| **Comissioners of the State v Perfect Courier, Ltd.** |
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| 2016 NY Slip Op 30780(U) |
| April 25, 2016 |
| Supreme Court, New York County |
| Docket Number: 452322/2015 |
| Judge: Carol R. Edmead |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. PART 35

Index Number : 452322/2015
COMISSIONERS OF THE STATE
vs
PERFECT COURIER, LTD
Sequence Number : 001
DISMISS ACTION

INDEX NO. ______
MOTION DATE 4.22.2016
MOTION SEQ. NO. ______

The following papers, numbered 1 to ____, were read on this motion to/for ______

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ | No(s). ______

Answering Affidavits — Exhibits ______ | No(s). ______

Replying Affidavits ______ | No(s). ______

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______
FOR THE FOLLOWING REASON(S): ______

It is hereby

**ORDERED that the application of defendant Perfect Courier, Ltd. (PERFECT), for an Order, pursuant to CPLR 3211(a)(1) and (7), dismissing the complaint of plaintiff Commissioners of the State Insurance Fund a//a/o Samia Gondal, Assignor, is denied.**

CPLR 3211 [a] [1]: Defense is founded upon documentary evidence

Pursuant to CPLR 3211 [a] [l], a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *Mill Financial, LLC v. Gillett*, 122 A.D.3d 98, 992 N.Y.S.2d 20 [1st Dept 2014]). "Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Mill Financial, LLC v. Gillett, supra, citing Art and Fashion Group Corp. v. Cyclops Production, Inc.*, 120 A.D.3d 436, 992 N.Y.S.2d 7 [1st Dept 2014]).

Dated: ______ ______, J.S.C.

1. CHECK ONE: .......... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..........MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: .......... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

To be considered "documentary," evidence must be unambiguous and of undisputed authenticity (*Fontanetta v Doe*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010] *citing* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22; *Raske v Next Management, LLC*, 40 Misc 3d 1240(A), Slip Copy, 2013 WL 5033149 (Table) [Supreme Court, New York 2013]; *Philips South Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 867 NYS2d 386 [1st Dept 2008] (documentary evidence "apparently aims at paper whose content is essentially undeniable and which assuming the verity of its contents and the validity of its execution will itself support the ground on which the motion is based"). To constitute documentary evidence, the papers must be "essentially undeniable" and support the motion on its own (*Amsterdam Hospitality Group, LLC v. Marshall-Alan Associates, Inc.*, 120 A.D.3d 431, 992 N.Y.S.2d 2 [1st Dept 2014] *citing* Siegel, Practice Commentaries, supra, at 2)).

CPLR 3211 [a] [7]: Dismiss for Failure to State a Cause of Action

"A CPLR 3211(a)(7) motion may be used by a defendant to test the facial sufficiency of a pleading in two different ways. On the one hand, the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law. On the other hand, the motion may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action. As to the latter, the Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim (*Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 980 N.Y.S.2d 21 [1st Dept 2014]). When documentary evidence is submitted by a defendant "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 A.D.3d 128, *supra*, citing John R. Higgitt, CPLR 3211[A][7]: Demurrer or Merits–Testing Device?, 73 Albany Law Review 99, 110 [2009]).

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra*). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund*

*Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra; Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1st Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff's counsel which flatly contradicted plaintiff's current allegations of prima facie tort]). "In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]). "On a motion to dismiss for failure to state claim on which relief could be granted, the court is not obligated to accept plaintiff's bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like" (*San Geronimo Caribe Project, Inc. v. Vila*, 663 F. Supp. 2d 54 (D.P.R. 2009).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7] where the parties have submitted evidentiary material the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Dollard v WB/Stellar IP Owner, LLC*, 96 AD3d 533, 948 NYS2d 243 [1st Dept 2012] (the "court may freely consider affidavits submitted by the [non-moving party] to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one") *citing Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994] [internal quotation marks and citations omitted] ) *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]). Affidavits submitted by a plaintiff may be considered for the limited purpose of remedying defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-36 [1976]; *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982]). While affidavits may be considered, if the motion is not converted to a 3212 motion for summary judgment, they are *generally* intended to remedy pleading defects and *not to offer evidentiary support for properly pleaded claims*" (*Nonnon v City of New York*, 9 NY3d 825 [2007] [emphasis added]). As to affidavits submitted by the defendant/respondent, "[a]ffidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 unless they "establish conclusively that [petitioner] has no [claim or] cause of action" (*Lawrence v Miller*, 11 NY3d 588, 873 NYS2d 517 [2008] *citing Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

On a motion to dismiss directed at the sufficiency of the complaint, the plaintiff is afforded the benefit of a liberal construction of the pleadings: "The scope of a court's inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed" (*1199 Housing Corp. v International Fidelity Ins. Co.*, NYLJ January 18, 2005, p. 26 col.4, *citing P.T. Bank Central Asia v Chinese Am. Bank,i* 301 AD2d 373, 375 [2003]), the object being "to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action" (*id. at 376; see Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]).

It is the movant who has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *See Leon v Martinez,* 84 N.Y.2d at 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994); *Guggenheimer v Ginzburg,* 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 (1977); *Salles v. Chase Manhattan Bank,* 300 A.D.2d 226, 228, 754 N.Y.S.2d 236 (1st Dept.2002).

Defendant, [movant] by contrast, is subject to a strict pleading provision. In an action on a contract, the obligation to raise the issue of compliance with conditions precedent rests on the party disputing their performance or occurrence (*1199 Housing Corp. v International Fidelity Ins. Co.*, NYLJ January 18, 2005, p. 26 col.4, *citing* CPLR 3015[a]; *see* Siegal, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3015:2, at 52). Thus, the burden to plead "specifically and with particularity" that any condition precedent has not been fulfilled rests on the party resisting enforcement of the contract (*id.*). At trial, the proponent of the agreement is required to demonstrate fulfillment of the condition only to the extent specified by the party asserting noncompliance. An exception is made if the performance or occurrence of a condition precedent has been expressly pleaded in the complaint, in which case a general denial will suffice to place satisfaction of the condition in issue (*see Allis-Chalmers Mfg. Co. v Malan Constr. Corp.*, 30 NY2d 225, 232-233 [1972]).

Defendant PERFECT submits the Affidavit of Louis Weiner, former President of PERFECT and current employee of Recall Corporation. Mr. Weiner affirms that PERFECT had no interest whatsoever in any baggage transportation service company or operations at John F. Kennedy International Airport in 2012. PERFECT operated a messenger and courier service entirely unrelated to baggage transportation in 2012.

Mr. Weiner further swears that PERFECT in 1989 purchased a preexisting delayed baggage delivery service which was then run as a division of PERFECT. Subsequently, the delayed baggage delivery service was sold *in* approximately 2002 to the co-defendant AMERICAN DELIVERY SOLUTIONS, INC. ("American Delivery"). The co-defendant American Delivery cannot dispute this. PERFECT did not employ the co-defendant Brito. See Paragraph 10 of Mr. Weiner's Affidavit.

Unfortunately, in 2002, PERFECT did not keep any electronic databases which would evidence the sale of the delayed baggage delivery service to American Delivery. Furthermore, the hard copies of records pertaining to the sale were destroyed in a fire which occurred at the Citi Storage warehouse, also leased by Recall, located at 5 North 11th Street, on January 31, 2015. See paragraph 6 of Mr. Weiner's Affidavit. Nothing was salvageable from the fire. Copies of news articles regarding the fire and the total destruction of the building is annexed to defendant's

moving papers. There is no other way for PERFECT to demonstrate the sale of the delayed baggage delivery service other than by Mr. Weiner's Affidavit.

Mr. Weiner further swears that PERFECT had no interest whatsoever in the delayed baggage delivery service during the year 2012. PERFECT did not perform any operations whatsoever at John F. Kennedy International Airport in 2012. PERFECT did not have any ownership interest in any business operating at John F. Kennedy International Airport during the year 2012. PERFECT performed no work during the year 2012 at any time at the accident location. PERFECT did not own, lease, direct, manage, supervise, control, maintain or employ anyone at John F. Kennedy International Airport on July 12, 2012. See paragraphs 8 and 10 of Mr. Weiner's Affidavit.

**Defendant Perfect's Motion to Dismiss is denied.**

Defendant PERFECT's contention that Plaintiff's Complaint against PERFECT should be dismissed because "documentary evidence" establishes defendant is not the proper defendant because defendant PERFECT allegedly sold its interest in a baggage delivery service sometime prior to the date of the accident and therefore PERFECT owed no duty to Plaintiff's Assignor, SAMIA GONDAL is insufficient to obtain summary judgment. Neither the affidavit nor the newspaper article are sufficient to constitute "documentary evidence" under 3211(a)(1). Additionally, to constitute documentary evidence in a pre-answer motion to dismiss, such evidence must be "unambiguous and of undisputed authenticity," and usually is limited to documents such as a deed or a contract of sale. The newspaper article at most shows only that there was a fire in Brooklyn in 2015.

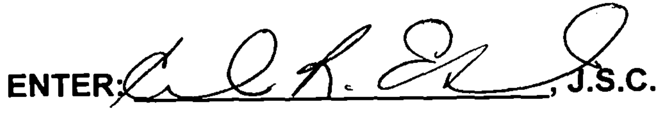
And, as plaintiff points out, granting defendant PERFECT's motion would deprive Plaintiff of the opportunity of obtaining documentary evidence to determine definitively whether or not defendant PERFECT and/or AMERICAN employed defendant BRITO on the date of the accident, and was responsible for the accident in question.

And, considering the standard for dismissal pursuant to 3211(a)(7), and, accepting factual allegations as true, and liberally construing the pleadings, defendant PERFECT's application must be denied. According plaintiff the benefit of every possible favorable inference, Plaintiff *states* a claim as against PERFECT.

Based on the foregoing, it is hereby

**ORDERED that the application of defendant Perfect Courier, Ltd. (PERFECT), for an Order, pursuant to CPLR 3211(a)(1) and (7), dismissing the complaint of plaintiff Commissioners of the State Insurance Fund a//a/o Samia Gondal, Assignor, is denied. And it is further**

**ORDERED that counsel for Defendant PERFECT shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all counsel.**

**Dated** 4. 25. 2016 **ENTER:**  **, J.S.C.**

**HON. CAROL R. EDMEAD**
**J.S.C.**

**Check one:** ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

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