NEW YORK APPELLATE DIGEST

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IN THIS ISSUE

*Summaries of Selected Recent Appellate Decisions and Opinions Which Flesh Out the Recurring Appellate Issues Raised by Pre-Answer Motions to Dismiss

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MOTIONS TO DISMISS (CIVIL)

A few issues periodically crop up in the appellate review of pre-answer motions to dismiss which warrant a Practice Pamphlet.

There has been a flurry of cases over the past couple of years, for example, which explain what should happen when a defendant submits evidence with the motion to dismiss.

Should the court consider it?

Does the plaintiff have to respond by also submitting evidence?

Is it okay for the plaintiff to submit evidence to fix problems with the complaint?

What should the result be if both plaintiff and defendant submit equally supportive evidence?

What is the standard for review?

Other questions answered here include:

What kind of evidence will support a dismissal based upon defendant's documentary evidence.

Can a second motion to dismiss be made in response to an amended complaint?

What should the court do when a motion to dismiss is submitted after the complaint has been answered?

How do courts handle motions to dismiss in declaratory judgment actions?

May a court consider defenses to the action on a motion to dismiss?

FROM THE EDITOR

This is the 6th Practice Pamphlet---a compilation of the summaries of New York State appellate decisions addressing the analysis of (civil) pre-answer motions to dismiss which were posted on the website www.newyorkappellatedigest.com 2015-2016.

To link to the summarized cases in a new tab, hold down the control key (ctrl) and click on the case name.

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MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION [CPLR 3211(a)(7)]; EFFECTS OF THE SUBMISSION OR ABSENCE OF DOCUMENTARY EVIDENCE IN SUPPORT OR OPPOSITION

Supreme Court Properly Considered Documentary Evidence Re: a Motion to Dismiss for Failure to State a Cause of Action Pursuant to CPLR 3211(a)(7)---Limited Role of Such Evidence in this Context Clarified

The Fourth Department, in a full-fledged opinion by Justice Whalen, clarified how a motion to dismiss for failure to state a cause of action (CPLR 3211(a)(7)) should be handled when documentary evidence is submitted by the defendant. The case involved a real estate transaction which initially fell through when plaintiff was unable to finance it. Years later, when plaintiff finally was able to obtain financing, it sought specific performance of the original contract. Documents tracing the history of the communications between plaintiff and defendant were submitted with the motion to dismiss. Supreme Court considered the documents and dismissed the complaint. The Fourth Department affirmed:

> CPLR 3211 (a) (7) authorizes the summary dismissal of a complaint for failure to "state" a cause of action. Historically, "[a] motion to dismiss for failure to state a cause of action . . . was[] limited to the face of the complaint" (Rovello, 40 NY2d at 638 [Wachtler, J., dissenting]), but the Legislature enlarged the scope of facial sufficiency motions by enacting subdivision (c) of CPLR 3211, which permits "trial court[s to] use affidavits in its consideration of a pleading motion to dismiss" (id. at 635 ...). The Court in Rovello held that the plain text of CPLR 3211 (c) "leaves this question," i.e., the admissibility of affidavits on a motion pursuant to CPLR 3211 (a) (7), "free from doubt" (id. at 635). The First Department recently explained that Rovello's reference to "affidavits" is merely shorthand for "evidentiary submissions" ... .
>
> As noted in Rovello, however, CPLR 3211 does not specify "what effect shall be given the contents of affidavits submitted on a motion to dismiss when the motion has not been converted to a motion for summary judgment" (id.). The Court noted that "[m]odern pleading rules are designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one' " and held that evidentiary submissions may only be considered for a "limited purpose" in assessing the facial sufficiency of a civil complaint (id. at 636). This "limited purpose," Rovello explained, is two-fold. On the one hand, "affidavits submitted by the defendant [as movant] will seldom if ever warrant the relief" sought under CPLR 3211 (a) (7) "unless too the affidavits establish conclusively that plaintiff has no cause of action" (id. [emphasis added]). On the other hand, the nonmoving party may "freely" submit evidentiary materials "to preserve inartfully pleaded, but potentially meritorious, claims" (id. at 635).
>
> The "limited purpose" to be accorded evidentiary submissions on a motion to dismiss has been consistently reiterated by the Court of Appeals since Rovello ... . Indeed, in Guggenheimer v Ginzburg (43 NY2d 268, 275), the Court of Appeals noted that "dismissal should . . . eventuate" only when the defendant's evidentiary affidavits "show[] that a material fact as claimed by the pleader to be one is not a fact at all and . . . that no significant dispute exists regarding it" ... . * * *
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> We therefore conclude that the court properly considered defendant's evidentiary submissions in evaluating the motion to dismiss at bar. **Liberty Affordable House Inc v Maple Ct Apts, 2015 NY Slip Op 0003, 4th Dept 1-2-15**

"Conclusory" Affidavit Submitted In Support of Motion to Dismiss for Failure to State a Cause of Action Did Not Demonstrate the Allegation Defendants Were Directly Liable for Negligent Maintenance of a Taxi Cab Was "Not a Fact At All"---Analytical Criteria Explained

The Second Department determined plaintiff's complaint should not have been dismissed in its entirety because the documentary evidence submitted in support of the motion to dismiss for failure to state a cause of action (CPLR 3211(a)(7)) did not demonstrate the facts alleged (which could support defendants' direct liability for negligent maintenance of a taxi cab) "were not facts at all." Plaintiff was injured when his motorcycle struck a tire which had come off defendants' taxi cab. Although the information in the affidavit submitted by a defendant was sufficient to warrant the dismissal of causes of action which relied on piercing the corporate veil, the information did not demonstrate defendants could not be directly liable for negligent maintenance of the cab. The related causes of action should not have been dismissed. The Second Department explained the analytical criteria to be applied when documentary evidence is submitted in support of a motion to dismiss for failure to state a cause of action:

> "In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court should 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" ... . Where evidentiary material is submitted and considered on a motion pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, "the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" ... .
>
> Here, [defendant's] affidavit falls short of establishing, conclusively, that [plaintiff] has no cause of action. The affidavit completely fails to address [plaintiff's] allegation that the subject taxi was not "roadworthy." The affidavit, while offering conclusory statements, did not supply competent evidence as to which of the various defendants, if any, might have had a duty to maintain, or might in fact have maintained, the offending taxi prior to the accident. Indeed, [defendant's] conclusory statements are completely unsupported with evidence or specific factual references ... and, hence, are of no probative force ... . **Rathje v Tomitz, 2015 NY Slip Op 04467, 2nd Dept, 5-27-15**

Constructive Trust Causes of Action Should Not Have Been Dismissed on the Merits/Procedure Re: Motion to Dismiss for Failure to State a Cause of Action (Where Documentary Evidence Opposing the Motion Has Been Submitted) Described

The Fourth Department held that the petitioners had stated a valid constructive-trust cause of action. The court discussed the consideration of evidence submitted by the proponent of the pleading (petition here) re: a motion to dismiss pursuant to CPLR 3211(a)(7):

> We agree with petitioners that the petition sufficiently states a cause of action for a constructive trust with respect to the NGR property, the Manitou Road property and NYSFC stock. "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 [petition] as true, accord [the petitioners] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . In assessing a motion under CPLR 3211 (a) (7), . . . a court may freely consider affidavits submitted by the [petitioner] to remedy any defects in the [petition] . . . and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one' " ... . **Matter of Thomas, 2015 NY Slip Op 00017, 4th Dept 1-2-15**

Analytical Criteria for a Motion to Dismiss for Failure to State a Cause of Action Where Plaintiff Submits an Affidavit/Analytical Criteria for a Motion to Amend the Complaint

The Second Department determined the motion to dismiss for failure to state a cause of action should not have been granted with respect to one of the defendants, and the motion to amend the complaint should have been granted. The court explained the proper way to handle a motion to dismiss for failure to state a cause of action when the plaintiff submits an affidavit in opposition, as well as the criteria for a motion to amend the complaint:

> In considering a motion to dismiss pursuant to CPLR 3211(a)(7), "the court should 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" ... . "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" ... . Unless the motion is converted into one for summary judgment pursuant to CPLR 3211(c), affidavits may be received for a limited purpose only, usually to remedy defects in the complaint, and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading ... . " [A] court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint'" ... * * *
>
> CPLR 3025(b) provides that courts may grant leave to parties to amend or supplement their pleadings, and, "[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" ... . Here, the Supreme Court improperly denied that branch of the plaintiff's cross motion which was pursuant to CPLR 3025(b) for leave to amend the complaint insofar as asserted against [one defendant]. No surprise or prejudice resulted from any delay in the plaintiff's motion, and the proposed amendment is neither palpably insufficient nor patently without merit insofar as it pertains to that defendant ... . **Tirpack v 125 N. 10, LLC, 2015 NY Slip Op 06236, 2nd Dept 7-22-15**

Omissions From Complaint Supplied By Affidavit In Opposition To Motion To Dismiss, Complaint Should Not Have Been Dismissed

The First Department, reversing Supreme Court, determined the omissions from the complaint against defendant insurance company were remedied by an affidavit submitted in opposition to the motion to dismiss:

> A complaint must "be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions" that form the basis of the complaint and "the material elements of each cause of action" (CPLR 3013). The factual allegations of the complaint are accepted as true, and afforded "every possible favorable inference" ... . "[A] court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one ... . When such affidavits are considered, dismissal should not result unless "a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" ... .
>
> Here, the complaint standing alone failed to apprise defendant insurance companies of basic pertinent information to put them on notice of the claims against them, such as the patients treated and the insurance policies issued by defendant, under which plaintiff submitted claims for treatment rendered. However, in opposition to defendant insurance companies' motion to dismiss, plaintiff submitted an affidavit from its principal with an exhibit attached providing such information. Thus, the complaint and affidavit submitted in opposition sufficiently apprise defendant insurance companies of the "transactions, occurrences, or series of transactions" that form the basis of the complaint (CPLR 3013). **High Definition MRI, P.C. v Travelers Cos., Inc., 2016 NY Slip Op 02027, 1st Dept 3-22-16**

Plaintiff Need Not Submit Any Evidence In Response to a Motion to Dismiss Alleging Failure to State a Cause of Action, Even If Defendant Does

The Second Department explained how a motion to dismiss for failure to state a cause of action (CPLR 3211(a)(7)) should be handled when evidence is submitted in support of the motion. The court noted that the plaintiff need not submit any evidence and can stand on the pleadings alone:

> "A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a) (7)" ... . "If the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one'" ... . "Yet, affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that the plaintiff has no cause of action" ... . The plaintiff "may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face" ... . The plaintiff may stand on his or her pleading alone to state all the necessary elements of a cognizable cause of action, and, unless the motion to dismiss is converted by the court to a motion for summary judgment, the plaintiff will not be penalized because he or she has not made an evidentiary showing in support of the complaint ... . In light of these standards, it is clear that the defendant's motion should have been denied. The complaint stated a cause of action, and the defendant's submissions did not "conclusively establish that the plaintiff has no cause of action" ... . **Clarke v Laidlaw Tr Inc, 2015 NY Slip Op 01602, 2nd Dept 2-25-15**

Plaintiff Need Not Submit Any Evidence In Response to a Motion to Dismiss Alleging Failure to State a Cause of Action, Even If Defendant Does

The Second Department determined the complaint stated a cause of action for specific performance of a real estate contract. The court offered a clear explanation of the analytical criteria to be used when defendant submits evidence in support of a motion to dismiss for failure to state a cause of action. Here, the fact that plaintiff submitted no evidence in opposition was of no consequence. The evidence submitted by defendant was not sufficient to demonstrate, as a matter of law, the complaint did not state a cause of action:

> In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), "the court must 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" ... . "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" ... .
>
> "A court is . . . permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7)" ... . However, "on a motion made pursuant to CPLR 3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party" ..., and a plaintiff "will not be penalized because he [or she] has not made an evidentiary showing in support of his [or her] complaint" ... . When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion has not been converted to one for summary judgment, "the criterion is whether the [plaintiff] has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it . . . dismissal should not eventuate" ... .
>
> Contrary to the defendant's contention, the complaint adequately alleged a cause of action for specific performance of a contract for the sale of real property. **E & D Group, LLC v Vialet, 2015 NY Slip Op 09400, 2nd Dept 12-23-15**

TREATMENT OF POST-ANSWER MOTIONS TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION [CPLR 3211(a)(7)]

Post-Answer Motion Treated as Motion to Dismiss In Which Documentary Evidence Was Submitted (as Opposed to a Summary Judgment Motion)---Court's Role Is to Determine Whether Plaintiff Has a Cause of Action, Not Whether Plaintiff Has Stated a Cause of Action

Reversing Supreme Court, the Third Department determined plaintiff had adequately pled a cause of action for tortious interference with contract. The plaintiff alleged that defendant subverted a bidding process for the installation of artificial turf at state and local schools. Usually competitive bidding cases are brought in an Article 78 proceeding against the relevant public entity. This case fit an exception to that rule because it was brought against a private party working with the public entities. There was also some question whether the proceeding was a motion to dismiss for failure to state a cause of action or a motion for summary judgment. Because documentary evidence was submitted, the court's role was to determine whether the plaintiff has a cause of action, not whether plaintiff has stated one:

> ...[S]ince the motion (made shortly after serving the answer and before disclosure) argued an absence of any legal viability of the alleged causes of action, Supreme Court did not err in treating the motion as a narrowly framed post-answer CPLR 3211 (a) (7) ground asserted in a summary judgment motion ... . When dismissal is sought for failure to state a cause of action and, as here, plaintiff submits affidavits, "a court may freely consider [those] affidavits . . . and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one'" ... . **Chenango Contr., Inc. v Hughes Assoc., 2015 NY Slip Op 03903, 3rd Dept 5-7-15**

Although It Was Proper to Consider the Motion to Dismiss Made After Issue Was Joined a Motion for Summary Judgment, Supreme Court Should Not Have Determined the Motion Without Giving Notice to the Parties So the Parties Could Lay Bare Their Proof

The Second Department determined Supreme Court should not have converted the motion to dismiss to a motion for summary judgment without notice to the parties. Because the motion to dismiss was made after issue was joined, it should be treated as a motion for summary judgment. However, because none of the exceptions to the notice requirement applied, Supreme Court should not have determined the motion without giving the parties the opportunity to submit additional evidence. The matter was remitted for that purpose:

> Since the [defendants'] motion was made after issue was joined, the Supreme Court correctly determined that it should be treated as a motion for summary judgment pursuant to CPLR 3212 ... . However, the Supreme Court "was required to give adequate notice to the parties' that the motion was being converted into one for summary judgment" ..., unless one of the recognized exceptions to the notice requirement was applicable ... . Here, no such notice was given, and none of the recognized exceptions to the notice requirement is applicable ... . Neither the [defendants] nor the plaintiff made a specific request for summary judgment, nor did they "indicate that the case involved a purely legal question rather than any issues of fact" ... . Further, the parties' evidentiary submissions were not so extensive as to "make it unequivocally clear' that they were laying bare their proof' and deliberately charting a summary judgment course'" ... . Accordingly, the Supreme Court erred by, in effect, converting the [defendants'] motion pursuant to CPLR 3211(a)(3) to dismiss the complaint into one for summary judgment, and should not have searched the record and awarded summary judgment to the plaintiff ... . **JP Morgan Chase Bank, N.A. v Johnson, 2015 NY Slip Op 05159, 2nd Dept 6-17-15**

Defendant Did Not Waive the Statute of Limitations Defense, Pled In Its Answer, by Failing to Assert It in a Pre-Answer Motion to Dismiss---Although Defendant's Post-Answer Motion Was Ostensibly Brought Pursuant to CPLR 3211 Instead of 3212, the Procedural Irregularity Should Have Been Excused under CPLR 2001

The Second Department explained there is no requirement that a statute of limitations defense be raised solely in a pre-answer motion to dismiss. The defense may be asserted in the answer, and subsequently raised in a summary judgment motion or at trial. Although defendant's post-answer motion was ostensibly brought pursuant to CPLR 3211 instead of 3212, the procedural irregularity should have been excused under CPLR 2001:

> CPLR 3211(a) permits a defendant who wishes to raise a defense based on the statute of limitations to do so by way of a motion to dismiss. That section provides, in relevant part, that "[a] party may move for judgment dismissing one or more causes of action asserted against him [or her] on the ground that . . . the cause of action may not be maintained because of [the] statute of limitations" (CPLR 3211[a][5]). CPLR 3211(e) provides that the defendant may make the motion to dismiss before its answer is required to be served, or may include the defense in its answer and seek relief later. When the defendant does neither, the defense is waived.
>
> "At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a) . . . . Any objection or defense based upon a ground set forth in paragraph[ ] five . . . of subdivision (a) is waived unless raised either by such motion or in the responsive pleading" (CPLR 3211[e]).
>
> Contrary to the Supreme Court's determination, a defendant who wishes to assert the statute of limitations as a defense is not limited to asserting it by way of a pre-answer motion. The defendant may instead choose to raise that defense in its answer, and either move on that ground later in a motion for summary judgment, or wait until trial to have it determined ... .
>
> Here, the defendant did not make a pre-answer motion to dismiss the complaint, but raised the statute of limitations as an affirmative defense in its answer. Then, after the note of issue was filed, the defendant moved to dismiss the complaint on that ground. Although the defendant denominated its motion as a motion pursuant to CPLR 3211(a) to dismiss the complaint, rather than as a motion pursuant to CPLR 3212 for summary judgment dismissing the complaint, that procedural irregularity should have been excused under CPLR 2001, upon proper notice to the parties ... . **Wan Li Situ v MTA Bus Co., 2015 NY Slip Op 06130, 2nd Dept 7-15-15**

SINGLE MOTION RULE; MOTIONS TO DISMISS MADE IN RESPONSE TO A COMPLAINT MAY NOT BE MADE AGAIN IN RESPONSE TO SUBSTANTIALLY IDENTICAL CAUSES OF ACTION IN AN AMENDED COMPLAINT

"Single Motion Rule" Barred Motions to Dismiss Pursuant to CPLR 3211(a)

The Second Department determined Supreme Court properly denied motions to dismiss pursuant to CPLR 3211(a) based upon the "single motion" rule. The defendants had made motions to dismiss certain causes of action in the original complaint. Therefore the defendants could not make those motions again with respect to an amended complaint:

> CPLR 3211(e) provides, in relevant part, that at any time before service of a responsive pleading is required, a party may move to dismiss a pleading "on one or more grounds set forth" in CPLR 3211(a), and that "no more than one such motion shall be permitted." Accordingly, this "single motion rule prohibits parties from making successive motions to dismiss a pleading" pursuant to CPLR 3211(a) ... . The rule bars both repetitive motions to dismiss a pleading pursuant CPLR 3211(a), as well as subsequent motions to dismiss that pleading pursuant to CPLR 3211(a) that are based on alternative grounds ... . Here, the defendants previously moved pursuant to CPLR 3211(a) to dismiss the original complaint on the grounds that documentary evidence established a complete defense to the action (see CPLR 3211[a][1]), that the action was time-barred (see CPLR 3211[a][5]), and that the complaint failed to state a cause of action (see CPLR 3211[a][7]). * * * Accordingly, those branches of the defendants' motion which were to dismiss ... [substantially identical] causes of action in the amended complaint were procedurally barred by the single-motion rule, and were properly denied (see CPLR 3211[e]...). **Bailey v Peerstate Equity Fund, L.P., 2015 NY Slip Op 01911, 2nd Dept 2-11-15**

THE UNIQUE TREATMENT OF MOTIONS TO DISMISS IN DECLARATORY JUDGMENT ACTIONS

The Treatment of Pre-Answer Motions to Dismiss an Action for a Declaratory Judgment Explained

The Second Department explained how pre-answer motions to dismiss are handled in the context of an action for a declaratory judgment:

> Generally speaking, " [a] motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration'" ... . As such, "where a cause of action is sufficient to invoke the court's power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy' (CPLR 3001; see CPLR 3017[b]), a motion to dismiss that cause of action should be denied" ... .
>
> Upon a motion to dismiss for failure to state a cause of action, a court may reach the merits of a properly pleaded cause of action for a declaratory judgment where " no questions of fact are presented [by the controversy]'" ... . Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action "should be taken as a motion for a declaration in the defendant's favor and treated accordingly" ... . **North Oyster Bay Baymen's Assn. v Town of Oyster Bay, 2015 NY Slip Op 06225, 2nd Dept 7-22-15**

THE NATURE OF DOCUMENTARY EVIDENCE WHICH WILL SUPPORT A MOTION TO DISMISS PURSUANT TO CPLR 3211(a)(1)

Affidavits and Text Messages Do Not Constitute "Documentary Evidence" In the Context of a Motion to Dismiss Pursuant to CPLR 3211(a)(1)

The Second Department determined defendant's motion to dismiss the breach of contract complaint should have been denied. The affidavits and text messages submitted in support of the motion did not constitute "documentary evidence" upon which a motion to dismiss may be based. The court defined "documentary evidence" in this context:

> In order for evidence submitted in support of a CPLR 3211(a)(1) motion to qualify as "documentary evidence," it must be "unambiguous, authentic, and undeniable" ... . "[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" ... . However, "[n]either affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)" ... .
>
> Here, the affidavits and text messages relied upon by the Supreme Court in concluding that the plaintiff failed to comply with the alleged condition precedent were not " essentially undeniable,'" and did not constitute documentary evidence ... . **Eisner v Cusumano Constr., Inc., 2015 NY Slip Op 07812, 2nd Dept 10-28-15**

Evidence Submitted In Support Of Motion To Dismiss Did Not Constitute Documentary Evidence Within The Meaning Of CPLR 3211(A)(1)

The Second Department determined the evidence submitted by defendant law firm in support of a motion to dismiss the malpractice complaint based on documentary evidence was properly denied. The letters and affirmation did not constitute "documentary evidence" and did not utterly refute plaintiff's allegations:

> "The evidence submitted in support of a [CPLR 3211(a)(1)] motion must be documentary' or the motion must be denied" ... . To qualify as documentary evidence, the evidence "must be unambiguous and of undisputed authenticity" ... . "[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" ... . Affidavits and letters "were not the types of documents contemplated by the Legislature when it enacted this provision"... .
>
> Here, the letters ... did not constitute documentary evidence for the purpose of a motion pursuant to CPLR 3211(a)(1)... , Similarly, the affirmation of one of [the law firm's] members was not documentary evidence for the purpose of this motion ... . **Anderson v Armentano, 2016 NY Slip Op 03690, 2nd Dept 5-11-16**

WHEN PLAINTIFF'S AND DEFENDANT'S ARGUMENTS ARE EQUALLY SUPPORTED, PLAINTIFF MUST PREVAIL IN A MOTION TO DISMISS

In a Motion to Dismiss, Plaintiff Prevails Where Both Arguments Equally Supported

The Fourth Department determined plaintiff police officer had stated causes of action for unlawful discrimination based upon a disability under the Human Rights Law and the federal Rehabilitation Act. Plaintiff was arrested for DWI and entered a rehabilitation program where he was diagnosed as suffering from post-traumatic stress disorder stemming from his work in New York City after the 9-11 attack. Plaintiff was terminated upon completion of the rehabilitation program. The city argued his termination was based on the DWI, but plaintiff alleged other officers, who were not disabled, were not terminated after committing a criminal offense. The Fourth Department noted that when the plaintiff's and defendant's arguments are equally supported, plaintiff must prevail in a motion to dismiss:

> Plaintiff sufficiently stated a cause of action for disability discrimination under the Human Rights Law by alleging that: he has a disability and is therefore a member of a protected class; he is qualified for his position; he suffered an adverse employment action, i.e., termination of his employment; and the termination occurred under circumstances giving rise to an inference of discrimination ... . Similarly, plaintiff sufficiently stated a cause of action for discriminatory termination under the Rehabilitation Act by alleging that: "(1) he has a disability; (2) he is otherwise qualified to perform the job; (3) he was terminated solely because of his disability; and (4) the program or activity receives federal funds" ... .
>
> In support of those causes of action, plaintiff alleged that the City did not terminate the employment of two nondisabled employees after they were arrested for criminal misconduct, thus raising an inference that his termination was based upon his disability. The court stated in its decision that plaintiff's allegations "equally support" the conclusions that those two employees and plaintiff were similarly situated, and that they were not similarly situated. On the motion to dismiss pursuant to CPLR 3211 (a) (7), however, facts that equally support opposing inferences must be resolved in plaintiff's favor ... . **Regan v City of Geneva, 2016 NY Slip Op 01101, 4th Dept 2-11-16**

COURT SHOULD NOT CONSIDER DEFENSES TO AN ACTION ON A MOTION TO DISMISS, WHETHER THE ACTION WOULD SURVIVE A MOTION FOR SUMMARY JUDGMENT IS NOT BEFORE THE COURT

Court Should Not Consider Defenses To An Action On A Motion To Dismiss, Whether The Action Would Survive A Motion For Summary Judgment Is Not Before The Court

The Second Department, reversing Supreme Court, determined plaintiff stated causes of action for sexual harassment and retaliatory firing. The Second Department noted that Supreme Court erred by relying on defenses to action, which are relevant only to a summary judgment motion, not a motion to dismiss. The Second Department further explained how a motion to dismiss is to be handled when (as here) documentary evidence is submitted in opposition:

> The court erred in determining that the subject cause of action must be dismissed because the plaintiff failed to show that the behavior of her supervisor constituted more than a petty slight or trivial inconvenience. The plaintiff does not have this burden. Rather, a contention that the behavior was a petty slight or trivial inconvenience constitutes an affirmative defense ... , which should be raised in the defendants' answer, and does not lend itself to a pre-answer motion to dismiss ... . A motion to dismiss merely addresses the adequacy of the pleading, and does not reach the substantive merits of a party's cause of action. "Therefore, whether the pleading will later survive a

motion for summary judgment, or whether the party will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss" ... . * * *

"When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion has not been converted to one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one, and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" .. . **Kaplan v New York City Dept. of Health & Mental Hygiene, 2016 NY Slip Op 06063, 2nd Dept 9-21-16**