

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

KEVIN PETERS,

Plaintiff,

– against –

THE CITY OF NEW YORK, 166 NORTHERN  
REALTY CORP. and ICM GLOBAL DESIGN, INC.,

Defendants.

Index No. 704967/2021

**MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS**

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**PRELIMINARY STATEMENT**

Defendant, 166 Northern Realty Corp. (“166 Northern”), respectfully submits this memorandum of law, together with the accompanying affidavit of Holman Lam (the “Lam affidavit”) sworn to on April 23, 2022 and the attached exhibit in opposition to the motion (the “Motion”) of defendant, ICM Global Design, Inc. (“ICM”) which seeks an order, pursuant to CPLR §3211(a)(1) and §3211(a)(7) dismissing plaintiff’s complaint and defendants’ crossclaims asserted against ICM or, alternatively, converting the Motion to a summary judgment motion pursuant to CPLR §3211(c) and §3212(c) and granting summary judgment dismissing the case against ICM.

**SUMMARY OF ARGUMENT**

Whether the court considers the Motion as a motion to dismiss or as a summary judgment motion it must be denied. CPLR § 3211(a)(1) provides that a party may move for a judgment dismissing a claim based upon documentary evidence. To prevail, the documentary evidence submitted must be such that it resolves all factual issues as a matter of law and conclusively and definitively disposes of the claims. ICM does not submit any documentary evidence in support of its motion that would support dismissal of plaintiff’s claims or defendants’ crossclaims. ICM submits nothing more than the pleadings, e-mails sent to counsel, a photograph of the purported accident site, a proposed stipulation which the parties did not sign and an affidavit of Sam Yung (the “Yung affidavit”), president of ICM. The Yung affidavit is not documentary evidence which may be considered in support of a motion to dismiss under CPLR §3211. The documents referred to in the Yung affidavit, including a contract and work permit, are not attached as exhibits and ICM does not submit them in support of the Motion. Since ICM does not submit documentary evidence which supports the Motion, ICM’s motion to dismiss based on documentary evidence must be denied.

CPLR § 3211(a)(7) provides that a claim may be dismissed if the pleading fails to state a cause of action. In considering such a motion, the Court is required to construe the pleadings liberally, take the allegations as true, and give the plaintiff, and in this case the crossclaiming defendants, the benefit of every possible favorable inference. Applying this standard, the Motion must be denied with respect to the crossclaim asserted by 166 Northern.

ICM requests alternatively that the court consider the Motion as a summary judgment motion under CPLR §3211(c) and §3212(c). Under that standard the Motion must be denied because the Lam affidavit and the attached exhibit, the contract between 166 Northern and ICM, omitted from the Yung affidavit, shows that exterior work including sidewalks, pedestrian walkways, excavation and a parking lot were within ICM's scope of work. If ICM did not perform that work, as stated in the Yung affidavit, it may be liable on the crossclaim of 166 Northern, if plaintiff is able to prove any defective condition of the subject sidewalk, which defendants deny. Further, the Lam affidavit shows that ICM hired subcontractors which performed sidewalk work. Accordingly, whether the court considers the Motion as a motion to dismiss or as a summary judgment motion it must be denied.

#### **STATEMENT OF FACTS**

On or around February 9, 2018, 166 Northern and ICM, as general contractor, entered into a contract (the "Contract") for ICM to perform certain interior and exterior construction work at and around the subject premises. Lam affidavit ¶ 3 The Contract is annexed to the Lam affidavit as exhibit A. Pursuant to the Contract, ICM was the contractor hired to complete exterior work including a parking lot and sidewalks at the subject premises. Plaintiff alleges that on September 28, 2020 he fell and sustained personal injuries on a sidewalk abutting the premises, due to a defective condition of the sidewalk. 166 Northern denies plaintiff's claims and asserts a crossclaim for indemnification against ICM for any damages plaintiff is able to prove.

The Yung affidavit (§7) states that “on or about February 9, 2018 ICM, as General Contractor entered into a contract agreement with (166 Northern)” for a construction project at the subject premises. The Yung affidavit states that ICM performed only interior work at the premises and “no work was done on the sidewalk” (§ 11); “ICM never altered. . . the sidewalk at the subject premises” (§12), and “ICM did not . . .repair, maintain . . and/or work in or around the sidewalk at any time” (§16). But the Contract is not attached to the Yung affidavit.

The Yung affidavit states that ICM performed only interior work at the subject premises. However, ICM’s scope of work set forth in the Contract is not limited to interior work and includes the following exterior work: Demolition, Excavation, Masonry, Plumbing Interior/Exterior, **Pedestrian Sidewalk** (emphasis added), and **Parking lot and store front walkway** (emphasis added).

If the court considers the Motion as a motion to dismiss, it must be denied because ICM does not submit documentary evidence to support the Motion, omitting the Contract and the permit referred to in the Yung affidavit. If the court considers the Motion as a summary judgment motion, the Lam affidavit and the Contract demonstrate an issue of fact which precludes granting summary judgment with respect to the crossclaim asserted by 166 Northern, since ICM’s scope of work did in fact include work on the exterior of the subject premises including the sidewalk, under the Contract. And ICM hired subcontractors which performed sidewalk work. Accordingly, if plaintiff is able to prove any defect in the subject sidewalk, which defendants deny, it would fall within ICM’s scope of work under the Contract. Since sidewalks, pedestrian walkways, demolition, a parking lot and other exterior work are within ICM’s scope of work under the Contract, and the Yung affidavit states that ICM did not perform the work, issues of fact exist with respect to whether ICM, or its subcontractors, were responsible for any defective condition of the sidewalk plaintiff

is able to prove. Therefore, whether the court considers the Motion as a motion to dismiss or as a summary judgment motion it must be denied.

## ARGUMENT

### I

#### THE MOTION TO DISMISS PURSUANT TO CPLR § 3211 MUST BE DENIED

The Motion seeks the dismissal of plaintiff's complaint and defendants' crossclaims pursuant to CPLR § 3211(a)(1) and (7).

##### A. The Motion pursuant to CPLR § 3211(a)(1) must be denied.

CPLR § 3211(a)(1) provides for the dismissal of a complaint where a defense is founded upon documentary evidence. The documentary evidence must resolve all factual issues and conclusively establish defenses to the asserted claims as a matter of law. *AG Cap. Funding Partners, L.P. v. State Street Bank & Trust Co.*, 5 N.Y.3d 582, 590-91 (2005); *Fontanetta v. Doe*, 73 A.D. 3d 78 (2<sup>nd</sup> Dept. 2010); *Granada Condominium III Ass'n v. Palomino*, 78 A.D.3d 996 (2<sup>nd</sup> Dept. 2010) To qualify as "documentary" the evidence relied upon must be unambiguous and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, and contracts. *Fontanetta* 78 A.D. 78 The Yung affidavit does not constitute documentary evidence for purposes of a motion to dismiss. *Johnson v Asberry*, 190 A.D.3d 491, 492 (1<sup>st</sup> Dept. 2021) ("Affidavits are not documentary evidence and are not appropriate proof on a CPLR 3211(a)(1) motion to dismiss"); *Phillips v. Taco Bell Corp., et al.*, 152 A.D.3d 806, 60 N.Y.S.3d 67 (2<sup>nd</sup> Dept. 2017). (an affidavit is not documentary evidence); *Jefferson, LLC v. Clano Concrete Insurance Corp.*, 177 A.D.3d 866 (2<sup>nd</sup> Dept. 2019). (affidavits, deposition testimony and letters are not considered documentary evidence within the intent of CPLR § 3211(a)(1)). Absent conversion of the motion to a motion for summary judgment, affidavits are not to be examined to determine whether there is evidentiary support for a pleading. *Rovello v.*



*Orofino*, 40 N.Y.2d 633, 636 (1976); *Pace v. Perk*, 81 A.D. 2d 444, 449-450 (2<sup>nd</sup> Dept. 1981)

The Yung affidavit refers to a contract agreement dated February 9, 2018 between ICM and 166 Northern (Yung affidavit ¶7) and a work permit issued by the NYC Department of Buildings (Yung affidavit ¶8). But ICM does not submit these documents in support of the Motion. Neither the Court nor the parties can evaluate the merits of a motion seeking to dismiss a complaint based upon documentary evidence where the documentary evidence is not presented. Accordingly, the Motion must be denied. *Phillips v. Taco Bell Corp., et al.*, supra; *Granada Condominium III Ass'n v. Palomino*, 78 A.D.3d at 996

**B. The Motion pursuant to CPLR § 3211(a)(7) must be denied.**

On a motion to dismiss for failure to state a cause of action under CPLR § 3211(a)(7), the court is required to “afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference. *Lawrence v. Miller*, 11 N.Y.3d 588, 595 (2008); *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994) The court’s role on such a motion is limited to determining whether the facts as alleged fit within any cognizable legal theory and not whether there is evidentiary support to establish a meritorious case of action. *Xia-Ping Wang v. Diamond Hill Realty, LLC*, 116 A.D.3d 767, 768 (2<sup>nd</sup> Dept. 2014); “So liberal is the standard under these provisions that the test is ‘simply’ whether the proponent of the pleading has a cause of action, ‘not even’ whether he has stated one.” *Weiner v. Lazard Freres & Co.*, 241 A.D.2d 114, 120 (1<sup>st</sup> Dept. 1998).

Moreover, the court may consider only certain evidence outside the four corners of the complaint on a motion to dismiss and then only for “limited purposes[s].” Such evidence will support dismissal only in rare cases where the documentary evidence “establish[es] conclusively that plaintiff has no cause of action.” Affidavits submitted by a defendant will almost never warrant

dismissal under CPLR §3211(a)(7). *Rovello v. Orofino*, 40 N.Y.2d at 636; *Xia-Ping Wang v. Diamond Hill Realty, LLC* at 116 A.D.3d at 768.

In the present case 166 Northern states a crossclaim against ICM for common-law indemnification. The crossclaim alleges:

Any injuries plaintiff sustained resulted completely from the wrongdoing and the breach of duties of care of defendants The City of New York and ICM Global Design, Inc. Defendant 166 Northern Realty Corp., committed no wrong and breached no duty of care with respect to the accident alleged in the Complaint. As such, defendants The City of New York and ICM Global Design, Inc., owe a common law duty of indemnification in favor of 166 Northern Realty Corp., for all damages.

The basis for the crossclaim is ICM's duty under the Contract, defined in the scope of work to include sidewalks, pedestrian walkways, excavation and other exterior work and breach of duties of care of ICM in favor of 166 Northern with respect to the alleged accident. It alleges that if plaintiff sustained a any injuries due to a defective condition as alleged, which defendants deny, they resulted from the wrongdoing and breach of duties of the other defendants.

ICM argues that the Motion should be granted because ICM does not owe a duty to any party. See ICM's memorandum of law submitted in support of the Motion (the "ICM memo"), at 5 through 8. ICM's argument is refuted by the Lam affidavit and the Contract, which ICM omitted from its moving papers. ICM argues that "ICM did not work at, near or about the subject sidewalk, controverting any claim that ICM owed the Plaintiff any duty". ICM memo at 6 But the Lam affidavit and the Contract show that ICM's scope of work at the subject premises did include exterior work, demolition, sidewalks, pedestrian walkways, excavation and other exterior work. And the Yung affidavit admits that ICM did not perform the work.

ICM cites to a litany of cases which generally rule that a contractor cannot be liable in negligence to a non-contracting third-party in the absence of a duty to the non-contracting third-

party. The cases cited by ICM are not controlling with respect to the crossclaim of 166 Northern against ICM because 166 Northern is not a non-contracting third-party seeking to hold ICM liable in tort. 166 Northern's crossclaim seeks indemnification from ICM in the event that plaintiff can prove that any defective condition existed causing the alleged injuries. The basis for the crossclaim is ICM's duty under the Contract, defined in the scope of work to include sidewalks, pedestrian walkways, excavation and other exterior work. "The key element of a cause of action for common-law indemnification is not a duty running from the indemnitor to the injured party, but rather, is a separate duty owed the indemnitee by the indemnitor" *Metadijia Atanasoki v Braha Indus., Inc.*, 124 A.D.3d 705, 706 (2d Dept. 2015) See *Byrd v Hughes*, 188 A.D.3d 975, 978 (2<sup>nd</sup> Dept. 2020) (ruling in a personal injury case that a subcontractor failed to establish entitlement to judgment dismissing defendants' cross claim for common-law indemnification asserted against the subcontractor); *Ginter v Flushing Terrace, LLC*, 121 A.D.3d 840, 844-45 (2<sup>nd</sup> Dept. 2014) (ruling in a personal injury case that the Supreme Court erred in dismissing defendants' crossclaims for common-law indemnification from a subcontractor at the accident site)

## II

### THE MOTION MUST BE DENIED IF CONSIDERED AS A SUMMARY JUDGMENT MOTION

ICM requests alternatively that the court consider the Motion as a summary judgment motion under CPLR §3211(c) and §3212(c). Summary judgment is properly granted where the moving party makes "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); see *Pullman v. Silverman*, 28 N.Y.3d 1060, 1062 (2016). Once that showing has been made, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the

existence of material issues of fact which require a trial of the action.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324.

In the present case ICM fails to meet its initial burden of tendering sufficient evidence in support of the Motion to eliminate any material issues of fact. The Motion must be denied because the Lam affidavit and the attached exhibits, including the contract between 166 Northern and ICM, show that ICM’s scope of work included exterior work at the subject premises and alleged accident location including sidewalks, pedestrian walkways, excavation and a parking lot. Lam affidavit ¶ 5, ex. A Pursuant to the Contract, ICM was the contractor hired to complete exterior work including a parking lot and sidewalks at the subject premises. The Young affidavit admits that ICM did not perform the work. The Yung affidavit states that ICM entered into the Contract with 166 Northern for a construction project at the subject premises, that ICM performed only interior work at the premises and did not work on the sidewalk. But the Contract is not attached to the Yung affidavit. The Lam affidavit and the Contract, annexed as exhibit A, demonstrate that ICM’s scope of work set forth in the Contract is not limited to interior work and includes the following exterior work: Demolition, Excavation, Masonry, Plumbing Interior/Exterior, **Pedestrian Sidewalk** (emphasis added), and **Parking lot and store front walkway** (emphasis added). Moreover, ICM hired contractors which performed sidewalk work. Lam affidavit ¶ 6

If the court considers the Motion as a summary judgment motion, the Lam affidavit and the Contract demonstrate an issue of fact which precludes granting summary judgment with respect to the crossclaim asserted by 166 Northern, since work on the exterior of the subject premises including the sidewalk, is included in ICM’s scope of work under the Contract and ICM admits it did not perform the work. Accordingly, if plaintiff is able to prove any defect in the subject sidewalk which caused the alleged injuries it would fall within ICM’s scope of work under the

Contract. Since sidewalks, pedestrian walkways, demolition, a parking lot and other exterior work are within ICM's scope of work under the Contract, and the Yung affidavit shows that ICM did not perform the work, issues of fact exist with respect to any defective condition of the sidewalk plaintiff is able to prove. Therefore, if the court considers the Motion as a summary judgment motion it must be denied. *Kielty v AJS Const. of L.I., Inc.*, 83 A.D.3d 1004, 1005 (2d Dept. 2011) ("An award of summary judgment on a cause of action for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties"); *Aragundi v Tishman Realty & Const. Co., Inc.*, 68 A.D.3d 1027, 1029-30 (2d Dept. 2009) (reversing a Supreme Court order dismissing the causes of action for common-law indemnification "since an award of summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of fact concerning the degree of fault attributable to the parties"); *Coque v Wildflower Estates Developers, Inc.*, 31 A.D.3d 484, 489 (2d Dept. 2006) ("Summary judgment on a claim for common-law indemnification "is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved")

**CONCLUSION**

166 Northern respectfully requests that the court deny the Motion in its entirety.

Respectfully submitted,

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Dated: White Plains, New York  
May 2, 2022

**CERTIFICATION OF COMPLIANCE WITH UNIFORM RULE 202.8-b**

I, William V. Coleman, an attorney at law licensed to practice in the State of New York, certify that this document contains 3035 words, as calculated by the Microsoft Word processing system, inclusive of point headings and footnotes, and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules and regulations, etc.

*William V. Coleman*  
William V. Coleman