Olivier v Nyack Joint Fire Dist.
2018 NY Slip Op 33906(U)
November 17, 2018
Supreme Court, Rockland County
Docket Number: 031241/2018
Judge: Thomas E. Walsh II
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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MARIE OLIVIER,

Plaintiff(s),

-against-

THE NYACK JOINT FIRE DISTRICT, THE VILLAGE OF NYACK, THE TOWN OF CLARKSTOWN, THE TOWN OF ORANGETOWN, THE COUNTY OF ROCKLAND, RICHARD J. SCULLY, JOSEPH MOGER and SKYE S. LEITH,

Defendant(s).

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DECISION & ORDER
Index No. 031241/2018

Motion #1 - MG
DC - N
Adj: 12/21/18

Hon. Thomas E. Walsh II, J.S.C.

The following papers numbered 1read on this motion by Defendant THE TOWN OF ORANGETOWN for an Order pursuant to *Civil Practice Law and Rules* § 3211(a)(7) dismissing the Verified Complaint as against Defendant THE TOWN OF ORANGETOWN on the grounds that said Complaint fails to state a cause of action:

PAPERS	**NUMBERED**
Notice of Motion (Motion #1)/Affirmation of Denise A. Sullivan, Esq. in Support of Motion to Dismiss Verified Complaint/Exhibits (A- G)	1

The lawsuit arises out of a motor vehicle accident which occurred on August 26, 2017 while Plaintiff was a passenger in a parked automobile that was struck by a motor vehicle that was leased, owned, controlled or managed by co-Defendant NYACK JOINT FORE DISTRICT and operated by co-Defendant RICHARD J. SCULLY. Defendant THE TOWN OF ORANGETOWN (hereinafter ORANGETOWN) contends that a joint fire district is an independent political entity serving the property and property owners included with the fore district. According to Defendant ORANGETOWN the affairs of the joint fir district are under the management of the board of fire commissioners who are appointed jointly by the town and village boards or elected by the voters pursuant to Article 11 of *Town Law*. Further, Defendant

submits that pursuant to *Town Law* § 176(18), (19), (28) and (3) a fire district is "empowered" to insure itself against liability and can use it's independent taxing power to pay claims made against the district. Additionally, Defendant submits that the liability of a fire district for negligent acts of a volunteer foreman are set forth in *General Municipal Law* § 205-b. Therefore, Defendant ORANGETOWN argues that they are not liable for negligence on the part of members of the Fire District who were engaged in firefighting or other authorized activities of the fire district.

Defendant ORANGETOWN asserts that they have no legal interest in any portion of the instant action. Additionally, Defendant ORANGETOWN asserts that the Verified Complaint filed in the instant action fails to contain a theory fo liability or reference any predicated liability as to Defendant ORANGETOWN. Specifically, Defendant states that the only reference to them in the Verified Complaint in paragraphs 14 through 16 in which Plaintiff asserts that she filed a Notice of Claim against Defendant ORANGETOWN and that Defendant ORANGETOWN conducted a *GML* § 50-h hearing on February 8, 2018. Defendant ORANGETOWN contends that they did not conduct a *GML* § 50-h hearing of Plaintiff on February 8, 2018 or at any time. Further, Defendant asserts that there is no allegation that co-Defendant SCULLY was employed by Defendant ORANGETOWN or that he was driving a vehicle that was owned or leased by Defendant ORANGETOWN.

Despite service of the instant motion on the co-defendants and the Plaintiff the Court has not received any opposition.

In considering a motion to dismiss for failure to state a cause of action pursuant to *Civil Practice Law and Rules* § 3211(a)(7) the pleadings must be liberally construed and the sole criterion is whether from within the complaint's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. The facts pleaded are to be presumed to be true and are to be accorded every favorable inference [*Gershon v Goldberg*, 30 AD3d 372 (2d Dept 2006); *Fitzgerald v. Federal Signal Corp.*, 63 AD3d 994 (2d Dept 2009)]. When a party moves to dismiss a complaint under this sub-section the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action, and, in considering such a motion the court must determine only whether the facts as alleged fit

within any cognizable legal theory. Whether a plaintiff can ultimately establish its allegations is not part of the calculus [*Sokol v Leader*, 74 AD3d 1180 (2nd Dept 2010].

The Court also recognizes plaintiff's right to seek redress, and not have the courthouse doors closed at the very inception of the action, where the pleadings need meet only a minimal standard necessary to resist dismissal of a complaint [*Campaign for Fiscal Equity v State of New York*, 86 N.Y.2d 307, 1995].

The Court has reviewed the complaint and, based upon the foregoing, the motion should be granted as defendants have demonstrated their entitlement to the requested relief. In arriving at this decision the Court has reviewed, evaluated and considered all of the issues framed by these motion papers and the failure of the Court to specifically mention any particular issue in this Decision and Order does not mean that it has not been considered by the Court in light of the appropriate legal authority.

Accordingly, it is hereby

ORDERED that the Defendant THE TOWN OF ORANGETOWN's motion (Motion #1) is granted in its entirety; and it is further

ORDERED that the Verified Complaint is dismissed as to Defendant THE TOWN OF ORANGETOWN; and it is further

ORDERED that the remaining parties are to appear for a status conference on **FRIDAY DECEMBER 21, 2018 at 9:30 a.m.**

Dated: New City, New York
November 17, 2018

Hon. Thomas E. Walsh II, J.S.C.

To:

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