

**Richman Plaza Garage Corp. v River Park Bronx
Apts., Inc.**

2019 NY Slip Op 35117(U)

June 7, 2019

Supreme Court, Bronx County

Docket Number: Index No. 36195/2017E

Judge: Wilma Guzman

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 7**

Index No. 36195/2017/17E
Motion Calendar No.7
Motion Date: 3/18/19

RICHMAN PLAZA GARAGE CORP.,
Plaintiff,
-against-

**DECISION/ ORDER
Present:
Hon. Wilma Guzman**

RIVER PARK BRONX APARTMENTS, INC.,
RIVER PARK RESIDENCES, LP, RIVER PARK
TOWERS GARAGE LLC, d/b/a CITY PARKING,
Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to:

Papers	Numbered
Notice of Motion and Affidavits Annexed	
Order to Show Cause and Affidavits Annexed	
Answering Affidavits and Cross Motion.....	
Replying Affidavits	
Exhibits	
Other:	

Upon the foregoing papers, the Decision/Order on this Motion is as follows:

Motion by defendants, seeking to dismiss the plaintiff's complaint pursuant to CPLR§3122 (a)(1), (a)(5), and (a)(7), and the plaintiff having submitted opposition thereto and reply affirmation having been submitted, upon due deliberation having been had, the court makes the following determination:

The within action has a tortured history in its litigation process. There are decisions from Civil Court, Appellate Term and Appellate Division. There have been post-evictions orders to show cause, orders and stipulations. The plaintiff had a commercial lease with the Owners', predecessor, River Park Associates, as landlord, where plaintiff operated a garage facility at the premises. Pursuant to the lease, plaintiff was required to account to the landlord each year the amount of rent collected in parking charges during the year to determine any additional rent payable to the landlord. Plaintiff failed to comply with the lease requirement and the Notice to Cure served therein. When plaintiff defaulted on the Notice to Cure, defendant commenced a holdover proceeding against the plaintiff. After trial and multiple appeals, the defendants,

Owners were awarded a final Judgment of possession in April 2017. Plaintiff sought to vacate the warrant of eviction and review the Judgment, however, said application was denied by order of the Appellate Division on September 25, 2017. Plaintiff was evicted from the premises on October 12, 2017. On November 8, 2017, plaintiff sought, through post-eviction orders to show cause, to be restored to possession and to hold defendants in contempt. However, said applications were denied.

The plaintiff commenced the instant action seeking property damages for the taking or detaining of chattel and/or recover damage for injury to property. Defendant now seeks to dismiss plaintiff's action pursuant to CPLR§3122 (a)(1), (a)(5), and (a)(7). A defendant may move to dismiss a complaint under CPLR 3211(a)(1) "on the ground that ... a defense is founded upon documentary evidence" (CPLR 3211 [a]). A motion on this ground "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. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190 [2002]); (*Rodeo Family Enters, LLC v. Matte*, 99 A.D.3d 781 [2nd Dept. 2012]). To be considered "documentary evidence" within the meaning of CPLR 3211(a)(1), the evidence must be unambiguous and of undisputed authenticity. (*Fontanetta v. John Doe 1*, 73A.D.3d 78 [2nd Dept. 2010]). The decision of Judge Paul L. Alpert, dated November 21, 2017, determined the merits of plaintiff's application for a contempt order against the defendant in the holdover proceeding and preserved plaintiff's right to commence a plenary action for damages, should plaintiff sustain property damages. The decision of Judge Sabrina B. Kraus, dated November 9, 2017, determined the merits of another application for a contempt order against the defendants. Neither the decision of Judge Kraus nor the decision of Judge Alpert were on the merits with regards to plaintiff's rights to maintain a property damages claim. The documentary evidence submitted, does not "utterly refutes" plaintiff's factual allegations with regards to plaintiff's property damage claim nor does it conclusively establish a defense as a matter of law.

The defendant further seeks dismissal pursuant to CPLR3211(a)(5) based upon res judicata. "Res judicata serves to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the same factual grouping' or transaction', and which should have or could have been resolved in the prior proceeding". (*Braunstein v. Braunstein*, 114 A.D.2d 46, 53 [2d Dept 1985]; see also *Breslin*

Realty Development Corp. v. Shaw, 72 AD3d 258, 263 [2d Dept 2010].) Both the decision of Judge Kraus and the decision of Judge Alpert determined the orders to show cause which sought plaintiff to be restored to possession (said application was denied) and also sought contempt of court (said application was also denied). In fact, both decisions were rendered solely upon the basis of the “contempt” request as addressed by the respective courts. Judge Kraus in her decision dated November 9, 2017, indicated “The moving papers fail to meet the high burden necessary to establish contempt,” when she denied the plaintiff’s [who was respondent in that civil court action] motion. Likewise, Judge Alpert’s decision of November 21, 2017 decision was regarding the plaintiff’s application for a contempt order. Therefore, plaintiff has not litigated or resolved the issues raised in the complaint herein.

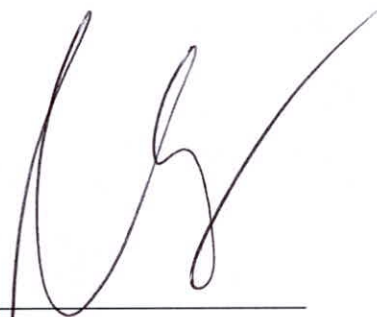
The defendant further seeks dismissal pursuant to CPLR3211(a)(7) in failing to set a cause of action. “It is well settled that on a motion to dismiss a pleading for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged therein to be true and according the allegations the benefit of every possible favorable inference.” See CPLR 3026; *Taverna v. Microchip Technology, Inc.*, 702 N.Y.S.2d 104. See also, *Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972. With respect to that branch of the defendant’s motion which was pursuant to CPLR 3211(a)(7), on a **motion to dismiss** the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511; *East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, 66 A.D.3d at 125, 884 N.Y.S.2d 94; *Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703, 703–704, 864 N.Y.S.2d 70). Thus, “a **motion to dismiss** made pursuant to CPLR 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law” (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 38, 827 N.Y.S.2d 231; *see Leon v. Martinez*, 84 N.Y.2d at 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Fisher v. DiPietro*, 54 A.D.3d 892, 894, 864 N.Y.S.2d 532).

“A court is, of course, permitted to consider **evidentiary** material submitted by a defendant in support of a **motion to dismiss** pursuant to CPLR 3211(a)(7)” (*Sokol v. Leader*, 74 A.D.3d 1180, 1181, 904 N.Y.S.2d 153). “If the court considers **evidentiary** material, the criterion then becomes ‘whether the proponent of the pleading has a cause of action, not whether he has stated one’ ” (*id.* at 1181–1182, 904 N.Y.S.2d 153, quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17). “Yet, affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that the plaintiff has no cause of action” (*Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d 682, 683, 941 N.Y.S.2d 675 [internal quotation marks omitted]; *see Sokol v. Leader*, 74 A.D.3d at 1182, 904 N.Y.S.2d 153). The plaintiff “may not be penalized for failure to make an **evidentiary** showing in support of a complaint that states a claim on its face” (*Miglino v. Bally Total Fitness of Greater N.Y., Inc.*, 20 N.Y.3d 342, 351, 961 N.Y.S.2d 364, 985 N.E.2d 128, citing *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635, 389 N.Y.S.2d 314, 357 N.E.2d 970). The plaintiff may stand on his or her pleading alone to state all the necessary elements of a cognizable cause of action, and, unless the **motion to dismiss** is converted by the court to a motion for summary judgment, the plaintiff will not be penalized because he or she has not made an **evidentiary** showing in support of the complaint (*see Rovello v. Orofino Realty Co.*, 40 N.Y.2d at 635, 389 N.Y.S.2d 314, 357 N.E.2d 970). In light of these standards, it is clear that the defendant's motion should be denied. The complaint stated a cause of action, and the defendant's submissions did not “conclusively establish that the plaintiff has no cause of action” (*Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d at 683, 941 N.Y.S.2d 675).

Accordingly, the defendant’s motion is denied in all respects, and pursuant to CPLR §3211(f) defendant is directed to serve an answer upon plaintiff within ten (10) days of service of this Order by plaintiff, with Notice of Entry.

This constitutes the decision and order of the Court.

Dated: June 7, 2019



HON. WILMA GUZMAN, J.S.C.