SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ROBERT AUGUSTE,

Plaintiff,

-against-

MTGLQ INVESTORS, L.P., TONNY SAINT PIERRE and ROSELYNE PERARD,

Defendants.

TRIAL/IAS PART 30
NASSAU COUNTY

Index No.: 604569/2020
Motion Seq. No.: 02
Motion Date: 06/03/2021

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits, Memorandum of Law and Statement of Material Facts	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant MTGLQ Investors, L.P. ("MTGLQ") moves, pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing plaintiff's Amended Complaint as against it, and any and all cross claims as against it. Plaintiff opposes the motion.

Plaintiff commenced the instant action with the filing a Summons and Complaint on or about May 25, 2020. *See* Defendant MTGLQ's Affirmation in Support Exhibit A. Plaintiff filed a Supplemental Summons and Amended Complaint on or about September 3, 2020. *See id.* Issue was joined by defendant MTGLQ on or about October 8, 2020. *See id.*

In support of the motion, counsel for defendant MTGLQ asserts, in pertinent part, that, "[t]his action arises from a fire that occurred on June 27, 2018 at 548 North Brookside Avenue,

Freeport, New York 11520 ('the home'). Plaintiff claims that he suffered various injuries related to the fire and from having to jump from his second-floor bedroom to escape the home. The home is a two-story split-level residential house. At the time of the fire, plaintiff was a tenant of co-defendants Tonny Saint Pierre and Roselyn Perard, who were the subjects of ongoing eviction proceedings. Tonny Saint Pierre and Roselyne Perard purchased the home as joint tenants with rights of survivorship on February 28, 1997. The deed was recorded in the Nassau County Clerk's Office on March 31, 1997.... Tonny Saint Pierre and Roselyne Perard granted a mortgage to the home to JPMorgan Chase Bank on August 9, 2002 in consideration for $200,000.00. This mortgage was recorded in the Nassau County Clerk's Office on September 5, 2002.... On March 24, 2015, a judgment of foreclosure and sale was entered for JPMorgan Chase Bank against Tonny Saint Pierre and Roselyne Perard in the Supreme Court of the State of New York, County of Nassau under Index No.: 2969-14. This judgment was recorded in the Nassau County Clerk's Office on March 31, 2015.... MTGLQ purchased the subject home at a foreclosure sale on August 30, 2016 and took title to the home by foreclosure referee's deed dated September 19, 2016. The deed was recorded on May 1, 2017.... After the foreclosure sale, MTGLQ made several attempts to evict the former owners – Tonny Saint Pierre and Roselyne Perard. As these attempts were unavailing, MTGLQ commenced eviction proceedings against the former owners in the District Court of Nassau County, Landlord and Tenant Part, under index number LT004421-17/NA.... An Order to Show Cause with Notice to Vacate was entered in December 2017. By Affidavit dated December 8, 2017, Mr. Saint Pierre requested an extension of time in which to vacate the home.... Mr. Saint Pierre's request was granted thereby allowing Mr. Saint Pierre and Ms. Perard until February 28, 2018 to vacate the home. After Mr. Saint Pierre and Ms. Perard failed to vacate the home by February 28, 2018, a

lockout was scheduled for March 9, 2018.... A second Order to Show Cause and Notice to Vacate was entered in March 2018 and a 60-day extension of the time to vacate was granted.... Thus, eviction proceedings were stayed until May 27, 2018.... On May 30, 2018, Roselyne Perard filed for bankruptcy in the United States Bankruptcy Court, Eastern District of New York (Case No.: 8-18-73646).... Due to these bankruptcy proceedings, the eviction matter involving Ms. Perard and Mr. Saint Pierre was automatically stayed. This stay was still in place when the subject fire occurred. As noted above, it is claimed that the fire in question occurred on June 27, 2018. As a result of the fire, Freeport Fire Department presented to the home at 548 Brookside Avenue North, Freeport, New York on June 27, 2018.... It is noted that the Freeport Fire Department units responded to a report of a house fire at the aforementioned address. Upon arrival, units found a 2.5 story private dwelling with heavy fie (*sic*) showing from the rear of the first floor. Nassau County Fire Marshal (*sic*) was notified and responded to the scene. Indeed, the Nassau County Fire Marshal (*sic*) presented to the scene to conduct an investigation as to the cause and origin of the fire.... After examining all of the rooms of the home, the Fire Marshal (*sic*) determined that the origin of the fire was in the first-floor northeast room. The cause of the fire was 'undetermined'. A couple of weeks later, on July 18, 2018, the Clerk of Court of the United States Bankruptcy Court, Eastern District of New York filed a notice that Ms. Perard's bankruptcy case was dismissed. On August 2, 2018, United States Bankruptcy Judge Robert E. Grossman ordered that the case be closed.... By Warrant of Eviction dated October 2, 2017, the Sheriff of Nassau County was directed to remove Mr. Saint Pierre, Ms. Perard and any other persons from the home.... This warrant was executed on October 15, 2018. This was MTGLQ (*sic*) first opportunity to be in possession of the home, which is clearly

after the date of the alleged fire." *See* Defendant MTGLQ's Affirmation in Support Exhibits C-N.

Counsel for defendant MTGLQ further asserts, in pertinent part, that, "[p]rior to the execution of the warrant on October 15, 2018, MTGLQ owned the home but could not enter the home because the prior tenants still occupied the home. At no time prior to October 15, 2018, and particularly on June 27, 2018, did MTGLQ own any of the furniture, appliances or any other personal items inside the home, including the smoke detectors and power strips. MTGLQ also did not perform or contract performance of any work at the home prior to October 15, 2018.... Prior to October 15, 2018, MTGLQ had not entered into any lease agreement with the prior owners or prior owners' tenants. MTGLQ had no control over the home, its occupants, or personal property located within the home. MTGLQ had no right to enter the property until eviction proceedings were complete in October 2015 (*sic*). Therefore, MTGLQ did not create, and could not have created, an alleged condition relative to the electrical outlets or appliances plugged into the electrical outlets." *See* Defendant MTGLQ's Affirmation in Support Exhibit C.

Counsel for defendant MTGLQ argues, in pertinent part, that, "[g]enerally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition. That duty is premised on the landowner's exercise of control over the property. In this case, MTGLQ was neither the lessor nor lessee of the property, nor did MTGLQ manage, maintain, supervise, inspect, or control the property. MTGLQ was the titleholder of the property by virtue of a referee's deed obtained pursuant to a foreclosure sale. However, because MTGLQ was in the midst of eviction proceedings against the holdover owners, Tonny Saint Pierre and Roselyne Perard, MTGLQ had no control over the home or the furniture, appliances or personal items contained therein. Where a defendant lacks control over a parcel, it cannot be held liable for any

unsafe condition thereon. Particularly, MTGLQ never owned, controlled, or maintained the power strip, extension cord, VCR, television, or stereo equipment that plaintiff alleges caused the subject fire. In fact, MTGLQ never knew or even should have known these items existed because they (*sic*) had no control over the home and could not enter the home as the eviction proceedings against co-defendants were not finalized until after the alleged fire occurred. Where a fire is caused by tenant activity, an out of possession owner will not be held liable. Since MTGLQ did not have the requisite control over the home or items contained therein, there can be no question that MTGLQ is entitled a dismissal of plaintiff's claims against them (*sic*) and any crossclaims that have or could be asserted by co-defendants. Simply put, since MTGLQ owed no duty to the plaintiff, an Order of dismissal is warranted and proper."

In further support of the motion, defendant MTGLQ submits the affidavit of Michael Welborn, an employee of New Rez LLC d/b/a Shellpoint Mortgage Servicing, acting as attorney in fact for defendant MTGLQ. *See* Defendant MTGLQ's Affirmation in Support Exhibit C.

In opposition to the motion, counsel for plaintiff argues, in pertinent part, that, "[d]efendant's motion should be denied in its entirety because: 1) the motion is premature, 2) defendant has failed to establish entitlement to dismissal and 3) questions of fact exist which necessitate denial of this motion. This action arises from a fire which occurred at 548 North Brookside Avenue, Freeport, New York on June 27, 2021. At the time of the fire, plaintiff was a tenant in the home. The fire broke out and plaintiff sustained serious injuries including spinal fractures when he was forced to jump out of a window to flee the smoke and flames. MTGLQ Investors, L.P. was the deed owner of the property on the date of the fire.... Plaintiff is unaware of the relationship between the various defendants in this lawsuit as of the date of the fire or the sequence of purchases, transfers and ownership of the property. As of this date, plaintiff is

neither able to confirm nor deny the facts laid out in the motion papers. Defendant is trying to establish entitlement to dismissal before even a single deposition has been completed. Rather than allowing the litigation process to continue and filing a motion for summary judgment at the close of discovery, defendant files this motion before the dawn of discovery. Clearly, there needs to be complete discovery where all parties are deposed and theories/claims can be examined, fleshed out, proven and disproven before the parties come to a juncture where a grant of summary judgment would be appropriate. This is not a simple undisputed rear-end car crash. Discovery is both necessary and required under the CPLR and the parties have the right to discovery before entities are relieved from liability. A motion should be denied as premature when the evidence required to defend the motion is in the sole control of a party who has yet to be deposed. [citation omitted]. This is especially true when the opposing party has not had a reasonable opportunity for disclosure prior to the filing of the motion. [citation omitted]. No depositions have been held in this case."

Counsel for plaintiff further contends, in pertinent part, that, "[e]ven a cursory reading of plaintiff's complaint makes it clear that defendant's motion should be denied. The allegations in plaintiffs' complaint sounds in negligence under a premises liability theory. Defendant cannot escape the fact that they were the deed owner of the property on the date of the accident. They may have had issues with the prior owner, but they were nonetheless responsible for a dangerous condition existing at the premises. The New York Landlord-Tenant Law requires foreclosing landlords to appoint a receiver whose duties include maintenance of the property. No mention is made in the motion papers about a receiver. Defendant has provided an affidavit in support of their (*sic*) motion, but one cannot cross-examine an affidavit. There are always facts that are missing or are interpreted differently at the time of a deposition. The legal rights and remedies

available to MTGLQ form a foundation, but do not tell the entire story. It is only through depositions that what will learn not only the legal rights of MTGLQ, but the facts as well. Did they (*sic*) hire a receiver to maintain the property? Were there any receiver reports that indicated a potential electrical hazard in the house? Did they exhaust all remedies to make and keep the house in a safe and hazard-free condition?"

In reply to plaintiff's opposition, counsel for defendant MTGLQ asserts, in pertinent part, that, "[i]n response to MTGLQ's statement of material facts, counsel asserts that he can neither confirm nor deny the statement set forth therein. This is interesting considering the allegation from plaintiff himself is that he was residing at the subject home when the subject fire occurred. As such, it seems incredulous that plaintiff can neither confirm nor deny such statement such as where his injuries are alleged to have occurred …, whether the home was a two-story split-level home …, whether the fire marshal appeared at the home because of a fire on June 27, 2018 …, whether an investigation occurred …, the origin of the subject fire … or the ownership of the subject appliances, entertainment equipment and power cord…. Further, while plaintiff asserts that he can neither confirm nor deny the statements made in the material statement of facts, it seems disingenuous that plaintiff can neither confirm nor deny statements pertaining to Tonny Saint Pierre and Roselyne Perard's ownership of the home when those statements are based upon documentary evidence. Indeed, it seems telling that plaintiff – a resident of the subject property when the fire loss occurred – could not even submit an affidavit providing factual evidence sufficient to defeat MTGLQ's motion to dismiss. Instead, counsel relies upon conjecture and hope which, it and of itself, is insufficient to defeat the within motion. In fact, MTGLQ established unequivocally that they were not the owners of the entertainment systems or power cord that is purported to have caused the subject fire. In response, plaintiff submits no evidence

whatsoever to create an issue of fact or otherwise defeat MTGLQ'S motion. As such, the within application should be granted in its entirety."

Counsel for defendant MTGLQ adds, in pertinent part, that, "[t]he documentary evidence in this case consists of, *inter alia*, MTGLQ's referee's deed, the eviction proceedings following MTGLQ's acquisition of the home and the proceedings of Ms. Perard's bankruptcy action. Together this evidence establishes that from the date of MTGLQ's acquisition of the home until October 15, 2018, MTGLQ had no control over the premises, the occupants or the contents therein, and thus did not owe Plaintiff a duty and did not breach any duty that may have been owed. Plaintiff argues that MTGLQ's motion must be denied because he is entitled to every possible favorable inference and the Court must accept each and every allegation as true.... However, the purpose of a motion to dismiss pursuant to CPLR §3211(a)(1) is to indisputably refute factual allegations in a Plaintiff's complaint.... Taken together, the documentary evidence in this case establishes that from the date of MTGLQ's acquisition of the home until October 15, 2018, MTGLQ had no control over the premises, the occupants or the contents therein.... Further, there is no question that MTGLQ did not own or control any of the electronic equipment, entertainment systems or power cord that is alleged to have been overloaded and the cause of the subject fire. Therefore, it is clear that at no point up to and including the date of the fire did MTGLQ ever have any control over the property, the occupants of the home or the contents therein. As such, MTGLQ clearly owed plaintiff no duty as it was not in possession or control of the subject home, occupants or contents therein. Accordingly, plaintiff's claims against MTGLQ must be dismissed."

Counsel for defendant MTGLQ further argues, in pertinent part, that, "[p]laintiff argues in opposition that the underlying motion is premature. In actuality, MTGLQ's motion is timely because it is founded upon documentary evidence, negating the need for any discovery. Plaintiff also asserts, incorrectly, that MTGLQ has failed to establish entitlement to dismissal. However, MTGLQ has, in fact, established its entitlement to a dismissal and it is Plaintiff who has failed to raise a question of fact in opposition to MTGLQ's motion. Therefore, it is respectfully submitted that MTGLQ's motion to dismiss should be granted in full. Plaintiff argues in opposition that MTGLQ's motion must be denied as premature because discovery must be conducted, as MTGLQ is in exclusive possession of evidence required to oppose the motion. In fact, the opposite is true. Indeed, it is *Plaintiff* that is in control of the evidence required to oppose the motion. Plaintiff, as a resident of the subject home, is in a better position to confirm or deny where his injuries occurred, whether the home was a two-story split-level home, whether the fire marshal appeared at the home because of a fire on June 27, 2018, whether an investigation occurred, the origin of the subject fire, or the ownership of the subject appliances and power cord. Plaintiff submits no affidavit as part of his opposition papers.... Even assuming, *arguendo*, that there was evidence in MTGLQ's exclusive control that was essential to justify opposition to the instant motion, Plaintiff has failed to avail himself of the protection of CPLR §3211(d) because he has not submitted a single affidavit to that effect. It does not 'appear from affidavits submitted in opposition' to MTGLQ's motion that such facts or evidence exists. This assertion is only supported by Plaintiff's counsel's conclusory argument which is not based upon facts or evidence. Indeed, counsel has failed to obtain an affidavit from his client that raises any question of whether such facts exist. Such speculation is insufficient to warrant denial of the instant motion. [citations omitted]. The simple fact is that no such evidence exists. Plaintiff states in

opposition that he is 'unaware of the relationship between the various defendants in this lawsuit as of the date of the fire or the sequence of purchases, transfers and ownership of the property.'… All of the evidence regarding such relationships and transactions, however, were submitted by MTGLQ in support of its motion to dismiss. Furthermore, such evidence consists almost entirely of public records readily obtainable by Plaintiff and his attorneys. Such evidence is precisely the kind of evidence upon which a motion pursuant to CPLR §3211(a)(1) must be founded…. The documentary evidence in this case, consisting of the property transfer records, eviction proceeding records, bankruptcy proceeding records, and the eviction warrant, conclusively establish that MTGLQ had no control over the subject property despite being the deed holder. That MTGLQ was engaged in eviction proceedings conclusively establishes that they were not in possession of the home, the occupants thereof and the contents therein. As they had no control over the property and particular the personal items located inside the home that is alleged to have caused the fire, MTGLQ could not have been aware of the subject entertainment system and power cords, let alone be in a position to take action to rectify the alleged fire hazard created by same. Because they had no control, MTGLQ did not owe Plaintiff any duty with respect to the condition of the property and certainly did not breach any duty that may have been owed. Therefore, MTGLQ is entitled to dismissal of Plaintiff's complaint. In opposition to the instant motion, Plaintiff further tries to muddy the waters by arguing that he is entitled to further discovery as to whether MTGLQ appointed a receiver to maintain the property. In so arguing, Plaintiff again fails to cite any statutory authority in asserting that 'New York Landlord-Tenant Law requires foreclosing landlords to appoint a receiver whose duties include maintenance of the property.' … However, this is not a landlord tenant action wherein MTGLQ is looking to foreclose upon the homeowners. Preliminarily, there is no 'New York Landlord-Tenant Law' as

such. Landlord-tenant relationships are governed by the Real Property Actions and Proceedings Law. Furthermore, receivers are appointed by courts to protect property. Although a party involved in a foreclosure proceeding may request appointment of a receiver, only courts have the power to appoint a receiver. [citation omitted]. More importantly, however, MTGLQ was not a party in the prior foreclosure action, so even if such a requirement existed, it would not apply to a buyer in foreclosure such as MTGLQ. After purchasing the property at a foreclosure sale, MTGLQ sought to take possession of the property by bringing eviction proceedings against Tonny St. Pierre and Roselyne Perard. They did so under RPAPL Article 6, which does not require that a party in an eviction proceeding request appointment of a receiver. Therefore, contrary to Plaintiff's claim, there is no requirement that MTGLQ have a receiver appointed for a foreclose and discovery as to same is not needed as it is inapplicable to the fact herein."

CPLR § 3211(a)(1) states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence;..." To obtain dismissal of a complaint pursuant to CPLR § 3211(a)(1), a defendant must submit documentary evidence which "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Lift Ins. Co. of NY.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002) *citing Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). An application predicated upon this section of law will be granted only upon a showing that the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiffs claim." *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010) *quoting Scadura v. Robillard,* 256 A.D.2d 567, 683 N.Y.S.2d 108 (2d Dept. 1998). "[T]o be considered documentary evidence, it must be unambiguous and of undisputed authenticity." *Fontanetta v. John Doe 1*, *supra*, *citing* SIEGEL, PRACTICE

COMMENTARIES; MCKINNEY'S CONSLAWS OF NY, BOOK 7B, CPLR 3211:10 pp. 21-22. "[T]hat is, it must be 'essentially unassailable.'" *Torah v. Dell Equity, LLC*, 90 A.D.3d 746, 935 N.Y.S.2d 33 (2d Dept. 2011) *quoting Schumacher v. Manana Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686 (2d Dept. 2010). However, in order to make such a showing neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR § 3211(a)(1). *See Granada Condominium III Ass'n v. Palomino*, 78 A.D.3d 996, 913 N.Y.S.2d 668 (2d Dept. 2010).

A complaint may be dismissed pursuant to CPLR § 3211(a)(1), based on documentary evidence, only if the factual allegations are definitively contradicted by the evidence or a defense is conclusively established. *See Yew Prospect v. Szulman*, 305 A.D.2d 588, 759 N.Y.S.2d 357 (2d Dept. 2003). A motion to dismiss based on documentary evidence may be granted only where such documentary evidence utterly refutes the plaintiff's factual allegations, resolves all factual issues as a matter of law and conclusively disposes of the claims at issue. *See Yue Fung USA Enters., Inc. v. Novelty Crystal Corp.*, 105 A.D.3d 840, 963 N.Y.S.2d 678 (2d Dept. 2013). In sum, the analysis is two-pronged - the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

An owner of property has a duty to maintain the property in a reasonably safe condition. *See Kellman v. 45 Tieman Assoc.*, 87 N.Y.2d 871, 638 N.Y.S.2d 937 (1995); *Basso v. Miller*, 40 N.Y.2d 233, 386 N.Y.S.2d 564 (1976); *Kruger v. Donzelli Realty Corp.*, 111 A.D.3d 897, 975 N.Y.S.2d 689 (2d Dept. 2013).

It is well settled that liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property. Where none of the factors are present, a party cannot be held liable for injuries caused by a dangerous or

defective condition on said property. *See O'Toole v. Vollmer*, 130 A.D.3d 597, 13 N.Y.S.3d 213 (2d Dept. 2015); *Suero-Sosa v. Cardona*, 112 A.D.3d 706, 977 N.Y.S.2d 61 (2d Dept. 2013); *Sanchez v. 1710 Broadway Inc.*, 79 A.D.3d 845, 915 N.Y.S.2d 272 (2d Dept. 2010).

The Court finds that the documentary evidence submitted by defendant MTGLQ in its moving papers resolves all factual issues as a matter of law and conclusively disposes of the claims at issue in the Complaint. *See* Defendant MTGLQ's Affirmation in Support Exhibits C-J and M-N.

"In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), '"the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory."' *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) *quoting Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) *quoting Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiff can succeed on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiff can ultimately establish the truth of the allegations. *See 219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the complaint gives sufficient notice of

the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). "In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon v. Martinez*, *supra* at 88.

When viewing plaintiff's Amended Complaint in light of the criteria set forth above, the Court finds that plaintiff cannot succeed on any reasonable view of facts stated.

Moreover, the Court finds that the motion was not premature, since plaintiff, himself, failed to offer an evidentiary basis to suggest that the discovery may lead to relevant evidence. Counsel for plaintiff's "hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery [is] an insufficient basis for denying the motion." *Conte v. Frelen Assoc., LLC*, 51 A.D.3d 620, 858 N.Y.S.2d 258 (2d Dept. 2008). *See also Lopez v. WS Distrib., Inc.*, 34 A.D.3d 759, 825 N.Y.S.2d 516 (2d Dept. 2006).

Therefore, based upon all of the above, defendant MTGLQ's motion, pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing plaintiff's Amended Complaint as against it, and any and all cross claims as against it, is hereby **GRANTED**.

The remaining parties shall participate in a Certification Conference, with IAS Part 30, Nassau County Supreme Court, on **November 23, 2021, at 10:00 a.m**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
November 18, 2021

ENTERED
Nov 22 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE