

Diaz v 51 Hamilton Place Realty Inc.

2021 NY Slip Op 31783(U)

May 24, 2021

Supreme Court, New York County

Docket Number: 159059/2020

Judge: David Benjamin Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

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INDEX NO. 159059/2020

MARGARITA DIAZ,

Plaintiff,

MOTION SEQ. NO. 001

- v -

51 HAMILTON PLACE REALTY INC. and 51 HAMILTON
LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18

were read on this motion to/for DISMISS.

In this personal injury action, defendant 51 Hamilton LLC moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint and all cross claims against it, as well as for such other relief as this Court deems just and proper. Plaintiff Margarita Diaz opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on January 24, 2019 in which plaintiff claims she was injured when her bedroom ceiling, located at 481 West 165th Street, also allegedly known as 2119 Amsterdam Avenue ("the building"), apartment 2E, in Manhattan ("the apartment") collapsed and fell on her. Doc. 1. On October 26, 2020, plaintiff commenced the captioned action against 51 Hamilton Place Realty Inc. ("Hamilton Inc.") and 51 Hamilton LLC ("Hamilton LLC), alleging that said defendants owned, managed, operated and/or controlled the

building and that their negligence caused her injuries. Doc. 1. Plaintiff further alleged a cause of action sounding in nuisance. Doc. 1.

Hamilton LLC now moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint on the ground that it has never owned, rented or occupied the building; was not negligent; did not owe or breach a duty to plaintiff; and did not proximately cause plaintiff's injuries. Doc. 5. In support of the motion, Hamilton LLC submits the deed to the building, which reflects that, on October 4, 2018, nonparty Pulssar Realty, LLC ("Pulssar") transferred title to the building to Hamilton Inc. ("Doc. 8"). It also submits a printout from the New York City Department of Buildings ("DOB") purporting to show that 2219 Amsterdam Avenue was also known as 481 East 165th Street. Doc. 7. A filing with the New York Department of State reflects that, on November 26, 2018, Hamilton Inc. legally changed its name to RG3 Realty Corp. ("RG3"). Doc. 9. Further, Hamilton LLC submits the affidavit of Douglas Peterson, one of its principals, who states that the said entity never had any ownership interest in the building. Doc. 10.

In opposition, plaintiff argues that the motion must be denied because Hamilton LLC has not submitted documentation adequate to warrant dismissal based on documentary evidence pursuant to CPLR 3211(a)(1). Doc. 14. Plaintiff further asserts that Hamilton LLC failed to establish its prima facie entitlement to summary judgment and that, in any event, the motion must be denied as premature since discovery needs to be conducted. Doc. 14.

In reply, Hamilton LLC argues that it submitted documentary evidence conclusively establishing that the complaint must be dismissed since it did not own, maintain, control, and/or manage the building. Doc. 17.

LEGAL CONCLUSIONS

When a court rules on a motion to dismiss under CPLR 3211, it “must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory” (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012] [internal quotation marks and citations omitted]). “However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence” (*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 627 [1st Dept 2017] [citation omitted]). A motion to dismiss under CPLR 3211(a)(1) “may be granted if documentary evidence utterly refutes the plaintiff’s factual allegations, thereby conclusively establishing a defense as a matter of law.” (*Whitebox Concentrated Convertible Arbitrage Partners, L.P.*, 20 NY3d at 63 [citation omitted]). While affidavits, deposition testimony, and letters do not constitute documentary evidence within the meaning of CPLR 3211 (*Granada Condo. III Assn. v Palomino*, 78 AD3d 996, 997 [2d Dept 2010]), “documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are ‘essentially undeniable’ may suffice (*Sands Point Partners Private Client Group v Fid. Nat. Title Ins. Co.*, 99 AD3d 982, 984 [2d Dept 2012]). The alleged documentary evidence “must be unambiguous and of undisputed authenticity” (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010]).

On a motion to dismiss under CPLR 3211 (a) (7), “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 a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Again, the court must “accept the

complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 270-71 [1st Dept 2004] [internal quotation marks and citations omitted]). "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, 19 [2005]).

Hamilton LLC's submissions are insufficient to warrant the granting of its motion since they do not conclusively resolve all factual issues and establish that dismissal is appropriate. (*Epifani v Johnson*, 65 AD3d 224, 229 [2d Dept 2009]). Although the documentary evidence submitted by Hamilton LLC includes a deed indicating that the building was transferred from Pulssar to Hamilton Inc. (now known as RG3), such evidence does not conclusively establish that Hamilton LLC had no actionable connection to the property, such as whether it leased, managed, or controlled the property. Additionally, Peterson's affidavit is not the type of documentary evidence that may be considered on a motion to dismiss pursuant to CPLR 3211(a)(1) (*Correa v. Orient-Express Hotels, Inc.*, 84 AD3d 651 [1st Dept 2011]). Further, the DOB printout purporting to show that the property deeded to RG3 was known as 2219 Amsterdam Avenue as well as 481 West 165th Street does not qualify as "documentary evidence" within the meaning of CPLR 3211(a)(1) (*Merrimack Mut. Fire Ins. Co. v GW Mech. Corp.*, 2020 N.Y. Misc. LEXIS 5373, at *2-3 [Sup Ct, Queens County Apr. 27, 2020, No. 706637/2019]).

With respect to the branch of the motion seeking dismissal pursuant to CPLR 3211(a)(7), this Court finds that, accepting the truth of the allegations in the complaint, plaintiff states a cause of action for negligence and nuisance against Hamilton LLC. This Court thus agrees with plaintiff that discovery is needed to determine whether Hamilton LLC is a proper party to this

action (See *Pennbus Realties, LLC v H Eighth Ave. Assoc. LLC*, 2011 NY Slip Op 34230[U] [Sup Ct, NY County 2011]). The parties' remaining contentions are either without merit or need not be addressed given the findings above.

Accordingly, it is hereby:

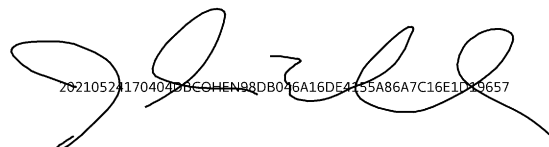
ORDERED that the motion by defendant 51 Hamilton LLC to dismiss is denied in all respects; and it is further

ORDERED that defendant 51 Hamilton LLC is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference on June 28, 2021 at 4 p.m. via Microsoft TEAMS (invitation to be emailed by the Part 58 Clerk) unless they first complete a bar coded preliminary conference form (to be emailed by the Part 58 Clerk) and return it to Part 58 at SFC-Part58-Clerk@nycourts.gov least two business days prior to the scheduled appearance.

5/24/2021

DATE



DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE