

Adams v Canon U.S.A., Inc.

2020 NY Slip Op 35153(U)

April 29, 2020

Supreme Court, Nassau County

Docket Number: Index No. 600746/19

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER

Acting Supreme Court Justice

.....
ELLA ADAMS,

Plaintiff,

-against-

CANON U.S.A., INC.,

Defendant.

TRIAL/IAS PART 33
NASSAU COUNTY

Index No.: 600746/19
Motion Seq. No.: 01
Motion Date: 12/12/19

.....
CANON U.S.A., INC.,

Third-Party Plaintiff,

-against-

ENGAGE PARTNERS, INC.,

Third-Party Defendant.

.....
The following papers have been read on this motion:

	<u>Papers Numbered</u>
Notice of Motion, Affirmation and Exhibits and Memorandum of Law	1
Affirmation in Opposition and Exhibits and Memorandum of Law	2
Reply Affirmation and Exhibits	3
Reply Affirmation	4

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

Third-party defendant moves, pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing defendant/third-party plaintiff’s Third-Party Complaint on the grounds that defendant/third-party plaintiff’s action is barred due to New York State Workers’ Compensation Law § 11. Defendant/third-party plaintiff opposes the motion. Plaintiff submitted a reply to defendant/third-party plaintiff’s opposition.

In support of the motion, counsel for third-party defendants submits, in pertinent part, that, “[t]his action arises out of personal injuries sustained by plaintiff Ella Adams on January 27, 2016 while she was in the course of her employment with Engage at the offices of Canon USA, INC.’s (*sic*) (‘Canon’) located at One Canon Park, Melville New York. Ms. Adams alleges to have slipped and fallen due to a hazardous, defective and dangerous condition thereat, allegedly sustaining personal injuries. As will be set forth below, Engage and Canon entered into a Contingent Staffing Agreement wherein it was agreed that Engage would provide recruitment services and temporary employees to Canon. Ms. Adams was employed by Engage and placed within the Canon offices. In this matter, third-party plaintiff impleaded employer Engage for common law and contractual contribution and indemnification. Third-party defendant Engage moves for summary judgment on the grounds that the third-party complaint is barred pursuant to Workers Compensation Law §11 as Engage has shown that (1) plaintiff was employed by third-party defendant Engage; (2) the accident occurred within the scope of her employment; (3) plaintiff received workers compensation benefits as a result of her accident; (4) plaintiff did not sustain any ‘grave injuries;’ and (5) the alleged accident did not occur as a result of any negligence on the part of third-party defendant Engage and thus any common law or contractual contribution or indemnification is prohibited under well settled law.”

Counsel for third-party defendant further asserts, in pertinent part, that, “[p]rinciples for both Canon and Engage entered into a Contingent Staffing Agreement which was in effect from December 1, 2014 to December 31, 2017. In summary, the purpose of the contingent staffing agreement was for Engage to provide recruitment services or ‘qualified contingent staff to perform certain services as requested by Canon.’ The agreement went on to state that any individuals performing service for Engage are solely employees of Engage.... On October 23,

2015 plaintiff Ella Adams, through her employer Engage, completed the necessary paperwork for her placement at defendant/third-party plaintiff Canon's offices in Melville, New York.... As part of these papers, Ms. Adams signed a document entitled 'Joinder in Confidentiality and Ownership Agreement', wherein she acknowledged that she was an employee of Engage and was working on assignment at Canon. The document also confirmed that Ms. Adams' wages and benefits would be provided solely by Engage and she was bound by Engage's personnel policies and procedures.... Thereafter, Ms. Adams was placed by Engage as a clerical worker at the Canon offices located at One Canon Park, Melville, New York. On January 27, 2016, Ms. Adams slipped and fell in the course of her employment with Engage while she was at Canon's offices.... A workers' compensation reported (*sic*) was completed on Ms. Adams' behalf on January 29, 2016.... As a direct result of her January 27, 2019 (*sic*) slip and fall accident while in the course of her employment with Engage, Ms. Adams received workers (*sic*) compensation benefits from Everest National Insurance Company, Engage's workers (*sic*) compensation insurance carrier." See Third-Party Defendant's Affirmation in Support Exhibits E-G.

Counsel for third-party defendant argues, in pertinent part, that, "[t]he defendant/third-party plaintiff Canon USA, Inc. cannot sustain a cause of action against the movant because Workers (*sic*) Compensation Law Section 11 prohibits any third-party plaintiffs from bringing a cause of action against a plaintiff's employer if the plaintiff's employer procures Workers (*sic*) Compensation benefits for the plaintiff who sustains an injury during the course of her employment. [citation omitted]. A third-party action can only be sustained against a plaintiff's employer in two circumstances: where the injured worker suffered a 'grave injury' or the employer entered into a written contract which expressly agreed to contribution or

indemnification. [citations omitted]. Neither exception applies in this case. The documentary evidence clearly establishes that plaintiff Adams was an employee of Engage at the time of her accident and was injured during the course of her employment. It is undisputed that Ms. Adams received Workers (*sic*) Compensation benefits as a result of the injuries she allegedly sustained on January 27, 2016.... When the employee sues a third-party tortfeasor, Section 11 prevents that third party from impleading in and bringing any common law claims against the employer. [citations omitted]. New York law holds that a third-party action against the employer would improperly circumvent the protection afforded under the Workers (*sic*) Compensation Law. [citation omitted]. Thus, since it is clear that plaintiff Adams was an employee of Engage at the time of the accident and was injured in the scope of her employment and that Ms. Adams received Workers (*sic*) Compensation benefits, Workers (*sic*) Compensation Law Section 11 bars any claims against Engage. As such, the third-party action against Engage for common law contribution or indemnification fails as a matter of law. There is no indemnification paragraph contained within the Contingent Staffing Agreement between Engage and Canon that is applicable to the instant circumstances. Nowhere within the Contingent Staffing Agreement is Engage required to indemnify Canon under circumstances where Ms. Adams was injured due to Canon's negligence, as is alleged in plaintiff's complaint. Additionally, neither exception to the Workers (*sic*) Compensation bar is applicable to this case. Here, plaintiff did not sustain a 'grave injury'. The injuries claimed in her workers (*sic*) compensation filing and confirmed in the workers (*sic*) compensation decision do not begin to rise to the standard of a grave injury. Moreover, third-party plaintiff's contractual indemnification claim against Engage must also be dismissed sine the agreement states that Engage will only indemnify third-party plaintiff Canon 'from and against any and all damages, costs and expenses (including attorneys' fees and

expenses) incurred by or asserted against any of the Canon Indemnified Parties arising out of any breach or alleged breach of any representation or warranty made under this Agreement or Contractor's activities under this Agreement.'... No such breach exists in the instant action. Therefore, the contractual indemnification claim is invalid.... In this particular case, Engage was not given access to Canon's premises to perform services and thus, indemnification does not apply in this action. Additionally, Engage had no duty to maintain, clean or repair the Canon premises and plaintiff's accident did not arise out of any conduct on the part of Engage. Nowhere in the agreement between Engage and Canon was there any requirement that Engage provide maintenance services, of any type, to the Canon premises, including the subject accident location. There is no evidence in this matter to suggest that the maintenance to the Canon premises was the responsibility of any party other than Canon themselves. As such, contractual indemnification is not applicable herein." *See* Third-Party Defendant's Affirmation in Support Exhibits E - G.

In opposition to the motion, counsel for defendant/third-party plaintiff submits, in pertinent part, that, "Canon's Third-Party Complaint asserts two causes of action.... Canon's first cause of action seeks indemnification and asserts that pursuant to the terms of the Agreement, Engage was and is obligated to indemnify, hold harmless, and defend Canon from and against the claims, liabilities, losses, damages, actions, (*sic*) causes of action alleged in the lawsuit commenced by Plaintiff.... Canon's second cause of action is for breach of contract and asserts that pursuant to the Agreement, Engage was and is obligated to maintain insurance on its own behalf and to obtain general liability and excess/umbrella insurance naming Canon as an additional insured." *See* Defendant/Third-Party Plaintiff's Affirmation in Opposition Exhibit D.

Counsel for defendant/third-party plaintiff further asserts, in pertinent part, that, “[o]n or about December 1, 2014, Engage entered into the [Contingent Staffing Agreement (‘the Agreement’)] whereby Canon retained Engage to provide staffing to perform certain services as requested by Canon.... The Agreement, which defines ‘Contractor’ as Engage Partners, Inc. ..., contains [an] indemnification provision (hereinafter ‘the Indemnification Provision’):... The Agreement also contains ... insurance procurement requirements.... The Agreement further requires that Engage purchase commercial general liability insurance and umbrella/excess coverage naming Canon as an additional insured:... Despite Engage’s representations and warranties above ‘that its certificate of insurance, including endorsements adding Canon as an additional insured, ...’, no such certificate of insurance is attached to the Agreement. In fact, Engage has failed to provide the required certificate of insurance to date and also failed to attach a certificate of insurance to its moving papers.... Furthermore, Engage’s Motion (*sic*) does not respond to the allegation contained in the Third-Party Complaint that it failed to procure the required insurance.... The only logical inference that can be drawn from Engage’s continued failure to provide the certificate of insurance is that Engage failed to procure the insurance required. Engage’s failure to obtain the required insurance is further evidenced by their insurance carrier’s denial of the tender of this matter. In denying tender, Engage’s insurer advised only that it ‘has issued a general liability policy to Engage Partners, Inc.’ and denied the defense of Canon because Plaintiff’s injury ‘did not arise from our employee’s negligence and therefore we would not owe Canon a defense in this matter.’... Canon respectfully asserts that if Canon were named as an additional insured as required by the Insurance Procurement Provision of the Agreement, the subject incident would be covered. Additionally, even if Canon were not entitled to indemnification, as an additional insured, Canon would likely be entitled to a defense as it is well

established that ‘the duty to defend is broader than the duty to indemnify.’ While Engage’s motion is premised entirely on Plaintiff’s allegation that her fall was caused by a hazardous condition created by Canon, the presence of any such hazardous condition has not been established and remains very much in dispute.... Canon has denied the existence of any such hazardous condition, and asserted the Plaintiff’s negligence/culpable conduct as an affirmative defense.... Video surveillance footage of Plaintiff’s fall ... shows no hazardous condition, shows others walking in the area without issue, and demonstrates that Plaintiff’s injuries resulted from her own negligence.” *See* Defendant/Third-Party Plaintiff’s Affirmation in Opposition Exhibits A, C E and G.

Counsel for defendant/third-party plaintiff further argues, in pertinent part, that, “Engage’s motion is based entirely on the misguided argument that Canon’s claims are barred by Workers (*sic*) Compensation Law §11. While Engage cites numerous inapplicable cases regarding the exclusivity of the Workers (*sic*) Compensation Law, the Appellate Division, Second Department has made (*sic*) clear that causes of action for contractual indemnification and to recover damages for breach of contract to procure insurance are not barred by Worker’s (*sic*) Compensation §11. [citations omitted]. It is well established that ‘the exclusivity provisions of Section 11 of the Workers’ Compensation Law do not vitiate a provision in a written contract, entered into prior to the accident or occurrence, by which an employer expressly agrees to provide indemnification. [citations omitted].... Engage further argues that Canon’s Third-Party Complaint should be dismissed because Plaintiff did not suffer a grave injury as defined under Worker’s (*sic*) compensation law (*sic*) §11. However, whether Plaintiff suffered a grave injury is immaterial for purposes of this motion as the Second Department has explicitly held that ‘causes of action for contractual indemnification and to recover for breach of contract to procure

insurance, respectively, are not barred' even where it is established that plaintiff did not sustain a 'grave injury' as defined by Workers' Compensation Law § 11. [citation omitted]. Furthermore, it is the burden of the moving third-party defendant to prove, by competent admissible evidence, within the meaning of Workers' Compensation Law § 11 [citation omitted]. Only upon such a showing does the burden shift to the opposing party. [citations omitted]. Engage fails to submit competent admissible evidence that the Plaintiff's injuries, do not rise to the level of 'grave' injuries, within the meaning of Workers' Compensation Law § 11."

Counsel for defendant/third-party plaintiff further argues, "Engage's Motion (*sic*) focuses entirely on the inapplicable Worker's (*sic*) Compensation bar, and fails to address the merits of Canon's breach of contract clause or Engage's underlying obligation to procure insurance naming Canon as an additional insured pursuant to the Insurance Procurement Provision of the Agreement. However, Engage breached the Agreement in at least two ways as set forth below. Engage failed to submit a certificate of insurance to Canon as required by the Insurance Procurement Provision of the Agreement. ... Engage's failure to provide the required certificate of insurance, in and of itself, constitutes a breach of the Agreement which has caused damage to Canon and provides the basis for a meritorious breach of contract cause of action. The only inference that can be drawn from Engage's continued failure to provide a certificate of insurance is that Engage failed to procure the required insurance. Engage's Motion (*sic*) is entirely silent on the issue and does not address the Third-Party Complaint's allegation that it failed to purchase general liability and umbrella/excess insurance naming Canon as an additional insured as required by the Insurance Procurement Provision of the Agreement. Canon respectfully submits that this is because Engage did not, in fact, procure the required insurance." *See* Defendant/Third-Party Plaintiff's Affirmation in Opposition Exhibit A.

Counsel for defendant/third-party plaintiff also contends, in pertinent part, that, “[i]t is undisputed that the Agreement contained an Indemnification Provision for the benefit of Canon. Engage argues that the Indemnification Provision is not applicable because (a) Engage had no maintenance responsibilities with regards to the Canon facility and (b) Engage did not directly cause plaintiff’s fall. However, these are not the bases on which Canon claims indemnification. In fact, there are at least four other bases under which the Indemnification Provision may apply in this matter. The first sentence of the Indemnification Provision states that Canon is entitled to indemnification for any breach of the Agreement: (a) [Engage] will indemnify Canon, ... from an (*sic*) against any and all damages ... ***arising out of any breach or alleged breach of any representation or warranty made under this Agreement*** ... (emphasis added). While Engage summarily asserts that ‘no such breach exists in the instant action’ ... Engage appears to have breached the Insurance Procurement Provision.... Therefore, Canon is entitled to contractual indemnification on those grounds. Secondly, the same sentence contains the following catch-all language: (a) [Engage] will indemnify Canon, ... from and against any and all damages ... arising out of ... ***[Engage’s] activities under this agreement***.... Surely the injuries alleged in the case at bar ‘arise of out Engage’s activities under the Agreement’ without which Plaintiff would not have been present on Canon’s premises. Any other reading of this clause would render this clause meaningless and it is a chestnut of the law that ‘a contract must be construed in a manner which gives effect to each and every part, so as not to render any provision meaningless or without force or effect’ [citations omitted]. Therefore, Canon is entitled to contractual indemnification on those grounds. Canon is also entitled to contractual indemnification to the extent that the Plaintiff’s tortious conduct was the cause of her own injuries. The Indemnification

Provision, in the final sentence of Paragraph 13(a), expressly covers personal injury caused by Engage's employees: [Engage] agrees to indemnify the Canon Indemnified Parties from and against any damages, costs and expenses (including attorneys' fees and expenses) incurred by Canon in connection with *personal injury ... caused by ... [Engage's] Employees*.... It is undisputed that Plaintiff was one of Engage's employees. Therefore, any injury she caused, including her own, would fit within the plain meaning of the Indemnification Provision.... If in fact, the Plaintiff's conduct is found to be tortious, Canon may also be entitled to common-law indemnification... Canon has provided numerous bases by which it may seek indemnification pursuant to the Agreement all of which 'fit within [a] cognizable legal theory' for indemnification." *See id.*

In reply to defendant/third-party plaintiff's opposition, counsel for third-party defendant submits, in pertinent part, that, "[t]o the extent that Canon is seeking to obtain defense and indemnification from Engage's insurance carrier, this third-party action is not the proper forum. Moreover, Canon's purported breach of contract claim lacks merit as set forth fully below. Thus Canon's efforts to circumvent the well established principles barring claims against employers should not be rewarded by allowing a feigned issue (*sic*) of fact to support a third-party action against plaintiff's employer."

Counsel for third-party defendant contends that defendant/third-party plaintiff's breach of contract claim is unfounded and must be dismissed. In support of this argument, counsel for third-party defendant annexes a copy of the General Liability Policy issued to third-party defendant by Philadelphia Insurance Companies for the coverage period of June 28, 2015 until June 28, 2016, and a copy of the Commercial Excess Liability issued to third-party defendant by Philadelphia Insurance Companies for the coverage period of June 28, 2015 until June 28, 2016.

See Third-Party Defendant's Reply Affirmation Exhibits A and B. Counsel for third-party defendant contends that, based upon said insurance policies, "the requirements of the Contingent Staffing Agreement for the Contractor to maintain Commercial General Liability insurance, including bodily injury, property damage including personal injury and death as well as Umbrella/Excess insurance were clearly met." *See id.*

Counsel for third-party defendant adds, in pertinent part, that, "[t]he Commercial General Liability policy averred that an insured under the policy included 'Blanket Additional Insured When Required by Contract'. This included 'any person or organization where required by a written contract executed prior to the occurrence of loss.' ... The endorsement goes on to state that 'Such person or organizations is an additional insured for 'bodily injury', 'property damage' or 'personal or advertising injury' but only for liability arising out of the negligence of the named insured.... Based upon the governing Contingent Staffing Agreement and corresponding insurance policies, sufficient coverage was affording (*sic*) to Canon. This coverage was extended to Canon as an additional insured, 'but only for liability arising out of the negligence of the named insured'. Given this, Edge did not breach the contract as written... In reviewing the elements necessary to uphold a breach of contract claim, the key third requirement, 'defendant's failure to perform' cannot be met. Even if a certificate of insurance was not attached to the agreement, the required insurance covering Canon as an additional insured was provided as set forth above. Given the foregoing, Engage has 'provided the documentary evidence which resolves all factual issues as a matter of law' and thus their (*sic*) motion to dismiss should be granted. [citation omitted]. The failure to provide the physical certificates of insurance is not what would rise to the level of a breach of contract in this instance as the insurance coverage was

the basis of the section of the agreement in question.” See Third-Party Defendant’s Reply Affirmation Exhibits A and B; Third-Party Defendant’s Affirmation in Support Exhibit E.

Counsel for third-party defendant further argues, in pertinent part, that, “[t]he exceptions to the Workers (*sic*) Compensation Law § 11 are not applicable to the instant case.... Counsel for defendant/third-party plaintiff raised the argument that ‘the exclusivity provisions of Section 11 of the Workers’ Compensation Law do not vitiate a provision in a written contract, entered into prior to the accident or occurrence, by which an employer expressly agrees to provide indemnification.’ [citation omitted]. However, in this matter, the indemnification provision in the Contingent Staffing Agreement is narrowly tailored, and does not include indemnification for accidents/injuries to Engage’s employees while on Canon’s premises for which Canon is arguable negligent.... The first part of [Section 13 of The Contingent Staffing Agreement] requires Engage to provide indemnification to Canon ‘from and against any and all damages, costs and expenses (including attorneys’ fee (*sic*) and expenses) incurred by or asserted against any of the Canon Indemnified Parties arising out of any breach or alleged breach of any representation or warranty made under this Agreement or Contractor’s activities under this Agreement.’ As set forth above, there was no breach of contract on the part of Engage. Further, there was no warranty made under the agreement that is application (*sic*) to the subject action. There is no evidence in this matter that activities by Engage contributed to the underlying incident involving Ms. Adams, which is the basis of this lawsuit. In fact, there was absolutely nothing asserted in the third-party summons and complaint that suggested that Engage’s ‘activities under this Agreement’ were a direct cause of the (*sic*) Ms. Adams (*sic*) accident. The second part of the contractual indemnification related to person (*sic*) injuries ‘caused by Contractor, Contractor’s employees, agents, or representations (*sic*) while on Canon’s

premises’[.]...The third portion of this section requires Engage to provide indemnification to Canon ‘from and against any damages, costs and expenses (including attorneys’ fee (*sic*) and expenses) incurred by Canon in connection with all claims which relate, in whole or in part, to Engage’s Employees alleged status as employees of Canon’. This section is also inapplicable to the subject action. There has been no claim asserted by plaintiff Adams regarding her alleged status as an employee of Canon as she is the one asserting the claim which is for premises liability on the part of Canon. Given the above, the defendant/third-party plaintiff’s indemnification claims fail. Ms. Adams’ accident was in no way caused by (*sic*) negligence of Engage. Therefore, the contractual indemnification exception to the Workers’ Compensation bar is not applicable.” See Third-Party Defendant’s Reply Affirmation Exhibit C; Third-Party Defendant’s Affirmation in Support Exhibit E.

Counsel for third-party defendant also contends, in pertinent part, that, “[i]n their opposition papers, counsel for defendant/third-party plaintiff aver that they have four bases under which they believe the indemnification provision in the Contingent Staffing Agreement apply. The first is that Engage breached the contract. As set forth above, no breach of contract was committed by Engage. The necessary insurance provisions have been disclosed and defendant/third-party plaintiff cannot meet the standards for a breach of contract cause of action. The second rationale for Canon’s argument is that Ms. Adams’ injuries arise out of Engage’s activities. However, this is a flawed argument. Plaintiff Ella Adams is alleging that on January 27, 2016 at approximately 8:55 a.m. she was caused to slip and fall on the fourth floor of the Canon premises.... Ms. Adams’ bill of particulars goes on to assert that Canon was negligent, careless and reckless in the ownership, management, maintenance, inspection and control of the aforesaid premises as follows: in causing a slippery condition to exist on the premises; in

allowing a hazardous condition to be, become and remain, in a dangerous, hazardous and defective condition; in failing to give notice or warning of the dangerous and hazardous condition existing at the location thereof of the premises.... No evidence has been offered to suggest that Engage had any responsibility in ownership, management, maintenance, inspection and control of the Canon premises. Further, no evidence has been offered to suggest that Engage directed Ms. Adams in her employment endeavors at the Canon office. Engage did not perform any maintenance duties on the Canon premises. Engage had no duty to inspect and/or clean or maintain the Canon premises. The argument that Engage's 'activities' led to the plaintiff's slip and fall accident on Canon (*sic*) premises, when Engage had no responsibility for those premises, is unfounded and would introduce a dangerous precedent. The third rationale for Canon's argument is that plaintiff's tortious conduct was the cause of her own injuries and therefore, the indemnification provision applies. Counsel for defendant/third-party plaintiff submits no case law or precedent to support this argument. Such an argument is crafted for the sole purpose of attempting to create a feigned issue of fact and is unfounded and without merit. No evidence has been introduced by defendant/third-party plaintiff to support this argument. In fact, the surveillance video provided by counsel for defendant/third-party plaintiff shows Ms. Adams' accident. Upon reviewing the video, there are no activities or tortious conduct by Ms. Adams that definitely contributed to her fall. Canon has offered no examples of the alleged 'tortious conduct' committed by Ms. Adams to contribute to her fall. Given the lack of evidence, this argument must be dismissed. Canon's fourth and final rationale for indemnification is that if Ms. Adams' conduct is found to be tortious, Canon may also be entitled to common law indemnification.... Vicarious liability, ..., is no longer a basis for a potential third-party action against an

employer.... In relation to the subject action, no contractual indemnification claims can be substantiated.” See Third-Party Defendant’s Reply Affirmation Exhibit C; Defendant/Third-Party Plaintiff’s Affirmation in Opposition Exhibit G.

CPLR § 3211(a)(1) states that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence;...” To obtain dismissal of a complaint pursuant to CPLR § 3211(a)(1), a defendant must submit documentary evidence which “utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v. Mutual Lift Ins. Co. of NY.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002) citing *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). An application predicated upon this section of law will be granted only upon a showing that the “documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiffs claim.” *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010) quoting *Scadura v. Robillard*, 256 A.D.2d 567, 683 N.Y.S.2d 108 (2d Dept. 1998). “[T]o be considered documentary evidence, it must be unambiguous and of undisputed authenticity.” *Fontanetta v. John Doe 1*, supra, citing SIEGEL, PRACTICE COMMENTARIES; MCKINNEY’S CONSLAWS OF NY, BOOK 7B, CPLR 3211:10 pp. 21-22. “[T]hat is, it must be ‘essentially unassailable.’” *Torah v. Dell Equity, LLC*, 90 A.D.3d 746, 935 N.Y.S.2d 33 (2d Dept. 2011) quoting *Schumacher v. Manana Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686 (2d Dept. 2010). However, in order to make such a showing neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR § 3211(a)(1). See *Granada Condominium III Ass’n v. Palomino*, 78 A.D.3d 996, 913 N.Y.S.2d 668 (2d Dept. 2010).

A complaint may be dismissed pursuant to CPLR § 3211(a)(1), based on documentary evidence, only if the factual allegations are definitively contradicted by the evidence or a defense is conclusively established. *See Yew Prospect v. Szulman*, 305 A.D.2d 588, 759 N.Y.S.2d 357 (2d Dept. 2003). A motion to dismiss based on documentary evidence may be granted only where such documentary evidence utterly refutes the plaintiff's factual allegations, resolves all factual issues as a matter of law and conclusively disposes of the claims at issue. *See Yue Fung USA Enters., Inc. v. Novelty Crystal Corp.*, 105 A.D.3d 840, 963 N.Y.S.2d 678 (2d Dept. 2013). In sum, the analysis is two-pronged - the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

The Court finds that the documentary evidence submitted by third-party defendant (*see* Third-Party Defendant's Affirmation in Support Exhibits E-G; Third-Party Defendant's Reply Affirmation Exhibits A-C) refutes defendant/third-party plaintiff's factual allegations, resolves all factual issues as a matter of law, and conclusively disposes of the claims at issue as against third-party defendant.

"In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), 'the court will 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 within any cognizable legal theory.'" *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) quoting *Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) quoting *Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*,

283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiffs can succeed on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiffs can ultimately establish the truth of their allegations. *See 219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the Verified Complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). "In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon v. Martinez, supra* at 88.

When viewing defendant/third-party plaintiff's Third-Party Complaint in light of the criteria set forth above, the Court finds that defendant/third-party plaintiff has failed sustain causes of action against third-party defendant based upon the fact that Workers' Compensation Law § 11 prohibits defendant/third-party plaintiff from bringing the causes of action alleged in its the Third Party Complaint.

Therefore, based upon the above detailed arguments, evidence, statutes and case law, third-party defendant's motion, pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing defendant/third-party plaintiff's Third-Party Complaint on the grounds that defendant/third-party plaintiff's action is barred due to New York State Workers' Compensation Law § 11, is hereby **GRANTED**.

The remaining parties shall appear for a Certification Conference in IAS Part 33, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on June 9, 2020, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

_____/S/_____
DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
April 29, 2020

ENTERED

May 01 2020

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**