

DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT: CIVIL PART ONE

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NEW YORK MERCHANTS PROTECTIVE CO, INC.,

Plaintiff.

Present:
Hon. Bonnie P. Chaikin

Index No. 000688/10

-against-

Decision and Order

FINISH LINE COLLISION, INC.,

Defendant.

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The following papers have been considered by the Court
on this motion.

	Papers Numbered
Notice of Motion, annexed affidavits and exhibits.....	1
Affirmation in Opposition.....	2

The defendant, Finish Line Collision, Inc., moves to dismiss the plaintiff's claim, pursuant to CPLR 3211(a)(1), upon the grounds of documentary evidence. The plaintiff opposes the defendant's motion.

The defendant's motion to dismiss the complaint, pursuant to CPLR §3211(a)(1) is denied. In order to be successful on the instant motion to dismiss the complaint 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 claim" (*New York Schools Insurance Reciprocal, a/k/a Bedford Central School District v. Gugliotti Associates, Inc.*, 759 NYS2d 372 [2d Dept 2003]), citing, *Teitler v Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]). The documentary evidence submitted by the defendant fails to establish conclusively its defense that plaintiff does not have a cause of action against the defendant.

The defendant's claim is that the plaintiff is in violation of General Obligations Law §5-903 and therefore the plaintiff can not enforce the terms of the contract. General Obligations Law §5-903

does not permit a service contract to be automatically renewed unless the service provider gives the person receiving the service, notice of such automatic renewal. In the plaintiff's affirmation in opposition, the plaintiff's attorney points out to the Court that the only cause of action set forth in the plaintiff's complaint is for conversion of alarm equipment and is not for a cause of action for an automatic renewal of alarm services, pursuant to a contract between the parties (*see also plaintiff's complaint*).

In view of the foregoing, the defendant's motion is denied, as without merit.

This constitutes the Decision and Order of the Court.

So Ordered:


Bonnie P. Chaikin
District Court Judge

Dated: July 8, 2010.

cc: Kirschenbaum & Kirschenbaum, P.C., Attorney(s) for the Plaintiff
Randy Scott Zelin, P.C., Attorney for the Defendant