

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

D55158  
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Argued - March 26, 2018

JOHN M. LEVENTHAL, J.P.  
SANDRA L. SGROI  
HECTOR D. LASALLE  
VALERIE BRATHWAITE NELSON, JJ.

2017-01916

DECISION & ORDER

Marie Sims, etc., et al., respondents, v Prom Realty Co., LLC, appellant.

(Index No. 705653/15)

Furman Kornfeld & Brennan LLP, New York, NY (Doris Bogdani of counsel), for appellant.

In an action to recover damages for wrongful death, etc., the defendant appeals from an order of the Supreme Court, Queens County (Marguerite A. Grays, J.), entered January 18, 2017. The order denied the defendant’s motion pursuant to CPLR 3211(a)(1) to dismiss the complaint.

ORDERED that the order is affirmed, without costs or disbursements.

“A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the ‘documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim’” (*Fontanetta v John Doe 1*, 73 AD3d 78, 83, quoting *Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383; see *Leon v Martinez*, 84 NY2d 83, 88; *Guido v Orange Regional Med. Ctr.*, 102 AD3d 828, 830). “In order for evidence to qualify as ‘documentary,’ it must be unambiguous, authentic, and undeniable” (*Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996-997 [internal quotation marks omitted]). “Neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)” (*Granada Condominium III Assn. v Palomino*, 78 AD3d at 997 [internal quotation marks omitted]; see *Suchmacher v Manana Grocery*, 73 AD3d 1017, 1017; *Fontanetta v John Doe 1*, 73 AD3d at 86).

Contrary to the defendant’s contention, the leases, assignments, and modification and

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extension agreement it submitted in support of its motion did not establish that the defendant was not responsible for the maintenance of the subject property, and accordingly, the evidence did not conclusively establish a defense as a matter of law.

Moreover, the certified meteorological records the defendant submitted in support of its motion did not conclusively dispose of the plaintiff's claim by demonstrating that the storm-in-progress rule applied, as those records concerned climatological data obtained from Central Park, New York, a location in a county different from the accident location.

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

LEVENTHAL, J.P., SGROI, LASALLE and BRATHWAITE NELSON, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court