

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

CHRISTINA OLIVA,

Plaintiff,

- against -

JENNIFER L. LIEBER, RAFAEL M. LIEBER
and CLAUDIA LIEBER,

Defendants.

TRIAL / IAS PART 30
NASSAU COUNTY

Index No. 20804/10

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	<u>4</u>
Defendant's / Respondent's	<u>5</u>

The defendants move pursuant to CPLR 3211 (a) (1) and (7) to dismiss the second, third, fourth and fifth causes of action in the verified complaint against the defendants Rafael Lieber and Jennifer Lieber, and the entire verified complaint against the defendant Claudia Lieber. The defense seek statutory accelerated judgment on the basis of a defense founded upon documentary evidence. The defense also contends the verified complaint fails to state a cause of action in the second, third, fourth and fifth causes of action against the defendants Rafael Lieber and Jennifer Lieber, and the total verified complaint against the defendant Claudia Lieber. This motion is supported by sworn

statements and other papers, including a legal memorandum regarding the underlying matter.

The plaintiff opposes this motion with a sworn statement and other papers, including a legal memorandum regarding the underlying matter. The plaintiff contends the verified complaint properly pleads defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, intentional interference with a business relationship and *prime facie* tort.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. The Second Department stated:

In considering a motion to dismiss pursuant to CPLR 3211, the court must afford the complaint a liberal construction and “determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus” (*EBCI, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 832 N.E.2d 26). Contrary to the defendants’ contentions on appeal, the allegations of the complaint are sufficient to state a viable cause of action sounding in breach of fiduciary duty. Furthermore, “CPLR 3211 allows plaintiff to submit affidavits, but it does not oblige him to do so on penalty of dismissal ... [U]nless the motion to dismiss is converted by the court to a motion for summary judgment, he will not be penalized because he has not made an evidentiary showing in support of his complaint” (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635, 389 N.Y.S.2d 314, 357 N.E.2d 970)

Reiver v. Burkhardt Wexler & Hirschberg, LLP, 73 A.D.3d 1149, 1150, 901 N.Y.S.2d 690 [2nd Dept, 2010].

The Second Department held:

A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the “documentary evidence resolves all factual issues as a matter of law,

and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs. v. Fimat Futures USA*, 290 A.D.2d 383, 383, 737 N.Y.S.2d 40; *see Leon v. Martinez*, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511; *Martin v. New York Hosp. Med. Ctr. of Queens*, 34 A.D.3d 650, 826 N.Y.S.2d 85; *Berger v. Temple Beth-El of Great Neck*, 303 A.D.2d 346, 347, 756 N.Y.S.2d 94)

Fontanetta v. Doe, 73 A.D.3d 78, 83-84, 898 N.Y.S.2d 569 [2nd Dept, 2010].

The Second Department explained:

In order for evidence to qualify as "documentary," it must be unambiguous, authentic, and undeniable (*Fontanetta v. John Doe I*, 73 A.D.3d 78, 84-86, 898 N.Y.S.2d 569). Neither affidavits, deposition testimony, nor letters are considered "documentary evidence" within the intendment of CPLR 3211(a)(1) (*see Suchmacher v. Manana Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686; *Fontanetta v. John Doe I*, 73 A.D.3d at 85-87, 898 N.Y.S.2d 569)

Granada Condominium III Ass'n v. Palomino, 78 A.D.3d 996, 996-997, 913 N.Y.S.2d 668 [2nd Dept, 2010].

This Court determines the material submitted by these defendants, does not constitute "documentary evidence" within the meaning of CPLR 3211(a)(1), and failed to utterly refute the plaintiff's allegations and conclusively establish a defense as a matter of law (*see Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., et al.*, 10 A.D.3d 267, 780 N.Y.S.2d 593 [1st Dept, 2004]. E-mails are not the types of documents contemplated when this provision was enacted (*Fontanetta v. Doe*, 73 A.D.3d, *supra*, at 85).

The Second Department articulated:

"On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Breytman v. Olinville Realty, LLC*, 54 AD3d 703, 703-704; *see Leon v. Martinez*, 84 N.Y.2d 83, 87). Where evidentiary material is submitted and considered on a motion to dismiss a complaint 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 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 (see *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 274-275; *Fishberger v. Voss*, 51 AD3d 627, 628)

Rietschel v. Maimonides Medical Center, --- N.Y.S.2d ----, 2011 WL 1441541 [2nd Dept, 2011].

This Court determines the fact Rafael Lieber and the plaintiff engaged in a relationship prior to the alleged communications among the parties does not warrant dismissal of the complaint (*Rietschel v. Maimonides Medical Center, supra*). This Court finds, contrary to the defense contentions, none of the defendants are entitled to dismissal of the verified complaint pursuant to CPLR 3211(a) (7).

Accordingly, the motion is denied.

So ordered.

Dated: April 21, 2011

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION

ENTERED

APR 25 2011

MASSAU COUNTY
CLERK'S OFFICE