

27 A.D.3d 445, 810 N.Y.S.2d 344, 2006 N.Y. Slip Op. 01603
(Cite as: 27 A.D.3d 445, 810 N.Y.S.2d 344)

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Supreme Court, Appellate Division, Second Department, New York.
SAXONY ICE CO., DIVISION OF SPRINGFIELD ICE CO., INC., appellant,
v.
ULTIMATE ENERGY RESTAURANT CORP., etc., respondents.
March 7, 2006.

Weinstein Kaplan & Cohen, P.C., Garden City, N.Y. (Robert N. Cohen of counsel), for appellant.

**345 Longo & D'Apice, Brooklyn, N.Y. (Mark A. Longo of counsel), for respondents.

*445 In an action to recover damages for breach of contract, the plaintiff appeals from an order of the Supreme Court, Westchester*446 County (Barone, J.), entered April 7, 2005, which granted the defendants' motion pursuant to CPLR 3211(a)(1) and CPLR 3212 to dismiss the complaint and for summary judgment on their counterclaims.

ORDERED that the order is reversed, on the law, without costs or disbursements, the motion is denied, and the complaint is reinstated.

The Supreme Court erred in granting the defendants' motion to dismiss the complaint and for summary judgment on their counterclaims. To the extent that the motion was made pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claims (*cf. Berardino v. Ochlan*, 2 A.D.3d 556, 557, 770 N.Y.S.2d 75; *Prudential Wykagyl/Rittenberg Realty v. Calabria-Maher*, 1 A.D.3d 422, 766 N.Y.S.2d 885; *Teitler v. Pollack & Sons*, 288 A.D.2d 302, 733 N.Y.S.2d 122). Here, the documentary evi-

ence submitted by the defendants did not resolve all of the factual issues as a matter of law, nor did it conclusively dispose of the plaintiff's claims (*see Museum Trading Co. v. Bantry*, 281 A.D.2d 524, 525, 721 N.Y.S.2d 822; *Brunot v. Eisenberger & Co.*, 266 A.D.2d 421, 698 N.Y.S.2d 882).

Moreover, the Supreme Court erred in awarding the defendants summary judgment since their submissions failed, prima facie, to eliminate all material issues of fact from the case (*see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *National Equip. Rental v. Frost Sand & Gravel Corp.*, 18 A.D.2d 709, 236 N.Y.S.2d 400).

CRANE, J.P., SANTUCCI, MASTRO and LIFSON, JJ., concur.

N.Y.A.D. 2 Dept. 2006.

Saxony Ice Co., Div. of Springfield Ice Co., Inc. v. Ultimate Energy Restaurant Corp.
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