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First, Second Departments Split on What Is Considered 'Documentary Evidence'

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CPLR 3211(a)(1) allows a defendant to "move for judgment dismissing one or more causes of action asserted against him on the ground that … a defense is founded upon documentary evidence." The CPLR does not define the phrase "documentary evidence." Commentators on the CPLR have attempted to fill the void by offering their own take on the issue. See, e.g., Higgitt, "CPLR 3211(a)(1) and (a)(7) Dismissal Motions—Pitfalls and Pointers," 83 N.Y. St. B.A. J. 32, 32 (November/December 2011) (hereinafter Higgitt 2011); Paige Bartholomew, "It May Look Like Documentary Evidence, But Is it Under CPLR 3211(a)(1)?," New York Commercial Division Practice Blog (Sept. 14, 2017); Mark A. Berman, "iPhones, Twitter, Deleted Emails and ESI Under CPLR 3211(A)(1)," New York Law Journal (Nov. 4, 2014). And the First and Second Departments have split on whether certain types of paper qualify as "documentary evidence." See David D. Siegel, New York Practice, 259 (5th Ed. Jan. 2017 supplement) (noting the split between the First and Second Departments as to whether an email can suffice as documentary evidence under CPLR 3211(a)(1)). The First Department has taken a flexible approach, holding that documents that are "essentially undeniable" constitute "documentary evidence." The Second Department has taken a more categorical approach, holding that emails and correspondence such as letters do not constitute "documentary evidence." Even in the First Department, however, motions to dismiss on the basis of documentary evidence are held to an exacting standard, and an email will not support dismissal if does not conclusively refute the asserted claim.

The Rule

A claim will be dismissed under CPLR 3211(a)(1) where "documentary evidence submitted conclusively establishe[s] a defense to the asserted claims as a matter of law." *Spoleta Constr. v. Aspen Ins. UK*, 27 N.Y.3d 933, 936 (2016) (quoting *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 (2007)); see also *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). The phrase "documentary evidence" is not defined in the CPLR. See Higgitt, Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:10 (2016) (hereinafter Higgitt Practice Commentary, 3211:10).

In the First Department, "[t]o qualify as 'documentary,' the paper's content must be essentially undeniable and, assuming the verity of the paper, and the validity of its execution, will itself support the ground on which the motion is based." *Amsterdam Hospitality Grp. v. Marshall-Alan Assoc.*, 120 A.D.3d 431, 432 (1st Dep't 2014) (internal quotations, brackets and ellipses omitted). In the Second

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Department, the test was recently stated as follows: "in order for evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable." *Fox Paine & Co. v. Houston Cas. Co.*, 153 A.D.3d 673, 677-78 (2d Dep't 2017).

Commentary on the Rule

According to the Advisory Committee on Civil Practice, a standing advisory committee established by the Chief Administrative Judge of the courts, CPLR 3211(a)(1) "was added to cover something like a defense based on the terms of a written contract." David D. Siegel, New York Practice, 259 (5th ed. 2010). Siegel observes that "[t]his was not a basis for dismissal under the pre-CPLR law," and "there is not much to tell us what qualifies as 'documentary' under this paragraph." Id.

Higgitt cautions in his practice commentaries that, although the ordinary meaning of the phrase "documentary evidence" would suggest that "anything reduced to paper could qualify[,] … '[d]ocumentary evidence' actually encompasses precious few documents, making CPLR 3211(a)(1) a decidedly narrow ground on which to seek dismissal." Higgitt Practice Commentary, 3211:10; see also Higgitt 2011 at 32 (same); Bartholomew, supra n.2.

Higgitt further observes that "medical records, letters, newspaper articles, printouts of Internet web pages, and transcripts of radio and television interviews" "do not quality as 'documentary'" evidence, whereas "contracts, deeds, leases, mortgages, stipulations of settlement, and judicial records can fall on the 'documentary evidence' side of the ledger." Higgitt 2011 at 33 (collecting cases). Even if the evidence is considered "documentary," Higgitt notes that the evidence must conclusively refute or establish a defense to the cause of action for dismissal to be granted. Higgitt 2011 at 33 (citing *Beal Sav. Bank*, 8 N.Y.3d at 324; *AG Capital Finding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582 (2005); *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314 (2002); *Leon*, 84 N.Y.2d 83).

To avoid "a skirmish over whether the (a)(1) motion is founded on the proper character of evidence," Higgitt has suggested that defendants also consider relying on CPLR 3211(a)(7) when seeking dismissal based on evidence they believe conclusively refutes the plaintiff's claims. Higgitt 2011 at 34. CPLR 3211(a)(7) provides a separate ground for dismissal where "the pleading fails to state a cause of action." Siegel similarly proposes that "a defendant relying on an email should consider invoking both subdivisions (a)(1) and (a)(7) in a CPLR 3211 motion." Siegel Jan. 2017 supplement, supra n.3, §259.

As commentators have observed, courts are generally limited to "an examination of the pleadings to determine whether they state a cause of action" on a motion to dismiss under CPLR 3211(a)(7). *Miglino v. Bally Total Fitness of Greater N.Y.*, 20 N.Y.3d 342, 351 (2013); see also Siegel Jan. 2017 supplement, supra n.3, §259; Patrick M. Connors, "Use of Affidavits on CPLR 3211(a)(7) Motion," New York Law Journal (Jan. 20, 2015) (hereinafter Connors 2015).

However, evidence beyond the pleadings may be considered in connection with CPLR 3211(a)(7) motions in limited circumstances where the evidence "establish[es] conclusively that plaintiff has no cause of action." Conners 2015 (quoting *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636 (1976)).

The Split of Authority

Although the First and Second Departments agree that an affidavit does not meet the requirements for "documentary evidence" (*Phillips v. Taco Bell*, 152 A.D.3d 806, 807 (2d Dep't 2017) ("An affidavit is not documentary evidence because its contents can be controverted by other evidence, such as another affidavit."); *Serao v. Bench-Serao*, 149 A.D.3d 645, 646 (1st Dep't 2017) ("[F]actual affidavits do not constitute documentary evidence within the meaning of the statute."), the departments diverge with respect to whether an email or other correspondence such as a letter can constitute "documentary evidence" under CPLR 3211(a)(1).

The Second Department has repeatedly held that letters and emails simply "fail to meet the requirements for documentary evidence." *Gawrych v. Astoria Fed. Sav. & Loan*, 148 A.D.3d 681, 682 (2d Dep't 2017); see also *25-01 Newkirk Ave. v. Everest Natl. Ins. Co.*, 127 A.D.3d 850, 851 (2d Dep't 2015) (same); *Integrated Constr. Servs. v. Scottsdale Ins. Co.*, 82 A.D.3d 1160, 1163 (2d Dep't 2011) (letters are not considered "documentary evidence within the intendment of CPLR 3211(a)(1)"). For example, in affirming the denial of a motion to dismiss

in *Zellner v. Odyl*, the Second Department stated: "the email messages submitted by the defendant did not constitute 'documentary evidence' for the purposes of CPLR 3211 (a)(1)." *Zellner v. Odyl*, 117 A.D.3d 1040, 1041 (2d Dep't 2014) (citations omitted).

The Second Department's decision in *Cives v. George A. Fuller Co.*, 97 A.D.3d 713 (2d Dep't 2012) is instructive. In *Cives*, the plaintiff sued Fuller, a general contractor, and Liberty Mutual Insurance Company for payment on invoices relating to a construction project. Id. at 713-14. Liberty Mutual moved for dismiss under CPLR 3211(a)(1) based on "various letters and emails" that it claimed demonstrated that the payment bond asserted against it had never become effective. Id. at 6. The Second Department reversed the trial court's grant of dismissal, holding that "the letters and emails submitted by Liberty did not constitute 'documentary evidence' under CPLR 3211(a)(1) and, thus, should not have been considered by the Supreme Court." Id.

The First Department takes a less absolute approach to email evidence. As the court stated in *Kolchins v. Evolution Mkts.*, "there is no blanket rule by which email is to be excluded from consideration as documentary evidence under the statute." *Kolchins v. Evolution Mkts.*, 128 A.D.3d 47, 59 (1st Dep't 2015). Thus, "emails can qualify as documentary evidence if they meet the 'essentially undeniable' test." *Amsterdam Hospitality Group*, 120 A.D.3d at 433; see also *Mendoza v. Akerman Senterfitt*, 128 A.D.3d 480, 482 (1st Dep't 2015) ("The court properly deemed the above emails that were described and quoted in the complaint itself to be documentary evidence"); *Art & Fashion Group v. Cyclops Prod.*, 120 A.D.3d 436, 438 (1st Dep't 2014) ("Email correspondence can, in a proper case, suffice as documentary evidence for purposes of CPLR 3211(a)(1)."). The same is true of letters. *WFB Telecommunications v. NYNEX*, 188 A.D.2d 257, 259 (1st Dep't 1992), lv. denied 81 N.Y.2d 709 (1993).

However, even in the First Department, emails that do not "utterly refute[] plaintiff's factual allegations" and "conclusively establish[] a defense to the asserted claims as a matter of law" still will not support a motion to dismiss under CPLR 3211(a)(1). *Amsterdam Hospitality Group*, 120 A.D.3d at 432-33 (quoting *Goshen*, 98 N.Y.2d at 326; *Weil, Gotshal & Manges v. Fashion Boutique of Short Hills*, 10 A.D.3d 267, 270-271, (1st Dep't 2004)). Thus, emails can qualify as documentary evidence in the First Department, but only in the right case.

> The CPLR does not define the phrase "documentary evidence."

A recent decision by Justice Barry Ostrager of the New York County Commercial Division in *Berkowitz v. Christie's*, No. 652549/2017, 2017 N.Y. Misc. LEXIS 4027 (Sup. Ct. N.Y. Cnty. Oct. 23, 2017) is illustrative. In *Berkowitz*, the trustees of Elizabeth Taylor's estate sued the auction house Christie's for breach of contract, declaratory judgment, and breach of fiduciary duty, among other claims, after Christie's rescinded the $8.8 million sale of the "Taj Mahal Diamond" from the Taylor estate. The consignment agreement between Christie's and the estate contained a provision permitting Christie's to rescind a sale "'at any time if Christie's in [its] reasonable judgment determines that the offering for sale of any Property has subjected or may subject Christie's and/or Seller to any liability, including liability under warranty of authenticity or title.'" Id. at 3 (quoting consignment agreement). The trustees argued that Christie's cancelled the sale, not due to any bona fide concern that the sale subjected Christie's or the seller to liability, but "to appease the buyer" who was "a frequent bidder at Christie's auctions" and had "refused to bid in other upcoming auctions until the Diamond purchase was cancelled." Id. at 3-4.

In support of its motion to dismiss the declaratory judgment claim under CPLR 3211(a)(1) and (a)(7), Christie's submitted "several emails between Christie's executives and Christie's general counsel evidencing concern that the buyer could bring a meritorious action against Christie's based on alleged misrepresentations it had made about the Diamond at the Auction." Id. at 3-4. These emails were proffered in an effort to show that Christie's had a reasonable belief that the sale could subject it to liability. See id. at 4.

Although the court considered the substance of the emails submitted by Christie's, Justice Ostrager concluded that "[t]he documentary evidence—while powerful—is not

without some ambiguity, and fails to conclusively rebut Plaintiffs' claims." Id. at 6. The court noted that "according to emails between Christie's executives, there appears to [] have been at least some concern regarding 'client Relations' and some equivocation as to the strength of Christie's legal position in a potential dispute with the Diamond's buyer." Id. The *Berkowitz* decision highlights the exacting standard a defendant faces when seeking dismissal under CPLR 3211(a)(1) based on documentary evidence.

Another recent New York County Commercial Division decision by Justice Jeffrey Oing, *WL Ross & Co. v. Storper*, No. 650107/2016, 2016 N.Y. Misc. LEXIS 2531 (Sup. Ct. N.Y. Cnty. July 7, 2016) demonstrates that an email will not constitute documentary evidence where it does not conclusively demonstrate grounds for dismissal. In *WL Ross & Co.*, an investment firm sued Storper, a former senior managing director, for breach of non-compete clauses in the parties' agreements. See id. at 1-2. Storper moved to dismiss under theories of waiver, laches and equitable estoppel, pointing to an email from his former employer congratulating him on the formation of his new merchant banking business and suggesting that the parties explore co-investments. Id. at *5-6. Justice Oing rejected this evidence, because it did "not conclusively establish any of defendant's defenses." Id. at 6. As in *Berkowitz*, while the defendant's email may have some probative value, it was not conclusive and thus could not support a motion to dismiss under CPLR 3211(a)(1).

Although decisions denying motions to dismiss under 3211(a)(1) abound, emails can still be valuable on such motions when they irrefutably demonstrate an objective fact fatal to a claim. For example, in *Chambers v. Weinstein*, No. 157781/2013, 44 Misc. 3d 1224(A) (Sup. Ct. N.Y. Cnty. Aug. 22, 2014), aff'd, 135 A.D.3d 450 (1st Dep't 2016), Justice Peter Sherwood of the New York County Commercial Division held that emails demonstrating that a defendant was still negotiating a transaction during February to April 2012 conclusively established that the same defendant did not know that the transaction had actually terminated in 2011, and therefore could not have aided and abetted fraud. Id. And in *Hansen-Nord v. Youmans*, New York County Commercial Division Justice Anil Singh found that an email from plaintiff plainly showing that she was acting as her own attorney disproved that she had an attorney-client relationship with the attorney-defendants at the relevant time, and thus conclusively refuted her malpractice claim. *Hansen-Nord v. Youmans*, No. 651924/2014, 2015 N.Y. Misc. LEXIS 3237, at *10 (Sup. Ct. N.Y. Cnty. Sept. 1, 2015), appeal dismissed by, 142 A.D.3d 432 (1st Dep't 2016).

The time may be ripe for the Court of Appeals to resolve the split of authority between the First and Second Departments on whether emails can quality as documentary evidence under CPLR 3211(a)(1), particularly since so much business today is conducted via email.

Conclusion

The time may be ripe for the Court of Appeals to resolve the split of authority between the First and Second Departments on whether emails can quality as documentary evidence under CPLR 3211(a)(1), particularly since so much business today is conducted via email. Indeed, emails are even used in some circumstances to form contracts. (New York's Electronic Signatures and Records Act ("ESRA") provides that, with important exceptions, "an electronic record shall have the same force and effect as those records not produced by electronic means." N.Y. State Tech. Law §305(3) (Consol. 2017). For a discussion of the exceptions, which include documents providing for the disposition of property upon death or incompetence and "negotiable instruments and other instruments of title," see ESRA §307(2). N.Y. State Tech. Law §307 (Consol. 2017)).

The First Department's rule properly places substance over form by permitting courts to consider electronic communications as documentary evidence so long as they are essentially undeniable and conclusively establish a defense. The rule leaves the door open for defendants to bring CPLR 3211(a)(1) motions based on other electronic communications such as text messages.