

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

D30897
O/kmb/nl

_____AD3d_____

Submitted - March 29, 2011

MARK C. DILLON, J.P.
ANITA R. FLORIO
CHERYL E. CHAMBERS
ROBERT J. MILLER, JJ.

2010-08705

DECISION & ORDER

Wendell Francis, appellant, v Vornado Realty
Trust/Kings Plaza Mall, respondent.
(and a third-party action)

(Index No. 7015/10)

Wendell Francis, Brooklyn, N.Y., appellant pro se.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York, N.Y. (Mark
A. Taustine of counsel), for respondent.

In an action, inter alia, to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Rothenberg, J.) dated July 29, 2010, as granted the defendant's motion, among other things, pursuant to CPLR 3211(a)(1) and denied, as academic, his cross motion, inter alia, for discovery.

ORDERED that the order is affirmed insofar as appealed from, with costs.

A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted if "a defense is founded upon documentary evidence" (CPLR 3211[a][1]; *see Fontanetta v John Doe I*, 73 AD3d 78). Here, the Supreme Court correctly determined that the documentary evidence submitted by the defendant Vornado Realty Trust/Kings Plaza Mall utterly refuted the factual allegations of the plaintiff's complaint and conclusively established a defense to the claims as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326; *Granada Condominium III Assn. v Palomino*, 78 AD3d 996; *Fontanetta v John Doe I*, 73 AD3d at 83). As such, the Supreme Court also properly denied, as academic, the plaintiff's cross motion, inter alia, for discovery.

November 1, 2011

Page 1.

FRANCIS v VORNADO REALTY TRUST/KINGS PLAZA MALL

The parties' remaining contentions either are without merit, are improperly raised for the first time on appeal, or have been rendered academic by our determination.

DILLON, J.P., FLORIO, CHAMBERS and MILLER, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court