

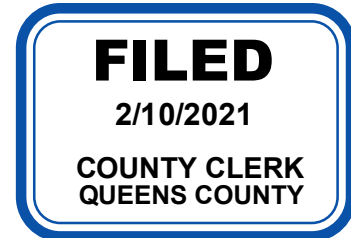
Rippo v Verdi's Rest.
2021 NY Slip Op 31927(U)
February 5, 2021
Supreme Court, Queens County
Docket Number: 707424/20
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35



-----X
ADELAIDE RIPPO,

Plaintiff,

Index No.: 707424/20

Mot. Date: 2/2/21

-against-

Mot. Seq. 1

VERDI'S RESTAURANT,

Defendant.

-----X

The following papers were read on this motion by defendant for an order dismissing plaintiff's Complaint, pursuant to CPLR 3211(a)(1); and on the cross-motion by plaintiff for an order consolidating the instant action with the action, under index number 716167/19.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	EF 4-10
Notice of Cross-Motion-Affidavits-Exhibits.....	EF 12-23
Replying Affidavits to Motion.....	EF 25-26
Affidavits in Opposition to Cross-Motion.....	EF 27-28

Upon the foregoing papers, it is ordered that the motion by defendant is denied; and the cross-motion by plaintiff is denied, without prejudice, with leave to renew under Index No. 716167/19.

The underlying action arises out of a motor vehicle accident, that occurred on September 22, 2018, wherein there was a collision between the vehicle owned and operated by plaintiff Adelaide Rippo and the vehicle owned and operated by non-party Jordan D. Scotti, III, in Queens County, New York.

Defendant moves to dismiss the Complaint against it, prior to an Answer being served. In support of its motion, defendant submits, *inter alia*, a copy of payroll records of defendant indicating individuals employed by defendant, in and prior to September 2018; and the affidavit of Angelo Rocco, a general manager of R.G.G. Enterprises, Inc. s/h/a Verdi's Restaurant (Verdi's), who avers, *inter alia* that: he has been employed at Verdi's for twenty years, Verdi's did not employ an individual by the name of Jordan D. Scotti III, in September, 2018, or at any time prior or subsequent; and Verdi's did not

supervise, direct, or control Jordan D. Scotti, III, on the date of the accident, nor did Verdi's own or control the vehicle Jordan D. Scotti, III was driving on the date of the accident.

Plaintiff alleges, *inter alia*, that non-party Scotti was acting within the scope of his employment as a delivery driver with Verdi's, at the time of the accident, and that defendant Verdi's negligently hired, trained, and supervised non-party Scotti. Plaintiff has sued no-party Jordan D. Scotti, III, in a separate action under Index No. 716167/19, which action is still pending.

In opposition, plaintiff maintains that the plaintiff has not had an opportunity to ascertain the authenticity of the payroll records, nor to depose a witness on behalf of defendant Verdi's.

The Court finds that relief cannot be granted, pursuant to CPLR 3211(a)(1). CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence ***". In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***" (*Fernandez v Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v Webster Town Center Partnership*, 221 AD2d 248). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint" (*Jericho Group, Ltd. v Midtown Development, L.P.*, 32 AD3d 294 [1st Dept 2006][internal citations omitted]). "To some extent, 'documentary evidence' is a 'fuzzy' term, and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). "[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 AD3d at 84–85 [internal quotation marks omitted]). It is well-established law that affidavits and deposition testimony are not documentary evidence, and deeds and contracts are documentary evidence (*Id.*) "[T]o be considered 'documentary', evidence must be unambiguous and of undisputed authenticity" (*Id.*)(*internal citations omitted*).

The documentary evidence submitted in the instant matter is insufficient to dispose of the Complaint. The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (*Held v Kaufman* 91 NY2d 425 [1998]; *Teitler v Max J. Pollack & Sons*, 288 AD2d 302 [2001]). While defendant submits the affidavit of Angelo Rocco, a general manager of defendant, in support of the motion, such documentation is not considered “documentary evidence” within the intended scope of CPLR 3211(a) (*Suchmacher v Manana Grocery*, 73 AD3d 1017 [2d Dept 2010][internal citations omitted]; *see, Fontanetta, supra*). Furthermore, the evidence, including the payroll records, is insufficient to dispose of the Complaint as issues of fact remain regarding, *inter alia*, whether there was any negligence on the part of defendant.

Furthermore, defendant has improperly sought to reach the merits of the Complaint on this mere CPLR 3211(a) motion (*see, Stukuls v State of New York*, 42 NY2d 272 [1977]; *Jacobs v Macy’s East, Inc.*, 262 AD2d 607 [2d Dept 1999]).

Defendant is free to make a CPLR 3212 motion for summary judgment once an Answer has been served and filed. As such, the motion is denied.

Plaintiff cross-moves for an order consolidating the instant action with the related action, under index number 716167/19, amending the action to reflect the consolidation, and deeming the consolidated action to have index number 716167/19, with venue in Queens County. The cross-motion is denied with leave to renew, without prejudice, under Index No. 716167/19.

Upon review of the cross-motion and answering papers and the minutes of the Queens County Clerk-NYSCEF, the Court has noted a discrepancy in the name used for the party defendant sued as Cardinali Pastry, under Index No. 716167/19.

Under Index No. 716167/19, said defendant, in its Verified Answer with Cross-Claims, captioned the action as **ADELAIDE RIPPO v JORDAN D. SCOTTI, III and GENNARI’S ITALIAN FRENCH BAKERY, INC. d/b/a CARDINALI PASTRY** (emphasis added.) It appears that the parties, based upon the caption used in that Verified Answer, adopted that caption for subsequent applications. However, neither the plaintiff nor said defendant submitted a stipulation to be so ordered permitting the change of name or moved the court to change the name or file and serve a Supplemental Summons and Amended Verified Complaint to reflect the proper name of said defendant.

Although, the Court finds there is no prejudice to changing the name of said defendant to reflect its proper name, the plaintiff must do so, under Index No. 716167/19.

Accordingly, it is is

ORDERED that the motion is denied; and it is further

ORDERED that the cross-motion is denied, with prejudice, with leave to renew, under Index No. 716167/19; and it is further

The foregoing constitutes the decision and order of this Court.

Dated: February 5, 2021

J. DUFFICY, J.S.C.

TIMOTHY

