At an I.A.S. Trial Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 31st day of October 2024.

PRESENT:

Hon. Carolyn E. Wade, J.S.C.

----------x

BORIS ALEX CABANILLA CHACHO,

Index No.: 535635/2023

Plaintiff,

-against-

ORDER

WILLIAM JAMES CUDNEY, ELIZABETH ZEHE, GABRIEL HARTMAN STEIN, ARIEL CELESTE AZOFF, and CO ADAPTIVE BUILDING LLC,

Defendants.

----------x

The following e-filed documents, listed by NYSCEF document numbers (Motion Seq. No. 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31 and 32 were read on this motion to dismiss.

Upon the foregoing papers, and after oral argument, Defendants William James Cudney, Elizabeth Zehe, Gabriel Hartman Stein, and Riel Celeste Azoff ("Moving Defendants") move to dismiss Plaintiff, Boris Alex Cabanilla Chacho's ("Plaintiff") Verified Complaint, and all cross-claims asserted by Defendant, Co Adaptive Building LLC ("Co Adaptive"), pursuant to CPLR §§ 3211(a)(1) and (7). In the alternative, Moving Defendants seek to extend their time to file their Answer to the Complaint.

Plaintiff commenced this action to recover for personal injuries that he allegedly sustained on October 2, 2023 during the course of his work at 142 Quincy Street, Brooklyn, New York (the "Property"). The Verified Complaint neither identifies Plaintiff's employer nor how the alleged

accident occurred. The Moving Defendants own the Property pursuant to a Deed filed with the New York City Register on November 8, 2021. Co-Adaptive is alleged to have been in contract with the Moving Defendants for construction at the Subject Property. This action is currently pre-discovery and no Verified Bill of Particulars have been exchanged.

In support of the motion, Moving Defendants submit affidavits, a Deed, an affidavit from an alleged former property owner, dated April 19, 1940, a Certificate of Occupancy, dated September 30, 1957; a contract between Moving Defendants and Co Adaptive, and a demolition plan. Moving Defendants use these documents to argue that they are exempt from liability under the Labor Law based upon the one and two-family dwelling owner exemption.

A party seeking dismissal on the ground that its defense is founded upon documentary evidence, pursuant to CPLR § 3211(a)(1), has the burden of submitting documentary evidence that must be unambiguous, authentic, and undeniable (*see Phillips v. Taco Bell Corp.*, 152 AD3d 806 [2017]).

The exhibits proffered by Moving Defendants do not utterly refute Plaintiff's factual allegations and do not conclusively establish that the Property is a two-family dwelling exempt from the Labor Law (*see Minchala v. 829 Jefferson, LLC*, 177 AD3d 866 [2019]; *S & J Serv. Ctr., Inc. v. Commerce Comm. Grp., Inc.*, 178 AD3d 657 [2019]; *Kalaj v. 21 Fountain Place, LLC*, 169 AD3d 657 [2019]). Specifically, affidavits are not documentary evidence because their contents can be controverted by other submissions, such as another affidavit (*see Phillips v. Taco Bell Corp.*, 152 AD3d 806 [2017]; *Cives Corp. v. George A. Fuller Co., Inc.*, 97 AD3d 713 [2d Dept 2012]).

The demolition plan is not documentary evidence, as the Court can not interpret the plan without the use of an affidavit, which is not documentary evidence and can not be considered (*see Nancy Zambrano Villamar v. Consolidated Edison Inc.*, Index No. 713783/2022 (Sup Ct, Queens

Cty, October 27, 2023) *citing Fontanett v. John Doe 1*, 73 AD3d 78 [2d Dept 2010]). Furthermore, the demolition plan and the Certificate of Occupancy are contradicted by the 2021 Deed and the New York City Department of Planning's Zoning and Land Use map, which both classify the Property as a three (3) family property, creating an issue of fact. Therefore, under the documents proffered by the Moving Defendants do not conclusively establish that the Property is a two-family property exempt from the Labor Law.

Next, Moving Defendants argue that they did not have any control over the Plaintiff's work at the Property. In support, the Moving Defendants proffer affidavits and the Contract with Co Adaptive. As mentioned, affidavits are not documentary evidence and can not be considered in connection with the instant motion (*see Phillips v. Taco Bell Corp.*, 152 AD3d 806 [2017]). Furthermore, contractual provisions placing sole responsibility on contractors for the means and methods of construction, the safety of their employees, and the adequacy of construction equipment referred are not sufficient to absolve Moving Defendants from strict liability under the Labor Law. "If that were the case, owners and general contractors could evade Section 240(1) liability by simply inserting such language into the contract. This in turn, would vitiate the impact of the statute" (*Silicato v. Skanska USA Civ. Northeast, Inc.*, 58 Misc3d 1229(A) [Sup Ct, N.Y. Cty, March 12, 2018).

The Court also notes that this matter is currently pre-discovery, and nothing is known about the circumstances surrounding Plaintiff's claim. Labor Law § 200 cases fall into two categories (i) cases involving the means and methods in which the work is performed and (ii) those where the injury was a result of dangerous or defective premises conditions (*see Titov v V&M Chelsea Prop., LLC*, 230 AD3d 614, 617-18 [2d Dept 2024]). Without a Verified Bill of Particulars or depositions, it is unknown how Plaintiff's alleged accident took place.

As such, Moving Defendants fail to proffer sufficient documentary evidence to refute their liability under both common law negligence and Labor Law § 200.

Moreover, it is well-settled that where a moving party proffers evidentiary material on a motion, pursuant to CPLR § 3211(a)(7), "the court is required to determine whether the proponent of the pleading has a cause of action, not whether she has stated one" (*see Sweeney v. Sweeney*, 71 AD3d 989, 991 [2d Dept 2010], *quoting Meyer v. Giunta*, 262 AD2d 463, 464 [2d Dept 1999]); *Zurich Depository Corp. v. Iron Mountain Information Management, Inc.*, 61 AD3d 750, 751 [2d Dept 2009]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*see EBC I v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

In the instant case, this Court finds that the Complaint, on its face, states a cause of action against the Moving Defendants at this early stage of litigation.

ORDERED that the Moving Defendants' Motion to Dismiss Plaintiff's Complaint, pursuant to CPLR §§ 3211(a)(1) and (7), and all cross-claims asserted by Co-Adaptive, is **denied**.

ORDERED that the Moving Defendants shall serve and file their Answer within thirty (30) days of Notice of Entry of this Order.

This constitutes the Decision and Order of the Court.

ENTER

Hon. Carolyn E. Wade, J.S.C.

HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT