Fanta v City of Albany
2017 NY Slip Op 33376(U)
December 5, 2017
Supreme Court, Albany County
Docket Number: Index No. 903375-17
Judge: Roger D. McDonough
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

HANG JA FANTA and RONALD FANTA,

Plaintiffs,

-against-

DECISION AND ORDER
Index No.: 903375-17
RJI No.: 01-17-125031

CITY OF ALBANY,

Defendant.

(Supreme Court, Albany County All Purpose Term)

Appearances:

JACOBY & MEYERS
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Roger D. McDonough, J.:

Defendant seeks dismissal of plaintiffs' complaint pursuant to CPLR § 3211(a)(7). Plaintiff opposes the motion.

Background

Plaintiff Hang Ja Fanta allegedly sustained injuries as a result of a fall on a sidewalk located in front of premises located at 150 State Street in the City of Albany. The fall occurred on August 5, 2016. The plaintiff Ronald Fanta has asserted a loss of services, society and consortium based on his spouse's injuries. The complaint alleges, *inter alia*, that defendant's

negligence included allowing, causing and/or permitting dangerous and unsafe conditions to exist on the aforesaid sidewalk. Defendant responded to plaintiff's complaint with the instant motion to dismiss.

Discussion

CPLR § 3211(a)(7)

Defendant argues that plaintiffs' complaint must be dismissed based on the City's prior written notice statute. In support, defendant relies upon Albany City Code § 24-1 as well as an affidavit from the City's Commissioner of the Department of General Services. The affidavit states that the City did not received prior written notice of any defective condition existing at the sidewalk at 150 State Street in the City of Albany. Additionally, defendant maintains that plaintiffs failed to establish that the City caused or created the allegedly defective condition. Defendant argues that there is no evidence to substantiate this type of claim beyond the allegations in plaintiff's complaint. Lastly, defendant points out that plaintiffs failed to establish the existence of a special relationship between themselves and the City.

In opposition, plaintiffs acknowledge having no proof of written notice at this stage of the litigation. Similarly, plaintiffs do not dispute the non-existence of any special relationship with the municipality. However, plaintiffs maintain that these issues are largely irrelevant because their negligence theory is that the City affirmatively created the sidewalk defect. In support, plaintiffs have provided an expert affidavit from a professional engineer who relied upon photographic proof, proof of 2015 and 2016 repair work done by the City, and an inspection of the subject sidewalk. Accordingly, plaintiffs maintain that a firm exception to the City's prior written notice statute exists here.

In reply, defendant notes the points that have basically been conceded and argue that the plaintiffs cannot establish that the City caused or created the allegedly defective condition. Specifically, defendant maintains that plaintiffs' expert's affidavit fails to establish that any affirmative action of the City immediately resulted in the existence of the defect. Alternatively, defendant argues that neither the complaint nor the Notice of Claim sets forth factual allegations sufficient to state a claim that the City created or caused the allegedly defective condition.

As an initial matter, to the extent the arguments were not improperly raised for the first time in reply papers, the Court finds that plaintiffs clearly set forth in their complaint and Notice

of Claim a theory that the defendant: (1) caused the dangerous condition; (2) caused the sidewalk to be cracked, broken up, uneven and not level; (3) caused ruts, holes and/or depressions to be in said sidewalk; and (4) caused the sidewalk to be in a dilapidated condition. Accordingly, this argument by defendant is wholly without merit.

The Court finds that plaintiffs have adequately stated a cause of action sounding in general negligence against the City. More specifically, the Court finds that the plaintiffs have sufficiently alleged in their complaint that the City caused/affirmatively created the allegedly dangerous sidewalk condition (*see*, Fogan-Chew v Poughkeepsie Dept. of Public Works, 135 AD3d 702, 703 [2nd Dept. 2016]). The remaining arguments by defendant largely go to whether plaintiffs can ultimately establish their allegations (*see*, Sim v Farley Equipment Co. LLC, 138 AD3d 1228, 1229 [3rd Dept. 2016]). Such a determination is unnecessary for the Court to reach in a CPLR § 3211(a)(7) motion.

General Municipal Law § 50-e

As an additional basis for dismissal, defendant argues that plaintiffs failed to comply with General Municipal Law § 50-e. Specifically, defendant maintains that plaintiffs' Notice of Claim failed to sufficiently describe the cause of the slip and fall. The defendant contends that no particularity was provided as to what, if any, defect caused the plaintiff's fall. Finally, based on all of the foregoing arguments, defendant maintains that the derivative loss of consortium claim must also be dismissed.

In opposition, plaintiffs maintain that they properly set forth the date, time and precise location of the incident. They note that they also set forth the condition of the sidewalk as "cracked, broken up, uneven and not level". Further, plaintiffs note that they attached photographs to their Notice of Claim in order to further identify the precise location of the fall. The City's reply did not address plaintiffs' argument as to this issue.

The Court finds that plaintiffs adequately complied with the requirements set forth in General Municipal Law § 50-e(2). The information set forth and the photographs provided clearly provided the City with sufficient knowledge to "locate the place, fix the time and understand the nature of the accident" (Brown v City of New York, 95 NY2d 389, 393 [2000]).

In light of the Court's findings, the Court must also reject defendant's attempt to have the

derivative consortium claim dismissed.

Defendant's remaining arguments have been considered and found to be insufficient to warrant dismissal under CPLR § 3211(a)(7).

Based on all of the foregoing, it is hereby

ORDERED that defendants' motion to dismiss, brought pursuant to CPLR § 3211(a)(7), is hereby denied; and it is further

ORDERED that counsel are directed to appear for a court conference in chambers on January 5, 2018 at 11:30 a.m. for the purpose of establishing a discovery schedule.

This shall constitute the Decision and Order of the Court. The original decision and order is being returned to the counsel for the plaintiffs who is directed to enter this Decision and Order without notice and to serve defendant's counsel with a copy of this Decision and Order with notice of entry. The Court will transmit a copy of the Decision and Order to the County Clerk. As this is an E-File case, no hard copies of the papers considered will be forwarded to the County Clerk. The signing of the decision and order and delivery of a copy of the decision and order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER.

Dated: Albany, New York
December 5, 2017

R. D. McD

Roger D. McDonough
Supreme Court Justice

12/19/17 AB

Papers Considered:

1. Defendant's Notice of Motion, dated July 3, 2017;
2. Affirmation of Jellisa M. Joseph, Esq., dated July 3, 2017, with annexed exhibits including affidavit of Daniel Mirabile, sworn to June 30, 2017;
3. Affirmation of James W. Shuttleworth, Esq., dated August 21, 2017, with annexed exhibits including Affidavit of Michael J. Tuttman, P.E., sworn to August 18, 2017, with annexed exhibits;
4. Affirmation of Jellisa M. Joseph, Esq., dated August 25, 2017, with annexed exhibit.