

Smith v City of New York
2022 NY Slip Op 31372(U)
April 26, 2022
Supreme Court, New York County
Docket Number: Index No. 157355/2021
Judge: J. Machelle Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

JULIAN SMITH,

Plaintiff,

- v -

THE CITY OF NEW YORK, BOLT MOBILITY

Defendants.

-----X

INDEX NO. 157355/2021

MOTION DATE 12/14/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for DISMISSAL.

In the underlying action, plaintiff alleges that he sustained injuries when he fell from an electric scooter on July 11, 2020, at approximately 5:30 pm. Plaintiff had leased the scooter from defendant Bolt Mobility (“Bolt”), located on East 120th Street near Lexington Avenue in New York City. Plaintiff alleges, *inter alia*, that the scooter was defective in that it had “inadequate lights.”

Now pending before the court is a motion filed by Bolt seeking an order: a) pursuant to CPLR 3211(a)(1) and (5), dismissing the complaint and all cross-claims, with prejudice, against Bolt based on documentary evidence and on the grounds that the action is barred by release, assumption of the risk, and/or pursuant to CPLR 3211 (a)(7) for failure to state a cause of action.

Arguments Made in Support and Opposition

Bolt argues that plaintiff executed a contract in the form of a lease agreement (the "Agreement") with Bolt for his use of the electric scooter, and the relationship between Bolt and plaintiff is defined by the Agreement. Bolt argues that the Agreement contains an enforceable exculpatory clause that unequivocally absolves Bolt of liability to plaintiff for negligence in connection with his use of the scooter, and also contains other language that waives plaintiff's claims, releases Bolt from liability, and bars any action by plaintiff against Bolt in negligence. Bolt also argues that plaintiff expressly assumed the risk for the injuries claims to have sustained.

In support of its motion, Bolt submitted a copy of the Agreement (NYSCEF Document #14) and a sworn Affidavit of Michael Tsinkler, the VP of Product Management for Bolt (NYSCEF Document #13). The Affidavit provides, in part:

3. In the Summer 2020, Bolt leased electric scooters to users in New York City. Bolt leases the Scooters through its mobile application, BOLT — Bolt There Now (the "Bolt App").
4. Once a user downloads the Bolt App, there appears a welcome screen that invites the user to sign up by inputting their telephone number or access code.
5. At the bottom of the screen, it says: "By continuing, I confirm that I am 18+ and agree to Bolt's TERMS OF SERVICE and PRIVACY POLICY," both of which appear as hyperlinks in capital yellow letters against the black screen.
6. After creating a profile, the user can then take delivery of a scooter at a designated location within New York City. The TERMS OF SERVICE remain available at all times by selecting Menu→ Settings→ Legal.
7. Annexed hereto are the screenshots that show the registration process on the App.
8. There is no way to lease a scooter without acknowledging that the user agrees to the terms of service, which for Plaintiff linked to the Lease Agreement labeled Exhibit D.

Further, Bolt argues that the Agreement contains a choice of law provision requiring that the Agreement be governed by Florida law, and that in adjudicating this motion, this court should apply New York procedural law and Florida substantive law. Bolt argues that Florida law should be applied to the question of whether the Agreement's exculpatory clause bars plaintiff's complaint against Bolt, but "applied through the rubric of the CPLR and New York standards on a motion to dismiss."

In opposition, plaintiff does not dispute that the relationship between Bolt and plaintiff is defined by the Agreement. Plaintiff also does not dispute that the Agreement contains an enforceable exculpatory clause that unequivocally absolves Bolt of liability to plaintiff for negligence in connection with plaintiff's use of the scooter. Plaintiff further does not dispute that the Agreement contains other language that serves to waive plaintiff's claims, release Bolt from liability, and bar any action by plaintiff against Bolt in negligence, and advises the person renting the scooter that he expressly assumes the risk of losses.

Plaintiff does however argue as follows: First, that the Agreement was not properly put before the court insofar as it is hearsay and lacks proper certification. Second, that the Affidavit of Michael Tsinkler is inadmissible, as it is an out-of-state affidavit which does not contain a certificate of conformity. Third, there is no showing that plaintiff agreed to the terms of the Agreement, as Bolt does not require the user to click anything acknowledging acceptance of the Agreement, and Bolt did not provide any proof of the transaction associated with plaintiff's phone number, the access code, username or ID number given to plaintiff, or any email confirmation sent to plaintiff. Fourth, the exculpatory provision in the Agreement is against New York public policy, as New York has an interest in protecting the health and wellness of its citizens and its public policy does not allow any exculpatory clauses that permit a party to shield themselves from liability

for gross negligence. Fifth, New York law should apply, as the law chosen in the Agreement violates the fundamental public policy of New York.

Analysis and Conclusions of Law

Here, there is no dispute that New York procedural law and New York standards on a motion to dismiss are applicable. As the New York Court of Appeals, has held, “On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction [...] We 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” (Leon v Martinez, 84 NY2d 83 [NY Ct. of Appeals 1994]).

Further, there is no dispute that Bolt’s motion to dismiss is based on documentary evidence, namely the contents of the Agreement. In Goshen v Mut. Life Ins. Co. of New York, 98 NY2d 314 (2002), the New York Court of Appeals held:

Turning to defendants’ CPLR 3211 (a) (1) motion to dismiss on the ground that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law [...]. Defendants produced documentation illustrating the 30-day trial period and the contractual terms and conditions, including the product disclaimer. These documents do not, however, bar plaintiffs’ claims for deceptive trade practices at this stage of the proceedings, as they do not establish a defense as a matter of law. Plaintiffs assert that the service they purchased was defective due to malfunctions largely or wholly within defendants’ control. They further assert that defendants knew this to be the case and that defendants’ promotional representations were therefore knowingly deceptive. As pleaded this is sufficient. Thus, defendants’ motion to dismiss pursuant to CPLR 3211 (a) (1) and (7) was improperly granted as to the New York plaintiffs and their General Business Law §§ 349 and 350 claims should be reinstated.

A paper will qualify as “documentary evidence” only if it satisfies the following criteria: (1) it is “unambiguous”; (2) it is of “undisputed authenticity”; and (3) its contents are “essentially undeniable” (VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (Sup. Ct. App. Div. 1st Dept 2019)). Further, *Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10 at 21-22 [2005 ed]* provides:

For dismissal, the proffered documents must “utterly refute” the allegations in the plaintiff's complaint, “conclusively establishing a defense as a matter of law” [...]. Note the extremism of the burden of proof—that the documentary evidence not only refute the allegations of the plaintiff's complaint, but “utterly” do so, and that defense not only be established as a matter of law, but that it “conclusively” do so. There is no room for daylight. Wiggle room is not countenanced. Close calls are not enough. Gray areas have no place within the ambit of CPLR 3211(a)(1). The document that is proffered must clearly say what it says and mean what it means. Courts will not grant motions brought under CPLR 3211(a)(1) on account of documentary evidence, and dismiss a plaintiff's complaint in lieu of an answer, unless the basis for doing so is clear, unambiguous, and absolute [internal citations omitted].

With respect to plaintiff's argument that the Affidavit of Michael Tsinkler is inadmissible because it lacks a certificate of conformity, the court notes that the Affidavit was sworn and notarized in the state of Florida, and also that a certificate of conformity (NYSCEF Document #26) was attached to Bolt's Reply. In any event, the lack of a certificate of conformity is not fatal. *See Ruchames v New York and Presbyt. Hosp.*, 176 AD3d 602 (Sup. Ct. App. Div. 1st Dept 2019) (“Contrary to defendants' contention, the sworn affidavit of plaintiff's expert submitted in opposition to the summary judgment motion was admissible even though it lacked a certificate of conformity as required by CPLR 2309”); Matapos Tech. Ltd. v Cia. Andina de Comercio Ltda, 68 AD3d 672 (Sup. Ct. App. Div. 1st Dept 2009) (“Defendant has not preserved its argument that the foreign affidavits were invalid for lack of the certification required by CPLR 2309(c) and Real Property Law § 299–a. In any event, the courts are not rigid about this requirement. As long as the oath is duly given, authentication of the oath giver's authority can be secured later, and given

nunc pro tunc effect if necessary [...] The absence of such a certificate is a mere irregularity, and not a fatal defect”). Therefore, the court does not find the Affidavit of Michael Tsinkler to be inadmissible due to the lack of a certificate of conformity.

Mr. Tsinkler’s Affidavit stated that when plaintiff rented the scooter, he agreed to “the Lease Agreement labeled Exhibit D.” Exhibit D (NYSCEF Document #14) contains a multi-page document titled “Leasing Agreement.” The court finds that Mr. Tsinkler’s Affidavit is sufficient authentication that Exhibit D is an accurate copy of the Agreement.

This Agreement is the key piece of documentary evidence on which Bolt relies, and according to Bolt, this Agreement contains an enforceable exculpatory clause that unequivocally absolves Bolt of liability to plaintiff for negligence in connection with his use of the scooter.

Importantly, however, there is a dispute as to the validity of the Agreement itself. Per Bolt, plaintiff agreed to its terms, and the Agreement therefore serves as the document which defined the relationship between plaintiff and Bolt. In contrast, plaintiff disputes that he ever actually agreed to the terms of the Agreement. In fact, plaintiff’s counsel argues, in this Affirmation:

15. There is also no showing that plaintiff agreed to the terms in the leasing agreement. The affidavit states that a user profile would have been created, yet there is no proof of any username or ID number associated with the plaintiff’s transaction nor is there proof of any email confirmation sent to the plaintiff. The screen shots offered by defendant show an entry for a phone number and an access code, yet the defendant offers no proof of the transaction associated with plaintiff’s phone number or the access code given to the plaintiff.


16. Even if the court were to consider the screen shots and terms, there is no showing that plaintiff explicitly agreed to the terms. Defendant conveniently does not require the user to click anything acknowledging the acceptance of the Terms of Use or the Leasing Agreement. Rather, defendant inconspicuously inserts a statement in small light gray letters on a dark gray background. This inconspicuous statement says that by proceeding the user is agreeing to the terms. Such a process can hardly be considered an agreement to the terms.

As noted above, the documentary evidence must be “unambiguous”, of “undisputed authenticity”, and “essentially undeniable.” The document that is proffered must be “clear, unambiguous, and absolute.” Here, there is a dispute as to whether the Agreement itself is valid and binding on both parties. Accordingly, the Agreement is not sufficient documentary evidence on which to grant a motion to dismiss. See also Merchants T & F, Inc. v Kase & Druker, 288 AD2d 153 (Sup. Ct. App. Div. 1st Dept 2001) (“The documentary evidence relied upon by defendants, an unverified copy of a wire transfer confirmation of payment made, without information as to what the payment was for or the nature of the relationship of the parties to the transaction, does not conclusively establish a defense based on documentary evidence to plaintiff’s claims as a matter of law”).

In contrast, cases where the court granted motions to dismiss based on documentary evidence were those in which the documentary evidence itself was not in dispute. See, e.g. CIBC Bank & Tr. Co. (Cayman) Ltd. v Credit Lyonnais, 270 AD2d 138 (Sup. Ct. App. Div. 1st Dept 2000) (“The IAS court properly dismissed plaintiff’s breach of contract claims since the documentary evidence showed that the exchange rate selected by defendant was in accordance with the *parties’ contracts.*”).

Given the above, it is hereby

ORDERED that the motion is DENIED.

<u>4/26/2022</u> DATE					 _____ J. MACHELLE SWEETING, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE