

Hurwitz v Extell W. 57th St. LLC

2013 NY Slip Op 31711(U)

July 25, 2013

Sup Ct, New York County

Docket Number: 157889/12

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. Justice

PART

Index Number : 157889/2012
HURWITZ, ESQ., MICHAEL L
vs
EXTELL WEST 57TH STREET LLC
Sequence Number : 002
DISMISS ACTION

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/25/13

CYNTHIA S. KERN J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
MICHAEL L. HURWITZ, ESQ.,

Plaintiff,

Index No. 157889/12

-against-

DECISION/ORDER

EXTELL WEST 57th STREET LLC, EXTELL
DEVELOPMENT COMPANY, EXTELL 115 WEST
57th STREET LLC, LEND LEASE (US)
CONSTRUCTION LMB INC., PINNACLE
INDUSTRIES II, LLC, BUDCO ENTERPRISES, INC.,
TOWER INSTALLATION LLC, U2 RIGGING &
HOISTING, INC., POST ROAD IRON WORKS INC.,
HOWARD I. SHAPIRO & ASSOCIATES
CONSULTING ENGINEERS, P.C., MRA
ENGINEERING P.C., STROH ENGINEERING
SERVICES P.C. and "XYZ CORP. #1-25",

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for
: _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross-Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Michael L. Hurwitz, Esq. commenced the instant action against defendants to recover damages for personal injuries and economic damages he allegedly sustained as a result of having to vacate his residence due to the partial crane collapse that occurred at the property located at 157 West 57th Street, New York, New York (the "site") on October 29, 2012 during Hurricane Sandy. Defendant Stroh Engineering Services, P.C. ("Stroh") now moves for an Order

pursuant to CPLR §§ 3211 (a)(1) and (a)(7) dismissing the complaint on the ground that it fails to state a cause of action. Plaintiff cross-moves for an Order (1) adjourning the resolution of Stroh's motion until certain discovery has been provided; and, upon adjournment, (2) compelling Stroh to provide plaintiff with said discovery and allowing Stroh to take certain depositions. For the reasons set forth below, Stroh's motion is granted in part and denied in part and plaintiff's cross-motion is denied.

The relevant facts are as follows. In or around March 2009, defendants Extell West 57th Street LLC, Extell Development Company and Extell 115 West 57th Street LLC (hereinafter collectively referred to as "Extell") began construction on the site of a high-rise multi-use building featuring spacious condominium units on its upper floors (the "Building"). Extell entered into contracts with certain subcontractors for the design, development, construction and the provision, erection, operation and maintenance of construction equipment and related parts for the development of the site, which included the cranes used on the site. Stroh was hired, allegedly through an oral contract, by defendant Pinnacle Industries II, LLC ("Pinnacle") to provide design plans for the installation of two cranes at the site. Pursuant to Pinnacle's request, Stroh also provided design plans to secure the crane at issue to withstand the anticipated winds of Hurricane Sandy.

On or about October 29, 2012, the crane at issue was subjected to hazardous wind conditions during Hurricane Sandy and it partially collapsed causing a portion of the crane to separate from its attachments to the structure and dangle from the 70th floor of the building over the public right-of-way adjacent to the site along West 57th Street. Due to the partial collapse of the crane, the City of New York ordered the immediate evacuation of the residents, business owners and their clients, customers and employees from the area surrounding the site, which

included the area from West 56th Street to West 59th Street. Plaintiff was evacuated from his residence on West 58th Street from October 29, 2012 until November 5, 2012.

Plaintiff then commenced the instant action to recover for personal injuries and economic damages he allegedly sustained as a result of having to vacate his residence due to the partial crane collapse. Specifically, plaintiff alleges that he incurred economic damages in the form of additional expenses for food, personal accessories, clothing and lodging, interference with his normal work schedule and cancellation of social engagements. Plaintiff's alleged personal injuries include anxiety attacks, arrhythmia, episodes of endocrine and pulmonary disorders, stress, disorientation, insomnia, post-traumatic stress disorder and exacerbation of unspecified underlying medical conditions. The complaint alleges causes of action for negligence and zoning and permitting violations asserting that defendants failed to properly erect, operate, inspect, maintain and secure the crane at issue.

On a motion addressed to the sufficiency of the pleadings, the facts pleaded are assumed to be true and accorded every favorable inference. *See Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a [claim] should not be dismissed on a pleading motion so long as, when [defendant's] allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977), citing *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956). Further, in order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211 (a)(1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Additionally, the documentary

evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

In the instant action, Stroh's motion for an Order pursuant to CPLR § 3211 dismissing the complaint is granted in part and denied in part. As an initial matter, that portion of Stroh's motion to dismiss plaintiff's cause of action for negligence is denied. To sufficiently plead a claim for negligence, a plaintiff must allege: (1) a duty owed by the defendant to the plaintiff; (2) a breach thereof; and (3) injury proximately resulting therefrom. *Solomon by Solomon v. City of New York*, 499 N.Y.S.2d 392 (1985). "Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party." *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 138 (2002). In general, "a contractual obligation standing alone, will generally not give rise to tort liability in favor a third party." *Espinal*, 98 N.Y.2d at 138. However, the Court of Appeals has identified three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care and could face potential liability in tort to a third party: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] 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." *Id.* at 140. (internal citations omitted).

In this case, plaintiff sufficiently states a cause of action for negligence against Stroh. Plaintiff alleges that defendants were negligent in failing to properly erect, operate, inspect, maintain and secure the crane at issue at the site, causing the partial crane collapse which led to his injuries. Although Stroh maintained the contract for its services with Pinnacle only, it may still be liable in tort to plaintiff under the first exception identified by the Court of Appeals in

Espinal as this court finds that the partial collapse of the crane dangling 70 stories above the ground may be said to be “a force or instrument of harm.” *See id.* (“a defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury.”) Thus, plaintiff’s allegation that Stroh failed to properly perform its work in providing plans to secure the crane to the building, specifically in anticipation of the high winds of Hurricane Sandy, is sufficient to allege a cause of action for negligence. However, plaintiff is not entitled to recover for any economic injuries as a result of Stroh’s alleged negligence as a party “cannot recover...for economic loss arising out of negligenc[ce]...in the absence of a contractual relationship.” *Residential Bd. of Mgrs. of Zeckendorf Towers v. Union Sq.-14th St. Assoc.*, 190 A.D.2d 636, 637 (1st Dept 1993), citing *Lake Placid Club Attached Lodges v. Elizabethtown Bldrs.*, 131 A.D.2d 159 (3d Dept 1987).

Additionally, that portion of Stroh’s motion to dismiss plaintiff’s cause of action for zoning and permitting violations is granted without opposition. Plaintiff’s complaint alleges that the floor area calculations for the building were deliberately misrepresented by defendants resulting in the erection of the building that is of a dangerous and unlawful height. However, such cause of action may not be maintained against Stroh as it is undisputed that Stroh is not the owner of the building nor did it play any role in the filing of the application for the erection of the building or the preparation of its floor area calculations. Thus, Stroh’s motion to dismiss the cause of action for zoning and permitting violations is granted.

Finally, this court turns to plaintiff’s motion for an Order (1) adjourning the resolution of Stroh’s motion until certain discovery has been provided; and, upon adjournment, (2) compelling Stroh to provide plaintiff with said discovery and allowing Stroh to take certain depositions.

Plaintiff's motion is denied as he has not established a basis for his adjournment request.

Plaintiff's assertion that Stroh's motion to dismiss should be adjourned pending the exchange of discovery such as details of the oral agreement between Pinnacle and Stroh and copies of the design plans created by Stroh is without merit as Stroh's motion to dismiss may be decided in the absence of such discovery.

Accordingly, Stroh's motion for an Order pursuant to CPLR § 3211 dismissing the complaint is granted solely to the extent that plaintiff's cause of action for zoning and permitting violations is dismissed as against Stroh only and that plaintiff is not entitled to recover from Stroh for any economic injuries under its negligence cause of action. Plaintiff's cross-motion for an Order adjourning Stroh's motion to dismiss pending the exchange of certain discovery is denied. The parties are to appear for a Preliminary Conference on September 24, 2013 at 9:30 a.m. at 60 Centre Street, Room 432 to set up a discovery schedule. This constitutes the decision and order of the court.

Dated:

7/25/13

Enter:

CK

J.S.C.
CYNTHIA S. KERN
J.S.C.