SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART __15____

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JOSE ORTIZ, Index №. 25359/2017E

-against- **Hon. MARY ANN BRIGANTTI**

ROBERT HACKNEY, JR., et al. Justice Supreme Court

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The following papers numbered 1 to _____6____ were read on this motion (Seq. No. ___2___)
for ____**DISMISSAL**_____ noticed on ____August 20, 2018_____.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1,2
Answering Affidavit and Exhibits	No(s).	3,4
Replying Affidavit and Exhibits	No(s).	5,6

Motion is Respectfully Referred to Justice: _____
Dated: _____

Upon the foregoing papers, the third party defendant The Hertz Corporation ("Hertz") moves for an order pursuant to CPLR 3211(a)(1) and 3211(a)(7), dismissing the third-party complaint of the third-party plaintiffs John Velez ("Velez") and 1345 Leasehold LLC d/b/a 1345 Garage ("1345")(collectively, the "Third Party Plaintiffs"). The Third Party Plaintiffs oppose the motion.

I. Background

According to the pleadings and materials submitted in support of this motion, this matter arises out of an alleged accident that occurred when the plaintiff Jose Ortiz ("Plaintiff") was stuck by a motor vehicle owned by defendant Robert Hackney Jr. ("Hackney") and operated by Velez while that vehicle was in the custody of a parking garage premises owned and operated by 1345. Plaintiff commenced the main action against Hackney, Velez, and 1345 alleging that their negligence caused or contributed to his injuries. The Third Party Plaintiffs thereafter commenced a third-party action against Hertz, a car rental business who leased space within 1345's parking garage, and employed Plaintiff at the time of the accident. The third party complaint alleges that if Plaintiff sustained injuries as a result of any negligence other than his own, such injuries were sustained solely due to negligence and/or recklessness of Hertz. Third Party Plaintiffs make allegations against Hertz sounding in common law indemnification and contribution as well as contractual indemnification and breach of contract for failure to procure liability insurance.

Hertz alleges that the foregoing causes of action must be dismissed based upon documentary evidence and/or failure to state a cause of action. In support of its motion, Hertz annexes: the relevant pleadings; a copy of an incident report it generated after this accident; an affidavit from Hertz's location manager Lenahndem Tankeng, who drafted the incident report; and a copy of the lease agreement between Hertz and 1345's predecessor indicating that at relevant times, Hertz was a tenant in the premises owned by

1345 Garage, and Hertz leased space for its car rental office and business inside of that premises. Hertz contends that, according to the accident report and the underlying complaint, Plaintiff was walking from a vehicle that he had just parked inside of the garage when he was struck by a vehicle operated by Velez, a garage employee. In her affidavit, , Ms. Tankeng asserts that Hertz had no involvement with this accident since it merely leased space within the premises. She asserts that Velez was never employed by Hertz and the subject vehicle was not owned or rented by Hertz, and Hertz and/or its employees did not control, direct, supervise or have any connection to 1345 or its employees other than to lease space inside of its premises.

Hertz claims that there are no facts in the Third Party Complaint establishing that Hertz was negligent, and thus the indemnification and contribution claims must fail. Hertz also argues that the indemnification provision in the subject lease is void as it purports to exempt 1345, as lessor, from liability for its own acts of negligence. In any event, Hertz claims that the indemnification provision provides that the landlord (1345) shall indemnify tenant (Hertz) from liability arising out of use or occupation of the landlord's portion of the garage by the landlord. Hertz contends that since, in this matter, the accident arose out of 1345's use of the garage, and Hertz had no involvement with the accident, the contractual indemnification claim must be dismissed. Finally, Hertz argues that the breach of contract claim must be dismissed because there is no requirement in the lease for the tenant to maintain insurance to cover losses that were entirely due to the negligence of the landlord and/or its employees.

Third Party Plaintiff opposes the motion, and its contentions in opposition as well as Hertz's arguments in reply are addressed *infra* as necessary.

II. Standard of Review

On a motion to dismiss pursuant to CPLR 3211(a)(7), a court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v. DaimlerChrysler Corp.*, 292 AD2d 118 [1st Dept. 2002]). In other words, the determination 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 [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). 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"(*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The motion should be

denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*McGill v. Parker*, 179 AD2d 98 [1st Dept. 1992]).

Factual allegations normally presumed to be true on a motion pursuant to CPLR 3211 (a)(7) may properly be negated by affidavits and documentary evidence (CPLR 3211 [a][1], *Wilhemlina Models, Inc. v. Fleisher*, 19 A.D.3d 267 [1st Dept. 2005]). 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" (John R. Higgitt, CPLR 3211 [a][7]: Demurrer or Merits - Testing Device?, 73 Albany Law Review 99, 110 [2009]). Dismissal is appropriate under these circumstances only where the documentary evidence flatly rejects a plaintiffs well-pleaded and cognizable claim, or "conclusively establishes a defense to the asserted claims as a matter of law" (*Basis Yield Alpha Fund (Master)*, 115 A.D.3d 128, 136 [1st Dept. 2014], citing *Leon v. Martinez*, supra.).

However, in order for evidence submitted under a CPLR 3211 (a)(1) motion to qualify as "documentary evidence," it must be "unambiguous, authentic, and undeniable" (*Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996, 996-997 [2nd Dept. 2010][internal quotation marks omitted]). Affidavits and deposition testimony are not considered documentary evidence "within the intendment of CPLR 3211(a)(1)" (*id.* at 997 internal quotation marks omitted]). Indeed, "[a]ffidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211(a)(7) unless they establish conclusively that plaintiff has no cause of action' " (see *Xia-Ping Wang v. Diamond Hill Realty, LLC*, 116 A.D.3d 767 [2nd Dept. 2014], quoting *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636 [1976]; *Lawrence v. Graubard Miller*, 11 N.Y.3d 588 [2008]; *Rozell v. Milby*, 98 A.D.3d 960, 961 [2nd Dept. 2012]).

II. Applicable Law and Analysis

In this case, Defendant's submissions fail to conclusively demonstrate that it was not negligent or did not have any involvement with the subject accident, so as to utterly refute the allegations in the third party complaint, which must be accepted as true. The factual affidavit from Ms. Tankeng, which largely only disputes whether or not Hertz was negligent, is not "documentary evidence" for purposes of CPLR 3211(a)(1) (*Celentano v. Boo Realty, LLC*, 160 A.D.3d 576, 577 [1st Dept. 2018]) and in this context it cannot be considered "for the purpose of determining whether there is evidentiary support for the complaint" (*Tsimerman v, Janoff*, 40 A.D.3d 242, 242 [1st Dept. 2007]). The incident report is a Hertz business document that was allegedly drafted by Ms. Tankeng after the accident. The report contains a description of how this accident occurred and indicates that Hertz must discuss "walking areas" within the garage with the "garage company," but it does not utterly refute any allegations that negligent acts or omissions on the part of Hertz caused or contributed to this accident, or otherwise conclusively establish

that Hertz is not liable to the Third Party Plaintiffs for common law contribution or indemnification (*see Tsimerman,* 40 A.D.3d 242).

Similarly, the lease agreement between Hertz and 1345 fails to conclusively refute any contention of contractual indemnification or breach of contract for failure to procure liability insurance. Notably, the lease at Article 35.1 states that the tenant (Hertz) "shall defend and save Landlord [1345 Garage] harmless from and against any liability or expense arising from the use or occupation of the demised premises by Tenant or anyone in the demised premises with Tenant's permission…" This indemnification provision further provides that "noting contained in this section 35.1 shall be deemed to exculpate Landlord from liability for a breach of this Lease by Landlord or for any liability arising under an law, including those referenced in this Section 35.1 or for its negligence or the negligence of its agents, invitees, employees or servants…" This provision thus does not require Hertz to indemnify 1345 for 1345's own negligence, and accordingly it does not violate General Obligations Law Sec. 5-321 (*see Mahon v. David Ellis Real Estate, L.P.*, 165 A.D.3d 600 [1st Dept. 2018]). Should it be determined that Third Party Plaintiff's allegations are true - that Hertz's negligence in the operation of its business within the premises or its supervision of Plaintiff contributed to the accident – the lease provides that 1345 would be entitled to contractual indemnification.

Finally, the lease provides that Hertz shall maintain general liability insurance with the landlord as an additional insured (Lease at Article 35.2). At this procedural posture, it cannot be stated as a matter of law that Hertz bears no liability for this accident. Hertz has not submitted any documentary evidence establishing that it complied with this contractual provision, and Hertz could not satisfy its initial burden by submitting materials for the first time in reply (*see Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560 [1st Dept. 1992]).

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III. Conclusion

Accordingly, it is hereby

ORDERED, that Hertz's motion to dismiss the third party complaint pursuant to CPLR 3211(a)(1) or (a)(7) is denied.

This constitutes the Decision and Order of this Court.

Dated: 3/29/19 **Hon.** Mary Ann Brigantti **J.S.C.**

Hon. Mary Ann Brigantti

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
   ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT