

**Sunbelt Rentals, Inc. v Prima Contr. Ltd.**

2019 NY Slip Op 33943(U)

May 14, 2019

Supreme Court, Nassau County

Docket Number: Index No. 606450/17

Judge: Anthony L. Parga

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This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

**SUPREME COURT-NEW YORK STATE-NASSAU COUNTY**

**PRESENT: HON. ANTHONY L. PARGA**

**JUSTICE**

-----X  
SUNBELT RENTALS, INC.,

**PART 4**

Plaintiff,

INDEX NO. 606450/17

-against-

MOTION DATE: 4/4/19

SEQUENCE NO.: 003

PRIMA CONTRACTING LTD., MICHAEL  
FILIPPONE, JORGE OUVINA and JOSE  
OUVINA,

Respondent.

-----X

<b>Notice of Motion, Affm., &amp; Exhs.....</b>	<b><u>1</u></b>
<b>Affirmation in Opposition.....</b>	<b><u>2</u></b>
<b>Reply Affirmation.....</b>	<b><u>3</u></b>

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Upon the foregoing papers, the motion by defendant, Jose Ouvina (hereafter as “movant”), which seeks an order, dismissing the complaint as against him upon the grounds of an absolute defense founded upon documentary evidence, pursuant to CPLR §3211(a)(1); dismissing the complaint as against him for failure to state a cause of action, pursuant to CPLR §3211(a)(7); and/or for summary judgment, pursuant to CPLR § 3212, is determined as follows.

Plaintiff, Sunbelt Rentals, Inc. (Hereinafter as “Sunbelt” or “Plaintiff”) commenced this action sounding in breach of contract arising out of a rental agreement. Plaintiff’s complaint alleges, in pertinent part that pursuant to the rental agreement, Sunbelt from the period of November 4, 2015 through September 6, 2016, rented construction equipment, provided supplies and service to defendant, Prima Contracting LTD. (hereinafter as “Prima”). That Prima and its principles, Michael Filippone (hereinafter as “Fillippone”), Jorge Ouvina (hereinafter as “Ouvina”) and movant, failed to pay the sums due and owing under the terms of the rental agreement.

Movant seeks to dismiss the plaintiff’s sixth cause of action, the sole claim against him, which alleges, in essence, that: movant is an officer and owner of Prima; Prima is the alter ego of movant; that movant exercised domination and control over Prima and disregarded corporate

formalities; movant defrauded plaintiff by renting the subject equipment allegedly for personal use under his corporate alter ego and as such is personally liable for Prima's debt.

The movant, in support of the motion submits his executed affidavit in which he attests that he was a mere employee of Prima and was hired by Filippone and Ouvina, whom he knows to be principals and owners of Prima; that he is not an officer or owner of Prima and never served in that capacity; he is a salaried employee with limited authority and responsibilities and is paid by check; when there was not sufficient work he was laid off and received unemployment benefits; he does not exercise any control let alone exclusive control over Prima and has no role in corporate workings and decisions; he was not a party to the rental equipment agreement and he did not use the equipment for personal use. In support of the motion he also submits copies of the complaint, his *pro se* answer (submitted prior to obtaining representation), pay stubs and checks, IRS form 4852 (substitute W-2), NY State Unemployment Benefits Determination (It is in Spanish, no translation provided) and a construction contract proposal signed by Jorge Ouvino, President, on behalf of Prima.

“On a motion to dismiss based on documentary evidence (pursuant to CPLR §3211[a][1]), dismissal is only warranted if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” *Moore v. Liberty Power Corp., LLC*, 72 AD3d 660, 661 [2d Dept. 2010] quoting *Klein v. Gutman*, 12 AD3d 417,418 [2d Dept. 2004]). To obtain dismissal “the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiffs claim” *Teitler v. Max J. Pollack & Sons*, 288 AD2d 302 [2<sup>nd</sup> Dept. 2001]; see *Leon v. Martinez*, 84 NY2d 83 [1994]; *Sheridan v. Town of Orangetown*, 21 AD3d 365 [2d Dept. 2005]).

On a motion for summary judgment, the movant “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

On a motion to dismiss for failure to state a cause of action, pursuant to CPLR

§3211(a)(7), the plaintiff's claims must be liberally construed, the factual allegations must be deemed true, and the pleading party must be accorded the benefit of every possible favorable inference (*Dinger v. Cefola*, 133 AD3d 816[2d Dept. 2015]; *Webb-Weber v. Community Action for Human Services, Inc.*, 23 NY3d 448 [2014]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Fuller v Collins*, 114 AD3d 827 [2014]; *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793). The "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law...." (*Guggenheimer v. Ginzberg*, 43 NY2d 268 [1977]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11 [2005]). "When a party moves to dismiss a complaint 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..." and "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Sokol v. Leder*, 74 AD3d 1180, 1181 [2d Dept. 2010]).

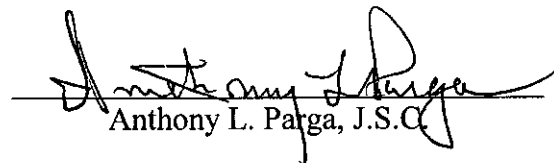
Based on the this Court's review of the allegations set forth in the complaint, the plaintiff has sufficiently pled a cause of action to hold movant, personally liable on the breach of contract claim, and a justiciable controversy exists.

Moreover, the movant's documentary evidence fails to definitively contradict the allegations in the complaint or conclusively establish that the movant, Jose Ouvina, was not an owner or principle of Prima, nor has the movant established his entitlement to summary judgment.

Accordingly, defendant Jose Ouvina's motion to dismiss and for summary judgment is denied.

This constitutes the decision and order of this Court. Any relief not expressly granted herein is denied.

Dated: May 14, 2019

  
Anthony L. Parga, J.S.C.

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