

Collazo v Hogsett Family Realty Assoc., LLC

2019 NY Slip Op 35084(U)

August 12, 2019

Supreme Court, Queens County

Docket Number: Index No. 700762/2019

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

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

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

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MIRIAM COLLAZO,

ORDER VACATING
PRIOR ORDER

Plaintiff,

Index No.: 700762/2019

- against -

Motion Date: 7/18/19

HOGSETT FAMILY REALTY ASSOCIATES, LLC,
LIC HOLDINGS GROUP LLC, SKYVIEW
NORTHERN TANANT LP, NOBLE SKYVIEW
CONSTRUCTION LLC, S&S CONCRETE PUMPING
CORPORATION, ALPINE READY MIS INC.,
GEM CONSTRUCTION INC. and CONSOLIDATED
SCAFFOLDING INC.,

Motion No.: 11

Motion Seq.: 2

Defendants.

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S&S CONCRETE PUMPING CORPORATION,

Third-Party Plaintiff,

- against -

CONSOLIDATED SCAFFOLDING INC.,

Third-Party Defendant.

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The decision dated July 22, 2019 and entered on July 31, 2018 is hereby vacated and amended only to the extent that the last "Ordered" paragraph shall now read:

"ORDERED, that defendant/third-party defendant CONSOLIDATED SCAFFOLDING INC.'s motion to dismiss pursuant to CPLR 3211(a)(1) is granted; the complaint and third-party complaint are dismissed as against CONSOLIDATED SCAFFOLDING INC.; and the Clerk of the Court shall enter judgment accordingly."

FILED
AUG 20 2019
COUNTY CLERK
QUEENS COUNTY

The following electronically filed documents read on this motion by defendant/third-party defendant CONSOLIDATED SCAFFOLDING INC. for an Order pursuant to CPLR 3211(a)(1) and (7), granting CONSOLIDATED SCAFFOLDING INC.'s pre-answer motion to dismiss the plaintiff's verified amended complaint and any and all cross-claims, or in the alternative, pursuant to CPLR 3211(c), treating this motion as one for summary judgment and upon treating this motion as one for summary judgment, granting CONSOLIDATED SCAFFOLDING INC. summary judgment as a matter of law, and directing the entry of judgment in favor of CONSOLIDATED SCAFFOLDING INC.:

	<u>Papers</u>
	<u>Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	EF 29 - 37
S&S Concrete Pumping Corporation's Aff. in Opp.....	EF 48
Plaintiff's Affirmation in Opposition.....	EF 49 - 50
Affirmation in Reply.....	EF 51 - 52

In this negligence action, plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of an incident that occurred on October 2, 2018 at a building located at 144-74 Northern Boulevard, Flushing, New York 11354. Regarding Consolidated Scaffolding, Inc. (Consolidated) plaintiff alleges that Consolidated negligently and carelessly maintained the subject premises in such a manner as to allow it to become and remain in an unsafe, improper, and dangerous condition. It is further alleged that Consolidated had notice of the alleged defective condition.

Consolidated now seeks to dismiss this action against it on the grounds that Consolidated is an improper party to this action.

In support of the motion, Consolidated submits a certified copy of the Trade Contract (hereinafter the Agreement) between Noble SkyView Construction LLC (Noble) and Consolidated for the project at the subject premises. The Agreement is dated October 18, 2018 and executed on October 24, 2018 by David Goldstein on behalf of Noble and Tom Bowes on behalf of Consolidated.

Mr. Bowes, the President of Consolidated, submits an affidavit dated May 22, 2019, affirming that the written Agreement was executed after the subject incident. He further affirms that this Agreement was the only agreement entered into with Noble and with respect to the subject premises. Consolidated did not enter into any contractual agreements with any of the

other defendants, or any other entity, for any work performed at the subject premises other than the Agreement with Noble. Consolidated did not engage in any work at the subject premises on or prior to October 2, 2018. On October 26, 2018, Consolidated performed a walk-through of the subject premises. October 29, 2018 was the first date that Consolidated performed work at the subject premises. Consolidated was not on site on or before the alleged date of loss. Consolidated did not own, lease, operate, control, supervise, direct or maintain the subject premises, nor did it perform any construction-related or renovation work at the subject premises at or prior to October 2, 2018.

Counsel for Consolidated contends that the submitted documentary evidence establishes, prima facie, that Consolidated is an improper party to this action because it had never been on site on the date of loss or prior thereto and had never done work at the site on the date of loss or prior thereto. Thus, Consolidated could not have caused or contributed to plaintiff's incident.

Both S&S Concrete Pumping Corporation and plaintiff submit untimely opposition. The Stipulation executed by all parties required opposition papers to be served and e-filed by July 10, 2019. S&S Concrete Pumping Corporation filed opposition on July 11, 2019 and plaintiff filed opposition on July 15, 2019. In any event, the attorney affirmations are insufficient to defeat this motion to dismiss.

"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]).

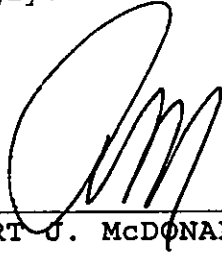
Here, the Agreement and Mr. Bowes's affidavit establish that Consolidated did not perform any work at the subject premises on or before the date of the subject incident. Thus, the evidence conclusively establishes that Consolidated is an improper party to the action as Consolidated could not have caused or contributed to the subject incident.

The opposing parties' contention that this motion to dismiss is premature is without merit. The opposing parties failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Medina v Rodriguez, 92 AD3d 850 [2d Dept. 2012]; Hanover Ins. Co. v Prakin, 81 AD3d 778 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]; Peerless Ins. Co. v Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]).

Accordingly, and for the above stated reasons, it is hereby

ORDERED, that defendant/third-party defendant CONSOLIDATED SCAFFOLDING INC.'s motion to dismiss pursuant to CPLR 3211(a)(1) is granted; the complaint and third-party complaint are dismissed as against CONSOLIDATED SCAFFOLDING INC.; and the Clerk of the Court shall enter judgment accordingly.

Dated: August 12, 2019
Long Island City, N.Y.



ROBERT J. McDONALD
J.S.C.

FILED
AUG 20 2019
COUNTY CLERK
QUEENS COUNTY