. Hughes Assoc.*, 128 AD3d 1150 (3rd Dept. 2015), *citing Murray Bresky Consultants, Ltd. v. New York Compensation Manager's Inc.*, 106 AD3d 1255 (3rd Dept. 2013); *Lindquist v. County of Schoharie*, 126 AD3d 1096 (3rd Dept. 2015). "Once issue was joined, defendant properly framed the dismissal request as one for summary judgment (*see Kavoukian v Kaletta*, 294 AD2d 646, 742 NYS2d 157 [3rd Dept. 2002]) and may base the motion on CPLR 3211 (a) grounds which have been asserted in the answer." *Mann v. Malasky*, 41 AD3d 1136, 1137 (3rd Dept. 2007) (citations omitted). In this matter, Crown has asserted ten affirmative defenses, including failure to state a cause of action, and that Crown did "not own, control nor maintain the sidewalk, nor the shoulder and property surrounding it, and is not a proper party to this lawsuit." Given that Crown is asserting the absence of any legal viability for the causes of action, and this motion was filed shortly after the service of the Answer, it is a Summary Judgment motion on CPLR 3211 (a)(7) grounds. Although Sullivan argues that Crown has not satisfied the criteria for dismissal under CPLR 3211(a)(1), that defense was not specifically raised in Crown's Answer, and was therefore waived.

Even if the Court were to consider a defense under CPLR 3211(a)(1), Crown would not be entitled to dismissal on that basis. Under that section, dismissal is only warranted "where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law." *Gulfstream Anesthesia Consultants, P.A. v. Cortland Regional Med. Ctr., Inc.*, 2018 NY App Div LEXIS 6949, *5 (3rd Dept. Oct. 18, 2018), *quoting Phillips v. Taco Bell Corp.*, 152 AD3d 806, 807 (2nd Dept. 2017); *Calhoun v. Midrox Ins. Co.*, 2018 NY App Div LEXIS 6936 (3rd Dept. October 18, 2018). "In order for evidence to qualify as 'documentary,' it must be unambiguous, authentic, and undeniable." *Granada Condominium III Assn. v. Palomino*, 78 AD3d 996, 996-997 (2nd Dept. 2010) (quotation omitted). Documentary evidence can include things such as mortgages, deeds, contracts and other documents which are

essentially undeniable. Affidavits do not constitute documentary evidence because they can be contradicted by other affidavits or documents. *Phillips v. Taco Bell*, 152 AD3d 806.

In the present case, Crown has only submitted affidavits to support its position, and no documentary evidence. Indeed, evidence establishing ownership and/or control of the property might well have been such documentary evidence and conclusively established Crown's defense, but that was not submitted. On this record, Crown has not met the requirements of CPLR 3211(a)(1).

Crown served its Answer in this case on June 28, 2018 and filed this motion for Summary Judgment less than two months later on August 23, 2018. Crown acknowledges that there has been no discovery, but claims that Brown's affidavit established that Sullivan has no viable claim against Crown. Crown argues that it should not have to be involved in this litigation and incur legal expenses, particularly because there are multiple defendants. Crown's point is well taken. However, it is also true that rather than submit documentary evidence to support its defense (and file a pre-answer motion to dismiss under CPLR 3211), Crown relies upon the Brown affidavit. That affidavit is self-serving, conclusory and uncorroborated. Further, by moving so quickly for Summary Judgment, Crown has deprived Sullivan of any discovery. It is important to note that Summary Judgment is a final determination on the merits. Summary Judgment should not be granted when it would deprive a plaintiff a reasonable opportunity for disclosure. *O'Toole v. County of Sullivan*, 255 AD2d 799 (3rd Dept. 1998).


Under CPLR 3211(d), the Court is empowered to deny a motion if facts essential to oppose a motion may exist but cannot be stated at that time. Similarly, under the Summary Judgment statute, "the Court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had." CPLR 3212(f); *Cassevah v. Mack*, 51 AD3d 1132 (3rd Dept. 2008). If the court concludes that depositions could lead to relevant evidence, the court should stay a Summary Judgment motion, and allow those depositions to proceed. *Cassevah v. Mack, supra*.

Here, the Court concludes that limited disclosure and possibly depositions could lead to relevant evidence (i.e. whether Crown has any connection to this property). Plaintiff has not been allowed a reasonable opportunity to obtain such disclosure prior to the bringing of this motion. Thus, Crown's motion is premature and is stayed, pending limited discovery. Sullivan and Crown are hereby directed to complete paper discovery between each other within 60 days of the date this Decision and Order is signed. If necessary, any depositions are to be completed within 90 days of when it is signed. Thereafter, if appropriate, Crown can supplement and/or renew its request for Summary Judgment.

CONCLUSION

This constitutes the **DECISION AND ORDER** of the Court. It is being uploaded to the electronic case file. The transmittal of copies of this **DECISION AND ORDER** by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: December 3, 2018
Owego, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice

The following papers were received and reviewed by the Court in connection with these motions, and have been previously uploaded to the electronic file.

- 1) Plaintiff's Notice of Motion dated August 8, 2018 with Affirmation of Emily K. Lavelle, Esq., dated August 8, 2018 with attached Exhibits, and Affidavit of Teresa Sullivan in support of Motion, with attached Exhibit;
- 2) Notice of Cross Motion of Crown Properties dated August 23, 2018, with Attorney Affirmation of Michelle M. Davoli, Esq., dated August 23, 2018, with attached Exhibits; and Affidavit of Eveline S. Brown, sworn to on August 23, 2018;
- 3) Affirmation of Emily K. Lavelle, Esq., dated September 19, 2018 in opposition to the Cross Motion;
- 4) Attorney Reply Affirmation of Michelle M. Davoli, Esq., dated September 27, 2018, in further support of the Cross Motion.