

**110 Fifth St. Private, LLC v Ribellion**

2020 NY Slip Op 31391(U)

May 13, 2020

Supreme Court, Kings County

Docket Number: 506623/2019

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART DJMP

-----X  
110 FIFTH STREET PRIVATE, LLC,

Plaintiff,

Decision and Order

-against-

Index No. 506623/2019

RICHARD RIBELLION, IC INDUSTRIAL A, INC., IC  
INDUSTRIAL B, INC., IC INDUSTRIAL I INC., IC  
INDUSTRIAL L INC., TRACE AV LLC, ALEX FIGLIOLIA  
WATER & SEWER LLC, JOHN DOE AND JANE DOE 1-10,

Mot. Seq.: 1 & 2

Defendants.

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The following papers were read on this motion pursuant to CPLR 2219(a):

<u>Papers</u>	<u>Numbered</u>
Plaintiff’s Notice of Motion for Default Judgment dated July 23, 2019, Affirmation of Jack Marmurstein, Esq., affirmed on July 9, 2019; Attorney Affirmation in Support of Israel Goldberg, Esq., affirmed on July 9, 2019; and Exhibits A-G.....	1
Defendant Richard Ribellino’s Attorney Affirmation in Opposition of Andrea Caruso, Esq., affirmed on November 18, 2019; and Exhibit A.....	2
Plaintiff’s Attorney Affirmation of Israel Goldberg, Esq., affirmed on February 3, 2020.....	3
Defendant Richard Ribellino’s Notice of Motion to Dismiss dated November 12, 2019; Attorney Affirmation in Support of Andrea Caruso, Esq., affirmed on November 12, 2019; and Exhibit A.....	4
Plaintiff’s Attorney Affirmation of Israel Goldberg, Esq., affirmed on January 28, 2020; and Exhibits 1-2.....	5
Defendant Richard Ribellino’s Attorney Affirmation in Reply of Andrea Caruso, Esq., affirmed on February 3, 2020.....	6

**MONTELIONE, RICHARD J., J.**

In this declaratory judgment action, plaintiff 110 Fifth Street Private LLC moves for default judgment against non-appearing defendants IC Industrial A, Inc., IC Industrial B, Inc., IC Industrial Inc., IC Industrial L Inc., Trace Ave., LLC., and Alex Figliolia Water & Sewers, LLC

for a declaration that the use of the easement as agreed and settled by an agreement between plaintiff and defendant Richard Ribellino (hereinafter, “defendant”), which affects their respective properties, be deemed abandoned. Defendant Richard Ribellino moves for dismissal of the complaint based upon documentary evidence and failure to state a cause of action.

Defendant Richard Ribellino argues, *inter alia*, that the settlement agreement outlined the terms of the express easement and the penalty for violating the settlement agreement. As such, defendant contends that plaintiff’s complaint should be dismissed based upon documentary evidence as the only relief plaintiff is entitled to is set forth in the terms of the settlement agreement, i.e., a contempt proceeding before the court and not an action to declare the easement as abandoned. Alternatively, defendant contends that plaintiff fails to state a cause of action as the amended complaint does not allege the requisite elements of an action for abandonment of an easement.

Plaintiff argues, *inter alia*, that defendant failed to attach any of the documentary evidence upon which defendant sought the dismissal based upon but in any event, nothing in the settlement agreement limits the parties to a contempt proceeding as their exclusive remedy. Further, plaintiff contends that it only needs to plead a cognizable cause of action at this juncture whereas defendant’s contention is with regards to prevailing in such an action and as such, plaintiff sufficiently pleaded causes of action for a declaratory judgment and the abandonment of the subject easement.

In reply, defendant contends that as the Judge’s part rules did not state otherwise, defendant is permitted to reference electronically filed documents as exhibits without annexing the exhibits pursuant to CPLR 2214(c). Defendant also argues that despite plaintiff’s contention, the settlement agreement definitively sets forth the exclusive remedy and that is, a contempt proceeding.

As an initial matter, a default judgment against the defaulting defendants can only bind those defendants and may not be given preclusive effect to deprive the appearing defendant, Richard Ribellino, their right to litigate the issue (*see State Farm Ins. Co. v. Frias*, 66 A.D.3d 997, 887 N.Y.S.2d 648 [2nd Dept. 2009]). As such, while plaintiff established its entitlement to a finding of a default as to the non-appearing defendants (CPLR 3215), no order may be entered that may affect the rights of the appearing defendant, Richard Ribellino.

As to a dismissal based upon documentary evidence, the Court in *Attias v. Costiera*, 120 A.D.3d 1281, 993 N.Y.S.2d 59 (2nd Dept. 2014) stated:

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’ (*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; *see Rodolico v. Rubin & Licatesi, P.C.*, 114 A.D.3d 923, 924–925, 981 N.Y.S.2d 144). ‘The evidence submitted in support of such motion must be documentary or the motion must be denied’ (*Cives Corp. v. George A. Fuller Co., Inc.*, 97 A.D.3d 713, 714, 948 N.Y.S.2d 658 [internal quotation marks omitted]; *see Fontanetta v. John Doe 1*, 73 A.D.3d 78, 84, 898 N.Y.S.2d 569; *see also* David D. Siegel, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR C 3211:10, at 21–23).

In order for evidence submitted in support of 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, 913 N.Y.S.2d 668 [internal quotation marks omitted]; *see Cives Corp. v. George A. Fuller Co., Inc.*, 97 A.D.3d at 714, 948 N.Y.S.2d 658). ‘[J]udicial 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’ (*Fontanetta v. John Doe 1*, 73 A.D.3d at 84–85, 898 N.Y.S.2d 569 [internal quotation marks omitted]; *see Cives Corp. v. George A. Fuller Co., Inc.*, 97 A.D.3d at 714, 948 N.Y.S.2d 658).

The facts would have to be “essentially undeniable” for the movant to succeed. Indeed, a dispute regarding the documentary evidence in a motion to dismiss warrants a denial of the

motion (*3615-15 Realty I, LLC v. Bedford Ave. Assocs. I, LLC*, 120 A.D.3d 487, 990 N.Y.S.2d 624 [2nd Dept. 2014]; *Hutton Grp., Inc. v. Cameo Owners Corp.*, 160 A.D.3d 676, 677, 75 N.Y.S.3d 193, 195 [2nd Dept. 2018]).

Pertaining to the instant case, a settlement agreement is “enforceable by those remedies available in a suit for breach of contract” (*Niagara Mohawk Power Corp. v. Green Island Power Auth.*, 260 A.D.2d 849, 688 N.Y.S.2d 763 [3rd Dept. 1999]). “Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms (internal citations omitted)” (*Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 865 N.E.2d 1210 [2007]).

In the instant case, the court will use its discretion in considering electronically filed exhibits<sup>1</sup> referenced in defendant’s arguments and consider the settlement agreement between the parties. The parties contend that paragraphs 5 and 6 of the agreement are relevant to the arguments of this motion. Paragraphs 5 and 6 reads as follows:

5. Default. A violation by either party of any portion of Section 2 of this agreement subjects the party to the following fines which are enforceable as a contempt proceeding before the Court:

- i. For the first offense, the violating party shall be fined \$250.00;
- ii. For the second offense, the violating party shall be fined \$500.00;
- iii. For each offense thereafter, the violating party will be fined \$1000.00;

There is no requirement that a party seeking to enforce this provision issues any notice or provides any opportunity to cure prior to bringing a motion for contempt.

6. Complete Agreement. Each Party hereto acknowledges that no other Party or any agent or attorney of any Party, or any person, firm, corporation or any other entity has made any promise, representation, or warranty, whether express, implied or statutory, not contained or referred to herein, concerning the subject matter hereof, to induce the execution of

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<sup>1</sup> Parties are advised, however, that the Part Rules are subject to change and will likely be amended to require attachment of all papers to be considered in the future.

this Agreement. Each signatory hereto acknowledges that he, she, or it has not executed this Agreement in reliance on any promise, representation, or warranty not contained or referred to herein. The Parties agree that this Agreement set forth the Parties' complete and final Agreement, and fully supersedes any and all prior agreements or understandings between the Parties pertaining to the matters addressed herein and all such agreements are deemed void ab initio. The parties are represented by counsel of their choice and enter into this agreement of their own accord and free will after consultation with their respective counsel. The "whereas" recitations in this agreement are deemed terms of the settlement agreement as if more fully set out herein.

Upon review, the parties essentially dispute the interpretation of the settlement agreement and as such, the documentary evidence presented cannot be said to be "essentially undeniable." The settlement agreement does not explicitly state or designate that the remedy for default is exclusive and despite the paragraph describing the settlement agreement as a "Complete Agreement," it does not shed light on future disagreements and resolve the issue in this dispute, i.e., abandonment of the easement. Moreover, "whether the pleading will later survive a motion for summary judgment, or whether the party will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss" (*Lieberman v Green*, 139 A.D.3d 815 [2nd Dept. 2016]).

As to a dismissal pursuant to CPLR 3211(a)(7), for failure to state a cause of action, the Court in *Tooma v. Grossbarth*, 121 A.D.3d 1093, 995 N.Y.S.2d 593 (2nd Dept. 2014) held:

On a motion to dismiss pursuant to CPLR 3211(a)(7), the facts alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez*, 84 N.Y.2d at 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Grant v. LaTrace*, 119 A.D.3d 646, 990 N.Y.S.2d 227). 'Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss' (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 38, 827 N.Y.S.2d 231).

Affidavits submitted by plaintiffs may be considered to remedy any defects in the complaint, "because the question is whether plaintiffs have a cause of action, not whether they

have properly labeled or artfully stated one” (*see Chanko v. Am. Broad. Companies Inc.*, 27 N.Y.3d 46, 49 N.E.3d 1171 [2nd Dept. 2016]).

Here, plaintiff has substantially complied with CPLR 3013 and the statements in the pleading are sufficiently particular to give the court and parties notice of the nature of its action (*Foley v. D'Agostino*, 21 A.D.2d 60, 62, 248 N.Y.S.2d 121, 124–25 [1st Dept. 1964]).

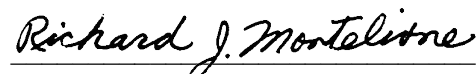
Defendant’s reliance upon *Gerbig v Zumpano*, 7 N.Y.2d 327, 197 N.Y.S.2d 1616 (1960) is misplaced. In that case, the standard as recited pertains to the requisite proof for a successful cause of action to declare an easement as abandoned. At this juncture, plaintiff’s pleading is sufficient to overcome a motion to dismiss as “CPLR 3211(a)(7) dismissals merely address the adequacy of the [pleading], and do not reach the substantive merits of a [party's] cause of action” (internal citation omitted)(*Lieberman v. Green*, 139 A.D.3d 815, 32 N.Y.S.3d 239 [2nd Dept. 2016]).

Based on the foregoing, plaintiff’s motion for default judgment against defaulting defendants IC Industrial A Inc., IC Industrial B Inc., IC Industrial I Inc., IC Industrial L Inc., Trace AV LLC and Alex Figliolia Water & Sewer LLC is granted only to the extent of finding that these defendants have defaulted in answering the complaint, but any judgment declaring the rights of the parties shall await determination either at trial or a determination of a dispositive motion. Defendant’s cross-motion to dismiss is denied.

This matter shall be overridden to a random IAS part and the parties are to appear for a preliminary conference in the intake part at 9:30 A.M. on August 3, 2020 (subject to change by Administrative Order).

This constitutes the decision and order of the court.

Dated: Brooklyn, NY  
May 13, 2020



Richard J. Montelione, A.J.S.C.

Digitally signed 5/13/2020 8:00:00 AM by Hon. Richard J. Montelione, E=rmonteli@nycourts.gov, also authorized to file twu@nycourts.gov, location Bklyn NY 11205, FoxitPhantomPDF Version 10.0, pursuant to Administrative Order 86/20 dated 4/20/2020.