

Kane v Galicia Constr. Co. Inc.

2007 NY Slip Op 31128(U)

April 19, 2007

Supreme Court, Queens County

Docket Number: 0016744/2006

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

	<u>x</u>	Index
MERYL L. KANE,		Number <u>16744</u> 2006
Plaintiff,		Motion
-against-		Date <u>February 21,</u> 2007
GALICIA CONSTRUCTION COMPANY INC.,		Motions
et al.,		Cal. Number <u>16</u>
Defendants.		Motion Seq. No. <u>1</u>
	<u>x</u>	

The following papers numbered 1 to 11 read on this motion by the New York City Department of Buildings (DOB), to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-8
Reply Affidavits	9-11

Upon the foregoing papers it is ordered that the motion is granted.

Plaintiff in this action seeks monetary damages to compensate her for damage to her property located at 32-32 168th Street, Flushing, New York. In the complaint, plaintiff alleges that her property was damaged by the negligent construction work performed on the property next door, by Galicia Construction Company Inc. (GCI), and that the work of GCI was not in compliance with the requirements of the New York City Building Code. Plaintiff further alleges that, despite numerous complaints regarding the illegal construction and structural damage to the retaining wall common to both properties, DOB deliberately or negligently failed to properly investigate complaints made by her regarding such violations. DOB moves to dismiss the complaint insofar as asserted against it on

the ground that it fails to state an actionable cause of action. Plaintiff opposes the motion.

The record indicates as follows: Plaintiff's property was adjacent to property owned by defendants Alfred Cirignano and Manuel Minino, located at 32-36 168th Street, in Flushing. Between June 7, 2005 and June 14, 2006, John W. Stacom submitted four applications for work at 32-36 168th Street, which were professionally certified by Stacom. Application number 402149689, filed on June 7, 2005, was for sidewalk paving. A permit was issued by DOB on October 12, 2005 for this work. Application number 402153496, filed on July 7, 2005, was for the construction of a new residential building. The job was audited, determined to be in conformity with all applicable laws, and a permit was issued on November 2, 2005. Construction work commenced at the location shortly after issuance of the permit.

Application number 40295797, filed on June 5, 2006, was for the construction of a garage. An inspection of the property on or about June 21, 2006, revealed that a garage had already been constructed without the issuance of a permit. Based thereon, a notice of violation was issued to defendant Minino. A permit was later issued for this job on July 10, 2006. An audit of application number 40295797 revealed several zoning objections. As a result, by letter dated July 21, 2006, a Stop Work Order was issued until the objections were addressed. The objections were answered and the audit was accepted on December 14, 2006.

The fourth application was submitted and approved for a permit on June 14, 2006. This application amended application number 402153496, as to the number of plumbing fixtures necessary for the building.

It is upon the foregoing that DOB moves to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7). On a motion to dismiss, the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true and the plaintiff is afforded the benefit of every possible favorable inference. Leon v. Martinez, 84 N.Y.2d 83 (1994); Santos v. City of New York, 269 A.D.2d 585 (2nd Dept.2000); Jacobs v. Macy's East, Inc., 262 A.D.2d 607 (2nd Dept.1999); Doria v. Masucci, 230 A.D.2d 764 (2nd Dept.1996). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999). The determination to be made is whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 88 (1994).

Here, in moving to dismiss, DOB contends that it is entitled to absolute immunity from liability in that the alleged acts of which plaintiff complains involve the exercise of discretion, and furthermore, that it did not act improperly with regard to its inspections and the issuance of related permits.

It is well settled that "when official action involves the exercise of discretion, the public officer [or municipality] is not liable for the injurious consequences of that action even if resulting from negligence or malice" (see Tango v Tulevech, 61 NY2d 34, 40 [1983]; see also Mon v City of New York, 78 NY2d 309 [1991]). Indeed, the doctrine of governmental immunity applies even where the act is determined to be wrongful (Tango v Tulevech, supra). Whether to grant a building permit "is a discretionary determination and the actions of the government in such instances are immune from lawsuits" (City of New York v 17 Vista Assocs., 84 NY2d 299, 307 [1994]; see Arteaga v State of New York, 72 NY2d 212, 217 [1988]; Tarter v State of New York, 68 NY2d 511 [1986]; Tango v Tulevech, 61 NY2d 34, 40 [1983]).

It is also noted, that plaintiff failed to establish that DOB acted improperly with respect to its inspections and related permit issuances. The record indicates that DOB conducted random audits to ensure compliance, and that the subject permit applications were professionally certified, indicating that a licensed architect verified that the plans complied with DOB rules and regulations. Plaintiff did not establish that further review or investigatory work by DOB was necessary or required under any statute or regulation. Accordingly, the motion to dismiss the complaint is granted, insofar as alleged against DOB.

Dated: April 19, 2007

J.S.C.