

**Commissioners of the N.Y. State Ins. Fund v
Universal Bldg. Solutions, Corp.**

2021 NY Slip Op 31788(U)

May 25, 2021

Supreme Court, New York County

Docket Number: 451900/2020

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. 451900/2020

COMMISSIONERS OF THE NEW YORK STATE
INSURANCE FUND, as assignee of CHARLES RENO,
assignor,

MOTION SEQ. NO. 001

Plaintiff,

- v -

UNIVERSAL BUILDING SOLUTIONS, CORP. and PAUL
TOTH EXCAVATION, INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14,
15, 16, 17, 18, 19, 20

were read on this motion to/for DISMISS.

In this action by plaintiff Commissioners of the State Insurance (“the SIF”) seeking to recover for workers’ compensation benefits it paid to compensate nonparty Charles Reno for injuries he sustained in a construction accident, defendant Paul Toth Excavation, Inc. (“PTE”) moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint. Alternatively, PTE moves, pursuant to CPLR 3211(c) and 3212, for summary judgment dismissing the complaint. Plaintiff 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

On October 17, 2017, Charles Reno, an employee of Our Island Property Management, Inc. (“OIPM”) was injured when he fell from an elevated scaffold or platform while engaged in

construction at 325 Dongan Hills Avenue in Staten Island, New York (“the premises”). Doc. 1. The premises were allegedly owned, maintained and/or controlled by defendant Universal Building Solutions Corp. (“UBS”) and/or PTE, one or both of which entered into a contract with OIPM to perform work at the site. Doc. 1. After Reno was injured, he collected workers’ compensation benefits, including medical expenses and wages, from the SIF. Doc. 1. The SIF thereafter advised Reno in writing that, if he did not commence an action against UBS and/or PTE within 30 days, his claims against those entities would be assigned to the SIF pursuant to Workers’ Compensation Law §29(2). Doc. 1. Reno did not commence an action against those defendants and the SIF became the holder of his claims, “except that to the extent of two-thirds of any recovery in excess of the total amount of compensation paid, medical expenses and expenditures including attorney’s fees necessary to recover such amount shall be deemed for [Reno’s] benefit.” Doc. 1.

The SIF commenced the captioned action on September 16, 2020 by filing a summons and complaint. Doc. 1. In its complaint, the SIF alleged negligence, violations of Labor Law sections 200, 240(1), and 241(6), as well as the applicability of the doctrine of *res ipsa loquitur*. Doc. 1.

UBS joined issue by its answer filed November 4, 2020. Doc. 5.

In lieu of answering, PTE now moves: 1) pursuant to CPLR 3211(a)(1), to dismiss the complaint based on documentary evidence; 2) pursuant to CPLR 3211(a)(7), to dismiss the complaint for failure to state a cause of action; 3) in the alternative, pursuant to CPLR 3211(c) and 3212, treating the motion as one for summary judgment and, upon doing so, dismissing the complaint against PTE; and 4) for such other relief as this Court deems just and proper. Doc. 9.

In support of the motion, PTE submits, inter alia, an attorney affirmation, the summons and complaint and UBS' answer, PTE's invoice relating to its work at the premises, a printout from the New York City Department of Buildings ("DOB") relating to the work performed at the premises by PTE, and an affidavit by Paul Toth ("Toth"), principal of PTE. Doc. 9-16.

In his affidavit in support of the motion, Toth represents, inter alia, that: 1) he owns PTE, an excavation, demolition, and environmental services contractor; 2) in or about November 2016, Our Island Real Estate ("OIRE") hired PTE to perform demolition work at the premises; 3) PTE performed the demolition on February 8, 2017; 4) OIRE paid PTE's invoice on February 10, 2017 and signed off and approved its demolition work on February 18, 2017; 5) PTE performed no additional work at the premises and, thus, was not present at the premises in October 2017; and 6) PTE performed no work for OIPM. Doc. 16.

Counsel argues that, since PTE's invoice to OIRE contains notations stating "paid" and "sign off 2/18/17", and a DOB printout reflects that its work had been "signed off" on February 18, 2017, it has established its entitlement to dismissal pursuant to CPLR 3211(a)(1) since this constitutes documentary evidence that it completed its work at the premises in February 2017, was not present at the premises thereafter, and thus did not cause or contribute to plaintiff's injuries. Doc. 10. Additionally, counsel maintains that the complaint must be dismissed pursuant to CPLR 3211(a)(7) given that Toth's affidavit establishes that: plaintiff has failed to state a cause of action; PTE could not have caused plaintiff's accident given that it was last at the property eight months prior to the alleged accident; and PTE was neither a general contractor nor owner which had supervision or control over plaintiff. Doc. 10 at par. 19. Thus, asserts PTE, it cannot be found negligent or in violation of the Labor Law, and cannot be liable under the

doctrine of res ipsa loquitur. Doc. 10. Alternatively, PTE argues that this Court should convert its motion to dismiss into a motion for summary judgment.

In opposition to the motion, the SIF argues that the branch of the motion seeking dismissal pursuant to CPLR 3211(a)(1) based on documentary evidence must be denied. Doc. 19. Specifically, the SIF asserts that neither PTE's invoice nor the DOB records constitute documentary evidence within the meaning of the statute. Doc. 19. It further maintains that, although these documents may demonstrate that PTE completed a discrete task, it does not conclusively demonstrate that PTE had no subsequent involvement at the premises. Doc. 19. The SIF also contends that Toth's affidavit does not constitute documentary evidence pursuant to CPLR 3211(a)(1). Doc. 19. Further, the SIF argues that PTE is not entitled to dismissal pursuant to CPLR 3211(a)(7) since it does not demonstrate that the SIF failed to state a cause of action. Doc. 19. Finally, the SIF insists that the instant motion should not be converted into one seeking summary judgment since such a motion would be premature given that it has not obtained discovery from PTE regarding its exact role at the premises. Doc. 19.

In reply, PTE largely reiterates its initial arguments, including, inter alia, that Toth's affidavit unequivocally demonstrates that PTE was not involved in Reno's accident. Doc. 20.

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]).

Here, the complaint is not subject to dismissal pursuant to CPLR 3211(a)(1) since there is no documentary evidence which utterly refutes the SIF's claim. The crux of PTE's argument is that, once it finished its demolition work at the premises in February 2017, it never returned to, or had anything to do with, the site. However, since neither the invoice nor the DOB printout establishes that PTE never returned to the site, or had any other involvement with the site after February 2017, they cannot be deemed documentary evidence sufficient to entitle PTE to dismissal. Additionally, Toth's affidavit does not constitute "documentary evidence" within the meaning of CPLR 3211(a)(1) (*see Regini v. Board of Mgrs. of Loft Space Condominium*, 107 AD3d 496 [1st Dept 2013]; *Flowers v. 73rd Townhouse LLC*, 99 AD3d 431 [1st Dept 2012]).

Nor is the complaint subject to dismissal pursuant to CPLR 3211(a)(7). According to the SIF the benefit of every possible favorable inference, it has stated causes of action alleging negligence and violations of Labor Law sections 200, 240(1), and 241(6). For the reasons stated above, neither the invoice nor the DOB printout warrants the dismissal of the complaint. Additionally, Toth's affidavit is insufficient to warrant dismissal of the complaint pursuant to CPLR 3211(a)(7) since the representations set forth therein do not demonstrate the absence of any significant dispute and do not completely refute the allegations against PTE (*See Asmar v 20th & Seventh Assoc., LLC*, 125 AD3d 563, 564 [1st Dept 2015] citing *Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]). For instance, although the SIF alleged in its complaint that PTE contracted with OIPM to work at the premises, Toth represents that PTE was hired by OIRE. Docs. 1, 16.

Finally, in its discretion, this Court denies PTE's request to convert its motion into one for summary judgment pursuant to CPLR 3211(c) since discovery has not been completed and the parties have not unequivocally charted a course for PTE to seek such relief (*See Primedia*

Inc. v SBI USA LLC, 43 AD3d 685, 686 [1st Dept 2007]).

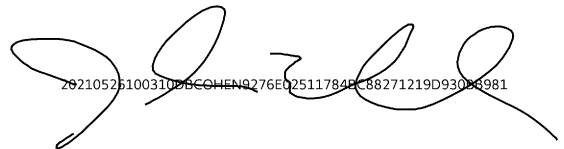
Accordingly, it is hereby:

ORDERED that the motion to dismiss by defendant Paul Toth Excavation, Inc. is denied in all respects; and it is further

ORDERED that defendant Paul Toth Excavation, Inc. 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 14, 2021 at 4:00 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.

5/25/2021
DATE


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DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE