

Hauer v 500 Kingsland Ave, LLC

2020 NY Slip Op 35642(U)

April 22, 2020

Supreme Court, Bronx County

Docket Number: Index No. 24186/2018E

Judge: Robert T. Johnson

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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ROBERT HAUER,

Plaintiff,

-against-

DECISION AND ORDER
Index No. 24186/2018E

500 KINGSLAND AVE, LLC, UNITED BIOFUELS, INC.,
And UNITED METRO ENERGY CORP.,

Defendants.

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The following papers, numbered 1-3 were considered on the motion to dismiss:

PAPERS

NUMBERED

Notice of Motion and annexed Exhibits and Affidavits.....	1
Answering Affidavits and Exhibits.....	2
Reply Affirmation.....	3

Upon the foregoing papers, it is ordered that the motion to dismiss is granted in part:

This is an action in which plaintiff allegedly slipped and fell downstairs while working as a general supervisor at defendant United Metro Energy Corp. (“UMEC”) on February 2, 2017. On February 3, 2017, plaintiff filed a Workers’ Compensation claim and was awarded benefits for partial disability on May 7, 2018. Defendants 500 Kingsland Ave, LLC (“Kingsland”), United Biofuels, Inc. (“UBI”) and UMEC (collectively “defendants”) file a pre-answer motion to dismiss the case under CPLR 3211(a)(1) and (a)(2).

As a preliminary matter, the court declines to convert the instant motion to a motion for summary judgment pursuant to CPLR 3211(c). CPLR 3211(c) provides that the court may convert a motion to dismiss to a motion for summary judgment upon adequate notice to the parties. Whereas here, no such notice was provided to the parties and plaintiff opposed the conversion, the court declines to exercise its discretion to convert since the record does not establish that the parties

“deliberately chart[ed] a summary judgment course” (*Wadiak v Pond Mgt., LLC*, 101 AD3d 474, 475 quoting *Elsky v Hearst Corp.*, 232 AD2d 310 [1st Dept 1996]; see also *Mihlovan v Grozav*, 72 NY2d 506 [1988]).

On a motion to dismiss pursuant to CPLR 3211, the pleadings are to be liberally construed and accorded the benefit of every possible favorable inference (see *Leon v Martinez*, 84 NY2d 83 [1994]; CPLR 3026). “Whether the complaint will later survive a motion for summary judgment or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss” (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2006]; see *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

CPLR 3211(a)(2) provides, in pertinent part, that a party may move for judgment dismissing one or more cause of action asserted against him on the ground that the court has not jurisdiction of the subject matter of the cause of action. It is well settled that Workers’ Compensation Law provides for the exclusive remedy for a worker injured in the course of employment (see Workers’ Compensation Law §§11; *Fung v Japan Airlines Co, Ltd.*, 9 NY3d 351 [2007]). It is undisputed that plaintiff was employed by UMEC at the time of the accident and was awarded Workers Compensation benefits. Accordingly, due to the exclusivity of the Workers Compensation Law as plaintiff’s remedy against his employer, the court lacks subject matter jurisdiction. Consequently, the complaint must be dismissed against UMEC pursuant to CPLR 3211(a)(2) and this portion of defendants’ motion is granted.

A motion to dismiss based on documentary evidence pursuant to CPLR 3211 (a) (1) may be granted only where the documentary evidence “utterly refutes” the plaintiff’s factual allegations, resolves all factual issues as a matter of law, and conclusively disposes of the claims at issue.

(*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]; *Rodeo Family Enters., LLC v Matte*, 99 A.D.3d 781, 782 [2d Dept. 2012]). To be considered "documentary," evidence must be unambiguous and of undisputed authenticity. "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (*Matter of Koegel*, 160 AD3d 11, 21[2d Dept 2018][internal quotation marks omitted]).

Here, the documents annexed as exhibit G to the defendants' motion establish that UBI is the owner of real property located at 427 Greenpoint Avenue, Brooklyn, New York and that said property is located on Lot 150 of Block 2517. Whereas plaintiff alleges that he fell at the premises located at 500 Kingsland Avenue, Brooklyn, New York, these documents are undeniable evidence that UBI is not the owner of 500 Kingsland Avenue, Brooklyn, New York. Consequently, this portion of defendants' motion is granted and the complaint against UBI is dismissed.

500 Kingsland, on the other hand, fails to utterly refute plaintiff's allegations that he fell at 500 Kingsland Avenue. Defendants' proffered affidavit does not constitute the type of documentary evidence that may be considered on a motion pursuant to CPLR 3211(a)(1) (see *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651 [1st Dept 2011]; *Williamson, Picket, Gross, Inc. v Hirschfeld*, 92 AD2d 289 [1st Dept. 1996]). The remaining evidentiary support proffered by the defendants do not conclusively establish a defense to the asserted claims as a matter of law (See, *Leon v. Martinez*, 84 NY2d 83, 88, 638 N.E.2D 511, 614 N.Y.S.2d 972 [1994]), because they failed to utterly refute the plaintiff's allegations. Accordingly, this portion of defendants' motion is denied with respect to 500 Kingsland.

Accordingly, it is hereby

ORDERED, that the motion to dismiss is granted only with respect to defendants United Metro Energy Corp., and United Biofuel, Inc.; and it is further

ORDERED, that the complaint is dismissed and severed against defendants United Metro Energy Corp. and United Biofuel, Inc.; and it is further

ORDERED, that the clerk is directed to enter judgment in favor of defendants United Metro Energy Corp. and United Biofuel, Inc.;

ORDERED that defendant 500 Kingsland Ave, LLC, shall serve an answer no later than thirty (30) days after plaintiff serves of a copy of this Order, with Notice of Entry, upon the defendants (see CPLR § 3211 [f]).

This constitutes the decision and order of this court.

Dated: April 22, 2020



Robert T. Johnson, J.S.C.