Salas v ML 188 Grand Concourse LLC
2019 NY Slip Op 35146(U)
May 24, 2019
Supreme Court, Bronx County
Docket Number: Index No. 25718/2018E
Judge: Alison Y. Tuitt
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART: 05

---X

SALAS, DARIO Index №. **0025718/2018E**

-against- Hon. **ALISON Y. TUITT,**

ML1188 GRAND CONCOURSE LLC Justice Supreme Court

---X

The following papers numbered 1 to 3 Read on this motion, (Seq. No. **1**) for **DISMISSAL**, noticed on **August 20 2018** .

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1
Answering Affidavit and Exhibits	No(s). 2
Replying Affidavit and Exhibits	No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision

Motion is Respectfully Referred to Justice: ______
Dated: ______

Dated: 5/24/19 Hon. [signature]
ALISON Y. TUITT, J.S.C.

1. CHECK ONE.............................. ☒ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS.............................. ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.............................. ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

[*1]

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

DARIO SALAS,

Plaintiff,

-against-

ML 188 GRAND CONCOURSE LLC,

Defendant.

INDEX NUMBER: **25718/2018E**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 3,

Read on this Defendant's Motion to Dismiss

On Calendar of **10/10/18**

Notice of Motion-Exhibits, Affirmation	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, defendant ML 188 Grand Concourse LLC's ("owner") motion to dismiss the action is granted for the reasons set forth herein.

The within is a personal injury action involving plaintiff's claim that he was injured on November 4, 2016 at 1188 Grand Concourse Bronx, New York when he tripped and fell over debris in the course of his employment with M&L Milevoi Management Inc. He asserts claims for common law negligence, as well as claims pursuant to Labor Law §§200, 240 and 241(6). Defendant moves to dismiss the action o the grounds that the exclusive remedy of Workers' Compensation §11. Plaintiff was employed by the manager of the subject premises, M&L Milevoi Management Inc. ("managing agent"). Plaintiff took all direction from Jon Milevoi, both an employee of the managing agent and a trustee of the Milevoi family trust that owns 50% of the owner company. Plaintiff received Workers' Compensation benefits and the Workers' Compensation Board considered the defendant owner to be plaintiff's employer. Premiums for the Workers' Compensation insurance

that covered all of the Milevoi properties came from one entity. Defendant argues that the owner company and managing agent company functioned as one company, therefore, plaintiff's claims are barred by the Workers' Compensation. In addition, defendant argues that the case must be dismissed because he alleged tripped and fell upon debris that he was in the process of moving in the course of his employment. Defendant argues that plaintiff cannot recover because he was allegedly injured by the very condition he was there to address.

Defendant moves to dismiss the action pursuant to C.P.L.R.§3211(a)(1) and (a)(7). Pursuant to C.P.L.R. §3211:

> (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> 1. a defense is founded upon documentary evidence; or...
>
> 7. the pleading fails to state a cause of action.

Moreover, dismissal pursuant to C.P.L.R. 3211(a)(1) is warranted only if the documentary evidence submitted "utterly refutes plaintiff's factual allegations", Goshen v. Mutual Life Insurance Co. of N.Y., 98 N.Y.2d 314 (2002); Green apple v. Capital One, N.A., 939 N.Y.S.2d 351 (1st Dept.2012), and conclusively establishes a defense to the asserted claims as a matter of law". Weil, Gotshal, Manges, LLP, 780 N.Y.S.2d at 593; Mill Fin., LLC v. Gillett, 992 N.Y.S.2d 20 (1st Dept. 2014). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to C.P.L.R. §3211(a)(1) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action. See, McGuire v. Sterling Doubleday Enters., L.P., 799 N.Y.S.2d 65 (1st Dept. 2005). On a motion to dismiss pursuant to C.P.L.R. §3211(a)(7), the complaint survives when it gives notice of what is intended to be proved and the material elements of each cause of action. Rovello v. Orofino Realty Co., Inc. 40 N.Y.2d 633 (1976); Underpinning & Foundation Construction v. Chase Manhattan Bank, 46 N.Y.2d 459 (1979).

Plaintiff opposes the motion arguing that the defendant owner company and the management company have failed to conclusively show that they are a single integrated entity, therefore, they cannot show that plaintiff was employed by the defendant herein. Under §11 and §29(6) of the Workers' Compensation Law, plaintiff may not maintain an action against his employer for work related injuries. Billy v. Consolidated Machine Tool Corp., 51 N.Y.2d 152, 156 (1980). Plaintiff's exclusive remedy against their employer for injuries sustained in the course of their employment is Workers' Compensation. See, Martinez v. Canteen

Vending Service Roux Fine Dining Chartwheel, 795 N.Y.S.2d 16 (1st Dept. 2005); Johnson v. Eaton Corp., 577 N.Y.S.2d 1 (1st Dept. 1991). It is well settled that once the Workers' Compensation Board has exercised jurisdiction over a claim, the Courts are precluded from entertaining an action against the employer arising out of the same incident. See, Cunningham v. State of New York, 60 N.Y.2d 248 (1983); O'Connor v. Midiria, 55 N.Y.2d 538 (1982). To fall under the Workers' Compensation §11 exclusivity provision, a corporate defendant property owner must demonstrate either that it is an alter ego of the plaintiff's employer, or that the defendant and the plaintiff's employer operate as a single integrated entity. See, Perez v. Gateway Realty LLC, 42 N.Y.S.3d 20 (1st Dept. 2016); Privett v. Precision Elevator, 40 N.Y.S.2d 380 (1st Dept. 2016); Ramnarine v Memorial Ctr. for Cancer & Allied Diseases, 722 N.Y.S.2d 493 (1st Dept. 2001).

Defendant's motion to dismiss the action must be granted. Plaintiff's remedy against defendant is Workers' Compensation as defendant failed to show that the defendant owner and the managing agent were not alter egos. In any event, regardless of the Workers' Compensation issue, the action must be dismissed because plaintiff did not oppose that branch of the motion that seeks dismissal on the grounds that plaintiff was injured by the very condition he was retained to address. Plaintiff was in the course of his work of removing debris when he was allegedly caused to fall on the very debris he was responsible for disposing. Defendant could not have provided plaintiff with a work place that was safe from the defect that he was engaged to eliminate. Brugnanno v. Merrill Lynch & Co., Inc., 627 N.Y.S.2d 635 (1st Dept. 1995)(Since plaintiff employee was employed to clear away the very debris that posed a hazard in the work place, complaint was properly dismissed). See also, Lopez v. Fordham University, 894 N.Y.S.2d 389 (1st Dept. 2010); Jackson v. Board of Education of City of New York, 812 N.Y.S.2d 91 (1st Dept. 2006); Senkbeil v. Board of Education of City of New York, 256 N.Y.S.2d 831 (2d Dept. 1965), affd. 18 N.Y.2d 789 (1996). It is well-settled that this rule applies to Labor Law claims as well. See, Henriquez v. New 520 GSH LLC, 931 N.Y.S.2d 312 (1st Dept. 2011) (There is no cause of action under Labor Law §200 because no responsibility rests upon an owner of real property to one hurt through a dangerous condition which he has undertaken to fix); Appelbaum v. 100 Church LLC, 774 N.Y.S.2d 705 (1st Dept. 2004)(Plaintiff has no viable Labor Law §200 claim since the hazard for which he would hold those defendants accountable was the very hazard he had undertaken to remedy).

Moreover, the motion is not premature. Dismissal cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant information.

[*4]

Bailey v. New York City Transit Authority, 704 N.Y.S.2d 582 (1st Dept 2000). For the court to delay action on the motion, there must be a likelihood of discovery leading to evidence that will justify opposition to the motion. Jeffries v. New York City Housing Authority, 780 N.Y.S.2d 1 (1st Dept. 2004). The mere hope that discovery will lead to evidence sufficient to defeat the motion is insufficient. Id. Here, plaintiff fails to make a showing that the motion is premature.

Accordingly, the motion to dismiss the action is granted and the action is dismissed.

This constitutes the decision and Order of this Court.

Dated: 5/24/19

Hon. Alison Y. Tuitt

[*5]