

Jobe v Cargo

2021 NY Slip Op 30713(U)

January 13, 2021

Supreme Court, Queens County

Docket Number: 702525/2020

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

FILED

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

**1/13/2021
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**COUNTY CLERK
QUEENS COUNTY**

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

DILLON S. JOBE, Deceased by and
through IAN SANDIFORD, as Proposed
Administrator of the Estate of DILLON
S. JOBE,

Index No.: 702525/2020
Motion Date: 12/24/2020
Motion No.: 12
Motion Seq.: 2

Plaintiffs,

- against -

LUFTHANSA CARGO, LUFTHANSA, LUFTHANSA
GROUP BUSINESS SERVICES NEW YORK LLC,
LUFTHANSA CARGO AKTIENGESELLSCHAFT;
DEUTSCHE LUFTHANSA AKTIENGESELLSCHAFT,
THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY, CITY OF NEW YORK, ETNA
PRESTIGE TECHNOLOGY, INC. and LODIGE
U.S.A., INC.,

Defendants.

- - - - - x

LUFTHANSA CARGO A.G.,

Third-Party Plaintiff,

- against -

COMMAND SECURITY D/B/A AVIATION
SAFEGUARDS (S/H/A AVIATION SAFEGUARDS)
and PROSEGUR SERVICES, GROUP, INC.,

Third-Party Defendants.

- - - - - x

The following electronically filed documents read on this motion
by defendant ETNA PRESTIGE TECHNOLOGY, INC. (Etna) for an Order
pursuant to CPLR 3211(a) (1) and (7), dismissing plaintiff's
amended complaint in its entirety based upon documentary evidence
and for failure to state a cause of action:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memo. of Law...	EF 72 - 80
Affirmation in Opposition.....	EF 84 - 86
Affirmation in Reply.....	EF 113

This wrongful death action arises out of an incident that occurred on February 19, 2019 at John F. Kennedy International Airport. At the time of the incident, plaintiff decedent was a security guard employed by Aviation Safeguard who was working in the Lufthansa Building located in cargo building No. 23. While plaintiff decedent was escorting elevator mechanics to a disabled freight elevator, he was struck in the elevator shaft by the freight elevator which came down upon him, resulting in his death.

Plaintiff commenced this action on February 13, 2020. On August 5, 2020, plaintiff filed an amended complaint. The amended complaint alleges that Etna entered into an agreement to perform maintenance and/or repair work on the elevators and that it was negligent in, inter alia, "allowing, causing and/or permitting dangerous, hazardous and unsafe conditions to exist on and in the area of the freight elevator;. . .allowing, causing and/or permitting the freight elevator to be, become and/or remain in a state of disrepair; in failing to properly maintain, check repair and/or inspect said freight elevator; in improperly and inadequately maintaining, repairing, checking and/or inspecting said freight elevator". Etna now moves to dismiss the amended complaint pursuant to CPLR 3211(a) (1) and (7).

"To succeed on a motion to dismiss pursuant to CPLR 3211(a) (1), 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 plaintiff's claim" (Teitler v Pollack & Sons, 288 AD2d 302 [2d Dept. 2001]). A motion to dismiss a complaint based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Stein v Garfield Regency Condominium, 65 AD3d 1126 [2009], quoting Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002]).

On a motion to dismiss pursuant to CPLR 3211(a) (7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002]; Leon

v Martinez, 84 NY2d 83[1994]; Greer v National Grid, 89 AD3d 1059 [2d Dept. 2011]; Prestige Caterers, Inc. v Siegel, 88 AD3d 679 [2d Dept. 2011]).

Before a defendant may be held liable for negligence, it must be shown that the defendant owes a duty to the plaintiff Kallem v Mandracchia, 111 AD3d 893 [2d Dept. 2013]; Safa v Bay Ridge Auto, 84 AD3d 1344 [2d Dept. 2011]). A party who enters into a contract to render services, as here, may be said to have assumed a duty of care and could potentially be liable to third persons: "(1) where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launch[es] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (Espinal v Melville Snow Contractors, Inc., 98 NY2d 136 [2002][internal quotation marks omitted]).

Here, it is undisputed that plaintiff decedent was not a party to the Agreement between Etna and Lufthansa Cargo AG (Lufthansa). Accordingly, any duty from Etna to plaintiff decedent must be established through one of the three delineated exceptions set forth in *Espinal*.

Etna seeks to dismiss the amended complaint on the grounds that the documentary evidence, specifically Etna's Maintenance Agreement with Lufthansa, establishes that it did not assume any duty to entirely displace Lufthansa's duty to maintain its premises safely. Additionally, Etna contends that the amended complaint fails to allege that Etna launched a force or instrument of harm or that the plaintiff decedent detrimentally relied on the continued performance of the contracting party's duties.

In support, Etna submits the affidavit of its president and chief executive officer, Nelson Martayan. Mr. Martayan affirms, inter alia, that Etna contracted with Lufthansa on October 1, 2008 to perform certain preventative and corrective maintenance tasks on Lufthansa's cargo handling system and ground support equipment in Building No. 23 at JFK Airport. The Agreement does not contain any provisions requiring Etna to inspect or maintain Cargo Building No. 23 safely. Additionally, the Agreement does not contain any provisions conferring third-party beneficiary status to any entities or persons, including plaintiff decedent. Etna did not have any contract or contractual relationship with any other entity at JFK Airport other than Lufthansa. Annexed to Mr. Martayan's affidavit is a copy of the Agreement.

Among other things, the Agreement states that Etna agrees to perform maintenance of Lufthansa's cargo handling system and ground support equipment. Etna was to "do all other things necessary or proper therefore or incidental thereto". Based on such provision, and reading the Agreement in the light most favorable to plaintiff, this Court finds that the Agreement does not conclusively establish that Etna did not entirely displace Lufthansa's duty to maintain the subject freight elevator and cargo handling system.

Moreover, and according plaintiff the benefit of every possible inference, the amended complaint does state a cause of action for negligence. Specifically, while the amended complaint does not state that plaintiff detrimentally relied on the continued performance of the contracting party's duties, the amended complaint does state that Etna caused or created the dangerous condition. Based on such, this Court finds that the amended complaint properly alleges that Etna launched a force or instrument of harm.

Accordingly, and based on the above reasons, it is hereby ORDERED, that the motion to dismiss is denied.

Dated: January 13, 2021
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.

FILED

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**COUNTY CLERK
QUEENS COUNTY**