[* 1]

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

YONG CHEN,	Index No. 712232/17
Plaintiff,	Motion Date March 2, 2018
- against-	
CAPITOL SPRINKLER SERVICE CORP.,	Motion Cal. No. 19
Defendant.	Motion Seq. No. 1

The following papers numbered EF3 to EF25 read on this motion by Capitol Sprinkler Service Corp. ("Capitol"), to dismiss the complaint, pursuant to CPLR 3211 [a][1]and [a][7] and, in the alternative, for summary judgment in its favor pursuant to 3211[c]; and for the issuance of sanctions against plaintiff's counsel pursuant to 22 NYCRR 130-1.1.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF3 - EF21
Affirmation in Opposition - Exhibits.....	EF23 - EF24
Reply Affirmation.....	EF25

Upon the foregoing papers, it is ordered that the motion is determined as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained on September 14, 2014, while traversing the sidewalk abutting 37-02 Main Street, Flushing, New York. In the verified bill of particulars, plaintiff claims that he was injured as a result of the "improper use of screws; screws that were too long; exposed screw points" on a standpipe that was positioned on the sidewalk adjacent to 37-02 Main Street, Flushing New York. Plaintiff further alleges that his leg was "punctured" by a "screw emanating from the standpipe."

Richard Shuster, Inspection Manager for Capitol at the time of the subject accident, testified as herein relevant that Capitol was retained by Mehran Enterprises, Ltd. ("Mehran"), the admitted owner of 37-02 Main Street, to perform routine examinations of the sprinkler and the standpipe systems located at the premises. The purpose of these inspections, he stated, was to ensure that the condition of the systems was in compliance with municipal codes.

Luis Romero of the FDNY, testified for the City of New York in the consolidated case of *Chen v Mehran Enterprises, Ltd.*, that there are no code requirements addressing the length of screws on standpipe caps. After reviewing a photograph depicting the said screws, Romero testified that the standpipe screws did not appear to be in violation of any code; and that he knew of no codes addressing the length of standpipe screws.

Alexander Mehran, president of Mehran Property Management, testified that Capital was the service company that did "monthly inspections. . . and they also [performed] annual tests and five-year tests [of their standpipe systems], and keeps [us] up to code."

Leslie Tannenbaum, an employee of Capitol, submitted an affidavit indicating that s/he conducted a search for business records within the possession of Capitol for the period of September 15, 2012 up to and including September 15, 2014 in response to a subpoena and no records were found indicating that Capitol had ever repaired or replaced caps/covers and screws for any standpipes abutting the property at 37-02 Main Street, in Flushing, New York. Furthermore, after being advised that plaintiff had commenced an action against Capitol, Tannenbaum conducted an additional search for any records pre-dating September 15, 2012, to confirm whether Capitol had ever replaced or repaired caps/covers and screws on any of the standpipes abutting 37-02 Main Street. Tannenbaum avers that there were no such records, and that s/he performed the search of both electronic and paper records.

Capitol moves to dismiss the complaint on the ground that, *inter alia*, it did not service the standpipe[s] abutting 37-02 Main Street, Flushing, New York; it merely inspected them on a monthly and yearly basis, for code violations. In any event, Capitol submits, it had no duty to plaintiff to maintain the subject standpipe on the property. Capitol also moves for sanctions against plaintiff's counsel for allegedly filing a frivolous complaint against Capitol. Plaintiff opposes the motion.

Discussion

The branch of the motion which seeks to dismiss the complaint based upon documentary evidence, is denied. The "documentary evidence" annexed to Capitol's motion consists of deposition testimony, an affidavit, pleadings and photographs. However, it is clear that affidavits and deposition testimony are not "documentary evidence" within the intendment of a CPLR 3211(a)(1) motion to dismiss (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010]; *Berger v Temple Beth–El of Great Neck*, 303 AD2d 346, 347 [2d Dept 2003]; *to the same effect*, *see Tsimerman v Janoff*, 40 AD3d 242, 835 N.Y.S.2d 146 [1st Dept], and Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211.10).

The documentary evidence contemplated by CPLR 3211(a)(1) must be unambiguous and of undisputed authenticity, to wit, "incontrovertible" and "conclusively establish" a defense as a matter of law (*Arnav Industries Retirement Trust v. Brown, Raysman, Millstein. Felder &*

Steiner, L.L.P., 96 NY2d 300 [2001] (signed revised stipulation of settlement not sufficient documentary evidence where attorney averred revision was only of a typographical error); *Weil Gotshal & Manaes, L.L.P. v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 [1st Dept 2004] (depositions, trial testimony, emails not the type of documentary evidence contemplated by the statute); *IMP Industries v. Anderson, Kill & Olick*. 267 AD2d 10 [1st Dept 1999] (correspondence, pleadings and stipulations not documentary evidence contemplated by the statute; *see* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22). In sum, the evidence submitted by Capitol is not "documentary evidence," and thus, does not conclusively establish that Capitol did not install the screws on the standpipe which allegedly injured plaintiff.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the complaint a liberal construction, accept all facts as alleged in the complaint 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 (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Jannetti v Whelan*, 97 AD3d 797, 797 [2d Dept 2012]). In assessing a motion under CPLR 3211(a)(7), a court may freely consider affidavits and other evidence submitted by the plaintiff to remedy any defects in the complaint (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Leon v Martinez*, 84 NY2d at 88; *Rad and D'Aprile, Inc. v Arnell Constr. Corp.*, 159 AD3d 971, 972 [2d Dept 2018]).

As a general rule, "[l]iability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises." (*Gibbs v Port Auth. of New York*, 17 AD3d 252, 254 [1st Dept 2005]). Specifically, "the owner of real property abutting any sidewalk. . . shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition" (New York City, N.Y., Code § 7-210 [2013]). Here, plaintiff submits that Capitol is liable for his injuries based upon its contract with Mehran to inspect (and allegedly maintain) the standpipe. However, in *Espinal v Melville Snow Contrs.*, (98 NY2d 136 [2002]), the Court of Appeals held that a contractual relationship between two parties does not create liability in negligence to a third party. "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal*, 98 NY2d at 138; *see also All Am. Moving & Stor, Inc. v Andrews*, 96 AD3d 674, 675 [1st Dept 2012]). There are three exceptions to this rule. A party may be seen as having assumed a duty of care to a third party if: (1) the contracting party, in failing to exercise reasonable care in the performance of its duty, launches a force or instrumentality of harm; (2) the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) the contracting party has entirely displaced the other party's duty to maintain a safe premises (*Espinal*, 98 NY2d at 140).

This Court finds that Capitol met their *prima facie* burden entitling them to dismissal of the complaint pursuant to CPLR 3211(a) (7), by demonstrating that their contract with Mehran Enterprises, Ltd. ("Mehran"), was limited and did not entirely displace Mehran's duty to

maintain the standpipe (*see Church v Callanan Indus*., 99 NY2d 104 [2002]; *cf. Palka v Servicemaster Mgt. Servs. Corp*., 83 NY2d 579, 588-589 [1994]). Additionally, the evidence failed to show that the plaintiff detrimentally relied upon Capitol's continued performance of their duty (*see Bugiada v Iko*, 274 AD2d 368 [2000]), or that Capitol "launched a force or instrument of harm" (*Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]; (*Farrell v City of New York*, 83 AD3d 655, 655–56 [2d Dept 2011]). Capitol demonstrated that they only provided services consisting of monthly inspections and testing (once annually and once every five years) for the standpipe at issue to ensure code compliance; and thus they did not cause the standpipe to be in a dangerous condition, and that they did not have a duty to maintain the standpipe. Without evidence that Capitol did anything to the standpipe to create the alleged hazard, plaintiff cannot rely upon the *Espinal* exceptions to impose liability upon Capitol (*Farrell v City of New York*, 83 AD3d 655, 655–56 [2d Dept 2011]).

In opposing the motion, plaintiff emphasizes his belief that Capitol launched a force or instrumentality of harm in that they exacerbated a dangerous condition, assuming the condition of the standpipe was dangerous. This has not been established. Further, there is no evidence that plaintiff detrimentally relied on the inspection of the standpipe. Nor has plaintiff demonstrated that Capitol displaced Mehran's duty to maintain a safe premises. Thus, despite his arguments, plaintiff has not shown that the exceptions mentioned in *Espinal* are applicable here. Accordingly, the branch of the motion which is to dismiss the complaint pursuant to CPLR 3211[a][7], is granted.

The branch of the motion which is to dismiss the complaint, in the alternative, pursuant to CPLR 3211[c], is denied as academic.

The branch of the motion which is for sanctions against plaintiff's counsel, is denied. Capitol failed to show that the actions of plaintiff's counsel in commencing the instant suit against Capitol "were completely without merit, were made primarily to harass or maliciously injure, or falsely asserted a material fact" (*Parkchester S. Condominium Inc. v Hernandez*, 71 AD3d 503, 504 [1st Dept 2010]). Nor was it established that the challenged conduct was "undertaken primarily to delay or prolong the resolution of the litigation" (22 NYCRR 130–1.1[c][2]; *see Sakow v Columbia Bagel, Inc*., 32 AD3d 689 [1st Dept 2006]).

Conclusion

The branch of the motion which is to dismiss the complaint pursuant to CPLR 3211[a][1], is denied.

The branch of the motion which is to dismiss the complaint pursuant to CPLR 3211[a][7], is granted.

The branch of the motion which is to dismiss the complaint, in the alternative, pursuant to CPLR 3211[c], is denied.

The branch of the motion which is to impose sanctions on plaintiff's counsel, is denied.

Dated: June 28, 2018

DARRELL L. GAVRIN, J.S.C.