SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

SYLVIA RIEDERS,

Plaintiff,

- against -

CYRUS I. KAHN, BRETT L. BONDI, PARKING SYSTEMS, INC., PARKING SYSTEMS, INC. d/b/a PARKING SYSTEMS, PARKING SYSTEMS, BURTON & DOYLE RESTAURANT, BURTON & DOYLE RESTAURANT, INC., PATRICIA WAGLAND and PATRICIA CRAIG WAGLAND DELANEY,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 14142/10
Motion Seq. No.: 02
Motion Date: 11/24/10

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibit	2
Affirmation in Opposition and Exhibits	3
Reply Affirmation and Exhibit	4

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

Defendants Patricia Wagland and Patricia Craig Wagland Delaney (collectively "the Patricia defendants") move, pursuant to CPLR § 3211(a)(1) and CPLR § 3211(a)(7), for an order dismissing the Verified Complaint as against the Patricia defendants on the grounds that the defense is based on documentary evidence and the pleadings fail to state a cause of action against the Patricia defendants. Plaintiff and defendant Cyrus I. Kahn ("Kahn") oppose the

motion.

This action involves injuries allegedly sustained by the plaintiff on October 31, 2009. Plaintiff alleges she was injured while a passenger in a vehicle owned by defendant Kahn and operated by defendant Brett L. Bondi ("Bondi"), an alleged parking employee of defendant Parking Systems, Inc. ("Parking Systems"). It is alleged that defendant Bondi began to operate the vehicle owned by defendant Kahn while the plaintiff was exiting the motor vehicle causing plaintiff to sustain personal injuries. *See* Defendants Patricia Affirmation in Support Exhibit A ¶ 83 of Verified Complaint. Defendant Parking Systems is allegedly a company who provided parking services to defendant Burton & Doyle Restaurant, Inc. at the property owned by the Patricia defendants. The Patricia defendants argue that as an out-of-possession landlord, she did not assume any obligation to maintain the subject premises under the commercial lease. Further, the Patricia defendants assert the Verified Complaint does not allege any specific allegations of negligence against her. The subject premises were leased to defendant Burton & Doyle, LLC pursuant to written lease initially entered into in 1990 by a predecessor restaurant, which lease was modified on three occasions and subsequently assigned. According to the lease, defendant Burton & Doyle occupies the entire subject premises. The lease (the documentary evidence) states that the tenant is responsible for the maintenance and repairs of the subject premises.

CPLR § 3211(a)(1) permits a defendant to seek and obtain a dismissal of one or more causes of actions asserted against it on the ground that the defendant has a defense founded upon documentary evidence. When a motion to dismiss based upon documentary evidence is made pursuant to CPLR § 3211(a)(1), the defendant must show that "the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitely disposes of the plaintiff's claim." *See Unadilla Silo Co. Inc. v. Ernst & Young*, 234 A.D.2d 754, 651 N.Y.S.2d 216 (3d Dept. 1996). *See also Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Sheridan v. Town of Orangetown*, 21 A.D.3d 365, 799 N.Y.S.2d 575 (2d Dept. 2005). CPLR § 3211(a)(7) permits a defendant to seek dismissal of a cause of action asserted against it on the basis that the plaintiff has failed to state a cause of action in the pleading. In deciding a motion made pursuant to CPLR § 3211(a)(7), the court must determine whether the pleader has a cognizable cause of action. *See Leon v. Martinez, supra; Well v. Rambam,* 300 A.D.2d 580,

753 N.Y.S.2d 512 (2d Dept. 2002). In so doing, the complaint must be liberally construed in the light most favorable to the plaintiff, and all allegations must be accepted as true. *See 511 West 232nd Street Owners Corp. v. Jennifer Realty Co.*, 10 A.D.3d 573, 782 N.Y.S.2d 423 (1st Dept. 2004); *Well v. Rambam, supra; Morad v. Morad*, 27 A.D.3d 626, 812 N.Y.S.2d 126 (2d Dept. 2006). If the court determines, from the facts alleged in the complaint and the inferences which can be drawn from the opposition to the motion, that the pleader has a cognizable cause of action, it must deny the motion to dismiss. *See Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001); *Stucklen v. Kabro Associates*,18 A.D.3d 461, 795 N.Y.S.2d 256 (2d Dept. 2005). On the other hand, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration." *Maas v. Cornell Univ*ersity, 94 N.Y.2d 87, 699 N.Y.S.2d 716 (1999). *See also Salvatore v. Kumar*, 45 A.D.3d 560, 845 N.Y.S.2d 384 (2d Dept. 2007).

In opposition, plaintiff and defendant Kahn argue that the motion is premature because discovery is pending. However, a pre-answer motion under CPLR § 3211(a)(1) is based only on the pleading and documentary evidence. The cases cited by plaintiff in opposition to this motion relate to motions for summary judgment and are not applicable to the within motion. *Cf., Venables v. Sagona*, 46 A.D.3d 672, 848 N.Y.S.2d 238 (2d Dept. 2007); *Amico v. Melville Volunteer Fire Co., Inc.*, 39 A.D.3d 784, 832 N.Y.S.2d 813 (2d Dept. 2007); *Fazio v. Brandywine Realty Trust*, 29 A.D.3d 939, 815 N.Y.S.2d 470 (2d Dept. 2006).

The allegations as set forth below in ¶ 83 of the Verified Complaint do not allege any facts by the plaintiff that can serve as the basis for a claim of negligence against the defendants Patricia.

> That at all times hereinafter mentioned, and more specifically on October 31, 2009 at approximately 7:00 p.m., when plaintiff Sylvia Rieders was exiting the 2008 Lexus automobile owned by the defendant Cyrus I. Kahn, and when the defendant Brett L. Bondi was operating the aforementioned vehicle, said vehicle began to pull away thereby causing injuries to the plaintiff Sylvia

Rieders.

There are no specific allegations in the complaint as to any negligent acts against the defendants Patricia. All of the factual allegations set forth as against the defendants Patricia are contained within paragraphs 5 and 68 through 75 of plaintiff's Verified Complaint. A review of those paragraphs reveals that the only allegations against the defendants Patricia are with regard to, alternatively, her ownership or leasing of the subject premises. The Verified Complaint alleges that Burton & Doyle Restaurant retained defendant Parking Systems, Inc., to perform parking services at the subject premises. *See* Defendants Patricia Affirmation in Support Exhibit A, Verified Complaint ¶¶45-57. No such allegation is made with regard to the defendants Patricia. There is no allegation that the defendants Patricia operated a business at the subject premises. There are no allegations as to any defective condition of the subject premises so as to support an allegation of negligence in the maintenance or operation of the subject premises against the defendants Patricia. The documentary evidence establishes that as an out-of-possession landlord, she reserved the right to enter the leased premises to make repairs upon the tenant's default, not to hire a valet service to park cars at the subject premises. The gravamen of plaintiff's cause of action set forth in the Verified Complaint pertains to the alleged negligence of defendant Bondi in operating the vehicle entrusted to him by defendant Kahn. Although the court's review is not limited to the face of the complaint (*see 805 Third Ave. Co. v. M.W. Realty Associates*, 58 N.Y.2d 447, 461 N.Y.S.2d 778 (1983)), when, as here, a party seeking dismissal under CPLR § 3211(a)(7) offers evidence extrinsic to the pleadings the truthfulness of the allegations contained in those pleadings are not assumed. The criteria to be applied in such a case is whether the plaintiff has a cause of action, not whether she has properly stated one. *Rappaport v. International Playtex Corp.*, 43 A.D.2d 349, 352 N.Y.S.2d 241 (3d Dept. 1974). The allegations in the Verified Complaint and the documentary evidence establish that the defendants Patricia, while the owner of the subject premises, is an out-of-possession landlord who did not assume an obligation to maintain the property pursuant to the lease and had nothing to do with the valet service provided by the tenant. It is the determination of the Court that the plaintiff does not have a cause of action against the defendants Patricia.

Defendants Patricia Wagland and Patricia Craig Wagland Delaney's motion for an order pursuant to CPLR § 3211(a)(1) and CPLR § 3211 (a)(7) dismissing the complaint is hereby

granted and they shall be deleted as party defendants.

The remaining parties shall appear for a Compliance Conference in Nassau County Supreme Court, IAS Part 32 at 100 Supreme Court Drive, Mineola, New York, on March 1, 2011 at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
January 25, 2011