

<b>Marcano v I.D.A. Yonkers</b>
2013 NY Slip Op 32769(U)
March 4, 2013
Sup Ct, Westchester County
Docket Number: 55565/2012
Judge: Robert M. DiBella
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
WESTCHESTER COUNTY**

-----X  
**ANDREA MARCANO,**

**Plaintiff,**

**-against-**

**DECISION AND ORDER  
Motion Seq. No. 004**

**I.D.A YONKERS, CASCO BAY REALTY,**

**INDEX NO. 55565/12**

**Defendant.**

-----X  
**DIBELLA, J.**

The following papers were read and considered on this motion by defendant Evergreen Partners, LLC to dismiss, pursuant to CPLR 3211:

- 1) Notice of Amended Motion to Dismiss; Affirmation of Linda B. Johnson, Esq.; Affidavit of Michael Leonard; Exhibit A
- 2) Affirmation in Opposition of Brandon E. Smith, Esq.; Exhibits A-E; and
- 3) Reply Affirmation of Linda B. Johnson, Esq.; Exhibits 1-3.

In this personal injury action, defendant Evergreen Partners, LLC moves to dismiss plaintiff's Supplemental Summons and Amended Verified Complaint as against it, pursuant to CPLR 3211(a)(1) and (7), and for an award of attorneys' fees, costs, and/or sanctions. Plaintiff opposes the motion. For the reasons set forth below, defendant's motion is denied in its entirety.

On a motion to dismiss, pursuant to CPLR 3211, the pleading is given a liberal construction and the facts alleged therein are accepted as true. *Leon v Martinez*, 84 NY2d 83, 87 (1994). The motion to dismiss will only be granted if, upon giving the non-moving party every favorable inference, the facts do not fit within any cognizable legal theory. *Id.* at 87-88. A party who seeks dismissal based on documentary evidence pursuant to CPLR

**MARCANO v. I.D.A. YONKERS**  
**INDEX NO. 55565/12**

3211(a)(1) has "the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." *Epifani v Johnson*, 65 AD3d 224, 229 (2d Dep't 2009) (internal quotations omitted).

Defendant contends that dismissal is warranted because it does not own, lease, control or manage the property where plaintiff allegedly was injured on May 4, 2011. In support of its motion, defendant attaches a copy of the deed of the subject property and an affidavit by Michael Leonard, a member of Leonard Family, LLC, which is the company that owns Evergreen Partners, LLC.

Defendant's submissions, however, are insufficient to warrant the granting of its motion. As stated above, on a motion to dismiss based on documentary evidence, defendant must conclusively resolve all factual issues and establish that dismissal is appropriate. *Epifani*, 65 AD3d at 229. In this case, the documentary evidence submitted consists of a deed demonstrating the transfer of the subject property from Nodine Terrace Houses, Inc. to Yonkers Industrial Development Agency on June 1, 2003. Such evidence does not conclusively establish that defendant had no actionable connection to the property, such as whether it leased, managed, or controlled the property. Further, the affidavit supplied is not the type of documentary evidence that may be considered on a motion to dismiss pursuant to CPLR 3211(a)(1). See *Berger v. Temple Beth-el of Great Neck*, 303 AD2d 346 (2d Dep't 2003); *Correa v. Orient-Express Hotels, Inc.*, 84 AD3d 651 (1st Dep't 2011).

As to the portion of defendant's motion pursuant to CPLR 3211(a)(7) that plaintiff

**MARCANO v. I.D.A. YONKERS**  
**INDEX NO. 55565/12**

failed to state a cause of action, a reading of plaintiff's pleadings, upon giving the facts therein every favorable inference, are sufficient to state a cause of action. The court's function is to determine if a cause of action was stated, and not to determine whether plaintiff should ultimately prevail. *Supreme Assoc, LLC v. Suozzi*, 65 AD3d 1219 (2d Dep't 2009).

Defendant contends that this action is frivolous as against it and requests an award of sanctions, costs and/or attorneys' fees. An action is frivolous if it is "(1) completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." 22 NYCRR 130-1.1(c). In light of the above, the portion of defendants' motion for sanctions is denied, as it cannot be said that the action was frivolous pursuant to the standard set forth in 22 NYCRR 130-1.1.

Accordingly, it is

Ordered that defendant Evergreen Partners, LLC's motion to dismiss and for sanctions is denied in its entirety.

This is the Decision and Order of the Court.

Dated: March 4, 2013  
White Plains, New York

  
Hon. Robert DiBella, JSC

**MARCANO v. I.D.A. YONKERS**  
**INDEX NO. 55565/12**

To: Hinman, Howard & Kattell, LLP  
Linda B. Johnson, Esq.  
PO Box 379  
West Sand Lake, NY 12196

Scott Baron & Associates, PC  
Brandon Smith, Esq.  
159-49 Cross Bay Boulevard  
Howard Beach, NY 11414

Law Office of Epstein, Gialleonardo & Rayhill  
Brian Rayhill, Esq.  
565 Taxter Road, Suite 275  
Elmsford, NY 10523