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

D32183
H/hu

_____AD3d_____ Submitted - June 23, 2010

PETER B. SKELOS, J.P.
ARIEL E. BELEN
L. PRISCILLA HALL
SHERI S. ROMAN, JJ.

2010-05967 DECISION & ORDER

Helen Curran, appellant, v Estate of Thomas P. Curran, Sr., respondent, et al., defendants.

(Index No. 23507/08)

Donna Dougherty, Rego Park, N.Y. (Krzysztof Lach and Kerry Jamieson of counsel), for appellant.

Adam Richards LLC, New York, N.Y., for respondent.

In an action, inter alia, for specific performance of the parties' stipulation of settlement, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Queens County (Hart, J.), dated April 8, 2010, as granted that branch of the motion of the defendant Estate of Thomas P. Curran, Sr., which was pursuant to CPLR 3211(a)(1) to dismiss the complaint insofar as asserted against that defendant.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the motion of the defendant Estate of Thomas P. Curran, Sr., which was pursuant to CPLR 3211(a)(1) to dismiss the complaint insofar as asserted against it is denied.

That branch of the motion of the defendant Estate of Thomas P. Curran, Sr. (hereinafter the defendant), which was pursuant to CPLR 3211(a)(1) dismiss the complaint insofar as asserted against it should have been denied. "An agreement to arbitrate is not a defense to an action," and thus, as here, it may not be the basis for a motion to dismiss a complaint based on documentary evidence (*Allied Bldg. Inspectors Intl. Union of Operating Engrs., Local Union No. 211, AFL-CIO v Office of Labor Relations of City of N.Y.,* 45 NY2d 735, 738; *see* CPLR 3211[a][1];

Nachman v Jenelo Corp., 25 AD3d 593; *Nastasi v Nastasi,* 26 AD3d 32, 40-41; *Schwartz v Schmergel,* 121 AD2d 527).

In light of our determination, the plaintiff's remaining contention is academic.

SKELOS, J.P., BELEN, HALL and ROMAN, JJ., concur.

ENTER:

Matthew G. Kiernan
Clerk of the Court