

**Acuna v Hudson Cos. Inc.**

2019 NY Slip Op 30325(U)

January 29, 2019

Supreme Court, Kings County

Docket Number: 509460/2018

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29<sup>th</sup> day of January, 2019.

P R E S E N T:

HON. CARL J. LANDICINO,

Justice.

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MAURICIO ACUNA,

*Plaintiff,*

Index No.: 509460/2018

- against -

DECISION AND ORDER

THE HUDSON COMPANIES INCORPORATED,  
GATEWAY ELTON III, L.L.C., ASHFORD LOCKE  
BUILDERS, L.L.C., CAMBA GATEWAY HOUSING  
DEVELOPMENT FUND CORPORATION, ELTON  
OWNERS 3 L.L.C., RELATED RETAIL LP, BRUNO F  
FRUSTACI GC L.L.C.,

*Defendants.*

Motion Sequence #1

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**Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:**

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed.....	1/2. _____
Opposing Affidavits (Affirmations).....	3. _____
Reply Affidavits (Affirmations).....	4. _____

Upon the foregoing papers, and after oral argument, the Court finds as follows:

Plaintiff commenced this action for alleged injuries sustained at 475 Locke Street, Brooklyn N.Y. (the "Premises") while working on the construction site located there. The Complaint, *inter alia*, claims violations of NYS Labor Law §§200, 240(1) and 241(6). The Defendants (the "Moving Defendants") now move for an Order pursuant to CPLR 3211(a)(1) and (7), dismissing the Complaint as against all named Defendants except for Defendant Ashford Locke Builders, LLC (hereinafter "Ashford") and Elton Owner III, LLC, i/s/h/a Elton Owner 3, LLC (hereinafter "Elton"). As to Defendants Ashford and Elton, the Defendants seek an extension of time to answer pursuant to CPLR 2004 or, alternatively an extension for any other of the moving Defendants, if any, remaining as a result of the determination of this motion. Plaintiff opposes the motion and contends that the evidence provided by the Moving Defendants is insufficient as a matter of law to establish a right to dismissal pursuant to either to 3211(a)(1) or (a)(7).

In support of the Moving Defendants' motion, they proffer: 1) an Affidavit of Aaron Koffman, purported Principal of Defendant, the Hudson Companies Incorporated and a member of Elton; 2) an Affidavit of Antonio Frustaci, a purported member of Ashford, 3) a purported Standard Form of Agreement Between Owner and Contractor For A Fixed or Lump-Sum Price with Defendant Elton as sponsor, Defendant Camba Gateway III Housing Development Fund Corporation as Fee Owner (hereinafter "Camba") and Ashford as Contractor (Defendants' Motion, Exhibit "C"); 4) a purported Declaration of Interest And Nominee Agreement between Defendant Camba and Defendant Elton, recorded/filed in the Office of the City Register of the City of New York on July 11, 2014 (Defendants' Motion, Exhibit "D"); 5) a purported Declaration of Condominium in relation to the Premises named Elton site A-2 Condominium with declarants reflected as Elton and Camba, dated January 12, 2016 and purportedly recorded with the NYC Register, on November 29, 2016 (Defendants' Motion Exhibit "E"); 6) a purported subcontract between Ashford and G.M. Contractors Plus Corp. (hereafter "G.M") (apparently Plaintiff's employer) concerning the Contract between Elton and Ashford in relation to the Premises (Defendants' Motion Exhibit "F"). The Moving Defendants contend that the above referenced affidavits and documents establish that the action should be dismissed as against them pursuant to CPLR 3211(a)(1) and (7).

*Moving Defendants' 3211(a)(1) Application*

Turning to the merits of the Moving Defendants' application to dismiss the instant matter pursuant to CPLR 3211(a)(1), the Court finds that the documentation provided was insufficient to conclusively establish the Moving Defendants non-involvement in the work and project. "A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence 'may be appropriately granted only where the documentary

evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.” *Rodolico v. Rubin & Licatesi, P.C.*, 114 A.D.3d 923, 924, 981 N.Y.S.2d 144, 146 [2<sup>nd</sup> Dept, 2014], quoting *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 326, 774 N.E.2d 1190, 1197 [2<sup>nd</sup> Dept, 2002]. “However, ‘[n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1).” *Eisner v. Cusumano Const., Inc.*, 132 A.D.3d 940, 941–42, 18 N.Y.S.3d 683, 685 [2<sup>nd</sup> Dept, 2015], quoting *Granada Condo. III Ass'n v. Palomino*, 78 A.D.3d 996, 913 N.Y.S.2d 668 [2<sup>nd</sup> Dept, 2010]. As outlined above, in the instant matter, the Moving Defendants rely on such documents including but not limited to, the Contract between Elton and Ashford in relation to the Premises, and a purported Declaration of Interest And Nominee Agreement between Defendant Camba and Defendant Elton. They also rely upon the Affidavit of Aaron Koffman, purported Principal of Defendant, the Hudson Companies Incorporated and a member of Elton and the Affidavit of Antonio Frustaci, a purported member of Ashford. These documents, taken together, do not utterly refute or conclusively establishing the Plaintiff's claims such that relief pursuant to CPLR 3211(a)(1) is appropriate. As stated, the affidavits are not documentary evidence, and the documents at Exhibit “C” and “F” are not properly authenticated. The affidavits are also conclusory and do not reference any of the documentary evidence. As a result, the Moving Defendants application made pursuant to CPLR 3211(a)(1) is denied.

*Moving Defendants' 3211(a)(7) Application*

The Court also denies that aspect of Moving Defendants' motion made pursuant to CPLR 3211(a)(7). Generally, in order to prevail on a motion to dismiss pursuant to CPLR §3211(a)(7), “the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action.” *Sokol v. Leader*, 74 A.D.3d 1180, 904 N.Y.S.2d 153, 155 [2<sup>nd</sup>

Dept]; see *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Foley v. D'Agostino*, 21 A.D.2d 60, 64–65, 248 N.Y.S. 2d 121. However, “where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate.” *Agai v. Liberty Mut. Agency Corp.*, 118 A.D.3d 830, 832, 988 N.Y.S.2d 644, 647 [2<sup>nd</sup> Dept, 2014]. However, “[a]ffidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 unless they ‘establish conclusively that [petitioner] has no [claim or] cause of action.’” *Lawrence v. Miller*, 11 N.Y.3d 588, 595, 901 N.E.2d 1268, 1271 [2008], quoting *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 357 N.E.2d 970, 971 [1976].

In the instant proceeding, the Moving Defendants contend as part of their application, made pursuant to CPLR 3211(a)(7), that the Plaintiffs have failed to state a cause of action (Defendants’ Motion, Paragraph 21, Page 8), and that “[t]here is no ‘substantial question,’ upon a review of the documentary evidence attached” (Defendants’ Motion, Paragraph 22, Page 8). As an initial matter, the Court finds that the Plaintiff’s underlying complaint is sufficiently plead as it relates to the Plaintiff’s negligence claim. Notwithstanding the fact that the Moving Defendants’ application pursuant to CPLR 3211(a)(7) seeks to rely on the aforementioned evidentiary material submitted, the Court declines to treat the instant motion as a summary judgment motion pursuant to CPLR 3211(c). See *Hendrickson v. Philbor Motors, Inc.*, 102 A.D.3d 251, 259, 955 N.Y.S.2d 384, 390 [2<sup>nd</sup> Dept, 2012]. As stated above, the support for the subject motion, documentary or otherwise, is

conclusory, not conclusive. The Court does note that the Plaintiff does not oppose the Defendants' motion as it relates to Camba Gateway Housing Development Fund Corp.

Based on the foregoing, it is hereby ORDERED as follows:

The Moving Defendants' motion is granted solely to the extent that the action is dismissed as against Camba Gateway Housing Development Fund Corp. and Answers shall be served on or before February 28, 2019. All other relief sought is denied.

This constitutes the Decision and Order of the Court.

ENTER:



**Carl J. Landicino**  
J.S.C.

KINGS COUNTY CLERK  
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*[Handwritten initials]*