

<b>Tiburcio v Brusco W. 78th St., LLC</b>
2015 NY Slip Op 32957(U)
March 5, 2015
Supreme Court, New York County
Docket Number: 112340-2009
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

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ANDRES TIBURCIO and BELEN TIBURCIO,

Plaintiffs,

Index No. 112340-2009

-against-

**DECISION/ORDER**

BRUSCO WEST 78<sup>th</sup> STREET, LLC,

Defendants.

-----X  
BRUSCO WEST 78<sup>TH</sup> STREET, LLC,

Third-Party Plaintiff,

Index No. 590267-2010

-against-

VIN-RAY PLUMBING AND HEATING INC.

Third-Party Defendant.

**FILED**

MAR 05 2015

COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
VIN-RAY PLUMBING AND HEATING INC.

Fourth-Party Plaintiff,

Index No. 590558-2012

-against-

MERCHANTS MUTUAL INSURANCE COMPANY  
d/b/a MERCHANTS INSURANCE GROUP,

Fourth-Party Defendant.

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**HON. GEORGE J. SILVER, J.S.C.**

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause, Affirmation, Affidavit & Exhibits	
Annexed.....	<u>1. 2. 3. 4</u>
Notice of Cross-Motion, Affirmation & Exhibits.....	<u>5. 6. 7</u>
Reply and Affirmation in Opposition to Cross-Motion & Exhibits.....	<u>8</u>
Reply Affirmation & Exhibit.....	<u>9</u>

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In this action to recover for personal injuries allegedly sustained by plaintiff Andres Tiburcio (plaintiff) during the course of his employment with third-party defendant/fourth party plaintiff Vin-Ray Plumbing and Heating, Inc. (Vin-Ray), Vin-Ray moves pursuant to CPLR §§ 3211 [a] [7] and [1] for an order dismissing defendant/third-party plaintiff Brusco West 78<sup>th</sup> Street, LLC's (Brusco) third-party complaint for common law contribution and indemnification on the ground that said claims are barred by the Workers' Compensation Law<sup>1</sup>. Brusco, the owner of the premises where plaintiff was alleged injured, cross-moves to dismiss Vin-Ray's workers' compensation affirmative defense.

In moving to dismiss, Vin-Ray argues that at the time of plaintiff's accident, October 11, 2006, it had secured workers' compensation coverage for its employees through OHI Workers' Compensation Trust (OHI), which, according to Vin-Ray, is now defunct. Vin-Ray claims that a workers' compensation claim was never filed on plaintiff's behalf because plaintiff failed to provide Vin-Ray with a written statement within 30 days of the accident, as required by Workers' Compensation Law § 18. Vin-Ray further contends that because plaintiff did not sustain a grave injury within the meaning of Workers' Compensation Law § 11, Brusco's common law contribution and indemnification claims must be dismissed. In support of the motion, Vin-Ray's owner, Raymond P. Arlia (Arlia), avers that he cannot locate the executed policy issued by OHI and on effect on the date of plaintiff's accident and that because OHI is defunct, he cannot obtain an executed copy of the policy from it. Arlia further avers if Vin-Ray did not have workers' compensation coverage in effect on the date of plaintiff's accident, it would not have been able to obtain a license to perform plumbing and heating work within the New York City, and, therefore, Brusco would not have been able to retain Vin-Ray to perform work at Brusco's New York City premises where the accident allegedly occurred.

In opposition, Brusco argues that Vin-Ray has failed to establish its entitlement to dismissal of the third-party complaint as it has not offered the requisite documentary evidence to support a motion made pursuant to CPLR § 3211 [a] [1]. Brusco further contends, in support of its cross-motion, that in the absence of any documentary evidence, Vin-Ray will not be able to prove its workers' compensation defense and that it should therefore be dismissed.

On a motion to dismiss brought pursuant to CPLR § 3211, "the court must presume the

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<sup>1</sup> By order dated July 1, 2014, this court granted Vin-Ray leave to amend its third-answer to include the workers' compensation affirmative defense.

facts pleaded to be true and must accord them every favorable inference. . . it is also axiomatic that factual allegations that consist of bare legal conclusions are not entitled to such consideration” (*Hispanic Aids Forum v Estate of Joseph Brown*, 16 AD3d 294 [1<sup>st</sup> Dept 2005]). On a motion to dismiss pursuant to CPLR §3211[a)][1] “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324, 865 NE2d 1210, 834 NYS2d 44 [2007]) (internal citations omitted). Such a motion “may be appropriately granted only when the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co. of NY*, 98 NY2d 314, 774 NE2d 1190, 746 NYS2d 858 [2002]). Documentary evidence includes, “judicial 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” (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]). As Brusco correctly points out, affidavits are not documentary evidence (*Berger v Temple Beth-El of Great Neck* (303 AD2d 346, 347 [2d Dept 2003]; Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:10). Neither are e-mails, deposition testimony or trial testimony (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1<sup>st</sup> Dept 2004]). Because Vin-Ray has failed to submit documentary evidence that conclusively establishes a defense to asserted third-party claims as a matter of law, the motion must be denied (*Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651 [1<sup>st</sup> Dept 2011])<sup>2</sup>.

Vin-Ray’s motion is also denied to the extent it is one to dismiss the third-party complaint for failure to state a cause of action. In determining whether to grant a motion to dismiss based upon a failure to state a cause of action pursuant to CPLR § 3211 [a] [7], the pleading is to be afforded a liberal construction (CPLR § 3026), and the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118 [1<sup>st</sup> Dept 2002]). CPLR § 3211 [a] [7] limits the court to an examination of the pleadings to determine whether they state a cause of action (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 985 NE2d 128, 961 NYS2d 364 [2013]). So long as the pleading is facially sufficient, a plaintiff is not obligated to come forward with claim-sustaining proof in response to a motion to dismiss unless the court treats the motion as one for summary judgment as so advises the parties (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 357 NE2d 970, 389 NYS2d 314 [1976]). Applying that criteria here, causes of action for common law contribution and indemnification are sufficiently stated within the four corners of Brusco’s third-party complaint. While there is case law from the Appellate Division, First Department that when, as here, a defendant submits documentary evidence in support of a motion to dismiss, the standard morphs from whether the plaintiff has stated a cause of action to whether it has one (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d

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<sup>2</sup> The documents submitted by Vin-Ray in reply cannot be used to cure the deficiency of proof in Vin-Ray’s moving papers (*see Henry v Peguero*, 72 AD3d 600 [1<sup>st</sup> Dept 2010]). Even if the documents could be considered by the court, they do not conclusively establish that OHI issued a workers’ compensation policy to Vin-Ray that was in effect on the date of plaintiff’s accident.

128 [1<sup>st</sup> Dept 2014]; *Loreley Fin. (Jersey) No. 3 Ltd. v Citigroup Global Mts., Inc.*, 119 AD3d 136 [1<sup>st</sup> Dept 2014]), the documentary evidence submitted by Vin-Ray in the form of a self-serving affidavit does not establish that Brusco does not have causes of action for indemnification and contribution. Accordingly the motion to dismiss the third-party complaint is denied<sup>3</sup>.

With respect to Brusco's cross-motion, "a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (CPLR § 3211 [b]; *Galasso, Langione & Botter, LLP v Liotti*, 81 AD3d 880, 882 [2d Dept 2011]). When moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit as a matter of law" (*Greco v Christoffersen*, 70 AD3d 769, 771 [2d Dept 2010], quoting *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559 [2d Dept 2006]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723 [2d Dept 2008]). "A defense should not be stricken where there are questions of fact requiring trial (*534 E. 11<sup>th</sup> St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541 [1<sup>st</sup> Dept 2011]). Since the<sup>o</sup> allegations of the third-party answer, viewed, as they must be in this procedural context, in the light most favorable to Vin-Ray (*182 Fifth Ave. v Design Dev. Concepts, Inc.*, 300 AD3d 198 [1<sup>st</sup> Dept [2002]), state a cognizable Workers' Compensation defense. Moreover, while the documentary evidence submitted by Vin-Ray in support of its motion is insufficient to establish its entitlement to dismissal of the third-party complaint, it is sufficient to raise issues of fact and credibility on the question of whether Vin-Ray had workers' compensation insurance on the date of plaintiff's accident (*534 E. 11<sup>th</sup> St. Hous. Dev. Fund Corp.*, 90 AD3d at 542). Accordingly, it is hereby

ORDERED that the motion and cross-motion to dismiss are denied; and it is further

ORDERED that the parties are to appear for pre-trial conference on May 4, 2015 in Part 40, Room 422 of the courthouse located at 60 Centre Street, New York, New York 10007 at 9:30 a.m.; and it is further

ORDERED that third-party defendant, as movant, is to serve a copy of this order, with notice of entry, upon all parties within 20 days of entry.

**FILED**

*George J. Silver*  
George J. Silver, J.S.C.

Dated: 3/5/15  
New York County

MAR 05 2015

GEORGE J. SILVER

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<sup>3</sup> The mere fact that the court granted Vin-Ray leave to amend its answer does not, in and of itself, establish that the affirmative defense is meritorious. On a motion for leave to amend, the question is not whether the amendment has merit but merely whether the proposed amendment is palpably insufficient or clearly devoid of merit (*MBIA Ins. Corp v Greystone & Co., Inc.*, 74 AD3d 499 [1<sup>st</sup> Dept 2010]).