

563, 563-564 [1st Dept 2015]).

Defendants' arguments based on summary judgment standards are of no moment; as noted by Supreme Court, they moved only to dismiss under CPLR 3211, and the court gave no indication that it was deeming the motion to dismiss a motion for summary judgment pursuant to CPLR 3211(c) (see *Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]).

Defendants' request to strike the paragraph at the end of the order is unavailing; in denying the motion to dismiss, the court did not render a finding on the merits of the complaint or express an opinion as to plaintiff's ability to establish the truth of the averments (see *Khan v Newsweek, Inc.*, 160 AD2d 425, 426 [1st Dept 1990]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 20, 2016


CLERK