

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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AVI M KOSCHITZKI, :
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 :
 Petitioner, : Index. . 2023-000163
 :
 -against- : **NOTICE OF MOTION FOR**
 : **OPPOSITION OF MOTION TO**
 EMANUEL EFRAIM and DUSTIN BOWMAN, ESQ. **DISMISS**
 :
 :
 Respondents :
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PLEASE TAKE NOTICE, that upon the Affirmation of AVI M KOSCHITZKI, Petitioner, and all documents and records attached hereto, AVI M KOSCHITZKI, Petitioner will move this court on the __ day of June, 2023, at the Nassau County Supreme Courthouse located at 100 Supreme Court Drive, Mineola, New York 11501 at 9:30 A_M, in the forenoon of that day, or as soon thereafter as counsel can be heard, before the Hon. Conrad Singer, at IAS: Part 21 in 1. Opposition to Respondents' Motion to Dismiss; and

Dated: New York, New York
September 12, 2022

BY: _____
AVI M KOSCHITZKI
Petitioner, Pro se

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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AVI M KOSCHITZKI, :
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 Petitioner, : Index. . 2023-000163
 :
 :
 -against- : **AFFIRMATION IN SUPPORT**
 : **OPPOSITION OF MOTION TO**
 EMANUEL EFRAIM and DUSTIN BOWMAN, ESQ. **DISMISS**
 :
 :
 Respondents :
 :
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AVI M KOSCHITZKI is the Petitioner in this course of action and does hereby affirm under the penalties of perjury that the following statements are true, except those made upon information and belief, which he believes to be true:

1. I have conducted a diligent search of my case and have made appropriate inquiries of others to inform myself to make this Affirmation.
2. This Affirmation is made in support of an opposition to motion to dismiss filed by the Respondents.
3. I make this affirmation in further support of Petitioner's Opposition to Defendants' motion to, inter alia, dismiss the instant action.
4. The time for filing the opposition has not yet expired.

PRELIMINARY STATEMENT

5. The Respondents' meritless ' Motion to Dismiss' is like a poorly-made cup of coffee - weak, lacking substance, and leaves a bad taste in your mouth. It's clear that the Respondents only intention is to waste the court's time and resources, rather than making a serious filing with the remotest possibility of success in a court of law. The Respondents devoted almost no attention to the serious allegations in the Petitioner's Petition. Instead, they dwelled at length on baseless standing and narration of events. Therefore, the Respondents' motion to dismiss must be denied because it ignored several clusters of contested facts.

BACKGROUND

6. AVI M. KOSCHITZKI ("petitioner") filed a Petition and Orders to Show Cause in special proceedings seeking temporary relief. Emanuel Efraim ("Efraim") and Dustin Bowman, Esq. ("Bowman"), collectively known as "Respondents," opposed the Orders to Show Cause and sought dismissal of the Petition. The Court conducted an oral argument and reviewed written submissions.
7. The petitioner claimed that she was forced out of the Subject Premises through an illegal holdover case brought by both Respondents. The Respondents cited a housing proceeding initiated by Efraim against the petitioner and Jack Koschitzki, known as the Landlord/Tenant Proceedings. The parties entered a stipulation to resolve the Landlord/Tenant Proceedings, which included terms such as payment to the petitioner and the petitioner vacating the premises.
8. The petitioner alleged delays in moving to Florida due to issues with the settlement payment, Efraim's refusal to verify funds, and Efraim reneging on an agreed amount. The petitioner also accused Bowman of conspiring with Efraim to illegally evict her. The petitioner further claimed that Efraim entered the premises without permission, changed locks, removed belongings, and rented the unit to someone else

9. The Respondents argued that Efraim fulfilled his obligations under the stipulation and accused the petitioner of breaching it by failing to vacate on time. They also alleged that Efraim disposed of the petitioner's property as deemed fit. The respondents contended that the Petition should be dismissed due to the petitioner's failure to serve them with a copy of the petition.
10. The Court determined that the petitioner demonstrated a basis for alternative service and provided sufficient evidence of serving the respondents with the necessary papers. The respondents' motion to dismiss the Petition was denied. Pursuant to CPLR 404, the respondents were given permission to serve and file an Answer to the Petition within fifteen days. The Court struck down most of the requested interim relief and deemed any remaining requests denied, to be addressed in further proceedings.
11. The Court held that, these proceedings are a Summary Proceedings governed under Article 4 of the CPLR pursuant to CPLR 401.
12. Pursuant to the Court's order, the following relief was granted:
 - a. A hearing on the matter is scheduled for May 31, 2023.
 - b. Respondents' claims for lack of personal jurisdiction are denied.
13. In light of the Respondents' dissatisfaction with the Court's order dated April 6, 2023, they now present a renewed attempt to reargue the motion to dismiss ("MTD") and seek discovery. This pertains to the same issue on which the Court has already rendered a decision on April 6, 2023.

ARGUMENTS

A. PETITIONER HAS ABIDED BY THE PRINCIPLES OF SPECIAL PROCEEDINGS UNDER CPLR

14. First and foremost, it is imperative to recognize the nature and purpose of special proceedings under the CPLR. Special proceedings are civil judicial proceedings specifically designed to establish rights or enforce obligations in a summary fashion. As enshrined in CPLR 411, these proceedings culminate in a judgment, albeit with a procedural approach akin to that of a motion, as expounded by CPLR 403 and CPLR

409. The underlying principles of speed, economy, and efficiency, as eloquently articulated by Alexander in his Practice Commentaries (McKinney's Cons Laws of NY, CPLR 401:1).

15. Moreover, it is crucial to emphasize the precise manner in which a special proceeding is commenced under the CPLR. As expressly stipulated in CPLR 304(a), the petitioner fulfills the requisite procedural step by duly filing a petition. The petition, as elucidated by CPLR §402, serves as the applicant's pleading, setting forth the relief sought and the legal basis supporting such relief. Furthermore, compliance with due process necessitates providing proper notice to the opposing party, as mandated by CPLR §403, through the issuance of a Notice of Petition or Order to Show Cause. By adhering to these specific provisions, the petitioner in this case has scrupulously followed the prescribed procedure for commencing a special proceeding.
16. Furthermore, it is of utmost significance to bring to the court's attention that the respondents' motion has already been subject to the court's previous ruling. In an order dated April 6, 2023, the court unequivocally denied the respondents' prior motion. This previous ruling stands as a testament to the court's prior consideration and rejection of the respondents' arguments challenging the validity of the special proceeding.
17. Consequently, revisiting arguments previously adjudicated would not only undermine the court's prior decision but also subvert the principles of justice by encouraging duplicative and redundant appeals. If the court allows such a practice, it risks creating a dangerous precedent of allowing multiple bites at the cherry, thus thwarting the very principles of speed, economy, and efficiency that special proceedings under the CPLR are meant to uphold.
18. In light of these facts and principles, we respectfully urge this Honorable Court to deny the motion to dismiss. The petitioner has meticulously adhered to the procedures for initiating a special proceeding, and the respondent's arguments are bereft of new or compelling legal ground. The sanctity of the underlying tenets of speed, economy, and efficiency, central to CPLR provisions governing special proceedings, must be upheld to guarantee a just and swift resolution in this matter.

B. PETITIONER HAS PERSONAL JURISDICTION IN THIS MATTER

19. The Respondents contend that the Petition should be dismissed based on the alleged failure of the Petitioner to obtain personal jurisdiction. They assert that the Petitioner failed to serve the Respondents with a copy of the petition as required by CPLR 308. However, it is crucial to highlight that the court has already adjudicated this matter in its prior order dated April 6, 2023. The court determined that the Petitioner had demonstrated a valid basis for alternative service under CPLR 308(5) and that the Respondents were indeed served with Motion Seq. 002 and the accompanying supporting documents, including the underlying Petition.
20. In reaching its decision, the court acknowledged the Petitioner's sworn representation contained in the Order to Show Cause Motion Seq. 003, wherein it was stated that the Petitioner had been granted a poor person application and lacked the means to effectuate service via overnight mail and personal delivery as previously directed by the court in Order to Show Cause Motion Seq. 002. The court also took into consideration the Petitioner's affirmation that the Respondents had been served with the relevant papers, including the Petition, via email and download link. Notably, Respondent Bowman himself confirmed on the record during an open court session on March 29, 2023, that he possessed a copy of the underlying Petition through the link provided by the Petitioner.
21. In light of these facts and representations, the court found that the Petitioner had sufficiently demonstrated a basis for alternative service under CPLR 308(5) and that the Respondents were indeed served with the requisite documents. Consequently, the court denied the Respondents' motion to dismiss the Petition.
22. Therefore, it is incumbent upon this Honorable Court to recognize that the issue of service has already been exhaustively addressed and resolved in the court's previous order. The Respondents' attempt to resurrect this matter through their present motion to dismiss is duplicative and devoid of legal merit. The court's previous order, which

unequivocally denied the motion to dismiss, remains the binding and authoritative decision on this matter.

C. PETITIONER HAS STATED A CAUSE OF ACTION AGAINST THE RESPONDENTS

23. When considering a motion to dismiss, courts must “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.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) “A complaint should not be dismissed on a pleading motion so long as, when the plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists.” (*R.H. Sanbar Products v Gruzen*, 148 AD2d 316, 318 [1st Dept 1989]). If the four corners of the complaint make out a cause of action, a motion to dismiss the complaint must be denied. (511 West 232nd v Jennifer Realty, 98 NY2d 144, 152 [2002]).

24. Seemingly based on CPLR §3211(a)(1), which permits a defendant to move for dismissal on the basis of “documentary evidence,” Respondents have introduced a voluminous series of affidavits and exhibits in support of their motion. (See brief for Respondents [hereinafter “Exhibit A.”] But §3211(a)(1)’s applicability is narrow and its burden is exceedingly high: the movant must show that “the documentary evidence utterly refutes plaintiff’s allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]), and any documentary evidence must be “unambiguous, authentic, and undeniable” (*Granada Condo. Assn v Palomino*, 78 AD3d 996, 996-97 [2d Dept 2010]). In support of their motion, Respondents submit affidavits, screenshots, and, among other things, which plainly do not meet this high standard.

25. Affidavits that merely refute the complaint’s allegations do not satisfy §3211(a)(1)’s standard. (See *Art & Fashion Group v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]; *Serao v BenchSerao*, 149 AD3d 645, 646 [1st Dept 2017].) Likewise, the informational letter submitted by Respondents do not satisfy the standard (see *Lindsay v Pasternack*, 129 AD3d 790, 792 [2d Dept 2015] [letter from law firm to client did not meet standard]; *Amsterdam Hospitality Group v Marshall-Alan*

Associates, 120 AD3d 431, 432 [1st Dept 2014] [finding letters not essentially undeniable and thus not documentary evidence]), 64 Misc3d 530 [Sup Ct, NY County 2019] [internet pages did not qualify, regardless of pages' authenticity; also noting the range of documents to qualify as documentary evidence is "exceedingly narrow"].)

26. Regardless, as described below, even if the documents Respondents submit in support of their motion were admissible pursuant to §3211(a)(1)—if they were unambiguous and undeniable, which they are not—they only serve to support Petitioner's claims.
27. Respondents' motion posits that the petitioner fails to state a cause of action against Respondent Dustin Bowman. However, a diligent analysis of the allegations in the petition reveals that they do, indeed, establish a valid cause of action against Mr. Bowman.
28. The crux of the argument, as pleaded for in the petition, revolves around Mr. Bowman's liability for damages incurred by the petitioner as a consequence of his actions. The petition alleges that Mr. Bowman breached his obligations under the stipulation by failing to make the promised payment to the petitioner. Moreover, it is averred that Mr. Bowman played a substantial role in the unlawful eviction of the petitioner and the subsequent removal of his belongings to a storage unit. These actions resulted in financial harm to the petitioner, who continues to sustain monetary damages due to Mr. Bowman's repeated demands for payment for the storage unit.
29. To establish abandonment or surrender, the burden of proof rests with the party seeking to establish it. In this case, the facts presented in the petition strongly support the contention that the petitioner did not abandon or surrender the unit without receiving the funds, as per the stipulation. The petitioner explicitly had no intention of relinquishing their interest in the premises without receiving the promised payment.
30. In support of Petitioner position, Petitioner hereby reference the case of *Coleman v Onsite Prop. Mgt., Inc.*, 44 Misc3d 1221[A], 999 N.Y.S.2d 796, 2014 NY Slip Op 51217[U], at *3 [Civ Ct, Bronx County 2014]). which provides definitions of abandonment and surrender within the context of an apartment.

31. The case elucidates that abandonment necessitates an intent to abandon and an act or failure to act indicating the tenant's lack of claim or retention of an interest in the premises. Surrender, conversely, entails a tenant's relinquishment of possession prior to the lease's expiration, enabling the landlord to treat the lease as terminated. In the present case, the petitioner's actions and intentions demonstrate their absence of any acts or failures to act signifying an intent to abandon the premises.
32. On a CPLR 3211 motion to dismiss, the sole question before the court is whether the complaint adequately alleged facts giving rise to a cause of action. *Sassi v. Mobile Life Support Servs., Inc.*, 154 N.Y.S.3d 290, 292, 175 N.E.3d 1246, 1248 (2021). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc.*, 53 N.Y.S.3d 598, 601-02, 75 N.E.3d 1159, 1162-63 (2017).
33. In deciding the motion, 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." *Nonnon v. City of N.Y.*, 842 N.Y.S.2d 756, 758, 874 N.E.2d 720, 722 (2007). Although the pleadings are given liberal construction, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." *Simkin v. Blank*, 945 N.Y.S.2d 222, 225, 968 N.E.2d 459, 462 (2012).
34. Therefore, based on a meticulous analysis of the petition and the relevant case laws, Petitioner respectfully requests that the court deny the motion to dismiss filed by Respondents. The allegations in the petition sufficiently establish a cause of action against Mr. Bowman, and the petitioner should be granted the opportunity to present evidence supporting their claims. The petitioner trusts that the court will conscientiously consider the arguments presented and render an equitable decision in this matter.

D. DISCOVERY IS NOT NEEDED IN THIS SPECIAL PROCEEDING

35. Discovery is not generally appropriate in special proceedings. The issues pled in the petition pertain to facts and actions of the Respondent alone. Respondent has failed to establish a "demonstrated need" for the requested discovery. Considering this Court's recognition that discovery is typically unsuitable in special proceedings and the Respondents' failure to demonstrate an "ample need" for further discovery, the request should be denied. (*see National Energy Marketers Assn. v New York State Pub. Serv. Commn.*, 57 Misc 3d 282, 296-297, 60 N.Y.S.3d 760 [*Sup Ct, Albany County 2017*, Zwack, J.], *affd* 167 AD3d 88, 88 N.Y.S.3d 259 [3d Dept 2018]).
36. Courts are required to consider whether the party seeking disclosure has established the materiality and necessity of the requested information (*Matter of Suit-Kote Corp. v Rivera*, 137 AD3d at 1365; *Matter of Town of Wallkill v New York State Bd. of Real Prop. Servs.*, 274 AD2d 856, 859, 711 N.Y.S.2d 228 [3d Dept 2000], *lv denied* 95 N.Y.2d 770, 745 N.E.2d 393, 722 N.Y.S.2d 473 [2000]). Additionally, the request should be sufficiently tailored to obtain the necessary information (*Matter of Suit-Kote Corp. v Rivera*, 137 AD3d at 1365; *Matter of Georgetown Unsold Shares, LLC v Ledet*, 130 AD3d 99, 106, 12 N.Y.S.3d 160 [2d Dept 2015]). The court should also consider whether undue delay will result from the request (*Matter of Suit-Kote Corp. v Rivera*, 137 AD3d at 1365; *Matter of Bramble v New York City Dept. of Educ.*, 125 AD3d 856, 857, 4 N.Y.S.3d 238 [2d Dept 2015]).
37. In this case, the requested information is not material and unnecessary. The discovery issue appears to be raised solely to cause delay, as the petitioner has failed to establish a genuine need for further discovery. Consequently, the respondent's request for discovery must be denied.

CONCLUSION

38. In conclusion, it is respectfully submitted that the Respondents' Motion to Dismiss lacks merit and should be denied. The Petitioner has scrupulously adhered to the prescribed procedures for commencing a special proceeding under the CPLR, and the Respondents' arguments challenging the validity of the special proceeding have

already been unequivocally rejected by the court in its previous order. To revisit these arguments would undermine the court's prior decision and contravene the fundamental principles of speed, economy, and efficiency that govern special proceedings.

39. Furthermore, the issue of personal jurisdiction has already been exhaustively addressed and resolved in the court's prior order. The Respondents' present attempt to resurrect this matter through their motion to dismiss is duplicative and devoid of legal merit. The court's previous order, which explicitly denied the motion to dismiss, remains the binding and authoritative decision on this matter.
40. Moreover, the Petitioner has sufficiently stated a cause of action against the Respondents. When the allegations in the petition are afforded the benefit of every possible favorable inference, they establish a valid cause of action against Respondent Dustin Bowman. The Respondents' reliance on documentary evidence in support of their motion to dismiss falls short of the high standard required by CPLR §3211(a)(1) and actually serves to bolster the Petitioner's claims.
41. Lastly, it is submitted that the requested discovery is unwarranted in this special proceeding. Discovery is generally unsuitable in such proceedings, and the Respondents have failed to demonstrate a legitimate need for the requested information. The request for discovery appears to be solely aimed at causing unwarranted delay, and thus it should be denied.
42. Based on the foregoing, it is respectfully urged that the court deny the Respondents' Motion to Dismiss and afford the Petitioner the opportunity to proceed with the special proceeding, presenting evidence in support of their claims. By doing so, the court would uphold the principles of justice and ensure a fair and expeditious resolution of this matter.

Dated _____ June 2023

Respectfully Submitted By

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this
JUNE _____ **2023**, to all parties on the attached service list.

SERVICE LIST

SAMPLE

SAMPLE