

Collins v Leighton Green Corp.
2021 NY Slip Op 32661(U)
December 10, 2021
Supreme Court, Kings County
Docket Number: Index No. 502088/18
Judge: Peter P. Sweeney
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SUPREME COURT OF STATE OF NEW YORK
COUNTY OF KINGS

-----X
Nathaniel Collins

Plaintiff,

-against-

Leighton Green Corp., Frank Curbelo Guillard,
Farrington Realty, LLC and Century Development
Group, LLC,

Defendants,

-----X
Farrington Realty, LLC

Third-Party Plaintiff,

-against-

Triborough Construction Services Inc.

Third-Party Defendant,

-----X
Triborough Construction Services Inc.

Fourth-Party Plaintiff,

-against-

Merengue Limo & Car Service, Inc.

Fourth-Party Defendant.
-----X

Index No. 502088/18
Motion Date: 9-20-21
Motion Seq. No.: 6

DECISION/ORDER

Upon the following e-filed documents, listed by NYSCEF as item numbers 147-150, the motion is decided as follows:

In this action to recover damages for personal injuries arising out of a motor vehicle accident, fourth-party defendant Merengue Limo & Car Service, Inc. (“Merengue”), moves for an order (a) dismissing the fourth-party complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7), (b) granting the fourth-party defendant the costs and disbursements of this motion,

and (c) such other and further relief as this court may deem just and proper. The motion is unopposed.

Plaintiff Nathaniel Collins commenced this action to recover damages for personal injuries allegedly resulting from a motor vehicle accident. The fourth-party plaintiff, Triborough Construction Services Inc., has recently impleaded Merengue as a fourth-party defendant seeking common laws indemnity and contribution. Triborough maintains that Merengue is vicariously liable for the negligence of one of the drivers who was involved in the accident. Merengue now moves to dismiss this action. The motion is unopposed.

In support of the motion, Merengue relies primarily on the affidavit of Misael Martinez, the President of Merengue, who stated that Merengue is a dispatching service, that all drivers that affiliate their vehicles with Merengue are independent and do not receive a salary or benefits but pay \$110.00 per week to the base to receive calls from the dispatcher. The affiant further stated that the drivers provide their own cars, their own car insurance, and that they maintain their own vehicles and that they set their own hours and can work as many hours as they choose or can elect not to work on any given day. Finally, the affiant stated that the drivers do not receive W-2 forms or 1099 forms from Merengue, that Merengue has no knowledge of the total amount of fees received by the drivers, and that the drivers keep all the fees they earn. For all these reasons, Merengue contends that it cannot be held vicariously liable for the negligence of Frank Curbelo Guillard, one of the drivers involved in the accident.

That branch of the motion to dismiss the fourth-party complaint pursuant to CPLR 3211(a)(1) is **DENIED**. A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence may only be granted where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*see 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; *Leon v. Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Bonavita v. Government Empls. Ins. Co.*, 185 A.D.3d 892, 127 N.Y.S.3d 577). A defendant moving to dismiss pursuant to CPLR 3211(a)(1) bears the burden of demonstrating that the proffered documentary evidence conclusively refutes the plaintiff's factual allegations (*see Kolchins v. Evolution Mkts., Inc.*, 31 N.Y.3d 100, 106, 73 N.Y.S.3d 519, 96

N.E.3d 784). “[T]o be considered ‘documentary,’ evidence must be unambiguous and of undisputed authenticity” (*Fontanetta v. John Doe 1*, 73 A.D.3d 78, 86, 898 N.Y.S.2d 569; *see Cives Corp. v. George A. Fuller Co., Inc.*, 97 A.D.3d 713, 714, 948 N.Y.S.2d 658). Affidavits are not considered documentary evidence within the intendment of CPLR 3211(a)(1) (*see Fox Paine & Co., LLC v. Houston Cas. Co.*, 153 A.D.3d 673, 678, 60 N.Y.S.3d 294; *Granada Condominium III Assn. v. Palomino*, 78 A.D.3d at 997, 913 N.Y.S.2d 668). For this reason, the Maretinez, affidavit cannot be considered and without it, Merengue did not utterly refute the allegations in the fourth-party complaint. That branch of the motion pursuant to CPLR 3211(a)(1) must therefore be denied.

That branch of the motion to dismiss the fourth-party complaint pursuant to CPLR 3211(a)(7) is also **DENIED**. On a motion pursuant to CPLR 3211(a)(7) to dismiss a pleading for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the proponent the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Phillips v. Taco Bell Corp.*, 152 A.D.3d 806, 807, 60 N.Y.S.3d 67; *T. Mina Supply, Inc. v. Clemente Bros. Contr. Corp.*, 139 A.D.3d 1040, 1040–1041, 34 N.Y.S.3d 82). However, where evidentiary material is submitted and considered on a motion to dismiss a pleading pursuant to CPLR 3211(a)(7), the question becomes whether the proponent of the pleading has a cause of action, not whether the proponent has stated one (*see Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *Phillips v. Taco Bell Corp.*, 152 A.D.3d at 807, 60 N.Y.S.3d 67; *T. Mina Supply, Inc. v. Clemente Bros. Contr. Corp.*, 139 A.D.3d at 1041, 34 N.Y.S.3d 82). An affidavit submitted by the movant will almost never warrant dismissal under CPLR 3211 unless it establishes conclusively that the proponent of the pleading has no cause of action (*see Phillips v. Taco Bell Corp.*, 152 A.D.3d at 807, 60 N.Y.S.3d 67; *Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d 682, 683, 941 N.Y.S.2d 675). Dismissal should not eventuate unless it has been shown that a material fact as claimed by the proponent to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it (*see Guggenheimer v. Ginzburg*, 43 N.Y.2d at 275, 401 N.Y.S.2d 182, 372 N.E.2d 17; *T. Mina Supply, Inc. v. Clemente Bros. Contr. Corp.*, 139 A.D.3d at 1041, 34 N.Y.S.3d 82; *Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d at 683, 941 N.Y.S.2d 675). Applying these principles, the

fourth-party complaint sufficiently stated as a cause of action against Merengue. The Martinez affidavit did not demonstrate that the facts claimed by the fourth-party plaintiff are not facts at all or that no significant dispute exists regarding them.

Accordingly, it is hereby

ORDRED that the defendant's motion to dismiss is in all respects **DENIED**.

This constitutes the decision and order of the Court.

Dated: December 10, 2021



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020