

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

D30519
G/prt

_____AD3d_____

Submitted - February 15, 2011

DANIEL D. ANGIOLILLO, J.P.
CHERYL E. CHAMBERS
LEONARD B. AUSTIN
ROBERT J. MILLER, JJ.

2010-01441

DECISION & ORDER

Marc Comito, respondent, v Foot of Main, LLC,
et al., appellants.

(Index No. 9311/09)

Feerick Lynch MacCartney, PLLC, South Nyack, N.Y. (Donald J. Feerick, Jr., of counsel), for appellants.

Burton Dorfman, P.C., Piermont, N.Y., for respondent.

In an action, inter alia, for specific performance of a stipulation of settlement, the defendants appeal from an order of the Supreme Court, Rockland County (Nelson, J.), dated December 8, 2009, which denied their motion to dismiss the complaint pursuant to CPLR 3211(a)(1).

ORDERED that the order is affirmed, with costs.

The defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(1), contending that documentary evidence established the plaintiff's failure to comply with certain notice and payment provisions of the parties' stipulation of settlement. The items submitted to the Supreme Court by the defendants in support of their motion do not constitute "documentary evidence" within the meaning of CPLR 3211(a)(1) (*see Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996-997; *Reiver v Burkhart Wexler & Hirschberg, LLP*, 73 AD3d 1149, 1149-1150; *Fontanetta v John Doe 1*, 73 AD3d 78, 85-87). Even if these items constituted documentary evidence, they did not utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326; *All Is. Media, Inc. v Creative AD Worx, Inc.*, 79 AD3d 677; *Granada Condominium III Assn. v Palomino*, 78 AD3d at 996-997).

March 22, 2011

COMITO v FOOT OF MAIN, LLC

Page 1.

Accordingly, the Supreme Court properly denied the defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1).

ANGIOLILLO, J.P., CHAMBERS, AUSTIN and MILLER, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court