
Feb 2021 | [Blog: The Westchester Litigator](#)

The Contours of CPLR 3211(a)(1): What Constitutes Documentary Evidence?

One of the most frustrating experiences for a defense attorney in federal court is to have a document that could demolish a complaint, but he/she is precluded from using it on a motion to dismiss. In New York state court, where the Civil Practice Law and Rules (CPLR) offers more flexibility than the Federal Rules of Civil Procedure, CPLR 3211(a)(1) permits a defendant to introduce on a motion to dismiss documents that “utterly refute” allegations in a complaint, but it is not boundless. As a recent case from the Westchester Supreme Court demonstrates, not every writing constitutes “documentary evidence” that can support dismissal under CPLR 3211(a)(1).

The Case: *Bodoin v. Alpha-En Corp., et al*

In *Bodoin v. Alpha-En Corp., et al.*, Index No. 70483/2019 (Westchester Sup. Ct. Nov. 18, 2020), the defendants sought to dismiss the plaintiff’s employment discrimination action, asserting claims under the New York Human Rights Law, New York State Equal Pay Act and Wage Theft Prevention Act, and various common law claims. The defendants moved, inter alia, pursuant to CPLR 3211(a)(1), contending that the emails, affidavits, and paystubs submitted to the court “utterly refute[d] plaintiff’s factual allegations, thereby conclusively establishing a defense as a matter of law.” Justice Linda Jamieson disagreed, noting that classic documentary evidence under the CPLR includes “judicial records, leases, or transactional documents such as a deed or contract,” none of which were presented by the defendants in this case. Relying on First and Second Department precedent, Justice Jamieson found that affidavits are not documentary evidence because they can be disputed by other evidence, including other affidavits.

While leaving the door open for emails to come in on a CPLR 3211(a)(1) motion if they “clearly conclude that [a] plaintiff’s claim is factually untrue,” the court found the emails at issue in this case did not qualify as documentary evidence. Justice Jamieson did conclude the paystubs provided a partial defense to the plaintiff’s Wage Theft Prevention Act claim, but only for the time period covered by the submitted stubs. Finding the defendants had not submitted evidence that “utterly refuted” the plaintiff’s claims, the court denied the motion to dismiss under CPLR 3211(a)(1)

Takeaway

CPLR 3211(a)(1) can be a powerful tool for the defense attorney as it allows movants to bring evidence to the court’s attention on pre-discovery motion to dismiss. However, there are limits to the provision and the court retains discretion to determine what constitutes “documentary evidence.” Defendants should utilize cautious optimism when filing motions to dismiss based on documentary evidence, understanding that the standard is more restrictive than it appears at first glance.