

**Golub v Oliver**

2019 NY Slip Op 33009(U)

October 3, 2019

Supreme Court, Kings County

Docket Number: 515844/2018

Judge: Paul Wooten

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**SUPREME COURT OF THE STATE OF NEW YORK  
KINGS COUNTY**

**PRESENT: HON. PAUL WOOTEN**  
*Justice*

**PART 97**

**BORIS GOLUB,**

Plaintiff,

INDEX NO.  
SEQ NO.

**515844/2018**

**1**

- against -

**ALEXANDER OLIVER and UNITED  
ELITE GROUP INC.,**

Defendants.

In accordance with CPLR 2219(a), the following papers were read on this motion by defendant to dismiss.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

Plaintiff Boris Golub commenced this action via Summons and Verified Complaint on August 3, 2018 against defendants Alexander Oliver (Oliver) and United Elite Group Inc. (United) (collectively, defendants) to recover for personal injuries allegedly sustained on April 13, 2018 when he slipped and/or tripped on a staircase while performing renovation work at Oliver's home located at 10 Dennett Place, Brooklyn, New York (subject premises). Specifically, in his Verified Complaint, plaintiff alleges causes of action against defendants for negligence and violations of Labor Law §§ 200 and 241(6).

Before the Court is a motion by Oliver, pursuant to CPLR 3211(a)(1) and (7), to dismiss the Verified Complaint and any cross-claims asserted against him; or alternatively, pursuant to CPLR 3211(c), granting summary judgment to Oliver dismissing the Verified

Complaint and any cross-claims asserted against him. Specifically, Oliver contends that he cannot be held liable herein due to the single family homeowner exemption. In opposition, plaintiff contends that he cannot oppose this motion on the merits since the facts regarding the level of Oliver's participation in the ongoing construction, and therefore whether the exemption applies, are exclusively within Oliver's possession.

#### STANDARD OF LAW

"A party seeking dismissal on the ground that its defense is founded on documentary evidence under CPLR 3211(a)(1) has the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Botach Mgt. Group v Gurash*, 138 AD3d 771, 771 [2d Dept 2016]; see *Sullivan v State*, 34 AD3d 443 [2d Dept 2006]). "A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence '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'" (*Rodolico v Rubin & Licatesi, P.C.*, 114 AD3d 923, 924-925 [2d Dept 2014], quoting *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *Sabre Real Estate Group, LLC v Ghazvini*, 140 AD3d 724, 724 [2d Dept 2016]; *Yue Fung USA Enters., Inc. v Novelty Crystal Corp.*, 105 AD3d 840, 841 [2d Dept 2013] ["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"]).

"In order to be considered documentary evidence within the meaning of CPLR 3211(a)(1), the evidence 'must be unambiguous and of undisputed authenticity'" (*Rabos v R & R Bagels & Bakery, Inc.*, 100 AD3d 849, 851 [2d Dept 2012], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010]; *Yue Fung USA Enters., Inc.*, 105 AD3d at 841-842). "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, would qualify

as documentary evidence in the proper case” (*Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012], quoting *Fontanetta*, 73 AD3d at 84-85). “Neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)” (*Cives Corp.*, 97 AD3d at 714, quoting *Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 997 [2d Dept 2010]).

A dismissal of motion under CPLR 3211(a)(7) requires determining whether the plaintiff has *stated* a cause of action, but “[i]f the court considers evidentiary material, the criterion then becomes ‘whether the proponent of the pleading *has* a cause of action’” (*Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2d Dept 2010] [emphasis added], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Dismissal results only if the movant demonstrates conclusively that the plaintiff has no cause of action, or that “a material fact as claimed by the pleader to be one is not a fact at all” (*Sokol*, 74 AD3d at 1182, quoting *Guggenheimer*, 43 NY2d at 275; *see also Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]). A court considering a dismissal motion on the basis of failing to state a cause of action generally must accept the facts alleged in the complaint as true and make any possible favorable inferences for the plaintiff (*Sokol*, 74 AD3d at 1181), even when such allegations are “upon information and belief” (*Roldan v Allstate Ins. Co.*, 149 AD2d 20, 40 [2d Dept 1989]).

#### DISCUSSION

Upon review of the papers submitted, the Court finds that Oliver’s motion must be denied at this time since discovery is necessary for the Court to determine whether the homeowner’s exception applies herein. Specifically, the Court notes that the affidavit from Oliver does not qualify as documentary evidence within the meaning of CPLR 3211(a)(1) (*see Cives Corp.*, 97 AD3d at 714; *Treeline 1 OCR, LLC v Nassau County Indus. Dev. Agency*, 82 AD3d 748 [2d Dept 2011]; *Summer v Severance*, 85 AD3d 1011, 1012 [2d Dept 2011]). Moreover, the remaining evidentiary submissions show that the property is a single family

residence owned by Oliver, a fact which is conceded to by plaintiff in opposition, but fail to show that Oliver did not actually direct or control, to wit, supervise the method and manner of the construction work. Thus, after reviewing all of Oliver's evidentiary submissions, the Court concludes that they either do not constitute documentary evidence within the meaning of CPLR 3211(a)(1), or they have failed to utterly refute the plaintiff's allegations or conclusively establish a defense as a matter of law (see *25-01 Newkirk Ave., LLC v Everest Natl. Ins. Co.*, 127 AD3d 850 [2d Dept 2015]; *Sabre Real Estate Group, LLC v Ghazvini*, 140 AD3d 724, 724–725 [2d Dept 2016]). Moreover, in regards to Oliver's claim that plaintiff fails to state a cause of action, after reviewing the submissions by Oliver and affording the plaintiff the benefit of every favorable inference (see *Leon*, 84 NY2d at 87-88), this Court finds that Oliver's motion must be denied.

Lastly, the Court declines to convert this motion to one for summary judgment, pursuant to CPLR 3211(c), as requested by Oliver. It has been held in the Second Department, that “[a] party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment” (*Martinez v 305 W. 52 Condominium*, 128 AD3d 912, 914 [2d Dept 2015], quoting *Malester v Rampil*, 118 AD3d 855, 856 [2d Dept 2014]). “A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated” (*Chmelovsky v Country Club Homes, Inc.*, 106 AD3d 684 [2d Dept 2013]; CPLR 3212[f] [“where essential facts to justify opposition to a motion for summary judgment might exist, but cannot be stated because they are in the moving party's exclusive knowledge or control, summary judgment must be denied”]). “This is especially so where the motion for summary judgment was made prior to the parties conducting depositions” (*Schlichting v Elliquence Realty, LLC*, 116 AD3d 689, 690 [2d Dept 2014]). Here, an award of summary judgment would be premature at this stage of the action since relevant discovery remains outstanding, including

depositions of defendants, and plaintiff is entitled to said discovery to determine whether Oliver supervised the means and method of the work being performed.

CONCLUSION

Accordingly, it is hereby

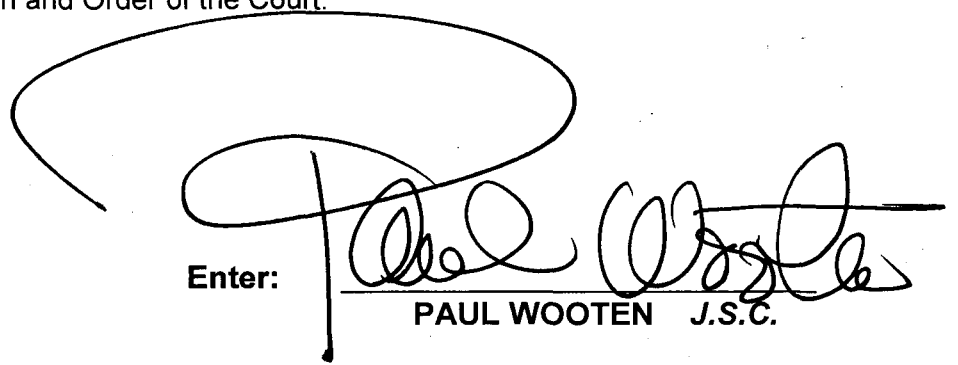
ORDERED that defendant Alexander Oliver's motion for an Order dismissing the Complaint, pursuant to CPLR 3211(a)(1) and (7), and in the alternative, pursuant to CPLR 3211(c) granting summary judgment to Alexander Oliver is denied in its entirety, without prejudice with leave to represent upon further discovery; and it is further,

ORDERED that the parties shall appear for a preliminary conference in the Intake Part, Room 282, on October 23, 2019; and it is further,

ORDERED that counsel for plaintiff shall serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 10/3/19

Enter:   
PAUL WOOTEN J.S.C.

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