

**Bisceglia v Recovery Racing, LLC**

2023 NY Slip Op 30509(U)

February 17, 2023

Supreme Court, New York County

Docket Number: Index No. 654335/2022

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LYLE E. FRANK **PART** **11M**

*Justice*

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ADRIAN PHILIP BISCEGLIA,

Plaintiff,

- v -

RECOVERY RACING, LLC D/B/A FERRARI OF FORT  
LAUDERDALE, JACK BARDAKJIA, BRIAN PAIGE, JOHN  
DOE

Defendant.

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**INDEX NO.** 654335/2022

**MOTION DATE** 02/08/2023

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20

were read on this motion to/for DISMISS.

Defendants move, pre-answer, to dismiss the complaint, pursuant to CPLR § 3211 (a)(1), (7) and (8), in response plaintiff timely files an amended complaint but does not oppose the substance of the defendants’ underlying motion. For the reasons set forth below, defendants’ motion is granted.

Preliminarily, the portion of defendants’ motion that seeks to dismiss based on the lack of personal jurisdiction is denied as it is not yet ripe. Plaintiff’s filing of an amended complaint was on February 3, 2023, thus the time for service of the complaint has not yet expired.

It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible inference. *See Avgush v Town of Yorktown*, 303 AD2d 340 [2d Dept 2003]; *Bernberg v Health Mgmt. Sys.*, 303 AD.2d 348 [2d Dept 2003]. Moreover, the Court must determine whether a cognizable cause of action can be discerned from the complaint rather than properly stated. *Matlin Patterson ATA*

*Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]. “The complaint must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory.” *Id.*

To plead breach of contract, the proponent must allege the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.

*Second Source Funding, LLC v Yellowstone Cap. LLC*, 144 AD3d 445, 446 [1st Dept 2016];

*Harris v. Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010].

“In a motion to dismiss pursuant to CPLR 3211 (a) (1), the defendant has the burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Fortis Fin. Servs., LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] internal quotations and citations omitted). Further, dismissal pursuant to CPLR § 3211(a)(1) is warranted where documentary evidence “conclusively establishes a defense to the asserted claims as a matter of law.” *Gottesman Co. v A.E.W, Inc.*, 190 AD3d 522, 24 [1st Dept 2021].

As to the first cause of action for breach of contract, the Court finds that plaintiff has insufficiently pled a cause of action for breach of contract as against defendant Recovery Racing LLC. Neither party has annexed the entirety of the subject contract, or the subject title and thus the Court cannot determine whether the vehicle inspection report adequately refutes the breach of contract claim.

However, in the light most favorable to the non-moving party, assuming that in the absence of the entire contract that there was a breach, plaintiff has failed to allege a nexus between its alleged damages and the alleged breach of the defendants. It is well established that the plaintiff must include “factual allegations which sufficiently demonstrate a causal

relationship between purported conduct on the part of defendants and damages suffered by plaintiff' (*Gall v Summit, Rovins & Feldesman*, 222 AD2d 225, 226 [1st Dept 1995]).

Accordingly, the first cause of action for breach of contract is dismissed.

Similarly, plaintiff's second cause of action, sounding in negligence fails for the same reasons stated above.

As to the third cause of action, which is also listed as its second cause of action, plaintiff alleges violations pursuant to General Business Law ("GBL") §380-s and §380-i<sup>1</sup>. While a liberal reading of this section does not appear to fit into any cognizable cause of action, GBL § 380-s, entitled identity theft, provides in relevant part that "no person ... shall knowingly and with the intent to defraud, obtain, possess, transfer, use, or attempt to obtain, possess, transfer or use credit, goods, services or anything else of value in the name of another person without his or her consent". "The law authorizes a civil action only if the identity theft resulted in the transmission or provision to a consumer reporting agency of information that would otherwise not have been transmitted or provided. (*Galper v JP Morgan Chase Bank, N.A.*, 802 F3d 437, 442 [2d Cir 2015] citing N.Y. Gen. Bus. L. § 380-l)

The Court finds that the complaint is insufficient as it fails to allege any factual allegations to support a cause of action for identity theft and any resulting damages as required.


Accordingly, it is hereby

ORDERED that amended complaint is dismissed in its entirety, and the Clerk of the Court shall enter judgment accordingly.

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<sup>1</sup> GBL § 380-i is entitled "Requirements on users of consumer reports", the Court is unclear as is the complaint on any factual allegations or private right of action conferred as a result of this section of the GBL, but need not reach the issue.

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2/17/2023  
DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: