

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D21666
C/kmg

_____AD3d_____

Argued - December 2, 2008

WILLIAM F. MASTRO, J.P.
HOWARD MILLER
DANIEL D. ANGIOLILLO
EDWARD D. CARNI, JJ.

2008-02752

DECISION & ORDER

Cheryl A. Troccoli, appellant,
v Isaac Zarabi, respondent.

(Index No. 11458/07)

Barrows & Associates, PLLC, New York, N.Y. (Michael C. Barrows of counsel), for appellant.

Martins & Silva, Mineola, N.Y. (Marco D. Silva of counsel), for respondent.

In an action, inter alia, to recover damages for fraudulent inducement, the plaintiff appeals from an order of the Supreme Court, Queens County (Dorsa, J.), entered January 28, 2008, which granted that branch of the defendant's motion which was to dismiss the complaint pursuant to CPLR 3211(a)(1).

ORDERED that the order is modified, on the law, by deleting the provision thereof granting that branch of the defendant's motion which was to dismiss the cause of action alleging fraudulent inducement, and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed, with costs to the plaintiff.

“In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction,” and the plaintiff is accorded the benefit of every favorable inference (*Goshen v Mutual Life. Ins. Co. of N.Y.*, 98 NY2d 314, 326). A motion to dismiss pursuant to CPLR 3211(a)(1) on the ground of a defense founded on documentary evidence may appropriately be granted “only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law” (*id.*; see *Shaya B. Pac., LLC v Wilson, Elser,*

December 30, 2008

Page 1.

TROCCOLI v ZARABI

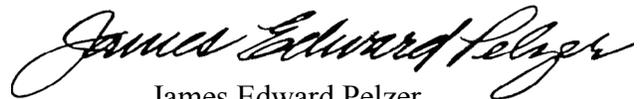
Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34, 37-38; *Williams v Williams*, 36 AD3d 693, 695).

The documentary evidence submitted by the defendant did not utterly refute the plaintiff's allegations, and thus did not conclusively establish a defense to that cause of action as a matter of law. Accordingly, the Supreme Court erred in granting that branch of the defendant's motion which was to dismiss the cause of action alleging fraudulent inducement.

The plaintiff's remaining contentions are without merit

MASTRO, J.P., MILLER, ANGIOLILLO and CARNI, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court