

Rosario v Town of Mount Kisco
2021 NY Slip Op 33646(U)
January 4, 2021
Supreme Court, Westchester County
Docket Number: Index No. 54017/2020
Judge: Mary H. Smith
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

**HON. MARY H. SMITH
JUSTICE OF THE SUPREME COURT**

RAMONA J. ROSARIO, AS ADMINISTRATOR
OF THE ESTATE OF HANIEL REYES-ROSARIO
and RAMONA J. ROSARIO, Individually

Plaintiff(s),

DECISION & ORDER
Index No.: 54017/2020

- against -

TOWN OF MOUNT KISCO, VILLAGE OF MOUNT KISCO,
FRANCESCA LUPPINO, FRANCESCA LUPPINO 2013
REVOCABLE LIVING TRUST, ANTONIO LUPPINO,
SHARON DASILVA, HARTFORD ACCIDENT &
INDEMNITY COMPANY and GPS METRO, LLC,

Defendant(s).

Defendants Town of Mount Kisco and Village of Mount Kisco (Village) moves to dismiss the complaint.

The following papers were read:

Notice of Motion, Affirmation, and Exhibits (13)	1-15
Affirmation in Opposition, Exhibits (7), and Memo of Law	16-24
Memo of Law in Reply	25
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By way of background, plaintiffs commenced this action on March 12, 2020. The complaint alleges that this action arises from a fire that occurred on January 20, 2016 at a property known as 121 St. Marks Place, Mount Kisco, New York (Premises) during the course of which Haniel Reyes-Rosario died. The complaint alleges that, within its jurisdiction, the Village is responsible for the administration and enforcement of the Uniform Code, the State Energy Conservation Construction Code, the Village Code, as well as other federal, state and local laws, ordinances and regulations governing housing

standards with the Village, which it refers to collectively as the Housing Regulations. The complaint sets forth numerous causes of action, including four claims against the Village: conscious pain and suffering (First Cause of Action), negligent infliction of emotional distress (Second Cause of Action), wrongful death (Seventh Cause of Action), and fraud and civil conspiracy (Eighth Cause of Action). Now, the Village moves to dismiss these claims pursuant to CPLR 3211 (a) (7).

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the Court is to afford the pleading a liberal construction (*see* CPLR 3026), accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and simply determine whether the alleged facts fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The Court of Appeals has explained that “[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see also Harris v Barbera*, 96 AD3d 904, 906 [2d Dept 2012]).

In support of its motion, the Village contends, among other things, that plaintiff’s negligence claims against the Village fail because it cannot be held liable for failing to enforce the Housing Regulations. The Village asserts that plaintiff alleges that the Village owed a duty to plaintiff and the decedent to ensure reasonably safe living conditions. The Village asserts that the complaint contains no indication that the Housing Regulations were enacted for particular persons rather than the public at large. The Village further contends that, even if the enforcement of the Housing Regulations could be found to be ministerial rather than discretionary, plaintiff’s allegations relating to the existence of a special duty are vague and conclusory. The Village asserts that the complaint contains no indication that the Housing Regulations created a private right of action or that they were enacted for particular persons. The Village also asserts that the complaint fails to allege that plaintiff had any direct contact with the Village or that the Village assumed an affirmative duty to act on behalf of the plaintiff or decedent. Further, the Village asserts that the complaint fails to sufficiently allege that the Village affirmatively did something to induce plaintiff and decedent to live at the Premises. As to the claim for fraud and civil conspiracy, the Village contends, among other things, the complaint lacks any factual allegations that the Village made any false statements and/or representations of fact regarding the safety or lack thereof of the Premises. The Village also contends that there are no factual allegations that plaintiff and decedent justifiably relied on the same.

In opposition, plaintiff asserts that, within its jurisdiction, the Village is responsible for the administration and enforcement of the Housing Regulations and that the enforcement of which is not discretionary. Moreover, plaintiff contends that the Court should imply a private right of action for the failure to enforce the relevant provisions; specifically, plaintiff cites to Executive Law § 371. Plaintiff asserts that a special relationship existed because the decedent was clearly part of a class that was intended to be protected by the relevant statute: that is, a resident of New York who was entitled to the

basic level of protection in connection the construction and maintenance of his rental unit. Plaintiff also contends that a special relationship existed because the Village “through their actions and/or inactions affirmatively and impliedly represented to Plaintiff and Haniel that the Illegal Dwelling was safe for habitation.” Even assuming that enforcement is discretionary or that no special relationship existed, plaintiff contends that dismissal is not warranted because plaintiff alleges that the Village acted with discriminatory intent. Based in part on the foregoing, plaintiff asserts that the claim for negligent infliction of emotional distress is adequately pleaded. In addition, plaintiff cites to the representation mentioned above to support the claim for fraud and civil conspiracy.

In opposition, GPS contends that the complaint adequately pleads the causes of action against the Village. In addition, GPS contends that the motion is premature.

Generally, in the absence of a special relationship, a municipality may not be held liable in a private right of action due to its failure to enforce a statute or regulation (*see Ferreira v Cellco Partnership*, 111 AD3d 777, 778 [2d Dept 2013]). The Second Department has explained that:

“A special relationship can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when the municipality voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known blatant and dangerous safety violation” (*id.* at 778-79).

As to the first category, the subject statute must authorize a private right of action or the Court may imply a private right of action when “(1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme” (*McLean v City of New York*, 12 NY3d 194, 200 [2009], internal quotation marks omitted). Here, plaintiff has failed to identify any statute or regulation, which provides a private right of action due to the Village’s failure to enforce it. Although the Court may imply a right of action, to recognize a private right of action under Executive Law § 371 would be inconsistent with the legislative scheme. Article 18 of Executive Law (Executive Law § 370 *et seq.*) is fairly detailed and discusses enforcement frequently and nowhere contemplates enforcement by non-governmental actors nor provides for governmental tort liability. Thus, it is fair to infer that the Legislature considered carefully the best means for enforcing the provisions of Executive Law § 371 and would have created a private right of action against erring government agencies if it found it wise to do so. This is not a case where the Legislature has simply prohibited or required certain conduct and left the mechanism of enforcement to the courts.

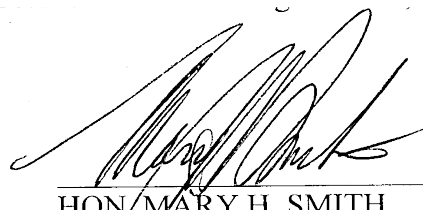
As to the second category, one requirement is “some form of direct contact between the municipality’s agents and the injured party” (*Etienne v New York City Police Dept.*, 37 AD3d 647, 649 [2d Dept 2007]). Here, plaintiff has failed to allege that plaintiff or the decedent had any direct contact with an agent of the Village or that there was an assumption by the municipality, through promises or actions of an affirmative duty to act on behalf of plaintiff or the decedent.

As to the third category, plaintiff has failed to allege that the Village assumed positive direction and control in the face of the alleged dangers of the Premises by merely alleging that the Village failed to issue any violations or citations or warn plaintiff or decedent (*see Ferreira*, 111 AD3d at 777).

Based on the foregoing, the Village’s motion to dismiss is granted as to plaintiff’s negligence claims, that is, First, Second, and Seventh Causes of Action as against the Village. Next, the Court considers the Eighth Cause of Action for fraud and civil conspiracy.

It is well settled that the elements of a claim for fraud are “(1) a misrepresentation or a material omission of fact which was false, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages” (*Minico Ins. Agency, LLC v B & M Cleanup Services*, 165 AD3d 776, 777 [2d Dept 2018], internal quotation marks omitted). In addition, CPLR 3016 (b) requires that “the circumstances constituting the wrong shall be stated in detail.” Here, plaintiff’s allegation that the Village “through their actions and/or inactions affirmatively and impliedly represented to Plaintiff and Haniel that the Illegal Dwelling was safe for habitation” fails to satisfy this heightened pleading standard. Accordingly, the Village’s motion to dismiss is granted as to plaintiff’s claim for fraud and civil conspiracy, that is, the Eighth Cause of Action.

Dated: January 4, 2021
White Plains, New York



HON. MARY H. SMITH
Justice of the Supreme Court