

SUA SPONTE ORDER

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 22

KNITWORK ACQUISITION LLC,
Plaintiff,

-against-

VERIZON NEW YORK INC. and VERIZON
NY INC.,
Defendants.

Index No. 26323/07

Motion
Date February 13, 2008

Motion
Cal. No. 11

Motion
Seq. No. S001

The Court, **sua sponte**, recalls its decision and order dated April 18, 2008 and issues the following decision and order in its place.

The following papers numbered 1 to 14 read on this motion by defendants to dismiss the plaintiff's complaint pursuant to CPLR 3211(a)(1), (5) and (7).

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-5
Defendants' Memorandum of Law.....	6-7
Affirmation in Opposition.....	8-10
Reply Affirmation.....	11-13
Defendants' Memorandum of Law.....	14

Upon the foregoing papers it is ordered that this motion is determined as follows:

Plaintiff commenced this action seeking, *inter alia*, equitable relief and money damages for defendants' failure to pay for use and occupancy and to satisfy its environmental clean-up/indemnification obligation under a lease. Defendants now move to dismiss the complaint.

A. CPLR 3211 (a) (1)

That branch of defendants' motion to dismiss plaintiff's cause of action pursuant to CPLR 3211(a) (1) is denied.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence ***." In order to prevail on a CPLR 3211(a) (1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***." (*Fernandez v Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v Webster Town Center Partnership*, 221 AD2d 248.)

Defendants do not specifically state the grounds under CPLR 3211(a) (1) they are moving. However, to the extent the motion is based upon, plaintiff's third, seventh and ninth causes of action which are grounded in the Fourth Amendment of a written Lease agreement, this documentary evidence is insufficient to dispose of these causes of action. The documentary evidence that forms the basis of a 3211(a) (1) motion must resolve all factual issues and completely dispose of the claim (*Held v Kaufman* 91 NY2d 425 [1998]; *Teitler v Max J. Pollack & Sons*, 288 AD2d 302 [2001]). Here, the lease agreement is insufficient to dispose of the causes of action.

B. CPLR 3211 (a) (5)

That branch of defendants' motion to dismiss plaintiff's causes of action pursuant to CPLR 3211(a) (5) is denied.

"When the complaint states several causes of action, the movant must address a CPLR 3211(a) motion to the specific cause of action objected to." (See, McKinney's Consolidated Laws of New York Annotated Commentary C3211:26; see also, *Smith v. A.A. Truck Renting Corp.*, 13 AD2d 1035 [2d Dept 1961]). Here, defendants have failed to clearly specify the specific causes of action they seek dismissal pursuant to CPLR 3211(a) (5). However, to the extent the motion is based upon plaintiff's first, second, third, fourth, fifth, ninth and tenth causes of action which are grounded in the "release" language of the Fourth Amendment of the Lease, the motion is denied. Issues of parties' intent with respect to meaning "release" language in the Fourth Amendment signed by the parties cannot be resolved on motion to dismiss at this stage of the action, as the "release" does not conclusively

appear from the motion papers that plaintiff's claims have been released (*Doldan v. Fenner*, 309 AD2d 1274 [4th Dept 2003]).

C. CPLR 3211(a) (7)

That branch of the motion which is for an order pursuant to CPLR 3211(a) (7) dismissing the complaint against defendant Verizon for failure to state a cause of action is decided as follows: "It is well-settled that on a motion to dismiss a complaint 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 alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ***." (*Jacobs v Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v Martinez*, 84 NY2d 83). The court does not determine the merits of a cause of action on a CPLR 3211(a) (7) motion (see, *Stukuls v State of New York*, 42 NY2d 272 [1977]; *Jacobs v Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a) (7) motion for the purpose of determining whether there is evidentiary support for the pleading (see *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a) (7) motion for the limited purpose of correcting defects in the complaint (see *Rovello v Orofino Realty Co., Inc.*, *supra*; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159). In determining a motion brought pursuant to CPLR 3211(a) (7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory." (1455 *Washington Ave. Assocs. v Rose & Kiernan*, *supra*, 770-771).

Applying these principles in this case, the court decides as follows:

- (1) That branch of the motion for an order pursuant to CPLR 3211(a) (7) dismissing the first cause of action is denied, as the complaint adequately states a cause of action for negligence.
- (2) That branch of the motion for an order pursuant to CPLR 3211(a) (7) dismissing the second cause of action is

denied, as the complaint adequately states a cause of action for nuisance.

- (3) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the third cause of action is denied, as the complaint adequately states a cause of action for trespass.
- (4) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the fourth cause of action is denied, as the complaint adequately states a cause of action under the Navigation Law.
- (5) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the fifth cause of action is granted, as this cause of action fails to state a claim for which relief may be granted.
- (6) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the sixth cause of action is denied, as the complaint adequately states a cause of action for indemnification.
- (7) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the ninth cause of action is denied, as the complaint adequately states a cause of action for breach of contract and specific performance.
- (8) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the tenth cause of action is denied, as the complaint adequately states a cause of action for a declaratory judgment.
- (9) That branch of the motion for an order pursuant to CPLR 3211(a)(7) dismissing the eleventh cause of action is denied, as the complaint adequately states a cause of action for injunctive relief.

Defendants have improperly sought to reach the merits of the complaint on this mere CPLR 3211(a)(7) motion (see *Stukuls v State of New York, supra; Jacobs v Macy's East Inc., supra*).

Defendants may serve an Answer within twenty (20) days of service of a copy of this Order with Notice of Entry.

The foregoing constitutes the decision and order of this Court.

Dated: April 25, 2008

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Howard G. Lane, J.S.C.

