CPLR 3211(a)(1) and (a)(7) Dismissal Motions – Pitfalls and Pointers

By John R. Higgitt

CPLR 3211 is the procedural vehicle that allows a defendant[1] to seek dismissal of a complaint or part of it before (and in some instances after) interposing an answer. Subdivision (a) of the statute enumerates specific grounds on which the defendant can seek dismissal. Among the diverse grounds listed are dismissals based on "documentary evidence" (CPLR 3211(a)(1)) and failure to state a cause of action (CPLR 3211(a)(7)). These grounds are similar but not kindred concepts, and the significant differences between the two have important practical consequences. This article will review the particulars of CPLR 3211(a)(1) and (a)(7), as well as the similarities and distinctions between them. Also, it will offer some observations regarding practice with these dismissal tools.

Dismissals Premised on "Documentary Evidence"

CPLR 3211(a)(1) provides that a defendant can seek dismissal of a complaint or part of it on the ground that "a defense is founded upon documentary evidence." This dismissal ground is a relative newcomer to civil procedure, arriving with the CPLR in 1963. The "documentary evidence" provision was designed to fill a void left by other dismissal grounds codified in CPLR 3211(a).[2] A motion pursuant to CPLR 3211(a)(1) must be made within the defendant's time to respond to the complaint.[3]

Based on the ordinary meaning of the phrase "documentary evidence," dismissals under CPLR 3211(a)(1) would presumably be available in myriad instances; after all, what motion submissions aren't ultimately reduced to paper? However, CPLR 3211(a)(1) is a decidedly narrow ground on which to rest a motion to dismiss. Employing the test suggested by Prof. David Siegel, courts have concluded that a paper qualifies as "documentary evidence" only if (1) it is unambiguous,

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(2) it is of undeniable authenticity, and (3) its contents are essentially undeniable.[4] Critically, too, the paper must, standing alone, warrant dismissal.[5] Most evidence cannot satisfy this stringent standard. Among the forms of proof on the outside looking in at the reserved class of evidence created by CPLR 3211(a)(1) is the affidavit, the principal form of evidence in motion practice.[6] Although an affidavit can itself demonstrate that an action should be dismissed, the contents of the affidavit can be controverted by other evidence. Other forms of evidence that do not qualify as "documentary" include medical records, letters, newspaper articles, printouts of Internet web pages, and transcripts of radio and television interviews.[7]

Although most evidence will not qualify as "documentary," certain key papers may. Contracts,[8] deeds,[9] leases,[10] mortgages,[11] stipulations of settlement,[12] and judicial records can fall on the "documentary evidence" side of the ledger.[13]

Assuming the movant has adduced "documentary evidence" in support of its CPLR 3211(a)(1) motion, what must that evidence show to warrant dismissal? Under well-settled Court of Appeals precedent, relief is appropriate where the evidence conclusively refutes the plaintiff's allegations or conclusively establishes a defense to the action.[14] Moreover, several rules of decision applicable to CPLR 3211(a) motions – rules that recognize that the action is in its infancy and the plaintiff has not had the benefit of disclosure – favor the nonmoving party: the complaint is to be afforded a liberal construction, the facts as alleged in the complaint accepted as true, and the plaintiff accorded the benefit of every favorable inference.[15]

In opposing a motion under the "documentary evidence" provision, a plaintiff is free to submit evidence demonstrating that the defendant's evidence does not conclusively resolve the action (or challenged causes of action).[16] Where appropriate, a plaintiff can invoke CPLR 3211(d) to forestall a decision on the merits of the motion pending the plaintiff's receipt of evidentiary materials necessary to frame its opposition.[17] Under subdivision (d), a court can deny a subdivision (a) motion[18] or adjourn it to allow the plaintiff an opportunity to procure affidavits or obtain disclosure. A plaintiff serious about receiving relief under CPLR 3211(d) must submit an affidavit demonstrating that evidence essential to the plaintiff's opposition "may exist" and a reasonable excuse as to why the evidence has not yet been obtained.

Dismissals for Failure to State a Cause of Action

CPLR 3211(a)(7) provides that a defendant may seek judgment dismissing the complaint on the ground that it fails to state a cause of action. The defendant is free to attack the entire complaint or target one or more of the specific causes of action. The motion for failure to state a cause of action is no stranger in New York practice; it's an incarnation of the common law demurrer with a modern name and, as discussed below, a bit more potency. Unlike the motion to dismiss on "documentary evidence," a motion to dismiss for failure to state a cause of action can be made at any point in the action.[19] However, only one motion to dismiss under CPLR 3211(a) is permitted, so if the defendant makes a motion under that subdivision but does not include the (a)(7) ground, the plaintiff will have to seek failure to state a cause of action relief through a different procedural mechanism.[20]

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Like the demurrer, the CPLR 3211(a)(7) motion can be used to test the facial sufficiency of a pleading. It may be useful in disposing of actions in which the plaintiff has not stated a claim cognizable at law (e.g., the plaintiff purports to assert a claim for educational malpractice) and actions in which the plaintiff has identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action.[21] Where a defendant has challenged the facial sufficiency of a complaint, the court's inquiry is limited to whether, applying the above-mentioned rules of decision applicable to CPLR 3211(a) motions, the allegations stated any claim cognizable at law.[22] If the motion attacks one or more specific causes of action but not the complaint in its entirety, the test is whether the challenged claims were stated in the complaint. In the context of CPLR 3211(a)(7), the word "stated" means pleaded: Do the *allegations*, liberally construed and viewed in the light most favorable to the plaintiff, plead a cognizable claim?

Whether the drafters of the CPLR meant to limit the function of CPLR 3211(a)(7) to testing the facial sufficiency of a pleading – the only task of the demurrer – has been the subject of some debate.[23] Case law has made it clear, however, that a defendant can submit evidence in support of a motion for failure to state a cause of action, thereby permitting the movant to challenge a well-pleaded, cognizable cause of action. Therefore, in stark contrast to a motion under CPLR 3211(a)(1), a defendant moving under CPLR 3211(a)(7) can rely on any form of evidence, including affidavits.[24] When evidence is submitted by the defendant, the standard morphs from whether the plaintiff *stated* a cause of action to whether it *has* one.[25] Thus, if the defendant's evidence establishes conclusively that the plaintiff has no cause of action (i.e., that a well-pleaded, cognizable claim is flatly refuted by

actual evidence), dismissal may be appropriate.[26] As the First Department put it

> where the affidavits on a motion to dismiss made under CPLR 3211(a)(7) conclusively establish that plaintiff has no cause of action, dismissal is warranted. Where the facts are not in dispute, the mere iteration of a cause of action is insufficient to sustain a complaint where such facts demonstrate the absence of a viable cause of action.[27]

Regardless of whether the defendant tests the facial sufficiency of the complaint or adduces evidence to challenge the merits of it, the plaintiff may submit evidence of its own. If the defendant's CPLR 3211(a)(7) motion is aimed merely at the face of the pleading, the plaintiff can submit an affidavit to remedy any defects in the pleading.[28] If, however, the defendant's motion is accompanied by evidence that prods at the merits of the complaint, the plaintiff's evidence should demonstrate that it *has* a cause of action – that facts suggested by the plaintiff's evidence (as opposed to mere allegations in the complaint) support its claim.[29]

> If representing a defendant, the attorney should consider relying on CPLR 3211(a)(7) and forsaking subparagraph (a)(1).

Two other potential options may be available to a plaintiff faced with a CPLR 3211(a)(7) motion. As discussed above, the plaintiff, where appropriate, can invoke CPLR 3211(d) to forestall a decision on the merits of the motion. Additionally, the plaintiff may wish to request leave to replead in the event the CPLR 3211(a)(7) motion is granted. Repleader permits a plaintiff to file and serve a new pleading in an effort to correct defects in a prior pleading.

Pitfalls and Pointers

Both CPLR 3211(a)(1) and (a)(7) permit a defendant, prior to answering the complaint, to seek dismissal of a complaint (or portions of it) based on evidence. And both can permit dismissal if the evidence on which the defendant relies conclusively defeats the targeted causes of action. These general similarities should not delude the careful practitioner, as critical distinctions between the two dismissal mechanisms lead to markedly different inquiries by the party opposing the motion and the court. With respect to the timeliness of a motion, a motion under CPLR 3211(a)(1) must be made within the defendant's time to respond to the complaint, while a motion under CPLR 3211(a)(7) can be made at any time. More importantly regarding the nature of the evidence on which a defendant can rely, when seeking dismissal under CPLR 3211(a)(1), a defendant is confined to "documentary evidence," an exclusive club comprising few members. No restrictions apply, however, to the types of evidence on which a defendant may rely in moving under CPLR 3211(a)(7); the movant's familiar friend, the affidavit, is welcome to join the papers supporting the motion. Thus, within the dismissal armory, CPLR 3211(a)(1) is a precise scalpel and 3211(a)(7) is a broad sword.

What can counsel draw from this discussion? If representing a defendant, the attorney should consider relying on CPLR 3211(a)(7) and forsaking subparagraph (a)(1). This tactic will allow the attorney to submit any evidence he or she wishes to produce and make the motion at any time. Moreover, by placing faith in CPLR 3211(a)(7) and omitting reference to CPLR 3211(a)(1), the attorney will avoid a skirmish over whether the (a)(1) motion is founded on the proper character of evidence. Because CPLR 3211(a)(7) offers everything available under CPLR 3211(a)(1) and more,[30] a pure motion to dismiss for failure to state a cause of action will ensure that the court's attention is focused on the substance of the application – whether the plaintiff has a cause of action – and not on the ancillary point of whether the defendant's evidence is "documentary." If the attorney is leery of passing on the opportunity to press for dismissal under CPLR 3211(a)(1), he or she should invoke both CPLR 3211(a)(1) and (a)(7), and seek dismissal in the alternative under each provision. Given the limitations of CPLR 3211(a)(1), the attorney should exercise caution in grounding a pre-answer motion to dismiss solely on that provision.

There's another option available to defense counsel, one suggested by a higher authority.[31] If counsel has evidence he or she believes warrants judgment in the client's favor, counsel should consider abstaining from motion practice under CPLR 3211(a), serving an answer and moving for summary judgment.[32] This strategy offers the defendant three significant advantages: it permits the defendant to rely on any form of evidence, it allows the defendant to obtain judgment under a less exacting standard than the standard applicable to motions under CPLR 3211(a)(1) and (a)(7) (demonstrating the absence of a triable issue of fact, as opposed to showing conclusively that the plaintiff has no cause of action), and it results in a judgment entitled to res judicata treatment.[33]

If counseling a plaintiff, the attorney should scrutinize the defendant's motion and ascertain whether the motion is in any way based on CPLR 3211(a)(1). If the motion has a CPLR 3211(a)(1) component, the attorney should seek to establish that the evidence on which the defendant relies is not "documentary." Where the defendant's evidence fails to qualify as "documentary," the CPLR 3211(a)(1) motion should be denied for that reason alone.[34] In this connection, counsel should examine whether a good faith argument can be made that the document is ambiguous,

is not undeniably authentic, or that it can be controverted by other evidence.

Regardless of how the defendant styled its motion, if the defendant submitted evidence with the motion, the plaintiff's attorney should attempt to persuade the court that the defendant's evidence does not warrant dismissal of the complaint (or the targeted portion of it) because the allegations in the complaint were not undercut fatally by the evidence. If the plaintiff's attorney harbors any doubt as to whether the defendant's evidence might lead to dismissal, the plaintiff's attorney should submit evidence in opposition to the motion. That evidence should demonstrate to the court that the plaintiff has a viable cause of action, one founded on actual evidentiary facts, not mere allegations. If the plaintiff needs disclosure to muster sufficient opposition to the motion, it should request relief under CPLR 3211(d) and submit an affidavit satisfying that provision.

Additionally, the plaintiff's attorney may wish, when confronting a motion to dismiss based on CPLR 3211(a)(7), to request leave to replead if the court grants the motion. While a request for leave to replead can, in some circumstances, be made even after a motion to dismiss for failure to state a cause of action has been granted,[35] the plaintiff's attorney may wish to seek leave while the court is considering the underlying motion. This course of action affords the plaintiff clarity going forward – if the defendant's motion is granted but the plaintiff is given leave to replead, the plaintiff's counsel can re-draft the complaint and cure its infirmities; if the defendant's motion is granted and the court denies the plaintiff's request for leave, the plaintiff can appeal from that order, including the portion of it that denied leave. Moreover, the determination of whether leave to replead should be granted is discretionary, and a request for leave in the plaintiff's opposition to the motion to dismiss may be viewed as a sign of diligence, which may help swing the discretion pendulum in the plaintiff's favor.

Conclusion

CPLR 3211(a)(1) and (a)(7) are important dismissal tools that can resolve an entire controversy or narrow the scope of the case going forward. These tools, however, must be negotiated carefully, as pitfalls in employing them abound. Thus, whether the proponent or opponent of a CPLR 3211(a) motion, counsel must consider carefully the virtues and vices of each tool, and be particularly sensitive to the limitations inherent in a motion to dismiss under CPLR 3211(a)(1). ■

1. For the sake of simplicity, this article is couched in terms of a defendant seeking dismissal under Civil Practice Law & Rules 3211(a). Any party against whom a cause of action is asserted, however, may seek relief under CPLR 3211(a), e.g., a plaintiff against whom a counterclaim is asserted (Siegel, N.Y. Practice § 257 (5th ed.)).

2. *See* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211, C3211:10, at 21. CPLR 3211(a)(5) provides most of the grounds on which "documentary evidence" will be used, *e.g.* collateral estoppel, res judicata, etc. (Siegel, N.Y. Practice § 259). Thus, CPLR 3211(a)(1) is a general backup provision designed to provide a dismissal mechanism in situations where a defendant has a document that defeats a plaintiff's cause of action, yet the defendant is unable to point to one of the more specific grounds listed in subdivision (a) (221 Siegel's Practice Review, *Second Department Shows Futility Exclusively on 'Documentary Evidence' Standard of CPLR 3211(A)(1) When What Party Really Wants is Summary Judgment*, at 2 (May 2010)).

3. CPLR 3211(e); *see Holman v. City of N.Y.*, 19 Misc. 3d 600 (Sup. Ct., Kings Co. 2008). Alternatively, a defendant who wishes to invoke CPLR 3211(a)(1) may raise that ground in the answer and seek summary judgment on that ground at some later point.

4. Siegel, Practice Commentaries, *supra* note 2, C3211:10, at 22; *see Fontanetta v. Doe*, 73 A.D.3d 78 (2d Dep't 2010); *see also Mason v. First Cent. Nat'l Life Ins. Co. of N.Y.*, 86 A.D.3d 854 (3d Dep't 2011); *Bronxville Knolls, Inc. v. Webster Town Ctr. P'ship*, 221 A.D.2d 248 (1st Dep't 1995).

5. *See Fontanetta*, 73 A.D.3d 78.

6. *See Crepin v. Fogarty*, 59 A.D.3d 837 (3d Dep't 2009); *Berger v. Temple Beth-El of Great Neck*, 303 A.D.2d 346 (2d Dep't 2003); *Williamson, Picket, Gross, Inc. v. Hirschfeld*, 92 A.D.2d 289 (1st Dep't 1983).

7. *See Mason*, 86 A.D.3d 854 (medical records); *Integrated Constr. Servs., Inc. v. Scottsdale Ins. Co.*, 82 A.D.3d 1160 (2d Dep't 2011) (letters); *Granada Condominium III Ass'n v Palomino*, 78 A.D.3d 996 (2d Dep't 2010) (letter); *Springer v. Almontaser*, 75 A.D.3d 539 (2d Dep't 2010) (newspaper articles, printouts of web pages, and transcripts of radio and television interviews); *Fonanetta*, 73 A.D.3d 78 (letters, summaries, opinions, and/or conclusions of defendants); *Holman*, 19 Misc. 3d 600 (medical records); *but see Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804 (2d Dep't 2011) (letter can constitute "documentary evidence"). In *VIT Acupuncture, P.C. v. State Farm Auto. Ins. Co.*, 28 Misc. 3d 1230(A) (Civ. Ct., Kings Co. (2010), the court indicated that an affidavit could potentially be used in connection with a motion based on "documentary evidence" "solely to establish the bona fides of . . . documentary evidence," i.e., affidavit could be used to authenticate the "documentary evidence."

8. *See Cochard-Robinson v. Concepcion*, 60 A.D.3d 800 (2d Dep't 2009); *Mazur Bros. Realty, LLC v. State*, 59 A.D.3d 401 (2d Dep't 2009); *Ryan v. Pascale*, 58 A.D.3d 711 (2d Dep't 2009); *150 Broadway N.Y. Assoc., L.P. v. Bodner*, 14 A.D.3d 1 (1st Dep't 2004); *see also Nisari v. Ramjohn*, 85 A.D.3d 987 (2d Dep't 2011)

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(insurance policy); *cf. Curran v. Estate of Curran*, 87 A.D.3d 607 (2d Dep't 2011) (agreement to arbitrate is not "documentary evidence" because remedy of party seeking arbitration is to move to compel arbitration).

9. *See Crepin*, 59 A.D.3d 837.

10. *See Leeirv Corp. v. S & E Realty Co.*, 178 A.D.2d 403 (2d Dep't 1991); *Lebowitz v. Mingus*, 100 A.D.2d 816 (1st Dep't 1984).

11. *See Bronxville Knolls, Inc.*, 221 A.D.2d 248.

12. *See Etzion v. Etzion*, 84 A.D.3d 1015 (2d Dep't 2011).

13. *See also* Siegel, Practice Commentaries, *supra* note 2, C3211:10, at 22 ("Judicial records, such as judgments and orders, would qualify as 'documentary,' as should the entire range of documents reflecting out-of-court transactions, such as contracts, deeds, wills, mortgages, and even correspondence.").

14. *See Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318 (2007); *AG Capital Funding 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 v. Martinez*, 84 N.Y.2d 83 (1994).

15. *Goldman v. Metro. Life Ins. Co.*, 5 N.Y.3d 561 (2005); *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11 (2005); *Leon*, 84 N.Y.2d 83.

16. *See Thomas A. Sbarra Real Estate, Inc. v. Lavelle-Tomko*, 84 A.D.3d 1570 (3d Dep't 2011).

17. *See* Siegel, N.Y. Practice § 257.

18. Where the court denies the motion under CPLR 3211(d) – instead of adjourning it – the defendant may assert its 3211(a) objections in its answer and seek summary judgment on those objections (*see* Siegel, Practice Commentaries, *supra* note 2, C3211:50).

19. *See* CPLR 3211(e); Siegel, N.Y. Practice § 272.

20. *See McLearn v. Cowen & Co.*, 60 N.Y.2d 686 (1983); Siegel, N.Y. Practice § 273.

21. *See MatlinPatterson ATA Holdings LLC v. Fed. Express Corp.*, 2011 N.Y. Slip Op. 06392, at *3 (1st Dep't Sept. 1, 2011).

22. *See Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977).

23. *See CPLR 3211(a)(7): Demurrer or Merits-Testing Device?*, 73 Albany L. Rev. 99 (2009).

24. Siegel, N.Y. Practice §§ 257, 265; *see Lawrence v. Graubard Miller*, 11 N.Y.3d 588 (2008); *Guggenheimer*, 43 N.Y.2d 268; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633 (1976); *but see Henbest & Morrisey Inc. v. W.H. Ins. Agency Inc.*, 259 A.D.2d 829, 830 (3d Dep't 1999) ("in determining the motion to dismiss, we must accept the allegations of the complaint as true and *ignore* the affidavits submitted by defendants" (emphasis added)).

25. *See Guggenheimer*, 43 N.Y.2d 268.

26. *See Lawrence*, 11 N.Y.3d 588; *Rovello*, 40 N.Y.2d 633; *see also Guggenheimer*, 43 N.Y.2d 268; *cf. M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 12 N.Y.3d 798 (2009) (plaintiff's own evidence, submitted in opposition to defendant's CPLR 3211(a)(7) motion, established conclusively that plaintiff had no cause of action).

27. *Allen v. Gordon*, 86 A.D.2d 514, 515 (1st Dep't), *aff'd*, 56 N.Y.2d 780 (1982).

28. *See Rovello*, 40 N.Y.2d 633; *cf. Rau v. Borenkoff*, 262 A.D.2d 388, 389 (2d Dep't 1999) ("Although affidavits may be considered to remedy defects in a complaint, the affidavits submitted by the plaintiff are similarly devoid of specific facts and only confirm that he has no cause of action against the defendants." (internal citations omitted)).

29. *See Johnson City Cent. Sch. Dist. v. Fidelity & Deposit Co. of Md.*, 263 A.D.2d 580, 581 (3d Dep't 1999) ("A complaint will not be dismissed for failure to state a cause of action under CPLR 3211[a][7] where affidavits or other documentary evidence submitted by the plaintiff demonstrate that a cause of action may exist.").

30. Because a defendant, under the courts' interpretation of CPLR 3211(a)(7), is permitted to submit any evidence it wishes in support of a motion to dismiss for failure to state a cause of action, it is unclear what, if any, independent function CPLR 3211(a)(1) serves. Notably, too, a motion under CPLR 3211(a)(7) may be made at any time and the standard for dismissal is similar to that of a motion under subparagraph (a)(1). Therefore, CPLR 3211(a)(1) appears, in effect, to have been subsumed by CPLR 3211(a)(7).

31. *See* Siegel, N.Y. Practice §§ 259, 265.

32. Generally, summary judgment cannot be sought before the joinder of issue (*see* CPLR 3212(a)). However, if the record on a CPLR 3211(a) motion is sufficiently developed, the court may, after giving the parties adequate notice, treat the motion as one for summary judgment (*see* CPLR 3211(c)).

33. *See* Siegel, Practice Commentaries, *supra* note 2, CPLR 3211:8.

34. *See Fontanetta*, 73 A.D.3d 78.

35. *See* Siegel, N.Y. Practice § 275*; see also Janssen v. Inc. Vill. of Rockville Ctr.*, 59 A.D.3d 15 (2d Dep't 2008).

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