

**Access Enter. Inc. v Shivdat**

2014 NY Slip Op 31673(U)

May 27, 2014

Sup Ct, Queens County

Docket Number: 705036/13

Judge: Howard G. Lane

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This opinion is uncorrected and not selected for official publication.

*Ullrich*

Short Form Order.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**  
**Justice**

**IAS PART 6**

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ACCESS ENTERPRISES INC.,  
  
Plaintiff,  
  
-against-  
  
MICHAEL SHIVDAT,  
  
Defendant.  
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Index No. 705036/13  
  
Motion  
Date March 13, 2014  
  
Motion  
Cal. No. 1  
  
Motion  
Sequence No. 1

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Upon the foregoing papers it is ordered that this motion by defendant, Michael Shivdat ("Shivdat") to dismiss the complaint of plaintiff, Access Enterprises Inc. ("Access") pursuant to CPLR 3211(a)(1), 3211(a)(5), and 3211(a)(7) is hereby denied.

Plaintiff commenced this action asserting a single breach of contract cause of action against defendant, which cause of action arises out of a Lease Agreement dated February 1, 2010 for the premises located at 117-15 101 Avenue, Richmond Hill, New York. Plaintiff alleges that the Lease Agreement was entered into by plaintiff as Lessor and defendant as Lessee and that there has been a failure by defendant to pay rent for the period from February 2010 to August 2011. Defendant now moves to dismiss the Complaint pursuant to CPLR 3211(a).

**FILED**  
**MAY 30 2014**  
**COUNTY CLERK**  
**QUEENS COUNTY**

On a motion to dismiss pursuant to CPLR §3211, the pleading is to be afforded a liberal construction. (*Leon v. Martinez*, 84 NY2d 83 [1994]). In determining whether plaintiff's complaint states a valid cause of action, the court must accept each allegation as true, without expressing any opinion on plaintiff's ultimate ability to establish the truth of these allegations before the trier of fact (*219 Broadway Corp. v. Alexanders, Inc.*, 46 NY2d 506 [1979]; *Tougher Industries, Inc. v. Northern Westchester Joint Water Works*, 304 AD2d 822 [2d Dept 2003]). The court must find plaintiff's complaint to be legally sufficient if it finds that plaintiff is entitled to recovery upon any reasonable view of the stated facts (see, CPLR 3211[a][7]; *Hoag v. Chancellor, Inc.*, 246 AD2d 224 [1<sup>st</sup> Dept 1998]).

#### A. CPLR 3211(a)(1)

That branch of defendant's motion to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(1) is denied.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence \*\*\*." In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim \*\*\*." (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248.)

If the documentary evidence disproves an essential allegation of the complaint, dismissal is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (see, *Snyder v. Voris, Martini & Moore, LLC*, 52 AD3d 811 [2008]; *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 46 AD3d 530 [2007]). The evidence submitted in support of such motion must be "documentary" or the motion must be denied (*Fontanetta v. John Doe 1*, 73 AD3d at 84, quoting Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C 3211:10, at 22). In order for evidence submitted under a CPLR 3211(a)(1) motion to qualify as "documentary evidence," it must be "unambiguous, authentic, and undeniable" (*Granada Condominium III Assn. v. Palomino*, 78 AD3d 996, 996-997 [2010] [internal quotation marks omitted]). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts,

and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (*Fontanetta v. John Doe 1*, 73 AD3d at 84-85 [internal quotation marks omitted]). At the same time, "[n]either 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 [2010]; *Fontanetta v. John Doe 1*, 73 AD3d at 86).

To the extent that the documentary evidence relied upon is the Lease Agreement dated February 1, 2010 for the premises located at 117-15 101 Avenue, Richmond Hill, New York, said evidence is insufficient to dispose of the cause of action for breach of contract. Documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (*Held v. Kaufman* 91 NY2d 425 [1998]; *Teitler v. Max J. Pollack & Sons*, 288 AD2d 302 [2001]). Here, the Lease Agreement is insufficient to dispose of the breach of contract cause of action, as factual issues remain. To the extent that defendant relies upon affidavits submitted in other actions, said is not documentary evidence (*Granada*, supra).

Accordingly, this branch of the motion is denied.

#### **B. CPLR 3211(a)(7)**

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against defendant for failure to state a cause of action is decided as follows: "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference." (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept 1999] [internal citations omitted]; *Leon v. Martinez*, 84 NY2d 83) and a determination by the Court as to whether the facts alleged fit within any cognizable legal theory (*1455 Washington Ave. Assocs. v. Rose & Kiernan, Inc.*, 260 AD2d 770 [3d Dept 1999]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, *Stukuls v. State of New York*, 42 NY2d 272 [1977]; *Jacobs v. Macy's East, Inc.*, supra), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support

for the pleading (see, *Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v. County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, *Rovello v. Orofino Realty Co., Inc.*, *supra*; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint." (*Jericho Group, Ltd. v. Midtown Development, L.P.*, 32 AD3d 294 [1<sup>st</sup> Dept 2006][internal citations omitted]).

Applying these principles in this case, the court finds that the Complaint adequately states a cause of action for breach of contract. "The elements of a cause of action for breach of contract are the formation of a contract between plaintiff and defendant, performance by plaintiff, defendant's failure to perform, and resulting damages." (*Beheer B.V. (Amsterdam) v. South Caribbean Trading Ltd.*, 801 NYS2d 243 [Sup Ct, NY County 2004][internal citations omitted]). All such elements are pled in the instant Verified Complaint, as it is alleged that defendant owes plaintiff monies pursuant to a Lease Agreement.

Accordingly, this branch of the motion is denied.

### **C. CPLR 3211(a)(5)**

That branch of the motion which is for an order pursuant to CPLR 3211(a)(5) dismissing the complaint on the grounds that it is barred by the doctrines of judicial estoppel and estoppel against inconsistent positions is hereby decided as follows:

Dismissal is warranted under CPLR 3211(a)(5) on the grounds that:

"the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, *res judicata*, statute of limitations, or statute of frauds;"

To the extent this branch of the motion seeks dismissal

pursuant to the doctrines of judicial estoppel and estoppel against inconsistent positions, said doctrines are not enumerated grounds under CPLR 3211(a)(5).

To the extent the motion seeks dismissal pursuant to collateral estoppel, said branch is denied.

The doctrine of collateral estoppel precludes a litigant from re-litigating an issue where that litigant has had a full and fair opportunity to litigate the issue in a prior proceeding where the identical issue was necessarily decided (*Capital Telephone Co., Inc v. Pattersonville Telephone Co., Inc*, 56 NY2d 11 [1982]). There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and . . . there [must be] a full and fair opportunity to contest the decision now said to be controlling" (see, *Schwartz v. Public Administrator of the County of Bronx*, 24 NY2d 65 [1969]).

In the instant case, defendant has not established that plaintiff is re-litigating an issue that it had a full and fair opportunity to litigate in a prior proceeding where the identical issue was necessarily decided (*Capital Telephone Co., Inc v. Pattersonville Telephone Co., Inc*, 56 NY2d 11 [1982]).

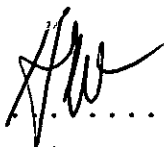
Accordingly, this branch of the motion is denied.

Pursuant to CPLR 3211(f), defendant's time to serve a pleading responsive to the complaint is extended until ten (10) days after service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: May 27, 2014

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Howard G. Lane, J.S.C.