

Lovejoy v City of New York

2022 NY Slip Op 33030(U)

September 6, 2022

Supreme Court, New York County

Docket Number: Index No. 159478/2021

Judge: J. Machelles Sweeting

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

CRYSTAL LOVEJOY,

Plaintiff,

- v -

THE CITY OF NEW YORK, DEPARTMENT OF PARKS
AND RECREATION OF THE CITY OF NEW YORK,
CAPITAL ONE, NATIONAL ASSOCIATION, 351 ST.
NICHOLAS AVENUE LLC

Defendants.

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INDEX NO. 159478/2021

MOTION DATE 06/02/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55 were read on this motion to/for DISMISS.

In the underlying action, plaintiff seeks monetary damages for personal injuries she allegedly sustained on July 4, 2021 when she tripped and fell. The complaint describes the location of the accident as “an alleyway and/or roadway between premises known as 351 St. Nicholas Avenue and St. Nicholas Park a/k/a West 128th Street, in the County of New York, City and State of New York” (the “Accident Location”). Photos of the Accident Location are on NYSCEF Documents #27 and #29.

Now pending before the court is a motion wherein defendant 351 ST. NICHOLAS AVENUE LLC (the “Building Owner”) seeks an order:

- (a) dismissing the complaint and all cross-claims with prejudice, pursuant to Civil Practice Law and Rules (“CPLR”) § 3211 (a)(1), and dismissing the complaint, pursuant to CPLR § 3211 (a)(7), for failure to state a cause of action; and

(b) upon dismissal, awarding costs and reasonable attorney's fees to the Building Owner, including costs associated with the instant motion.

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction [...] We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (Leon v Martinez, 84 NY2d 83 [NY Ct. of Appeals 1994]).

Arguments Made by the Parties

As noted above, plaintiff described the accident location as an alleyway that lay “between” two different properties. It is undisputed that one of the properties is a private property known as 351 St. Nicholas Avenue and is owned by the Building Owner. It is also undisputed that the second property is a public park known as St. Nicholas Park that is not owned by the Building Owner. The private property is located to the south of St. Nicholas Park, and St. Nicholas Park is located to the north of the private property.

In its motion, the Building Owner argues that it bears no responsibility for plaintiff's fall, because the Accident Location was not a part of its property and that the Building Owner did not make any special use of the Accident Location.

In support of this argument, the Building Owner submits two sworn affidavits. The first affidavit by Angelo J. Fiorenza (NYSCEF Document #35), states material part that

10. Everything north of the north line of Lot 46, including the alleyway to the north of Lot 46 and two stone retaining walls, *are part of St. Nicholas Park and appear to be owned by the City of New York ("City"). This includes the location of the plaintiff's alleged accident, which is located entirely within the alleyway to the north of the north line of Lot 46. Any defect in the alleyway is not owned by Lot 46.* The City maps records show the extension of the City-park over and including the alleyway.

The second affidavit is by Dan Rozenblatt, the managing member of 351 St. Nicholas Avenue LLC, which owns the building located at 351 St. Nicholas Avenue in Manhattan (the “building” or the “property”). He is also the principal of E&C Management, which manages the property. (NYSCEF Document #38). In his affidavit he states that:

8. The location where the plaintiff claims she fell is located to the north of the building and is not a part of 351’s property. The same was true on 7/4/21.

In opposition, plaintiff did not dispute the Building Owner’s central contention that the Accident Location was not a part of the property of the Building Owner. However, the plaintiff argues that this motion is premature, as plaintiff had not yet undertaken discovery from any defendant and no preliminary conference order has been entered into. Plaintiff also submitted Google Maps photos (NYSCEF Document #50) from 2021, prior to the accident. Plaintiff argues that the photos show that the Building owner “has fencing attached to what appears to be window wells for the building along the alley,” and that at a minimum, these photos “raise a factual inference that 351 had to engage in a special use of 128th Street in order to have the window fencing installed and or maintained.”

In Reply, the Building Owner denied that it had made any special use of the Accident Location, and submitted another sworn affidavit (NYSCEF Document #55) from Mr. Rozenblatt. that stated “The plaintiff’s attorney’s assertion that there is “fencing attached to what appears to be window wells for the building along the alley,” is false.

Analysis and Conclusions of Law

Here, even accepting the facts as alleged in the complaint as true, and according plaintiff the benefit of every possible favorable inference, the court find plaintiff's arguments to be unavailing.

First, and critically, co-defendant City does not oppose any portion of the Building Owner's motion, or dispute that the City is the owner of the neighboring lot (St. Nicholas Park) that includes the Accident Location. The City also does not allege that the Building Owner made any special use of the alleyway that includes the Accident Location.

Second, plaintiff's argument that the alleyway includes "fencing *attached* to what appears to be window wells for the building" is belied by the photos (NYSCEF Document #50) submitted by plaintiff herself, which show on their face a fence that does not appear to touch the building in any way. Mr. Rozenblatt, who owns and manages the building, has also stated that the fence is not attached to the building, or the building's windows.

Further, Mr. Rozenblatt also stated, in his first affidavit, that the Building owner does not use, clean, maintain or repair any area located to the north of the northern property line, including the Accident Location; that the Building Owner did not direct anyone to use, clean, maintain or repair that area on its behalf; that there are no special uses of or easements for the area; and that there is no access from the north side of private property to the alleyway where plaintiff fell.

Finally, with respect to the argument that this motion is premature, plaintiff fails to even allege any evidentiary basis to suggest that there is outstanding discovery that may lead to the discovery of relevant evidence. *See DaSilva v. Haks Engineers, Architects & Land Surveyors, P.C.*, 125 A.D.3d 480 (Sup. Ct. App. Div. 1st Dept. 2015) ("Contrary to plaintiff's contention, defendants' motions were not premature although discovery was incomplete. A grant of summary

judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence).

Conclusion

It is hereby:

ORDERED that this motion is GRANTED insofar as the complaint and all cross-claims are dismissed, with prejudice, as against the Building Owner; and it is further

ORDERED that the caption shall be amended to remove 351 ST. NICHOLAS AVENUE LLC (the Building Owner) as a named defendant in this action.

9/6/2022			J. MACHELLE SWEETING, J.S.C.
DATE			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> GRANTED IN PART
		<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE