Werthman v Town of N. Hempstead
2015 NY Slip Op 32851(U)
August 25, 2015
Supreme Court, Nassau County
Docket Number: 601944/15
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 15**

JOAN C. WERTHMAN,

Plaintiff(s),

-against-

TOWN OF NORTH HEMPSTEAD, VILLAGE OF SADDLE ROCK and COUNTY OF NASSAU,

Defendant(s).

INDEX # 601944/15
Mot. Seq. 1
Mot. Date 5.26.15
Submit Date 8.7.15

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2
Reply Affidavit..... 3

Defendant County of Nassau moves pursuant to CPLR 3211(a)(7) to dismiss plaintiff's complaint.

On March 24, 2014 the County of Nassau received a notice of claim alleging the plaintiff sustained personal injuries on June 12, 2014 when she tripped and fell due to a defective condition existing on a sidewalk on Bayview Avenue at its intersection with Bluebird Drive, Great Neck, New York.

Defendant County argues that the complaint fails to state a cause of action because the location of the alleged incident is not owned, operated, maintained, managed or controlled by the County. In support of this motion, the County attaches an affidavit from Anthony Esposito, a Landscape Architect II with the Nassau County Department of Public Works. He states that he is familiar with the appurtenances, roadways and sidewalks located under the jurisdiction of the County of Nassau.. He personally searched the records of the Nassau County Department of Public Works which includes contracts, sidewalks complaints and repair records, and from his

personal knowledge he attests that the subject location including the sidewalks at the subject location are not under jurisdiction, responsibility or control of the County. He states while Bayview Avenue is a roadway under the County's jurisdiction, the sidewalk adjacent to the roadway is not under the jurisdiction of the County, rather, it is under the jurisdiction of the Village of Saddle Rock. Further, the County has no responsibility for maintenance of the sidewalk at the subject location.

Plaintiff argues that this motion is premature since no discovery has taken place. Further, plaintiff argues that there is a dispute regarding jurisdiction between the County and the Village of Saddle Rock. Each denies ownership of the sidewalk and instead claims that the other municipality owns, maintains, controls or inspects the sidewalk in question. Counsel for the plaintiff has attempted to acquire the documentation relied upon by Anthony Esposito in making his affidavit. However, as of the date of the affirmation in opposition, counsel for plaintiff was unsuccessful in obtaining this documentation.

In reply, the County argues that the records relied upon by Mr. Esposito are clearly stated in the affidavit. Further, the County Administrative Code Sections 12-4.0(c)(1) and (c)(2) provide in relevant part that the villages and city councils have sole jurisdiction over the abutting sidewalks through which the County road passes. The County further points out that plaintiff misconstrued the type of motion that is before the court. Therefore, the prior written notice law and disclosure demands will not create any cause of action against the County because the location of the alleged accident was not controlled, maintained or owned by the County.

"On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Siracusa v. Sager,* 105 AD3d 937 quoting *Breytman v. Olinville Realty, LLC,* 54 AD3d 703, 703–704).

> A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a) (7) (*see* CPLR 3211 [c]). If the court considers evidentiary material, the criterion then becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg* , 43 NY2d at 275). Yet, affidavits submitted by a defendant "will almost never warrant dismissal under CPLR 3211 unless they 'establish conclusively that [the plaintiff] has no cause of action' " (*Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008], quoting *Rovello v Orofino Realty Co.*, 40 NY2d at 636 [emphasis and alterations of original quotation omitted]). Indeed, a motion to dismiss pursuant to CPLR 3211(a) (7) must be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding

it" (*Guggenheimer v Ginzburg*, 43 NY2d at 275)." *Sokol v Leader*, 74 AD3d 1180.

Accordingly, consideration of such evidentiary materials will almost never warrant dismissal under CPLR 3211(a)(7) unless the materials " 'establish conclusively that [the plaintiff] has no [claim or] cause of action' " (*Lawrence v. Graubard Miller,* 11 N.Y.3d 588, 595, quoting *Rovello v. Orofino Realty Co.,* 40 N.Y.2d 633, 636).

This motion was brought pursuant to CPLR Section 3211(a)(7). A successful CPLR Section 3211 motion can result in the dismissal of a complaint without addressing the merits while a successful CPLR Section 3212 motion awards judgment to the moving party on the merits as a matter of law (*see Hendrickson v Philbor Motors, Inc.* 102 AD3d 251 [2d Dept 21012]). The court will treat this application as one for dismissal pursuant to CPLR Section 3211(a)(7).

"It is fundamental that, in order to be held liable in tort, the alleged tortfeasor must have owed the injured party a duty of care (*see*, *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 584 [1994]). As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property (*see, Kydd v Daarta Realty Corp.*, 60 AD3d 997, 998 [2009]; Gover v Mastic Beach Prop. Owners Assn., 57 AD3d 729 [2008]; Dugue v 1818 Newkirk Mgt. Corp., 301 AD2d 561 [2003])" (*Forbes v. Aaron*, 81 AD3d 876, 877 [2d Dept. 2011]).

Discovery has not been commenced in the instant action. The defendant County's affidavit states that the County does not own, maintain or control the sidewalk in question. Affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211(a)(7) unless they "establish conclusively that plaintiff has no cause of action" (*Xia Ping Wang v. Diamond Hill Realty, LLC*, 116 AD3d 767, 768 [2d Dept. 2014]). However, this affidavit is insufficient to conclusively establish that the plaintiff has no cause of action against the County. The affidavit does not provide sufficient information regarding whenthe search was conducted and what records were actually searched.

In this case, even though defendant County's affidavit presents a seemingly strong defense, unlike in a motion for summary judgment where plaintiff would be forced to introduce evidence to withstand the motion, this is a motion to dismiss pursuant to CPLR 3211(a)(7) and such evidence to rebut defendant's affidavit may exist (*see, Rovello v Ofrino Realty Co., Inc.*, 40 NY2d 633 [1976]). Moreover, a defendant is not entitled to dismissal of a complaint pursuant to CPLR Section 3211(a)(7) for failure to state a cause of action based solely upon common law negligence as to the facts alleged in the complaint (*see Miglino v Bally Total Fitness of Greater New York, Inc.* 92 AD3d 148 [2d Dept 2011]).

For all the foregoing reasons, the motion is **denied**.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
August 25, 2015

ENTER:

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