

<b>Mahtani v 96th St. Lofts LLC</b>
2022 NY Slip Op 33134(U)
September 19, 2022
Supreme Court, New York County
Docket Number: Index No. 158613/2021
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

*Justice*

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INDEX NO. 158613/2021

KARINA LAXMI MAHTANI,

Plaintiff,

MOTION SEQ. NO. 001

- v -

96TH STREET LOFTS LLC, ROCK BUILDERS INC., RENT  
A UNIT NY INC., and SPRING SCAFFOLDING LLC,**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42

were read on this motion to/for

DISMISS

In this personal injury action, defendant Rent A Unit NY Inc. (“RAU”) moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint. Plaintiff Karina Laxmi Mahtani opposes the motion. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff was allegedly injured on June 15, 2021 when she tripped and fell in the roadway located in front of 223 East 96<sup>th</sup> Street in Manhattan (“the site” or “the premises”). In her complaint, she claimed that she was caused to fall due to an “industrial nut and bolt, which was partially embedded into and jutting out from the asphalt.” Doc. 1. She alleged that the premises were owned, managed and/or maintained by defendant 96<sup>th</sup> Street Lofts LLC (“96<sup>th</sup> Street”), which hired defendants Rock Builders Inc. and/or RAU to serve as a general contractor or construction manager with respect to certain construction, renovation, alteration, and/or

demolition work at that location. Doc. 1. She also alleged that 96<sup>th</sup> Street hired Spring Scaffolding LLC to perform work at the premises and that all of the defendants were negligent in creating the condition which caused her to fall. Doc. 1.

RAU now moves, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint. In support of the motion, RAU submits the affidavit of Avi Klenter, a dispatcher for the company, who represents that RAU provides portable toilets to construction sites and special events, and that, pursuant to a subcontractor agreement annexed to his affidavit, it provided portable toilets to the premises from December 19, 2019 until May 10, 2021. Docs. 26 and 29. Klenter further represents that invoices and a final pickup request annexed to his affidavit establish that RAU was last at the site on May 10, 2021. Docs. 27-28. RAU argues that, since the documentary evidence annexed to Klenter's affidavit "refute[s] every factual allegation" in the complaint, it is entitled to dismissal of the complaint pursuant to CPLR 3211(a)(1). Doc. 24 at par. 19. RAU also asserts that it is entitled to dismissal of the complaint pursuant to CPLR 3211(a)(7) since "it could not have caused or contributed to the [p]laintiff's accident." Doc. 24 at par. 23.

In opposition, plaintiff argues that RAU is not entitled to dismissal pursuant to CPLR 3211(a)(1) since neither Klenter's affidavit nor the documents annexed thereto utterly refute her claims. Doc. 38. Plaintiff also asserts that she has adequately stated a claim and that the branch of RAU's motion pursuant to CPLR 3211(a)(7) must be denied as well. Doc. 38.

In reply, RAU argues that the complaint must be dismissed pursuant to CPLR 3211(a)(1) and (a)(7) on the ground that the claim against it is speculative.

### **LEGAL CONCLUSIONS**

The complaint is not subject to dismissal pursuant to CPLR 3211(a)(1) since RAU has not submitted documentary evidence which utterly refutes plaintiff's claim. RAU's principal

claim is that, once it removed the last portable toilet from the premises on May 10, 2021, it never returned and, thus, could not have caused or contributed to the alleged accident. However, even assuming, arguendo, that the documents annexed to Klenter's affidavit establish that RAU was last at the site on May 10, 2021, this does not refute plaintiff's claim that "defendants caused and created the condition complained of by negligently placing the aforesaid industrial nut and bolt and/or allowing the same to be placed..." Doc. 1 at par. 40. Thus, RAU's assertion that the documentary evidence submitted refutes every claim in the complaint is clearly without merit. Additionally, Klenter's affidavit does not constitute "documentary evidence" within the meaning of CPLR 3211(a)(1) (*see Regini v. Board of Mgrs. of Loft Space Condominium*, 107 AD3d 496 [1st Dept 2013]; *Flowers v. 73rd Townhouse LLC*, 99 AD3d 431 [1st Dept 2012]).

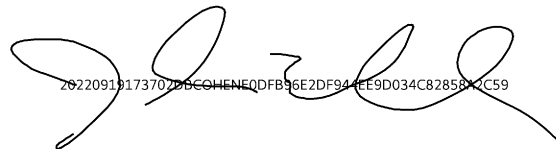
Nor is the complaint subject to dismissal pursuant to CPLR 3211(a)(7). When considering a motion to dismiss pursuant to CPLR 3211 [a] [7], this Court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiff [ ] every possible favorable inference" (*Sassi v Mobile Life Support Servs., Inc.*, 37 NY3d 236, 239 [2021]). "The question is whether the complaint adequately allege[s] facts giving rise to a cause of action" (*id.*; *see also Chen v Romona Keveza Collection LLC*, \_\_\_AD3d\_\_\_, 2022 NY Slip Op 04702, \*3 [1<sup>st</sup> Dept 2022]). Here, the plaintiff alleges in her complaint that RAU was hired to perform work at the site and that its negligence caused and/or contributed to the plaintiff's accident. Despite RAU's argument that it had no involvement at the site for over month prior to the plaintiff's accident, it does not deny that it had provided the toilets to the site before the occurrence and, as plaintiff asserts, since it did so, its actions may have created or contributed to the condition which allegedly injured plaintiff. Doc. 38 at par. 11. Thus, this Court finds that the plaintiff has stated a cause of action for negligence.

Accordingly, it is hereby:

ORDERED that the motion by defendant Rent A Unit NY Inc. seeking dismissal of the complaint pursuant to CPLR 3211(a)(1) and (a)(7) is denied in all respects; and it is further

ORDERED that defendant Rent A Unit NY Inc. is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference via Microsoft Teams on December 13, 2022 at 11:30 a.m. (an invitation will be sent to the parties by the Part 58 Clerk) unless they jointly complete a preliminary conference form (to be provided by the Part 58 Clerk) and provide the completed form to the Part 58 Clerk at [sfc-part58@nycourts.gov](mailto:sfc-part58@nycourts.gov) at least 2 business days prior to the scheduled conference.



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9/19/2022  
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE