

**Genet Plumbing & Heating Corp. v Didio Agency,
Inc.**

2021 NY Slip Op 31188(U)

April 7, 2021

Supreme Court, Kings County

Docket Number: 511922/2020

Judge: Ingrid Joseph

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At an I.A.S. Term, **Part 83** of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of April, 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
P R E S E N T : HON. INGRID JOSEPH, JSC

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GENET PLUMBING AND HEATING CORP.,

Index No *511922/2020*

Plaintiff,

-against-

DiDIO AGENCY, INC., ATLANTIC CASUALTY
INSURANCE COMPANY, THE BROOKLYN UNION
GAS COMPANY d/b/a NATIONAL GRID NY,
SONIA G. NOEL, CHILDREN'S PARADISE
DAYCARE, RODERICK GEORGE and COLIN
HUTCHINSON,

Defendants.

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The following e-filed papers considered herein:

	<u>E-Filed Papers Numbered</u>
Notices of Motion/Affidavits/Exhibits Annexed	<u>14 - 21</u>
Opposition/Affidavits/Affirmation/Exhibits Annexed	<u>23 - 26</u>
Reply	<u>29 - 32</u>

In this matter, defendant, Di Dio¹ Agency, Inc. ("Di Dio"), moves (Mot. Seq. 1) by Notice of Motion for an order pursuant to CPLR § 3211 (a) (1) and (a) (7) dismissing the Verified Complaint filed by plaintiff, Genet Plumbing and Heating Corp. ("Genet"), and further for dismissal of the cross-claims for contribution and indemnification asserted against Di Dio by defendant, Sonia G. Noel ("Ms. Noel").

In a separate law suit, defendants herein, Roderick George ("George") and Colin Hutchinson ("Hutchinson"), asserted negligence-based claims against Genet, to recover money damages for injuries they allegedly sustained from a gas explosion that occurred on 9/17/12 at the premises known at 206 Rogers Avenue, Brooklyn, New York 11225. In its Verified Complaint, Genet claims that Di Dio previously represented to Genet that it procured a commercial general liability policy of insurance on Genet's behalf from Atlantic Casualty Insurance ("Atlantic"). Genet alleges that Di Dio provided Genet with a corroborating

¹In the affidavit of Mitchell Di Dio, the spelling of the agency is noted as "Di Dio Agency, Inc."

Certificate of Liability Insurance showing Policy Number L04407120, with lines of insurance, covering a period from 2/13/17 through 2/3/18, that included personal injury liability insurance in the amount of \$1,000,000. Genet further alleges that Atlantic denied its claim to provide coverage for the 9/17/17 incident that precipitated George and Hutchinson's suit against Genet. Genet asserts that Atlantic, via correspondence dated May 15, 2019, denied having a policy of insurance that would have covered the 9/17/17 incident. In its Verified Complaint, Genet asserted causes of action against the Di Dio agency sounding in breach of contract, negligence and misrepresentation.

Di Dio filed the instant pre-answer motion to dismiss based upon its contention that Genet has failed to assert a cause of action against Di Dio and further, on the ground that documentary evidence conclusively establishes its defense to Genet's claims. In support thereof, Di Dio submitted the affidavit of Mitchell Di Dio ("Mr. Di Dio"), who claims that the Di Dio agency never procured insurance on Genet's behalf to cover the period from 2/3/17 through 2/3/18 but rather, the Di Dio agency sought to place coverage for Genet for the period from 2/3/18 through 2/3/19. Di Dio alleges that the Certificate of Liability Insurance, annexed to its motion, as Exhibit C, conclusively establishes that the policy number referenced in Genet's Verified Complaint did not cover the 2017 incident.

Genet maintains that its causes of action are cognizable at law and that Di Dio has failed to establish that dismissal is warranted for failure to state a claim or based upon its contention that the documentary evidence annexed to Di Dio's motion extinguishes Genet's claims against Di Dio. In further support, Genet included with its motion, a Certificate of Liability Insurance, at Exhibit A, that references the same policy number and indicates a coverage period consistent with Genet's allegations in the complaint (from 2/3/17 through 2/3/18).

On a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged in the complaint as 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 Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Where, as here, evidentiary material is submitted and considered on a motion pursuant to CPLR § 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact claimed by the plaintiff is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not

eventuate (*see Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]). However, dismissal will be granted if documentary evidence conclusively establishes a defense to the asserted claim as a matter of law (*see Leon v. Martinez*, 84 N.Y.2d 83, 88 [1994]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) is properly granted 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 NY2d at 326).

Here, Genet claims that Di Dio failed to procure insurance coverage on Genet’s behalf or advise Genet that an insurance policy had not been procured. The court, having accepted the facts as alleged in Genet’s complaint as true and accorded Genet the benefit of every possible favorable inference, finds that Genet has set forth facts that fit within cognizable claims for negligence, misrepresentation and breach of contract. The court recognizes that the issue of whether Genet took the proper steps to procure insurance remains. In fact, Genet’s Verified Complaint contains no allegations, and its opposition, is without an affidavit from an individual with personal knowledge, stating that Genet paid the requisite insurance premium to procure liability insurance that would have been in effect when the explosion occurred. However, at this pre-discovery stage, it cannot be said that a material fact claimed by the plaintiff is not a fact at all, nor can it be said that no significant dispute exists regarding Genet’s assertions concerning Di Dio in its Verified Complaint.

Additionally, the court finds that the exhibits annexed to Di Dio’s moving papers, consisting of an affidavit from Mr. Di Dio and copy of a Certificate of Liability Insurance page showing a coverage period from 2/3/18 through 2/3/19, are insufficient to conclusively establish a defense to Genet’s claims. In fact, the time period covered under the Certificate of Liability Insurance page annexed to Di Dio’s motion papers does not disprove Genet’s claim that Di Dio misrepresented to Genet that it was insured from 2/3/17 through 2/3/18. Indeed, Genet submitted a copy of a Certificate of Liability Insurance page (dated January 30, 2017) that Di Dio purportedly issued to Genet showing that Genet had liability insurance through Atlantic during the disputed time period, from 2/3/17 through 2/3/18. Thus, the court finds that Di Dio has failed to meet the criteria that would warrant dismissal of Genet’s claims under CPLR § 3211 (a) (1). Further, this court wholly rejects, and declines to consider, the documents that Di Dio included for the first time in its reply papers.

Regarding that branch of Di Dio’s motion requesting dismissal of Ms. Noel’s cross-

claims for contribution and indemnification, the motion is granted, on default, since Ms. Noel submitted no written opposition. The court finds that Di Dio has established that there is no basis upon which Ms. Noel may assert a right to contribution or indemnification against the Di Dio agency, because Di Dio has shown that there is no relationship, vicariously or otherwise, with Ms. Noel, nor is Di Dio a joint tort-feasor in the underlying action involving George and Hutchinson's claims against Ms. Noel.

Accordingly, it is hereby

ORDERED, that the motion filed by defendant Di Dio Agency, Inc. (Motion Seq. 1) to dismiss the claims asserted by Genet Plumbing and Heating Corp. is denied and that branch of Di Dio's motion seeking dismissal of the cross claims asserted against Di Dio Agency, Inc. by Sonia G. Noel is hereby granted, on default. The cross claims asserted by Sonia G. Noel against Di Dio Agency, Inc. are hereby dismissed .

This constitutes the decision and order of the court.

ENTER,



HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**