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Use of Evidence in a Motion Under CPLR 3211(a)(7): A Refresher Course

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An examination of relevant case law regarding these rules suggests that CPLR 3211(a)(7) may actually provide a more flexible vehicle for the use of evidence than CPLR 3211(a)(1).

The rules are familiar to litigators: On a pre-answer motion to dismiss a claim pursuant to CPLR 3211(a)(7) (which permits dismissal where “the pleading fails to state a cause of action”), the factual allegations in the complaint are treated as true and all reasonable inferences are drawn in the plaintiff’s favor. A defendant who moves to dismiss under CPLR 3211(a)(7) generally argues that those allegations provide no legal basis for relief. One who wishes to present evidence on a pre-answer motion usually proceeds instead under CPLR 3211(a)(1), which permits dismissal where “a defense is founded upon documentary evidence.” But an examination of relevant case law regarding these rules suggests that CPLR 3211(a)(7) may actually provide a more flexible vehicle for the use of evidence than CPLR 3211(a)(1).

The Court of Appeals opened this door in *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635-36 (1976), explaining that, because a plaintiff seeking to avoid dismissal under CPLR 3211(a)(7) may “freely” use affidavits “to preserve inartfully pleaded, but potentially meritorious, claims,” “there may be instances” where the plaintiff’s submission has the opposite of its intended effect and “conclusively establish[es] that he has no cause of action.” By the same token, the court observed, if “affidavits submitted by the defendant . . . establish conclusively that the plaintiff has no cause of action,” dismissal may be appropriate—without converting the motion to one for summary judgment under CPLR 3211(c). *Id.* at 636.

Although CPLR 3211(a)(1) speaks of evidence and CPLR 3211(a)(7) does not, practice under CPLR 3211(a)(7) since *Rovello* has developed to the point where that rule, ordinarily thought of primarily as a means to challenge a pleading on its face, may permit dismissal in a wider range of evidentiary circumstances than CPLR 3211(a)(1).

The Scope of Permissible Evidence

First a word about CPLR 3211(a)(1). That rule permits a pre-answer motion to dismiss based on “evidence,” provided that it is “documentary.” The parameters are strictly limited. “[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,” are permitted. *Ajaka v. Mount Sinai Hosp.*, 189 A.D.3d 963, 965 (2d Dept. 2020) (internal quotations omitted); *accord Binn v. Muchnick, Golieb & Golieb, P.C.*, 2019 WL 1091258, *8 (Sup. Ct. N.Y. Co.

March 7, 2019) (emails in which plaintiffs were advised of the terms of certain transactions properly considered as documentary evidence where plaintiffs' claim rested on assertion that they were never so advised), *aff'd*, 180 A.D.3d 598 (1st Dept. 2020). But other kinds of material—including affidavits that do more than authenticate the documentary evidence—are off limits. *Ajaka*, 189 A.D.3d at 965.

In *Doe v. Intercontinental Hotels Group, PLC*, 193 A.D.3d 410 (1st Dept. 2021), the First Department suggested that CPLR 3211(a)(7) permits consideration of virtually any evidence that would be permissible under CPLR 3211(a)(1). The court found the defendant's CPLR 3211(a)(1) motion untimely because it had already answered the complaint without preserving its rights. 193 A.D.3d at 410. But the court went on to note that "admissible documentary evidence ... could nevertheless have been considered in support of that branch of [the] motion" that sought dismissal under CPLR 3211(a)(7). *Id.* The court ultimately held that the motion should have been denied based on defects in the evidence itself, which was not properly authenticated. *Id.* at 411. Its analysis suggests, however, that CPLR 3211(a)(7) may be flexible enough to encompass any evidence-based argument that could be made in a motion under CPLR 3211(a)(1). *Accord Liberty Affordable Housing. v. Maple Court Apts.*, 125 A.D.3d 85, 92-93 (4th Dept. 2015) (affirming dismissal of complaint based on documentary evidence submitted on a motion under CPLR 3211(a)(7)).

On the other hand, types of evidentiary material that are generally not permissible on a CPLR 3211(a)(1) motion are often considered on motions under CPLR 3211(a)(7). These include letters (*M&B Joint Venture v. Laurus Master Fund, Ltd.*, 12 N.Y.3d 798, 800 (2009)), unexecuted documents (*id.*), prior testimony (*Cordell Marble Falls v. Kelly*, 191 A.D.3d 760 (2d Dept. 2021)), drafts (*Pinnacle Realty of New York v. 255 Butler*, 125 A.D.3d 952, 953 (2d Dept. 2015)), and factual affidavits (*Jeanty v. State*, 175 A.D.3d 1073, 1073-74 (4th Dept. 2019), *lv. denied*, 34 N.Y.3d 912 (2020)).

The result is that, even though on its face CPLR 3211(a)(1) is specifically about evidence and CPLR 3211(a)(7) is not, CPLR 3211(a)(7) may in some instances permit more kinds of evidence than CPLR 3211(a)(1) does. But there is an important limiting principle: The evidence must be beyond "significant dispute" and must negate "the essential facts ... beyond substantial question." *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977); *accord Miglino v. Bally Total Fitness of Greater NY*, 20 N.Y.3d 342, 351 (2013) (motion properly denied where affidavits simply take factual issue with well-pleaded allegations).

Meeting the Criteria

When can a defendant obtain a pre-answer dismissal based on such evidence? Courts repeatedly caution that it is rare: "consideration of such evidentiary materials will almost never warrant dismissal under CPLR 3211(a)(7)." *Francisco v. Kiara Foods*, 197 A.D.3d 563 (2d Dept. 2021)

(collecting cases). But, as the discussion above demonstrates, such dismissals do occur in practice despite these pronouncements.

A recent decision in *Lincon-Rubio v. COA 200 E 34th LLC*, 2021 WL 4427368 (Sup. Ct. Kings Co. Sept. 26, 2021), provides useful guidance. The plaintiff, who was injured at a construction site on Dec. 2, 2020, sued the site's owner and several contractors. Two of those contractors moved to dismiss the claims against them pursuant to CPLR 3211(a)(7). The first (Moncon) maintained that "it did not own, operate, manage, control or supervise the accident location, which it asserts was on the 2nd floor of the construction site, and that it did not have any actual or constructive notice of a dangerous or defective condition thereat." 2021 WL 4427368, *3. In support of this assertion, Moncon submitted the affidavit of its site manager attesting that it did not have any operations or equipment on the second floor of the site at the time of the accident, together with records showing its work schedules. *Id.* But while this material may have proven that Moncon had no operations or equipment on the second floor, it did not show that the second floor was where the accident occurred. As to that, Moncon's evidence—an "NYC Department of Buildings Complaint allegedly prepared as a result of this accident"—was hearsay. *Id.* Since the complaint itself did not specify where the accident occurred, Moncon's proof that it could not have been responsible for an accident on the second floor did not conclusively establish that the plaintiff had no claim against it. *Id.* Moncon's motion was therefore denied.

In contrast, the second contractor (Celtic) submitted an affidavit from its president stating that it had been retained to perform asbestos abatement and demolition work on the site, had completed that work by Nov. 28, 2018, and had not performed any further work at the site since that time. *Id.* It also submitted its contract with the owner, and other documentation demonstrating that it had received final payment and issued a "final unconditional lien waiver" by Dec. 11, 2019. *Id.* Since this evidence demonstrated that Celtic "never owned the site and that it completed its work there more than two years before this alleged accident," it could not be liable on any of the claims the plaintiff had asserted. *Id.* Celtic's motion was therefore granted.

Lincon-Rubio illustrates a key difference between a successful evidentiary motion and an unsuccessful one. Both Moncon and Celtic presented incontrovertible proof of certain facts. Moncon lost, however, because its proof fell short on one of its key elements: a factual assertion about the location of the accident, which was neither alleged in the complaint nor proven with admissible evidence. In contrast, Celtic won because all of the facts necessary to absolve it of liability were either proven with admissible evidence or alleged in the complaint.

Lessons and Cautions

There are lessons and cautions here for both plaintiffs and defendants. For plaintiffs, it is risky to rely on the courts' oft-repeated assurance that pre-answer dismissals are rare. A plaintiff faced with evidence on a CPLR 3211(a) motion should seriously consider responding with evidence—

or at least with a cogent argument that he or she needs discovery in order to respond. See CPLR 3211(d). For defendants, although a CPLR 3211(a) motion is generally not the time to litigate the plaintiff's claims on the merits, evidence that negates essential elements of those claims is fair game—and if that evidence is truly conclusive, it may not have to be strictly “documentary.”

A defendant's best course will almost always be to move under both rules in order to obtain as much room for evidence as possible. But under either rule, it is crucial to make sure that the evidence is properly authenticated and otherwise meets all applicable criteria for admissibility. Otherwise (under either rule), the motion will fail.

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