

**Granati v New York City Dept. of Parks and  
Recreation**

2017 NY Slip Op 31550(U)

June 2, 2017

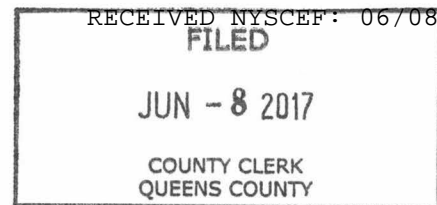
Supreme Court, Queens County

Docket Number: 711889/16

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 6

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FRANK GRANATI,

Index No. 711889/16

Plaintiff,

Motion

Date May 16, 2017

-against-

Motion

Cal. No. 51

NEW YORK CITY DEPARTMENT OF PARKS  
AND RECREATION, et al.,

Motion

Seq. No. 1

Defendants.  
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Papers  
Numbered

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Aff. In Support.....	EF 15
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Upon the foregoing papers it is ordered that the branch of the motion by defendants, the City of New York s/h/a New York City Department of Parks and Recreation, the City of New York, Queens Ballpark Company, L.L.C. and Sterling Mets, L.P. i/s/h/a Sterlings Mets, L.P. to dismiss plaintiff's Complaint pursuant to CPLR 3211(a)(1) is denied.

This action arises out of an incident that allegedly occurred on October 17, 2015 at Citifield, located at 123-01 Roosevelt Avenue, Queens, New York, specifically in the parking

lot known as Area F, when plaintiff, Frank Granati, was caused to trip and fall "due to a ramp type structure placed over electrical and/or broadcast wires." Plaintiff maintains that he sustained serious personal injuries due to the negligence of defendants.

Movants are not entitled to relief on the basis that a defense is founded on documentary evidence (CPLR 3211[a][1]). 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). "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]). "To some extent, 'documentary evidence' is a 'fuzzy' term, and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v. John Doe 1*, 73 AD3d 78 [2d Dept 2010]). However, it is well-established law that affidavits and deposition testimony are not documentary evidence, and deeds and contracts are documentary evidence (*Id.*) "[T]o be considered 'documentary', evidence must be unambiguous and of undisputed authenticity" (*Id.*) (internal citations omitted).

The affidavits relied upon by defendants in connection with this ground for dismissal are not the form of unambiguous, undeniable materials which qualify as documentary evidence for the purposes of CPLR 3211(a)(1) (see *Kappa Dev. Corp. v Queens Coll. Point Holdings, LLC*, 95 AD3d 1178 [2d Dept 2012]; *HSBC Bank, USA v Pugkhem*, 88 AD3d 649, 651 [2d Dept 2011]). The Lease Agreement submitted by movants does not utterly refute the factual allegations of the complaint and conclusively establish a defense to plaintiff's claims as a matter of law (see *Kappa Dev. Corp.*, 95 AD3d at 1179; *Bodden v Kean*, 86 AD3d 524, 526 [2d Dept 2011]).

That branch of defendants' motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against defendants for failure to state a cause of action is denied.

"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; *Leon v Martinez*, 84 NY2d 83). 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).

To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty, a breach of the duty, and that said breach was the proximate cause of their injuries (see *Gordon v Muchnick*, 180 AD2d 715 [2d Dept 1992]). However, absent a duty of care, there is no breach and no liability (*Id.*; see also *Marasco v C.D.R. Electronics Security & Surveillance Systems Co., et. al.*, 1 AD3d 578 [2d Dept 2003]).

Applying these principles in this case, the court decides that the complaint adequately states a cause of action for negligence.

That branch of defendants' motion pursuant to CPLR 3211(c), in the Court's discretion, to treat the instant motion as a motion for summary judgment and dismiss all claims against defendants is denied without prejudice with leave to renew.

As the record reflects that the parties have not completed discovery, and that discovery remains outstanding, including examinations before trial of the parties, the motion for summary judgment pursuant to CPLR 3212 is denied without prejudice as it is premature (see CPLR 3212[f]; *Groves v Lands End Housing Co., Inc.*, 80 NY2d 978 [NY 1992]; *Ramos v DEGU Deutsche Gesellschaft Fuer Immobilienfonds MBH*, 2007 NY Slip Op 1714 [2d Dept 2007]; *Yadgarov v Dekel*, 2 AD3d 631 [2d Dept 2003]; *George v New York City Transit Authority*, 306 AD2d 160 [1st Dept 2003]). Accordingly, the motion for summary judgment is hereby denied "with leave to renew when discovery . . . is complete." (See *Ramos, supra*).

Furthermore, defendants has improperly sought to reach the merits of the complaint on this mere CPLR 3211 motion (see *Stukuls v State of New York, supra*; *Jacobs v Macy's East Inc., supra*).

Moving defendants are granted thirty (30) days from the date of this order to serve its Answer.

A courtesy copy of this order is being mailed to counsel for moving defendants and to counsel for plaintiff.

This constitutes the decision and order of the Court.

Dated: June 2, 2017

  
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**Howard G. Lane, J.S.C.**

