Piroozian v County of Nassau
2018 NY Slip Op 34062(U)
October 3, 2018
Supreme Court, Nassau County
Docket Number: 608749/17
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

_____x

ILLANA PIROOZIAN,

Plaintiff(s),

-against-

COUNTY OF NASSAU,

Defendant(s).

_____x

TRIAL/IAS, PART 23
NASSAU COUNTY

Index No.: 608749/17

Motion Seq. No.: 001 & 002
Motion Submitted: 8/1/18

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Notice of Cross Motion/Opposition.....X
Reply Affirmations.....XX

Defendant, the County of Nassau (the County), moves this court (Motion Seq. 001) for an Order, pursuant to CPLR § 3211(a)(1) and (7) dismissing the complaint against it. Plaintiff, Illana Piroozian (Piroozian) opposes the motion and cross moves (Motion Seq. 002), presumably pursuant to CPLR §3025, for leave to amend her complaint to add other parties. The County does not oppose the cross motion.

After filing a notice of claim, Piroozian commenced this action by service of a summons and complaint dated August 25, 2017. The County brought this motion in lieu of a complaint.

Piroozian alleged she tripped and fell over a raised piece of cement, serving as the base of a metal lamppost, that was situated in the middle of a sidewalk at the corner of Middle Neck Road and Picadilly Road, Village of Great Neck, County of Nassau. The County argues the complaint should be dismissed because the sidewalk where the accident allegedly occurred is outside of its jurisdiction and they never received prior written notice of the alleged defect.

A motion to dismiss a complaint based on CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations conclusively establishing a defense as a matter of law (*Gosch v Mutual Life Ins. Co.* of N.Y., 98 NY2d 314, 326 [2002]; *Bibbo v 31-30, LLC,* 105 AD3d 791, 792 [2d Dept 2013]). To be considered documentary, for the purposes of a motion to dismiss based on documentary evidence, the evidence must be unambiguous and of undisputed authenticity. Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are "essentially undeniable," qualify as "documentary evidence" in the proper case. If the document does not reflect an out-of-court transaction, and is not essentially undeniable, it is not documentary evidence within the intendment of CPLR 3211(a)(1) (*see Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). Neither affidavits, deposition testimony or letters are considered documentary evidence within the intendment of CPLR 3211(a)(1) (*Integrated Constr. Servs., Inc. v Scottsdale Ins. Co.*, 82 AD3d 1160, 1163 [2d Dept 2011]).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law[,] a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Hense v Baxter*, 79 AD3d 814, 815 [2d Dept 2010]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept. 2010]). "The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference" *(Hense v Baxter*, 79 AD3d 814, 815 [2d Dept 2010], *supra*; *see Leon v Martinez*, 84 NY2d 83, 87 [1994], *supra*; *Sokol v Leader*, 74 AD3d 1180,1181 [2d Dept 2010], *supra*; *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008]).

In reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court is to accept all facts alleged in the complaint as being true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see Delbene v. Estes*, 52 AD3d 647 [2d Dept. 2008]; *see also 511 W.232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2D 144 [2002]. Pursuant to CPLR § 3026, the complaint is to be liberally construed (*see Leon v. Martinez*, 84 NY2d at 83). It is not the court's function to determine whether plaintiff will ultimately be successful in proving the allegations (*see*

Aberbach v. Biomedical Tissue Services, 48 AD3d 716 [2d Dept 2008]; *see also EBC I, Inc. v. Goldman Sachs & Co.,* 5 NY3D 11 [2005]).

The pleaded facts, and any submissions in opposition to the motion, are accepted as true and given every favorable inference *(see 511 W. 323nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d at 151-152; *Dana v. Malco Realty, Inc.,* 51 AD3d 621 [2d Dept 2008]; *Gershon v. Goldberg*, 30 AD3d 372, 373 [2d Dept 2006]). However, a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) (*see* CPLR § 3211[c]; *Sokol v. Leader*, 74 AD3d at 1181). "When evidentiary material is considered" on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether they have properly stated one, and unless it has been shown that a material fact as claimed is not a fact at all or that no significant dispute exists, the dismissal should not be granted (*Guggenheimer v. Ginzburg*, 43 NY2d at 275; *see Sokol v. Leader*, 74 AD3d at 1182).

One cannot be held liable for a dangerous or defective condition on property unless ownership, occupancy, control or special use of the property has been established. *(Ruggiero v. City School District of New Rochelle*, 109 A.D.3d 894 [2nd Dept 2013]; *Soto v. City of New York*, 244 A.D.2d 544 [2nd Dept. 1997], *James v. Stark*, 183 A.D.2d 873 [2nd Dept. 1982]).

Herein, in support of its motion, the County submits, *inter alia*, the sworn

affidavit of Veronica Cox, an employee with the Bureau of Claims and Investigations in the Office of the Nassau County Attorney. Ms. Cox states she searched County records for a period of six years prior to the accident to determine whether the County has received any prior written notice of complaints or defects in connection with the area where Piroozian fell. Based upon her search, she determined there was no such prior written notice.

The County also submits the affidavit of Anthony Esposito, a Landscape Architect II with the Nassau County Department of Pubic Works (DPW). Based upon a search of DPW records, Mr. Esposito states that he found no records that the County performed any work, or contracted to perform any work, at the location of the subject accident. The court notes that while the County's counsel, in his affirmation, further alleges the location of the accident is not within the jurisdiction of the County, no admissible evidence is offered in support of that assertion. He cites to the Nassau County Administrative Code, but offers no proof that the location is solely within the confines of the Village of Great Neck.

"Where, as here, a municipality has enacted a prior written notice law, it may not be subject to liability for injuries caused by a dangerous roadway condition unless it has received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies" (*Wald v City of New York*, 115 AD3d 939 [2d Dept 2014]; *Phillips v City of New York*, 107 AD3d 774, [2d Dept 2013]; *see Martinez v City*

of New York, 105 AD3d 1013, 1014 [2d Dept 2013]). "The only recognized exceptions to the statutory prior written notice requirement involve situations in which the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a benefit upon the municipality" (*Wald v City of New York, supra; Long v City at Mount Vernon*, 107 AD3d 765 [2d Dept 2013]; *Oboler v City of New York*, 8 NY3d 888, 889-890 [2007]; *Miller v Village of E. Hampton*, 98 AD3d 1007, 1008 [2d Dept 2012]). In addition, "the affirmative negligence exception is limited to work by the [municipality] that immediately results in the existence of a dangerous condition" (*Wald v City of New York, supra*, quoting *Yarborough v City of New York*, 10 NY3d 726, 728 [2007], quoting *Oboler v City of New York, supra* at 889).

Furthermore, neither actual nor constructive notice of a given defect is sufficient to overcome the requirement of prior written notice (*Amabile v City of Buffalo,* 93 NY2d 471, 474 [1998]; *Caramancia v City of New Rochelle*, 268 AD2d 496 [2d Dept 2000]). In order for a municipality to be held liable for a condition where no prior written notice was given, a plaintiff must set forth competent evidence that the municipality affirmatively created the alleged offending condition in issue (*see Walker v Incorporated Village of Northport*, 304 AD2d 823 [2d Dept 2003]; *Monteleone v Incorporated Village of Floral Park*, 74 NY2d 917 [1989]).

Herein, it is clear that the County did not receive prior written notice. However, neither of the affidavits submitted by the County assert that the County did not install the lamppost. Pictures annexed to the opposition papers show that the lamppost is in the

middle of the sidewalk, and that the base is raised approximately two inches. It can be reasonably argued that the installation of this lamppost created an immediate, dangerous condition. (*Madonia v. City of New York* 2018 WL 447299 [2d Dept 2018]). Therefore, whoever erected the lamppost could be seen to have affirmatively created the dangerous condition. The affidavit of Mr. Esposito states that the County "did not perform or contract for any work related to the subject location, nor did it make any repairs in the vicinity...". Neither this affidavit, nor anything in the County's reply denies the County installed the lamppost. Accordingly, the court finds that the County's motion will be denied. The only documentary evidence offered is affidavits, which normally cannot serve as documentary evidence. As for failure to state a claim, granting Piroozian every favorable inference, the court finds the motion deficient.

Piroozian's cross motion will also be denied as defective and moot. It is defective for the failure to include the proposed amended pleading. CPLR §3025(b). It is moot because pursuant to CPLR §3025(a), Piroozian may amend her pleading at any time without leave prior to the time for a responsive pleading to be filed expires. By virtue of this motion, the County's answer is not due until 10 days after service of notice of entry of this order. CPLR §3211(f).

Accordingly, it is hereby

ORDERED, that the County's motion (Motion Seq. 001) to dismiss pursuant to CPLR §3211(a)(1)(7) is DENIED, without prejudice, with leave to renew upon proper proofs; and it is further

ORDERED, that Piroozian's cross motion (Motion Seq. 002) for leave to amend her complaint is DENIED as defective and moot.

The foregoing constitutes the Decision and Order of the Court.

Dated: October 3, 2018
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.

ENTERED
OCT 05 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE