

<b>Gramajo v Nauffal Contr. Corp.</b>
2017 NY Slip Op 32962(U)
February 21, 2017
Supreme Court, Westchester County
Docket Number: 60292/2016
Judge: Sam D. Walker
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To commence the statutory time for 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  
COUNTY OF WESTCHESTER  
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X  
ANGEL GRAMAJO,

Plaintiff,

-against-

Index No. 60292/2016  
Seq #1  
**Decision & Order**

NAUFFAL CONTRACTING CORP. and JIMMY  
NAUFFAL,

Defendants.  
-----X

The following papers were read on a motion by the defendant, Jimmy Nauffal, seeking an order, pursuant to C.P.L.R. 3211(a)(1) and (a)(7), dismissing the plaintiff's action against him due to documentary evidence and for failure to state a cause of action:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affidavit/Exhibits A-F	1-8
Memorandum of Law in Support	9
Affirmation/Exhibits 1-3	10-13
Reply Affirmation	14
Memorandum of Law in Reply	15

Upon the foregoing papers, it is ordered that the motion to dismiss is granted.

FACTUAL AND PROCEDURAL BACKGROUND

This is an action to recover for injuries allegedly suffered by the plaintiff, Angel Gramajo ("Gramajo"), on or about August 24, 2015, when he fell from a ladder to the ground below while he was working at 1007 East 241<sup>st</sup> Street, Bronx, New York ("the

premises"). Gramajo was an employee of Edy Home Improvement LLC, which was hired by Nauffal Contracting Corp. ("Nauffal Corp."), the general contractor for the project.

Plaintiff commenced this action on July 27, 2016, by filing a summons and complaint against Nauffal alleging two causes of action for negligence and violation of New York Labor Laws §§ 200, 240 and/or 241 and other rules and regulations. Nauffal Corp. filed an answer with twenty two affirmative defenses. On October 7, 2016, the plaintiff filed a supplemental summons and an amended complaint to add the defendant, Jimmy Nauffal ("Nauffal") as a defendant. Nauffal now files this pre-answer motion seeking dismissal of the plaintiff's action, pursuant to CPLR 3211(a)(1) and (a)(7), arguing that there is documentary evidence requiring dismissal and that the pleadings fail to state any cause of action against him. Plaintiff opposes the motion.

#### DISCUSSION

Rule 3211 of the Civil Practice Law and Rules provides, in relevant part that,

"[a] party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that:

- (1) A defense is founded upon documentary evidence; or
- (7) the pleading fails to state a cause of action..."

N.Y. Civ. Prac. L. & R. 3211(a)(1) and (a)(7).

In such motions, the facts alleged in the complaint are accepted as true, and the only determination is whether the facts alleged fit within any recognizable legal theory of recovery. However, this rule does not apply to legal conclusions lacking factual support, or to factual claims that are contradicted by documentary evidence. See, *Doria v. Masucci*, 230 A.D.2d 764 (2d Dep't 1996).

With regard to the motion pursuant to CPLR 3211(a)(1), "[a] motion to dismiss pursuant to CPLR 3211(a)(1) may be appropriately granted only where the documentary

evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law". *730 J & J LLC v. Fillmore Agency, Inc.*, 303 A.D.2d 486, 755 N.Y.S.2d 887 (2d Dep't 2003).

Under CPLR 3211(a)(7), initially "[t]he sole criterion is 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...". *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182 (1977). On a motion to dismiss for failure to state a cause of action, the court must view the challenged pleading in the light most favorable to the non-moving party, and determine whether the facts as alleged fit within any cognizable legal theory. *Brevtman v Olinville Realty, LLC*, 54 AD3d 703 (2d Dept. 2008). See, also, *EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, (2005); *Leon v Martinez*, 84 NY2d 83 (1994).

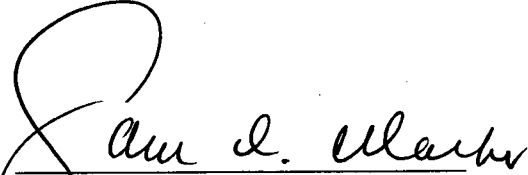
Thus, a motion to dismiss pursuant to CPLR 3211 (a) (7) will not succeed if, taking all facts alleged as true and affording them every possible inference favorable to the nonmoving party, the complaint states in some recognizable form any cause of action known to law (see *Leon v Martinez*, supra; *Fisher v DiPietro*. 54 AD3d 892 (2d Dep't 2008); *Shava B. Pac., LLC v Wilson. Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, (2d Dep't 2006). "Indeed, a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it'". *Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d 682, 683, 941 N.Y.S.2d 675, 677 (2d Dep't 2012).

Nauffal avers that he is the president and sole shareholder of Nauffal Corp., a New York corporation, which was incorporated in or about November 2000. Nauffal avers that Nauffal Corp. contracted with Pearl Edwards to perform construction at the premises and submitted a proposal and an agreement as documentary evidence. Both documents were executed on the corporation's letter head. The proposal states that "Nauffal Contracting Corp. would like to take a moment to say thank you for inviting us to bid on your project...." and further states that "any additional repair, not included in this contract is extra and an additional contract will be made with us to do that work prior to start of new work." The agreement states that it is an agreement between Nauffal Corp. and Pearl Edwards. It states that Nauffal Corp. shall be called the Contractor and then Jimmy Nauffal signs the contract as Contractor. The Court finds that these documents are sufficient to show that the contract was between Nauffal Corp. and Pearl Edwards and not between Jimmy Nauffal personally.

In opposition, the plaintiff argues that the defendant had requested an extension of time to answer the complaint, which was granted by stipulation, but that such extension did not include an extension of time to file any motion in response to the complaint and therefore, the motion is untimely. The parties' stipulation states that Nauffal's time to respond to the plaintiff's amended summons and complaint is extended. It does not specifically state that his time to answer is extended. However, the stipulation extended the time to respond to November 30, 2016 and Nauffal's motion to dismiss was not filed until December 9, 2016 with no showing of a reasonable excuse to the Court for the lateness of the motion. Therefore, Nauffal's motion is untimely and must be denied.

Accordingly, the defendant's motion seeking dismissal of the complaint against it, is DENIED. The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York  
February 21, 2017

  
HON. SAM D. WALKER, J.S.C.