

**Kakhailishi v J & A Glass Creations, Inc.**

2025 NY Slip Op 32030(U)

May 20, 2025

Supreme Court, Kings County

Docket Number: Index No. 521605/2024

Judge: Anne J. Swern

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This opinion is uncorrected and not selected for official publication.

At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 20<sup>th</sup> day of May 2025

PRESENT: HON. ANNE J. SWERN, J.S.C.

LASHA KAKHAILISHI,

*Plaintiff,*

*-against-*

J & A GLASS CREATIONS, INC.  
and J & A REALTY HOLDERS, LLC,

*Defendants.*

**DECISION & ORDER**

Index No.: 521605/2024

Calendar No.: 26

Motion Seq.: 001

*Recitation of the following papers as required by CPLR 2219(a):*

|   | <b>Papers<br/>Numbered</b> |
|---|----------------------------|
| Defendant J & A GLASS CREATIONS, INC.'s<br>Notice of Motion, Affirmation, Affidavits and<br>Exhibits (NYSCEF 7-17)..... | 1, 2                       |
| Affirmation and Exhibits in Opposition (NYSCEF 20-22) .....   | 3                          |
| Memorandum of Law in Reply (NYSCEF 23).....   | 4                          |
| Plaintiff's Sur-Reply (NYSCEF 24) .....   | 5                          |

*Upon the foregoing papers and after oral argument, the decision and order of the Court is as follows:*

This is an action to recover damages for personal injuries sustained by plaintiff on 8/9/2023 while present on the premises owned, leased and/or operated by defendants, jointly and/or severally (NYSCEF 5, ¶¶4-7, and 11). It is alleged in the complaint that at the time of the accident, plaintiff was performing services pursuant to a contract with defendant J & A GLASS CREATIONS, INC. (JAGC) (*id.* ¶10). On 8/12/2024, plaintiff commenced this action (NYSCEF 1). Defendants were served with the summons and complaint on 9/9/2024 (NYSCEF 2 and 3). On 9/13/2024, JAGC filed a claim with the Workers Compensation Board (WCB) alleging that

plaintiff was its employee on 8/9/2023 (NYSCEF #9, 10 and 11) and NYSCEF 12 and 13). Defendant J & A REALTY HOLDERS, LLC (JARH) filed an answer on 10/24/2024 (NYSCEF 4 and 5). On 12/11/2024, JAGC filed this pre-answer motion to dismiss pursuant to CPLR § 3211 [a] [1] and [7] based on the WCB claim filed by JAGC claiming plaintiff's exclusive remedy is Workers Compensation benefits. JAGC also moved for sanctions pursuant to 22 NYCRR § 130-1.1 based on plaintiff's failure to discontinue this action based on this defense.

In its affidavit in support of the motion, JAGC states that plaintiff was hired through a non-party recruiting "Temp Agency" DNL Power and after plaintiff was injured, he did not return to work with JAGC. Therefore, JAGC paid plaintiff \$600 for the days he worked before the accident. (NYSCEF 9). In opposition, plaintiff submitted an affidavit denying the allegations in JAGC's affidavit, including that he was an employee of either DNL or JAGC. Plaintiff also states that JAGC paid him \$600 towards his medical bills. Plaintiff's medical bills to date in the approximate amount of \$25,000.00 have not been paid by the WCB. (NYSCEF 22). For the first time in its reply, JAGC asserts that plaintiff was its "special employee."

The motion is denied in its entirety.

### Legal Framework

#### a) CPLR § 3211 [a] [1]

"A motion pursuant to CPLR § 3211 [a] [1] to dismiss the complaint on the ground that the action is barred by documentary evidence may be [appropriately] granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense, as a matter of law" (*Karpovich v City of New York*, 162 AD3d 996, 997 [2d Dept 2018] citing *Mawere v Landau*, 130 AD3d 986, 987 [2d Dept 2015]; see also *Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007] and *Goshen v Mutual Life Insurance Co. of N.Y.*, 98

NY2d 314, 326 [2002]). “To constitute ‘documentary’ evidence, the evidence must be unambiguous, authentic, and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and other papers, the contents of which are essentially undeniable” (*Karpovich v City of New York*, 162 AD3d at 997-998; see *Prott v Lewin & Baglio*, 150 AD3d 908, 909 [2d Dept 2017]). Affidavits submitted in support of such motion do not qualify as documentary evidence because their “contents can be controverted by other evidence, such as another affidavit” (*Phillips v Taco Bell Corp.*, 152 AD3d 806, 807 [2d Dept 2017]; *Prott v Lewin & Baglio*, 150 AD3d at 909).

b) CPLR § 3211 [a] [7]

Plaintiffs may submit affidavits in opposition to a motion to dismiss pursuant to CPLR § 3211 [a] [7] but it does not obligate them to do so to avoid a dismissal (*See Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). Therefore, plaintiff may stand on the pleadings alone, “confident that its allegations are sufficient to state all of the necessary elements of a cognizable cause of action” to survive a motion to dismiss under CPLR § 3211 [a] [7] (*id.*). When determining a motion to dismiss pursuant to CPLR § 3211 [a] [7], the Court must accept the factual allegations in the complaint as true and “accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit into any cognizable legal theory” (*Leon v Martínez*, 84 NY2d 83, 88 [1994]).

However, when the Court considers evidentiary material outside the pleadings and the motion is not converted to one for summary judgment, “the question becomes whether the pleader has a cause of action, not whether the pleader has stated one and, unless it has been shown that a material fact as claimed by the pleader is not a fact at all, and unless it can be said that no significant dispute exists regarding it, [a] dismissal should not [be granted]” (*Board of*

*Mgrs. of 100 Congress Condominium v SDS Congress, LLC*, 152 AD3d 478, 480 [2d Dept. 2017]).

**Analysis**

JAGC's documentary evidence does not, as a matter of law, establish a defense pursuant to § 11 of the Workers Compensation Law. JAGC's affidavit and the Workers Compensation claim form submitted in support of the motion have been disputed by plaintiff's complaint and affidavit that he was contracted by JAGC to perform work and was not its employee, special or otherwise. The Workers Compensation claim was not filed until more than year after the accident and immediately after JAGC was served with the summons and complaint. The timing of the filing of the Workers Compensation claim is suspect and therefore does not utterly refute the complaint's factual allegations that a contract for services was entered into between the parties. The memo line on the \$600 check is blank (NYSCEF 11). Therefore, defendant's documentary evidence does not conclusively establish, as a matter of law, that plaintiff was either an employee or special employee (*cf. Karpovich v City of New York*, 162 AD3d 997 and *Goshen v Mutual Life Insurance Co. of N.Y.*, 98 NY2d 326).

JAGC's reliance on *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553 [1991] is misplaced and does not dictate a different result. The Court of Appeals decided *Thompson* based on the trial Court's denial of summary judgment after full discovery. As pointed out by plaintiff, defendant has disguised a CPLR §3212 motion as one pursuant to CPLR § 3211.

In *Thompson*, plaintiff commenced a negligence against Applied Transportation Services (ATS) and Grumman Aerospace Corp. (Grumman). ATS recruited and trained employees to work for Grumman pursuant to a written contract. Thompson filed for and was receiving Workers Compensation Benefits. The Court of Appeals affirmed the dismissal of Thompson's

complaint against Grumman based on his “special employee” status even though the contract between ATS and Grumman stated that plaintiff was not Grumman’s employee.

Here, JAGC has not tendered documentary evidencing a contract between JAGC and DNL (unlike *Thompson*) or that plaintiff was provided with Workers Compensation insurance information by DNL or JAGC at the time of his accident but that he failed to file with the WCB. JAGC’s affidavit is also devoid of any sworn statements concerning this fact. Therefore, applying *Thompson* in the context of a CPLR § 3211 [a] [7] and based on the affidavits of both parties and the timing of JAGC’s filing with the WCB, a significant dispute exists concerning the issue of plaintiff’s contractual status with JAGC as alleged in the complaint (*Board of Mgrs. of 100 Congress Condominium v SDS Congress, LLC*, 152 AD3d 480; CPLR § 3211 [a] [7]; *Compare, Thompson v Grumman Aerospace Corp.*, 78 NY2d 558 [“...the determination of special employment status may be made as a matter of law where the particular, *undisputed critical facts* compel that conclusion and present no triable issue of fact.” [emphasis added]).

Accordingly, it is hereby

ORDERED that J & A GLASS CREATIONS, INC.’ motion to dismiss pursuant to CPLR § 3211 [a] [1] and [7] and for sanctions pursuant to 22 NYCRR § 130-1.1 is denied in its entirety.

This constitutes the decision and order of the Court.

ENTER:



**Hon. Anne J. Swern, J.S.C.**  
**Dated: 5/20/25**

For Clerks use only:  
MG \_\_\_\_\_  
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