Keating v 243 Dev., LLC
2020 NY Slip Op 32417(U)
July 23, 2020
Supreme Court, New York County
Docket Number: 157350/2019
Judge: W. Franc Perry

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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KATHLEEN KEATING,

Plaintiff,

- v -

243 DEVELOPMENT, LLC, WERIZE, INC., SILVERCUP SCAFFOLDING I, LLC., DUNN CO. SAFETY, LLC, BRODMORE MANAGEMENT INC., MASTER ROOFING & SIDING CONS., INC., MASTER ROOFING & SIDING, INC., VADEM BRODSKY, C&L STUCCO CORP.,

Defendant.

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INDEX NO. 157350/2019

MOTION DATE 02/10/2020

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

243 DEVELOPMENT, LLC, WERIZE, INC.

Plaintiff,

-against-

MISSION DOLORES, 249-251 4TH AVE PROPERTY LLC, KONE INC., A-1 UNDERGROUND PLUMBING CONTRACTORS CORP., LATEMPA SERVICES INC., SETHERA LAURENCY.

Defendant.

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Third-Party Index No.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 51, 52

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105

were read on this motion to/for JUDGMENT - DEFAULT.

This is an action for personal injuries sustained by Plaintiff Kathleen Keating on June 30, 2019, when she was struck by falling debris from a construction site located at 243 4th Avenue, Brooklyn, New York. In motion sequence 2, Defendant Dunn Co. Safety, LLC ("Dunn") moves

to dismiss the complaint based on documentary evidence and for failure to state a claim. The motion has been submitted unopposed.

In motion sequence 3, Plaintiff moves for a default judgment against Defendants C&L Stucco Corporation ("C&L") and Brodmore Management, Inc. ("Brodmore") pursuant to CPLR 3215. Since the date of filing, C&L has submitted its Answer (NYSCEF Doc No. 111) but Brodmore has yet to appear or oppose. The motions are consolidated for disposition.

BACKGROUND

Around 3 pm on June 30, 2019, Plaintiff was a patron at Mission Dolores, a restaurant in Brooklyn, when she was allegedly struck by scaffolding and construction material that fell from the 12th floor of an overhanging construction site. (NYSCEF Doc No. 27 at 1.) Plaintiff filed her initial Complaint on July 26, 2019 (NYSCEF Doc No. 1) against four Defendants, including moving Defendant Dunn, but later amended the Complaint several times, adding Defendants Brodmore (NYSCEF Doc No. 15), Master Roofing & Siding, Inc., Vadem Brodsky (NYSCEF Doc No. 22), and C&L (NYSCEF Doc No. 69).

Motion Sequence 002

Dunn moves to dismiss the Complaint as alleged against it on the grounds that Dunn's contract to provide site safety management services had been terminated by the general contractor of the project in July 2018, and it thus owed no duty to the Plaintiff. In support, Dunn submits the following documentation: a July 3, 2018 termination letter from 243 Development LLC (NYSCEF Doc No. 34); New York City Department of Buildings ("DOB") permit records demonstrating that Dunn was the site safety coordinator on May 4, 2018 but that Dunn's involvement in the project ceased as of July 12, 2018 (NYSCEF Doc No. 35); and email communications between counsel for Plaintiff and Dunn (NYSCEF Doc Nos. 37, 39). The motion has been submitted unopposed.

It is well established that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." (*Leon v Martinez*, 84 NY2d 83, 87 [1994].)

Where dismissal of an action is sought, pursuant to CPLR 3211 [a] [1], on the ground that it is barred by documentary evidence, such relief may be warranted only where the documentary evidence "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 citations omitted].) "To be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity." (*239 East 115th Street v Pizza*, 2017 WL 1193205, *2 [Sup Ct, NY County 2017], citing *Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010].)

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], "the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory." (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002].) However, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts. (*See Bishop v Maurer*, 33 AD3d 497 [1st Dept 2006]; *Igarashi v Higashi*, 289 AD2d 128 [1st Dept 2001].)

The court finds that the documentary evidence submitted in support of dismissal utterly refutes Plaintiff's claim that Dunn was responsible for site safety at the time of the accident. The DOB records demonstrate that Dunn had not worked at the site for a year prior to the accident, that Dunn had been replaced, and that Dunn's replacement had also been replaced. The court also

notes that Plaintiff has failed to oppose the motion despite being otherwise active in this case. Accordingly, Dunn's motion to dismiss is granted.

Motion Sequence 003

Plaintiff moves for default judgment pursuant to CPLR 3215 against Defendants C&L and Brodmore. The motion is denied as moot as to Defendant C&L, as C&L has since filed its Answer. (NYSCEF Doc No. 111.)

In a Decision and Order dated March 5, 2020, this court granted Plaintiff's motion sequence 001 for default judgment against Brodmore to the extent that Brodmore's failure to appear was noted, but stated that "the degree of defendant Brodmore Management Inc.'s liability, if any, and plaintiff's damages attributable to the defaulting defendant are to be decided at an inquest which will be held at the time of trial." (NYSCEF Doc No. 76.)

Because this court has already determined Brodmore to be in default, the motion is denied as to Brodmore. Accordingly, it is hereby

ORDERED, that Defendant Dunn's motion to dismiss the action as against it is granted; and it is further

ORDERED that Plaintiff's motion for default judgment against Defendants C&L and Brodmore is denied.

Any requested relief not otherwise discussed has nonetheless been considered by the curt and is hereby denied. This constitutes the decision and order of the court.

July 23, 2020
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE