

**DISTRICT COURT OF NASSAU COUNTY  
FIRST DISTRICT CIVIL PART 2**

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ADENRELE A. ADEBOWALE,

Plaintiff(s)

INDEX NO. CV-000163/19

Present:

against

HON. ROBERT E. PIPIA

NYAB BROKERAGE, INC.,  
KINGS PREMIUM SERVICE CORP.,  
ADRIATIC INSURANCE COMPANY,

Defendant(s)  
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**The following named papers numbered 1  
submitted on this motion on**

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	<u>papers numbered</u>
Notice of Motion to Dismiss.....	1
Memorandum of Law In Support of Defendant's Motion to Dismiss Plaintiff's Complaint.....	2
Affirmation in Opposition.....	3
Affirmation in Further Support of Defendant's Motion to Dismiss the Plaintiff's Complaint.....	4
Reply Memorandum of Law in Further Support of Defendant's Motion to Dismiss the Plaintiff's Complaint.....	5
Notice of Motion.....	6
Supplemental Affirmation.....	7
Affirmation in Opposition.....	8
Reply Affirmation.....	9
Notice of Cross Motion to Dismiss.....	10
Affirmation in Opposition To Defendant NYAB Brokerage Inc.'s Cross-Motion to Dismiss.....	11
Reply Affirmation in Support of Notice of Cross-Motion to Dismiss.....	12

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Before the court is a motion to dismiss plaintiff's complaint from defendant Kings Premium Service Corp. ("Kings") pursuant to CPLR 3211(a)(1) ,(7) and for attorney fees, a cross-motion to dismiss plaintiff's complaint, also pursuant to CPLR 3211(a)(1) ,(7) from defendant NYAB Brokerage, Inc ("NYAB") and a Motion by defendant Adriatic Insurance Company ("Adriatic") for summary judgment pursuant to CPLR 3212 and dismissal of plaintiff's complaint. Same are determined as provided herein.

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On or about March 2, 2018 plaintiff-insured obtained automobile liability insurance coverage from Adriatic. This was financed through Kings. Under the financing agreement ("Agreement"), Kings as "Lender" advanced the full policy premium to Adriatic. Plaintiff paid Kings a down payment of \$524.31 and unconditionally promised to pay Kings nine (9) monthly installments of \$121.28. The Agreement provided for plaintiff's irrevocable appointment of Kings as his attorney -in-fact in the event of a default with full power, *inter alia*, to cancel the policy and receive all sums assigned to Kings (Agreement, ¶ 2).

The Agreement provided that upon such cancellation Kings has the right to receive all unearned premiums and that any monies received after cancellation will not serve to reinstate the policy (Agreement, ¶¶ 11-13). King's right of cancellation in the event of plaintiff's non-payment was specified in a letter dated March 21, 2018 from Kings to plaintiff. Furthermore, the subject Agreement provides for plaintiff's payment of reasonable attorney's fees in the event that Kings had to avail itself of legal representation to enforce its rights under the Agreement (Agreement, ¶ 19).

Initially, Kings and NYAB move and cross-move respectively, to dismiss the complaint, pursuant to CPLR 3211(a)(1), which provides that "[a] party may move to dismiss one or more causes of action asserted against him on the ground that a defense is based upon documentary evidence." However, "[t]o succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR 3211 (a) (1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law' (*Gould v Decolator*, 121 AD3d 845, 847 [2014]; see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994])." (*Garcia v Polsky, Shouldice & Rosen, P.C.*, 161 AD3d 828 (2d Dept 2018). In the instant motion, the documentary evidence submitted by Kings and NYAB is not of the type to *utterly refute* the plaintiffs' factual allegations and conclusively establish a defense. As such, Kings and NYAB's motions to dismiss, pursuant to CPLR 3211(a)(1), are denied.

However a different conclusion is reached concerning a CPLR 3211(a)(7) analysis. "It is axiomatic that on a motion to dismiss pursuant to CPLR 3211(a)(7), the court must 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory' (*Leon v Martinez*, 84 NY2d 83, 87-88)" (*Collins v Telcoa International Corporation*, 283 AD2d 128, 131 [2d Dept 2001] [citations omitted]).

In opposing papers plaintiff asserts that he was not aware of the existence of Kings and that the Agreement is a forgery. However, the records of payments from plaintiff to Kings undermine such an argument. Plaintiff also argues that the carrier was

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not notified of the policy cancellation. However, Kings has provided a copy of an email from Adriatic acknowledging receipt of the same. Moreover, the Banking law that authorizes an agreement such as that at issue herein does not require an acknowledgment to be valid. Lastly, the parties' Agreement expressly provides for the recovery of attorney's fees in the event that Kings retains counsel to enforce its rights under the same. Lastly, plaintiff's reliance on the notion that this matter is in its early stages is unavailing. The facts of this case warrant dismissal pursuant to CPLR 3211(a)(7).

Based on all of the foregoing, that portion of the subject motion and cross-motion seeking to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(7) are granted and plaintiff's complaint is hereby dismissed as to Kings and NYAB. Furthermore, this court finds that the facts of this case and the terms of the parties' agreement allow for reasonable attorneys' fees and that Kings is entitled to the same. Accordingly, the subject of the reasonableness of the attorney's fees sought by Kings will be the subject of an inquest to be held on October 25, 2109 at 9:30 am.

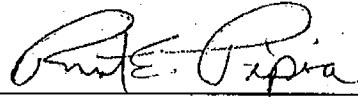
Summary judgment is drastic relief, as it denies one (1) party the opportunity to go to trial. Thus, summary judgment should only be granted where there are no triable issues of fact (see *Andre v Pomeroy*, 35 NY2d 361 [1974]). The focus for the court is on issue finding, not issue determining (see *Hantz v Fishman*, 155 AD2d 415 [2d Dept 1989]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidence in admissible form to demonstrate the absence of any material issues of fact. Failure to make such a *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion, to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see *Zuckerman v New York*, 49 NY2d 557 [1980]).

Plaintiff's opposition exhibits confusion as to the roles of the defendants in this matter. Incredibly, plaintiff professes a lack of basic awareness that Adriatic was his insurer, even though Adriatic is listed as the insurance company on the subject policy. Plaintiff was also apparently unaware of the implications of the parties' agreement regarding payments made post-cancellation. Simply put, Adriatic did not receive premiums due under the policy and said policy was validly cancelled for non-payment on June 11, 2018, long before the date that plaintiff's vehicle was damaged on November 2, 2018. Adriatic has proven the mailing of its Notice of Cancellation, plaintiff's desperate arguments in opposition to Adriatic's request for summary judgment are simply unavailing.

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Accordingly, the motion of Adriatic for summary judgment pursuant to CPLR 3212. and for dismissal of plaintiff's complaint, is granted.

So Ordered:



DISTRICT COURT JUDGE

Dated: September 13, 2019

CC: Rivkin Radler, LLP  
Adenrele A. Adebowale, *pro se*  
Galvano & Zanthakis, P.C.  
NYAB Brokerage, Inc.

REP:mc