SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 10

X

LYUBOV I. GILCHIK,

Plaintiff,

-against-

Index No. 604935/15
Motion Sequence...02
Motion Date...01/20/16

ELIOT JACOBWITZ, VICKY JACOBWITZ, TOWN OF HEMPSTEAD, COUNTY OF NASSAU, and "JOHN DOE 1-10" NAMES CURRENTLY UNKNOWN REPRESENTING EMPLOYEES, AGENTS, OR CONTRACTORS OF NAMED DEFENDANTS,

Defendants.

X

Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Reply Affidavit.....x

Upon the foregoing papers, the motion submitted by the Defendant, COUNTY OF NASSAU ("County"), seeking an order pursuant to CPLR § 3211 (a) (7) dismissing the complaint against it and any and all cross-claims asserted against the County, is determined as hereinafter provided.

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff, LYUBOV I. GILCHIK ("Plaintiff") on May 6, 2014, when she tripped and

fell on the sidewalk at or near 884 Cranford Avenue, South Valley Stream, New York. The Plaintiff commenced this action against the County by electronically filing a Summons and Verified Complaint in the Office of the Nassau County Clerk on or about July 30, 2015.

The County now moves, pre-answer, seeking to dismiss the Complaint on the grounds that the sidewalk upon which the Plaintiff allegedly was caused to trip and fall is not within the County's jurisdiction, and therefore, the County did not repair, inspect, manage or control the sidewalk.

In support of its motion, the County submits the affidavit of Anthony Esposito, a Landscape Architect II employed by the Nassau County Department of Public Works. Mr. Esposito states in his Affidavit that the sidewalk where the Plaintiff alleges the accident occurred is not within the jurisdiction of the County and that the County is not responsible to repair or contract to perform work in that location.

The Plaintiff opposes the County's motion. The opposition states, in sum and substance, that the County's motion is premature as the Plaintiff has not had an opportunity to conduct any discovery "to be sure of the complete ownership information for the property at issue". (*See* Affirmation in Opposition at ¶ 2) Further, the Plaintiff's counsel asserts that there are factual issues, including evidence that the County has some ownership interest and/or responsibility for the area in question. (*Id.* at ¶ 3) The Plaintiff's counsel also asserts that since the Defendants, ELIOT JACOBWITZ, VICKY JACOBWITZ, paid taxes to the County, the County has responsibility for the sidewalk in question. The Plaintiff's counsel

concludes that since the location of the accident was within the County of Nassau, the County is responsible for the sidewalk. (*Id.* at ¶ 9)

Counsel for the Plaintiff further states that the Affidavit of Mr. Esposito, alone, without presenting certified documentation of who owns and is responsible for the sidewalk in question, is insufficient to establish the County's lack of ownership.

On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the Court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory". (*Simkin v. Blank*, 19 N.Y.3d 46, 52 [2012]; *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 [2001]; *Polonetsky v. Better Homes Depot*, 97 N.Y.2d 46, 54 [2001]; *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]) "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss". (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]) Indeed, the plaintiff has no obligation on a motion to dismiss to demonstrate evidentiary facts to support the allegations contained in the complaint. (*Stuart Realty Co. v. Rye Country Store*, 296 A.D.2d 455 [2d Dept. 2002]; *Paulsen v. Paulsen*, 148 A.D.2d 685, 686 [2d Dept. 1989])

However, conclusory averments of wrongdoing are insufficient to sustain a complaint. (*DiMauro v. Metropolitan Suburban Bus Auth.*, 105 A.D.2d 236 [2d Dept. 1984]) Thus, bare legal conclusions and factual allegations "flatly contradicted by documentary

evidence in the record are not presumed to be true, and [i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211 (a) (7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action". (*Deutsche Bank Natl. Trust Co. v. Sinclair*, 68 A.D.3d 914, 915 [2d Dept. 2009] *quoting Peter F. Gaito Architecture., LLC v. Simone Dev. Corp.*, 46 A.D.3d 530, 530 [2d Dept. 2007])

A claim for negligence requires the pleading of facts that impose a duty of care upon the defendant in favor of the plaintiff, a breach of that duty, and that the breach of such duty was a proximate cause of the plaintiff's injuries. (*Pulka v. Edelman*, 40 N.Y.2d 781 [1976]; *Akins v. Glens Falls School Dist.*, 53 N.Y.2d 325, 333 [1981]) Absent a duty of care, there is no breach, and without breach there can be no liability. (*Pulka v. Edelman*, *supra*; *Gordon v. Muchnick*, 180 A.D.2d 715 [2d Dept. 1992]) Preliminarily, however, whether a duty of care is imposed upon the defendant in favor of the plaintiff under the circumstances alleged is an issue of law for the court to decide. (*Church v. Callanan Indus.*, 99 N.Y.2d 104 [2002])

Here, the Plaintiff has failed to specify or identify the duty that she claims the County allegedly breached. This is fatal on a motion seeking to dismiss the negligence claim based on the failure to state a cause of action. Furthermore, the County's motion was not premature, as the Plaintiff failed to demonstrate how discovery may reveal or lead to relevant evidence, or that "facts essential to opposing the motion were exclusively within" another

party's "knowledge and control". (*Espada v. City of New York*, 74 A.D.3d 1276 [2d Dept. 2010]) Ownership of the sidewalk is a matter of public record and, thus, does not constitute information in the sole and exclusive possession of the County. *(Kenworthy v. Town of Oyster Bay*, 116 A.D.2d 628 [2d Dept. 1986]) The Plaintiff failed to submit a shred of evidence to establish even an attempt to investigate the public records to determine the ownership of the subject sidewalk.

The Court finds that the evidence submitted on behalf of the County is sufficient to establish that the County does not own or maintain the sidewalk where the Plaintiff's accident occurred. In opposition, the Plaintiff submitted no evidence to rebut the County's contention that it was not responsible for the sidewalk. *See, Capobianco v. Frank Mari*, 267 A.D.2d 191 (2d Dept. 1999); *Ribacoff v. City of Mount Vernon*, 251 A.D.2d 482 (2d Dept. 1998); *Verdes v. Brooklyn Union Gas Company*, 253 A.D.2d 552 (2d Dept. 1998).

Accordingly, it is hereby

ORDERED, that the motion submitted by the Defendant, County, seeking an order pursuant to CPLR § 3211 (a) (7), dismissing the Complaint against it and any and all cross-claims asserted against it, is **GRANTED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
March 9, 2016

ENTERED

MAR 11 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Hon. Randy Sue Marber, J.S.C.

HON. RANDY SUE MARBER

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