

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

D36241
G/kmb

_____AD3d_____

Argued - September 24, 2012

MARK C. DILLON, J.P.
RUTH C. BALKIN
JOHN M. LEVENTHAL
L. PRISCILLA HALL, JJ.

2011-06635

DECISION & ORDER

Lucille Cucco, also known as Lucille Piazza,
appellant, v Chabau Café Corp., et al., defendants,
Catherine Chavenet, respondent.

(Index No. 100751/10)

Windels Marx Lane & Mittendorf, LLP, New York, N.Y. (Mark A. Slama and
Christina J. Sorbera of counsel), for appellant.

Soren & Soren, Staten Island, N.Y. (Steven J. Soren of counsel), for respondent.

In an action, inter alia, to recover damages for breach of a commercial lease, the
plaintiff appeals from an order of the Supreme Court, Richmond County (McMahon, J.), dated April
26, 2011, which granted that branch of the motion of the defendant Catherine Chavenet which was
pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against her and the
defendant Laurent Chavenet, her indemnitee.

ORDERED that the order is reversed, on the law, with costs, and the subject branch
of the motion of the defendant Catherine Chavenet is denied.

“On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to
state a cause of action, the court must afford the pleading a liberal construction, accept all facts as
alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and
determine only whether the facts as alleged fit within any cognizable legal theory” (*Breytman v
Olinville Realty, LLC*, 54 AD3d 703, 703-704; *see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11,
19; *Leon v Martinez*, 84 NY2d 83, 87; *White Plains Cleaning Servs., Inc. v 901 Props., LLC*, 94
AD3d 1108, 1108-1109; *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d

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CUCCO, also known as PIAZZA v CHABAU CAFÉ CORP.

122, 125, *affd* 16 NY3d 775). When courts consider evidentiary material on motions to dismiss, the criterion becomes whether proponents of pleadings have a cause of action, not whether they have stated one. Upon a court's consideration of such evidentiary material, however, motions to dismiss pursuant to CPLR 3211(a)(7) should be granted only when (1) it has been shown that a material fact alleged in the complaint is not a fact at all, and (2) there is no significant dispute regarding it (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Sokol v Leader*, 74 AD3d 1180, 1181-1182).

Here, the complaint adequately states a cause of action to recover damages for breach of guaranty. Moreover, the evidentiary material that the defendant Catherine Chavenet submitted in support of that branch of her motion which was pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against her and the defendant Laurent Chavenet, her indemnitee, failed to show beyond significant dispute that any material fact alleged in the complaint was not a fact at all (*see Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682, 683). Accordingly, the subject branch of the motion should have been denied.

DILLON, J.P., BALKIN, LEVENTHAL and HALL, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court