| **Dewalt v Plascencia** |
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| 2019 NY Slip Op 35015(U) |
| April 5, 2019 |
| Supreme Court, Bronx County |
| Docket Number: Index No 20120/2019E |
| Judge: John R. Higgitt |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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JEFFREY DEWALT,

Plaintiff,

- against -

RAMIRO PLASCENCIA, PEDRO TEIXEIRA, INC., ENRICO E. OMEDES and J-TECH CONTRACTING, INC.,

Defendants.

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DECISION AND ORDER

Index No. 20120/2019E

John R. Higgitt, J.

Upon the February 6, 2019 notice of motion of defendants Enrico E. Omedes and J-Tech Contracting, Inc. (J-Tech) and the affirmation, affidavits and exhibits submitted in support thereof; plaintiff's March 29, 2019 affirmation in opposition and the exhibit submitted therewith; the moving defendants' April 2, 2019 affirmation in reply; and due deliberation; the moving defendants' motion for dismissal of the complaint pursuant to CPLR 3211(a)(1) and (7) is denied.

Plaintiff alleges personal injuries emanating from a motor vehicle accident involving plaintiff's and defendants' vehicles. In support of the motion, the moving defendants submit the affidavit of an employee of J-Tech, defendant Omedes' affidavit, an email from an employee of non-party Navigators Management Company, Inc. to the J-Tech employee, and a certified copy of the police accident report.

A motion seeking dismissal pursuant to CPLR 3211(a)(1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002]; *see also AG Capital Funding Partners, L.P. v State St. Bank & Tr. Co.*, 5 NY3d 582 [2005]). "A paper will qualify as documentary evidence only if it satisfies the following criteria:

(1) it is unambiguous; (2) it is of undisputed authenticity; and (3) its contents are essentially undeniable" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 2019 NY Slip Op 02437, at *3 [1st Dept 2019] [internal citations and quotation marks omitted]).

Affidavits do not constitute documentary evidence within the meaning of CPLR 3211(a)(1) (*see Serao v Bench-Serao*, 149 AD3d 645 [1st Dept 2017]; *Asmar v 20th & Seventh Assocs., LLC*, 125 AD3d 563 [1st Dept 2015]; *Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436 [1st Dept 2014]; *Amsterdam Hosp. Group, LLC v Marshall-Alan Assocs., Inc.*, 120 AD3d 431 [1st Dept 2014]).

Emails may constitute documentary evidence (*see Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47 [1st Dept 2015], *affd* 31 NY3d 100 [2018]); however, as with any other evidence submitted on a CPLR 3211(a)(1) motion, the emails must meet the "essentially undeniable" test and be sufficient to support the motion on their own (*see Amsterdam Hosp. Group, LLC, supra*). Here, an email from a "claims specialist" of Navigators Management Company, Inc., stating that "Navigators has taken full responsibility for the accident" is insufficient to "utterly refute[] plaintiff['s] factual allegations and conclusively establish[] a defense as a matter of law" (*Tozzi v Mack*, 2019 NY Slip Op 01308, at*1 [1st Dept 2019]). The email does not mention what Navigators' role is or on whose behalf it is acting. The email is neither "explicit" nor "unambiguous" (*see Dixon v 105 W. 75th St. LLC*, 148 AD3d 623 [1st Dept 2017]), and, therefore, is insufficient to support the motion (*see Art & Fashion Group Corp., supra*; *United States Fire Ins. Co. v North Shore Risk Mgt.*, 114 AD3d 408 [1st Dept 2014]).

The narrative statements contained in the police accident report, while certified, are not attributed to any particular source and, in any event, do not qualify for any hearsay exception. Furthermore, there is no indication that the responding officer witnessed the accident. The

statements in the report not being otherwise admissible, the report "cannot serve as documentary evidence which conclusively establishes a defense" (*Advanced Global Tech., LLC v Sirius Satellite Radio, Inc.*, 44 AD3d 317, 318 [1st Dept 2007]).

"On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), it is well settled that courts must liberally construe a pleading, accept all the facts alleged therein to be true, and accord those allegations the benefit of every possible favorable inference in order to determine whether those facts fit within any cognizable legal theory" (*Molina v Phoenix Sound, Inc.*, 297 AD2d 595, 596 [1st Dept 2002]). "A CPLR 3211 dismissal 'may be granted where documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" (*Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 571 [2005] [citations omitted]). "[A] defendant can submit evidence[, such as affidavits or testimony,] in support of [a CPLR 3211(a)(7)] motion attacking a well-pleaded cognizable claim" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Grp., Inc.*, 115 AD3d 128, 134 [1st Dept 2014]). The affidavits or testimony submitted in support of a motion to dismiss must conclusively establish the lack of a claim or cause of action (*see Godfrey v Spano*, 13 NY3d 358 [2009]; *Anonymous v Anonymous*, 165 AD3d 19 [1st Dept 2018]).

Defendant Omedes avers that while his vehicle was stopped or traveling very slowly in heavy traffic on the Major Deegan Expressway, it was struck by plaintiff's vehicle, which had been propelled into defendant Omedes' vehicle by a third vehicle. Defendant Omedes avers that he did not cause the accident or contribute to personal injuries or property damage resulting from the accident. "[A]ffidavits submitted by the defendant will seldom if ever warrant the relief he [or she] seeks unless too the affidavits establish conclusively that plaintiff has no cause of action" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). "[A]lthough defendants'

supporting affidavit may have presented a seemingly strong defense, it did not *conclusively* establish that plaintiff has no cause of action" (*Zaichik v HK Investigations Co.*, 23 Misc 3d 128[A], 2009 NY Slip Op 50601[U] [App Term 1st Dept 2009] [emphasis added]). Furthermore, plaintiff asserts that the motion is premature because discovery has not yet taken place, and plaintiff is entitled to discovery that could lead to relevant evidence on the issue of the moving defendants' negligence (*see* CPLR 3211[d]; *Hooker v Magill*, 140 AD3d 589 [1st Dept 2016]).

Accordingly, it is

ORDERED, that the moving defendants' motion for an order dismissing the complaint as against them is denied; and it is further

ORDERED, that plaintiff shall file a request for preliminary conference within 45 days after entry of this order.

This constitutes the decision and order of the court.

Dated: April 5, 2019

John R. Higgitt, A.J.S.C.