[* 1]

Dismissed
v. Starrett City Preservation

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X

JOSE BRITTON,

Plaintiff,

-against-

FELICIA RILEY-FANN, ANTHONY BRITTON, STARRETT CITY, INC, STARRETT CITY PRESERVATION, LLC and STARRETT CITY ASSOCIATES, L.P.,

Defendants.

X

Index No: **300443/2017**

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

The following papers numbered 1 to **3** read on this **motion for summary judgment**

No On Calendar of **May 24, 2017**	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	**1**
Answering Affidavit and Exhibits	**2**
Replying Affidavit and Exhibits	**3**
Affidavit	
Pleadings -- Exhibit	
Memorandum of Law	
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants, Starrett City, Inc., Starrett City Preservation, LLC and Starrett City Associates, L.P. ("Starrett") seek the dismissal of the complaint pursuant to CPLR 3211(a)(1) based upon documentary evidence and for failure to state a cause of action pursuant to CPLR 3211(a)(7). Plaintiff also seeks legal fees, costs and sanctions for commencing a frivolous action pursuant to CPLR § 8303-a and Uniform Rules of Court § 130-1.1. Plaintiff opposes the motion to dismiss and cross-moves for an order granting him legal fees, costs and sanctions for making a frivolous motion pursuant to CPLR § 8303-a and Uniform Rules of Court § 130-1.1. The Starrett defendants oppose the cross-motion.

On February 21, 2017, the plaintiff commenced this action to recover for personal injuries he sustained in a motor vehicle accident that occurred on September 13, 2014 in front of an apartment building owned by Starrett and located at 112-45 Seaview Avenue, Brooklyn, New York. The plaintiff claims he was standing on the sidewalk near the entrance of the building when a vehicle being driven by defendant Anthony Britton mounted the curb striking him and pinning him to the wall of the building. The plaintiff maintains the vehicle was owned by defendant Felicia Riley-Fann. The plaintiff contends the driveway, sidewalk and building were owned and controlled by the Starrett defendants.

The plaintiff alleges defendants Britton and Riley-Fann's actions were negligent, careless and reckless in the operation of the motor vehicle. The plaintiff claims the Starrett defendants were negligent in the ownership, operation, management, control and maintenance of the premises and driveway.

In support of the motion to dismiss the complaint, the Starrett defendants contend they did not own, operate, control or maintain the vehicle that struck the plaintiff causing his injuries. The Starrett defendants maintain its agents and employees did not cause or create any dangerous, defective or unsafe conditions on the subject property where the accident took place. The Starrett defendants claim

they cannot be held responsible for the negligent and/or intentional operation and control of the motor vehicle driven by defendant Anthony Britton.

The plaintiff maintains the compliant should not be dismissed as he has alleged a valid cause of action against the Starrett defendants as owners of the apartment building where the accident occurred.

The Starrett defendants move to dismiss the complaint pursuant to CPLR 3211(a)(7). In response to a motion pursuant to CPLR 3211, the pleadings shall be liberally construed, the facts alleged accepted as true, and every possible favorable inference given to plaintiff. (*Leon v. Martinez*, 84 NY2d 83 [1994]). On such a motion, the court is limited to examining the pleading to determine whether it states a cause of action. (*Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]). A motion to dismiss pursuant to CPLR 3211will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law. (*AG Capital Funding Partners. L.P. v. State St. Bank and Trust Co.*, 5 NY3d 582 [2005]). The Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory. (*Clarke v. Laidlaw Transit, Inc.,* 125 AD3d 920 [2nd Dept. 2015]). Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its

claims, plays no part in the determination of the motion to dismiss. (*EBC I, Inc v. Goldman, Sachs & Co.*, 5 NY3d 11 [2005]).

The Starrett defendants also move to dismiss the complaint pursuant to CPLR 3211(a)(1) alleging a defense founded upon documentary evidence. A motion to dismiss based on documentary evidence may be granted only where such documentary evidence utterly refutes plaintiff's factual allegations and conclusively establishes a defense as a matter of law. (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 [2002]). The evidence submitted in support of the motion must be "documentary" or the motion must be denied. (*Cives Corp. v. George A. Fuller Co., Inc.*, 97 AD3d 713 [2nd Dept. 2012]). To qualify as "documentary evidence", it must be unambiguous, authentic and undeniable. (*Eisner v. Cusumano Const. Inc.*, 132 AD3d 940 [2nd Dept. 2015]). Affidavits, deposition testimony or letters are not considered documentary evidence pursuant to CPLR 3211(a)(1). (*Granada Condominium III Assn. v. Palomino*, 78 AD3d 996 [2nd Dept. 2010]).

To establish a prima facie case of negligence, the plaintiff must demonstrate (1) that the defendant owed the plaintiff a duty of reasonable care, (2) a breach of the duty, and (3) a resulting injury proximately caused by the breach. (*Solomon v. City of New York*, 66 NY2d 1026 [1985]). An owner of realty owes a duty to

maintain the property in a reasonably safe condition. (*Basso v. Miller,* 40 NY2d 233 [1976]) and one who has been injured must prove that the property owner had either actual or constructive notice of the defect in order to recover. (*Early v. Hilton Hotels Corp.*, 73 AD3d 559 [1st Dept. 2010]; *Juarwz v. Wavecrest Mgt. Team*, 88 NY2d 628 [1996]). Plaintiff must demonstrate that defendant either created the condition by its own affirmative act, was aware of a specific condition yet failed to correct it, or was aware of an ongoing and recurring unsafe condition which regularly went unaddressed. (*Mazerbo v. Murphy,* 52 AD3d 1064 [3rd t Dept. 2008]).

After a review of the record, the Court hereby grants the motion of the Starrett defendants to dismiss the complaint. Defendant, Anthony Britton, as the driver of the motor vehicle, intentionally or negligently struck the plaintiff as he stood on the sidewalk in front of the apartment building. Plaintiff's injuries were caused solely by the actions and the negligent operation of the vehicle by Anthony Britton. The plaintiff has not offered any evidence that demonstrates the Starrett defendants were negligent. The plaintiff sustained injuries as a result of being struck by a motor vehicle that jumped the curb as he stood on the sidewalk in front of defendants' building.

Accordingly, the motion to dismiss of Starrett is granted to the extent that the complaint is dismissed as against defendants Starrett City, Inc., Starrett City Presentation, LLC and Starrett City Associates, L.P. The motion is denied insofar as it seeks legal fees, costs and sanctions. The cross-motion is denied.

The foregoing constitutes the decision and order of the Court.

Dated: 4/2/2018

KENNETH L. THOMPSON JR. J.S.C.