DeMatteo v Celwyn Co., Inc.
2021 NY Slip Op 33804(U)
January 27, 2021
Supreme Court, Nassau County
Docket Number: Index No. 610704/2020
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

VICTORIA DEMATTEO,

Plaintiff(s),

-against-

CELWYN COMPANY, INC., TOWN OF HEMPSTEAD, COUNTY OF NASSAU, NASSAU INTER-COUNTY EXPRESS and METROPOLITAN TRANSPORTATION AUTHORITY,

Defendant(s).

TRIAL/IAS, PART 12
NASSAU COUNTY

Index No. 610704/2020

Motion Seq. No.: 001
Motion Submitted: 12/21/2020

The following papers read on this motion:

Notice of Motions/Supporting Exhibits.....XX
Affirmation in Opposition.....X

Defendant, County of Nassau (County), moves this court for an order, pursuant to CPLR §3211(a)(7), dismissing the complaint against it. Plaintiff, Victoria DeMatteo (DeMatteo) opposes the motion. DeMatteo commenced this action, sounding in negligence, by service of a summons and complaint dated October 2, 2020. Issue was joined by service of an answer with cross claims by Defendant Town of Hempstead dated October 26, 2020. The County brought this motion in lieu of an answer.

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 [2nd 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. *Leon v. Martinez*, 84 NY2d 83 [1994]. It is not the court's function to determine whether plaintiff will ultimately be successful in proving the allegations. *Aberbach v. Biomedical Tissue Services*, 48 AD3d 716 [2nd Dept. 2008]; see also *EBCI, 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, DeMatteo alleges she tripped and fell over the remaining piece of a broken-off steel or metal sign post located in front of the Tri-County Flea Market in Levittown, County of Nassau. The County alleges it does not own or maintain the area where DeMatteo allegedly fell. In support of its motion, the County offers, *inter alia*, the sworn affidavit of William Nimmo, Deputy Commissioner of the Department of Public Works (DPW), and a deed for the subject property.

In his affidavit, Mr. Nimmo states that he is familiar with the appurtenances, roadways and sidewalks maintained by DPW. He personally searched DPW's records which includes contracts, sidewalk complaints and repair records and determined that the area where DeMatteo alleges she fell was not under the jurisdiction or control of the County. He denies that the County maintains, repairs, controls, possesses, contracts for, supervises, constructs, inspects, renovates, rehabilitates or alters the subject location. As for the deed, it indicates the property is owned by a private entity.

The County further argues it received no written notice of any defect with the subject premises. In support of this argument, the County submits the sworn affidavit of Robert Dujardin, Attorney's Assistant with the Litigation and Appeals Bureau of the office of the Nassau County Attorney. "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]).

In his affidavit, Mr. Dujardin states that as a part of his job duties, he maintains the files containing notices of claim and notices of defects. He performed a search of these records going back six years from the date of the incident and found no written notice of a defect at the subject location.

In opposition, DeMatteo only offers the affirmation of counsel. Counsel refers to the affidavit of Mr. Dujardin as "self serving", but an affidavit by a municipal employee which states that a thorough search has been conducted and no written notice has been received is competent evidence. (*Dabbs v. City of Peeksill*, 178 AD2d 577 [2d Dept 1991]). Counsel also claims the motion should be denied because DeMatteo has not yet had the opportunity to conduct discovery. Said discovery "may reveal evidence to support a claim..." against the County. However, DeMatteo has neglected to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. "The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion" (*Hanover Ins. Co. v.*

Prakin, 81 AD3d 778 [2d Dept. 2011]; *see also Essex Ins. Co. v. Michael Cunningham Carpentry*, 74 AD3d 733 [2d Dept. 2010]; *Peerless Ins. Co. v. Micro Fibertek, Inc.*, 67 AD3d 978 [2d Dept. 2009]; *Gross v. Marc*, 2 AD3d 681 [2d Dept. 2003]).

As DeMatteo does not effectively challenge any of the arguments raised by the County, the court finds the County has established that it did not own or maintain the subject sidewalk and that it had no prior written notice of any defect.

Accordingly, it is hereby

ORDERED, that the County's motion to dismiss the complaint against it is GRANTED. The complaint and any cross claims are dismissed as to the County only.

This constitutes the Decision and Order of the Court.

Dated: January 27, 2021
Mineola, N.Y.

ENTERED
Feb 03 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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