NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

MERRIMACK MUTUAL FIRE INSURANCE COMPANY as subrogee of THE 26-14 28TH STREET CONDO, Plaintiff,	Index No.	706637/19
	Motion Date	November 26, 2019
- against-	Motion Cal. No.	
GW MECHANICAL CORP. and CB ENGINEERING P.C., Defendants.	Motion Seq. No.	1

The following numbered papers read on this motion by defendant GW Mechanical Corp. (GW) pursuant to CPLR 3211 (a) (1) and 3211 (a) (7) to dismiss the complaint in this action as against it.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits	EF7-14
Affirmation in Opposition - Exhibits	EF18
Reply Affirmation	EF19

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this subrogation action against defendants GW and CB Engineering, P.C. (CB) seeking recovery of the $52,037.22 that it paid to its insured, the 26-14 28th Street Condo (Condo), for water damage sustained to the Condo's property located at 26-14 28th Street, Queens County, New York, on or about January 9, 2018.

Plaintiff's complaint asserts causes of action for negligence against defendants GW and CB. In the complaint, plaintiff alleges that on or about January 9, 2018, a leak in the sprinkler

system, which had been negligently installed by defendant GW and had been negligently inspected by defendant CB after the installation, caused water damage to the property in the amount of $52,037.22, which amount plaintiff reimbursed its insured, the Condo.

Defendant CB answered the complaint and defendant GW made this pre-answer motion to dismiss plaintiff's complaint as against defendant GW pursuant to CPLR 3211 (a) (1) and (7).

"A motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only if the documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law." (*Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793, 796 [2d Dept 2011]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002].) "In order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable." (*Kopelowitz & Co., Inc. v Mann,* 83 AD3d at 796 [internal quotation marks and citations omitted].) "Deeds, mortgages, and notes can qualify as 'documentary evidence' for the purpose of CPLR 3211 (a) (1)" (*Forbes v Aaron*, 81 AD3d 876, 877 [2d Dept 2011]), but affidavits, deposition testimony, e-mails, letters, summaries, opinions and conclusions cannot. (*See Integrated Constr. Servs., Inc. v Scottsdale Ins. Co.*, 82 AD3d 1160 [2d Dept 2011]; *see also Granada Condominium III Assn. v Palomino,* 78 AD3d 996 [2d Dept 2010].) Items failing to satisfy the standard of "documentary evidence" for purposes of CPLR 3211 (a) (1) typically fail because they are not "unambiguous" and are not of "undisputed authenticity," and thus, are not "essentially undeniable." (*Fontanetta v John Doe 1*, 73 AD3d 78, 86-87 [2d Dept 2010].)

The material submitted by defendant GW in support of its motion consists of an unsworn engineering report based on a post-accident inspection of the sprinkler system prepared on behalf of plaintiff, an invoice for construction materials, and a "document overview" and "query inspection results" downloaded from the NYC Dept. of Buildings (DOB) website. These items do not satisfy the CPLR 3211 (a) (1) definition and standard of "documentary evidence." Even if these items constituted documentary evidence, they are insufficient to resolve all factual issues and to completely dispose of plaintiff's claims against defendant GW. (*See Granada Condominium III Assn. v Palomino*, 78 AD3d 996; *see also Reiver v Burkhart, Wexler & Hirschberg, LLP*, 73 AD3d 1149 [2d Dept 2010]; *Russo v Macchia-Schiavo*, 72 AD3d 786 [2d Dept 2010].) The items fail to conclusively establish that defendant GW was not negligent in its installation of the subject sprinkler system which allegedly caused the leak damaging the property of plaintiff's insured. Therefore, defendant GW through its submissions herein did not conclusively establish a defense as a matter of law or utterly refute the plaintiff's factual allegations against it.

Accordingly, that branch of defendant GW's motion seeking to dismiss plaintiff's complaint against it pursuant to CPLR 3211 (a) (1), is denied.

That branch of defendant GW's motion seeking to dismiss plaintiff's complaint against it for failure to state a cause of action pursuant to CPLR 3211 (a) (7) is also denied.

On a motion to dismiss a 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 [2d Dept 2008]; *see Leon v Martinez*, *supra*; *see also Sokol Leader*, 74AD3d 1180 [2d Dept 2010].) "Where . . . evidentiary material is submitted on a motion to dismiss pursuant to CPLR 3211 (a) (7), it may be considered in assessing the viability of a complaint, but unless the defendant demonstrates that a material fact alleged by the plaintiff 'is not a fact at all' and that 'no significant dispute exists regarding it,' the complaint should not be dismissed." (*Yew Prospect v Szulman*, 305 AD2d 588, 589 [2d Dept 2003], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977].)

The elements of a cause of action sounding in negligence are the existence of a duty that the defendant owed to the plaintiff, a breach of that duty, and that the breach of that duty was a proximate cause of the plaintiff's injuries. (*See Pulka v Edelman*, 40 NY2d 781[1976]; *see also Wang v Barr & Barr, Inc.*, 127 AD3d 964 [2d Dept 2015]; *Fox v Marshall*, 88 AD3d 131 [2d Dept 2011].) Absent a duty of care to the injured party, there is no breach and no liability. (*See Pulka v Edelman*, 40 NY2d 781)

Here, construing the complaint liberally, accepting the facts alleged in the complaint as true, and according the plaintiff the benefit of every possible inference, plaintiff has stated a cause of action for negligence against defendant GW, and defendant GW, whose submissions fail to show that a material fact alleged in the plaintiff's complaint was "not a fact at all" and that "no significant dispute exists regarding it," did not conclusively establish that plaintiff has no cause of action for negligence against it. (*Guggenheimer v Ginzburg*, 43 NY2d at 275; *see Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682 [2d Dept 2012]; *see also Allstate Ins. Co. v Raguzin*, 12 AD3d 468 [2d Dept 2004].)

In light of the foregoing, defendant GW's motion is denied in its entirety.

Dated: April 27, 2020

DARRELL L. GAVRIN, J.S.C.

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