

<b>Toro v Centurion Condominium</b>
2020 NY Slip Op 31892(U)
June 16, 2020
Supreme Court, New York County
Docket Number: 155002/2019
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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ANGEL TORO,

Plaintiff,

- v -

THE CENTURION CONDOMINIUM, THE BOARD OF MANAGERS OF CENTURION CONDOMINIUM, CENTURION APS LLC, ARISTOCRAT PLASTIC SURGERY P.C., KEVIN TEHRANI, M.D., M-AZAD CONSTRUCTION INC, HRBDX INC., PTS GENERAL CONSTRUCTION LLC, JG GENERAL WELDING, INC., DKM CONSTRUCTION CORP.,

Defendant.

-----X

CENTURION APS LLC, ARISTOCRAT PLASTIC SURGERY P.C., KEVIN TEHRANI, M.D.

Plaintiff,

-against-

EASTERN CUTTING CORP, M-AZAD CONSTRUCTION INC.

Defendant.

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DECISION + ORDER ON MOTION

Third-Party Index No. 595059/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 23, 24, 25, 26, 27, 28, 36, 37

were read on this motion to/for DISMISS

In this personal injury action, plaintiff Angel Toro, an employee of third party defendant Eastern Cutting Corp, claims he was injured on November 2, 2016, while he was performing work on a patio and was allegedly knocked over by a hoist being used to lift concrete slabs. Defendant, PTS General Construction LLC, ("PTS" and/or "defendant"), seeks an order pursuant to CPLR §3211(a)(1) and (a)(7), dismissing plaintiff's complaint and all cross-claims against it, contending that PTS was not on site on the date of plaintiff's accident, and with the exception of

its one day of work installing pavers on the roof five months prior, on June 14, 2016, it never returned to the job site and had nothing to do with plaintiff's work for Eastern Cutting Corp.

## BACKGROUND

Plaintiff, an employee of Eastern Cutting Corp., alleges that he was injured on November 2, 2016, while performing work on a patio at The Centurion Condominium, as a result of the failure of each of the defendants to provide a safe work place. (NYSCEF Doc. No. 1, ¶¶ 128 – 146). In lieu of answering the complaint, defendant PTS has filed the instant motion contending that it was hired to do work on the premises five months prior to plaintiff's accident and that the documents submitted in support of dismissal, establish a complete defense to plaintiff's claims and the cross claims asserted against it. (NYSCEF Doc. No. 15, exhibits A – G).

PTS contends that its proposal submitted on May 11, 2016 for the installation of pavers on the roof of the premises, the Department of Buildings ("DOB") permit, and various emails and photographs depicting its work, conclusively establish that PTS performed and successfully completed its work on June 14, 2016, five months prior to plaintiff's accident. (NYSCEF Doc. No. 15, Ex. C). PTS further contends that on June 15, 2016, its work was reviewed and approved and it inquired where to send its invoice for payment. (NYSCEF Doc. No. 15, Ex. D). PTS submitted its invoice for payment on June 15, 2016 and on June 17, 2016 it received confirmation from the building manager that its work was approved and that its invoice would be processed. (NYSCEF Doc. No. 15, Exs. E, F). PTS' manager states that PTS never returned to the job site after it completed its work on June 14, 2016 for which the DOB issued its letter of completion thereafter, on July 12, 2016. (NYSCEF Doc. No. 15, ¶ 8, and Exs. C, G).

In opposition, plaintiff contends that the documents submitted in support of PTS' motion do not eliminate all questions of fact, and claims that PTS is not entitled to summary judgment or

dismissal because the motion is premature having been made before any discovery has been conducted, including depositions of the parties.

### STANDARD OF REVIEW/ANALYSIS

A motion to dismiss may be granted pursuant to CPLR 3211(a)(1) if the defendant asserts “a defense . . . founded upon documentary evidence” (CPLR 3211[a][1]). Dismissal is warranted “only if the documentary evidence submitted utterly refutes plaintiff’s factual allegations and conclusively establishes a defense to the asserted claims as a matter of law” (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014] [internal quotation marks and citations omitted]).

Under CPLR §3211(a) (7), a party may move for dismissal of one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action. On such a motion, the Court is concerned with whether the plaintiff has a cause of action and not whether he has properly stated one. (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633,636 [1976]).

The court will liberally construe the pleadings in the plaintiff’s favor, accept the facts as true, and determine whether the facts alleged fit within any cognizable theory. (See *Cron v. Hargro Fabrics*, 91 N.Y.2d 362, 366 [1998]). However, a court is not obliged to accept as true legal conclusions or factual allegations that are either inherently incredible or flatly contradicted by evidence. (See *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91 [1999]). Even in the case of perfectly pleaded causes of action, a movant may, using permissible proof, go behind the pleading to establish that it lacks merit. See (*Rovello*, 40 N.Y.2d at 636; see also *Carnival Co. v. Metro-Goldwyn-Mayer, Inc.*, 23 A.D.2d 75, 77 [1st Dept. 1965]). In any case, CPLR 3211(c) permits the court to treat a motion denominated as seeking dismissal as a motion for summary judgment.

Here, PTS submits the affidavit of its managing partner and documents related to the work it performed five months prior to plaintiff's accident. (NYSCEF Doc. No. 15, exhibits A – G). Specifically, PTS maintains that the documentary evidence, including PTS's accepted proposal, the DOB permit, emails, photographs and the permit signed off by the DOB, establish a complete defense to plaintiff's claims as alleged in the complaint.

In opposition, plaintiff contends that the documents submitted in support of PTS' motion do not eliminate all questions of fact, claiming that PTS "can still be liable for this accident without being physical [sic] present at the job site" and speculating that PTS "could very well be a general contractor who was directing the work being done by plaintiff at the time of the accident even though they did not hire the plaintiff's employer." (NYSCEF Doc. No. 24, ¶ 26).

Plaintiff's speculative conclusion that discovery may lead to evidence demonstrating that defendant is responsible for plaintiff's alleged injury does not even attempt to address the documentary proof. Plaintiff has simply failed to rebut PTS's claim that it is not responsible for plaintiff's accident because its work at the premises was completed five months prior to plaintiff's accident and that it never returned to the job site after it completed its work on June 14, 2016. (NYSCEF Doc. No. 15, exhibits A – G).

Plaintiff has not offered any evidence in opposition and as such, he has failed to raise a triable issue of fact as to PTS's liability. Mere proof that PTS was involved in construction at the premises prior to the date of the plaintiff's accident is insufficient to defeat PTS' motion to dismiss. (see, *Lewis v. Guy Pratt, Inc.*, 264 A.D.2d 383 [2d Dept 1999]; *Perrone v Waldbaum, Inc.*, 252 AD2d 517 [2d Dept 1998]; *Raimo v Brown*, 249 AD2d 530 [2d Dept 1998]).

PTS also seeks dismissal of all cross-claims asserted against it by the defendants who have appeared in this action. As PTS correctly notes, defendants have not opposed this motion

and plaintiff does not address this portion of PTS' motion. As such, based on the proof submitted in support of dismissal, the cross claims are dismissed. Accordingly, it is hereby,

ORDERED that the motion of defendant PTS General Construction LLC, (motion sequence number 001) to dismiss the complaint and all cross-claims herein is granted and the complaint and all cross claims are dismissed 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; 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 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/supctmanh](http://www.nycourts.gov/supctmanh)).

6/16/2020  
DATE

  
W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART  OTHER

APPLICATION:

SETTLE ORDER  
 INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER  
 FIDUCIARY APPOINTMENT  REFERENCE

CHECK IF APPROPRIATE: