Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

TERESA KRAJNYK as Proposed Administratrix of the Estate of BOHDAN KRAJNYK,

Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. and 80 EAST 3, LLC,

Defendants.

IAS Part - 42

Index No.: 710577/2018

Motion Date: 2/27/20

Motion Cal. No. 6

Motion Seq. No. 1

The following electronically filed documents read on this motion by 80 East 3, LLC ("80 East 3, LLC") for an order dismissing the complaint and cross-claims, pursuant to CPLR §§ 3211(a)(1) and 7 and reasonable attorneys' fees and costs, pursuant to CPLR § 8303-a and 22 NYCRR 130-1.1.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	EF 12 – 22
Affirmation in Opposition-Exhibits-Service.....	EF 26 – 28
Partial Affirmation in Support.....	EF 29 – 30

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages for personal injuries and wrongful death allegedly sustained by Bohdan Krajnyk ("Mr. Krajnyk" or "decedent") as a result of a fire at 80 East 3 Street, New York, New York ("subject premises"), which is owned, operated, managed and maintained by co-defendant 80 East 3, LLC. Teresa Krajnyk as Proposed Administatrix of the Estate of Bohdan Krajnyk ("Estate of Krajnyk" or "plaintiff") alleges on December 15, 2017,

Mr. Krajnyk died in an explosion at his residence at located at 80 East 3 Street, New York, New York ("subject premises") due to the negligence of the 80 East 3, LLC and Consolidated Edison Company of New York, Inc. ("Con Edison"). In particular, the plaintiff alleges that the defendants had a duty to operate, maintain, control, supervise and inspect the subject premises and the natural gas pipeline that supply gas to the subject premises. As a result, on July 11, 2018, the plaintiff commenced the instant action against the defendants. On or about July 30, 2018, issue was joined, wherein Con Edison interposed an answer with a cross-claim against 80 East 3, LLC.

On October 11, 2019, 80 East 3, LLC, filed the instant motion seeking the following relief: a) dismissal the complaint based upon documentary evidence, pursuant to CPLR § 3211(a)(1); b) dismissal the complaint based upon failure to state a cause of action, pursuant to CPLR § 3211(a)(7); c) dismissal of Con Edison's cross-claim; and d) an award of reasonable attorneys' fees and costs, pursuant to CPLR § 8303-a and 22 NYCRR 130-1.1. In support of said motion, 80 East 3, LLC provides two Incident Reports from the Fire Department of New York ("FDNY"), which indicate that the fire was started solely by the decedent's negligent actions of smoking a cigarette near bedding material. Furthermore, in partial support of the instant motion, Con Edison argues that "[t]he cause of the fire was determined to be "Smoking (Cigarette/Cigar") and that the heat source was a cigarette which ignited bedding, blanket, sheet or comforter" inside Mr. Krajnyk's own apartment."

In opposition, counsel for the plaintiff argues that the defendant's motion to dismiss should be denied on the grounds that it is premature since no discovery or depositions have yet been conducted in the instant action; the documentary evidence submitted by 80 EAST 3 is insufficient to warrant dismissal of the plaintiff's complaint under CPLR 3211 as a matter of law. Furthermore, counsel argues that ". . . the documentary evidence relied upon by Defendant 80 EAST 3, namely, the two FDNY incident reports relating to the subject fire incident . . . while certified, are both unsworn. Therefore, any statements and/or conclusions contained in the reports are inadmissible hearsay. Such unsworn reports clearly may not be relied upon by 80 EAST 3 to establish a defense based on documentary evidence as a matter of law." Moreover, counsel argues that those reports are not dispositive of the issue of the alleged negligence of 80 EAST 3 in the ownership, inspection, management, and maintenance of the subject premises where the fire occurred. There are raise triable factual

issues as to the defendant's potential negligence in maintaining the property - for example, whether there were working smoke alarms in the decedent's apartment and/or elsewhere in the building, whether there was adequate fire exits, or whether defendant was in violation of any applicable fire code or building code.

It is well settled law that, pursuant to CPLR § 3211(a)(7), on a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in the light most favorable to plaintiff, and plaintiff must be given the benefit of all reasonable inferences (*see Maddicks v. Big City Property, LLC,* 34 NY3d 116 [2019]; *Patel v. Gardens at Forest Hills Owners Corp.,* 181 AD3d 611 [2d Dept 2020]; *Hampshire Props. v. BTA Bldg. & Developing, Inc.*, 122 AD3d 573 [2d Dept 2014]; *Chanko v. American Broadcasting Cos.,* 27 NY3d 46 [2016]). The court determines only whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). Furthermore, the court must deny a motion to dismiss, "if, from the pleading's four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law." (*511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). "[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration." (*Quatrochi v. Citibank, N.A.*, 210 AD2d 53, 53 [1st Dept 1994] (internal citation omitted).

Furthermore, "[t]o succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Gorunkati v. Baker Sander*, LLC, 179 AD3d 904 [2d Dept 2020], citing *Garcia v. Polsky, Shouldice & Rosen, P.C.*, 161 AD3d 828 [2d Dept 2018]; *Gould v. Decolator*, 121 AD3d 845 [2d Dept 2014]; *see also JPMorgan Chase Bank, National Association v. Klein*, 178 AD3d 788, [2d Dept 2019]). Documents that have traditionally qualified for evidentiary consideration under CPLR § 3211(a)(1) are those which are 1) unambiguous, 2) of undeniable authenticity, and 3) reflect content that is essentially undeniable (*Mehrhof v. Monroe-Woodbury Central School District*, 168 AD3d 713 [2d Dept 2019]). Moreover, documents that have been found to qualify as documentary evidence have included judicial records, mortgages, deeds, contracts, and other papers the contents of which meet the requirements of being essentially unambiguous, authentic,

and undeniable. Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence. *(Magee-Boyle v. Reliastar Life Ins. Co. of New York,* 173 AD3d 1157 [2d Dept 2019]).

Here, the court finds that the plaintiff has stated facts, which fit within a cognizable legal theory. In fact, the plaintiff has adequately alleged the elements of negligence at this "pre-discovery stage." (*see Stone v. Bloomberg*, 163 AD3d 1028 [2d Dept 2018]; *Knutt v. Metro Intl, S.A.,* 91 AD3d 915 [2d Dept 2012]; *Pollnow v. Poughkeepsie Newspapers*, 107 AD2d 10 [2d Dept 1985] *affd* 67 NY2d 778). Furthermore, the FDNY incident reports do not utterly refute the plaintiff's allegation that the defendants were negligent in its ownership, inspection, management, and maintenance of the subject premises. (*Gorunkati v. Baker Sander*, LLC, 179 AD3d 904 [2d Dept 2020]). In fact, the FDNY incident reports are neither unambiguous, authentic, nor reflect content that is essentially undeniable. (*Mehrhof v. Monroe-Woodbury Central School District*, 168 AD3d 713 [2d Dept 2019]). More importantly, the documents relied by the defendant does not definitively dispose of the plaintiff's claim as a matter of law. Clearly, there are triable issues, which must be resolved by the trier of fact. (*see Goshen v. Mutual Life Ins. Co. of N.Y.,* 98 NY2d 314 [2002]); *Bd of Managers of the 25 N. Condo v. 125 N. 10, LLC*, 150 AD3d 1063 [2d Dept 2017]; *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2d Dept 2012]; *Greenberg v. Blake*, 117 AD3d 683, 685 [2d Dept 2014]).

Additionally, pursuant to CPLR § 3211(d), it states, in relevant part that "[s]hould it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just." Furthermore, the burden is on the opposing party to convince the court in the opposing affidavits that facts "may exist" that would defeat the motion; mere hope that discovery will yield helpful information will not forestall a determination of the CPLR § 3211 motion. (*Trump Village Section 4, Inc. v. Bezvoleva*, 161 AD3d 916 [2d Dept 2018]; *Karpovich v. City of New York*, 162 AD3d 996 [2d Dept 2018]; *Bordan v. North Shore University Hosp.*, 275 AD2d 335 [2d Dept 2000]; *Cantor v. Levine*, 115 AD2d 453 [2d Dept

1985]; *Cracolici v. Shah*, 127 AD3d 413 [1st Dept 2015]). Here the plaintiff has demonstrated that facts unavailable to her might exist that would justify the instant motion's denial.

Lastly, the defendant neither established entitlement to attorney fees or cost. It is well settled that "[t]he court, in its discretion, may award to any party or attorney in any civil action . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct" (22 NYCRR 130-1.1). Conduct is frivolous if "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR 130-1.1 (c); *see Premier Capital v. Damon Realty Corp.*, 299 AD2d 158, 158 [1st Dept 2002]). Here, defendant fails to demonstrate that the plaintiff or its attorneys engaged in conduct within the meaning of § 130-1.1(c) (*Stone Min. Holdings, LLC v. Spitzer,* 119 AD3d 548, 550 [2d Dept 2014]).

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss, pursuant to CPLR § 3211(a)(1), CPLR § 3211(a)(7), CPLR § 8303-a and 22 NYCRR 130-1.1, is denied in its entirety; and it is further,

ORDERED that plaintiff shall serve a copy of this Order with Notice of Entry upon the defendants on or before August 31, 2020.

The foregoing constitutes the decision and order of the court.

Dated: May 20, 2020
Long Island City, New York

Maurice E. Muir

MAURICE E. MUIR, J.S.C.

FILED

5/21/2020
2:50 PM

COUNTY CLERK
QUEENS COUNTY