

Mullen v Incorporate Vil. of Northport

2007 NY Slip Op 31493(U)

June 4, 2007

Supreme Court, Suffolk County

Docket Number: 0019353/2006

Judge: Paul J. Baisley

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Paul J. Baisley, Jr.

 DAWN MULLEN,

Plaintiff,

-against-

INCORPORATE VILLAGE OF NORTHPORT,
 EMPA, INC. and GALLOWITSCH
 ENTERPRISES, LTD.,

Defendants,

ORIG. RETURN DATE: February 22, 2007

FINAL RETURN DATE: March 22, 2007

MTN. SEQ. #: 001-MD

PLTF'S ATTORNEY:

Michael F. Perrotta, Esq.
 775 Park Avenue, Suite 205
 Huntington, New York 11743

**ATTORNEYS FOR INCORPORATE
 VILLAGE OF NORTHPORT:**

Donohue, McGahan, Catalano & Belitsis, Esqs.
 555 North Broadway
 P.O. Box 350
 Jericho, New York 11753

**ATTORNEYS FOR EMPA, INC. and
 GALLOWITSCH ENTERPRISES, LTD.:**

Gibson & Behman, P.C.
 80 Broad Street, 13th Floor
 New York, New York 10004

Upon the following papers numbered 1 to 24 read on this motion to dismiss: Notice of Motion and supporting papers 1 - 8; First Affirmation in Opposition and supporting papers 9 - 13; Second Affirmation in Opposition and supporting papers 14 - 18; Reply affirmation 19 - 24; it is,

ORDERED that that part of this motion (001) by the defendant Incorporated Village of Northport for an order dismissing the complaint pursuant to CPLR 3211 is denied; and it is further

ORDERED that that part of this motion (001) by the defendant Incorporated Village of Northport for summary judgment pursuant to CPLR 3212 is denied without prejudice; and it is further

ORDERED that, pursuant to 22 NYCRR 202.8(f), the parties are directed to appear for a preliminary conference on June 19, 2007 at the Supreme Court Annex, DCM Part, Room 203A, One Court Street, Riverhead, New York at 10:00 a.m.

This is a personal injury action arising out of an alleged trip and fall on July 26, 2005 on a sidewalk in the Village of Northport in front of premises allegedly owned by the defendants EMPA, Inc. and Gallowitsch Enterprises, Ltd. The plaintiff claims that a depression in the sidewalk which evidenced partial repair work was the cause of the incident.

Mullen Vs. Incorporate Village of Northport

Index No. 19353/2006

Page Two

This motion to dismiss is brought by the defendant Incorporated Village of Northport (hereinafter Northport) pursuant to CPLR 3211 and 3212 and primarily upon the basis that since it did not cause the potentially dangerous condition it could only be liable if it had received prior written notice of the defect and since it had no such notice, it could not be liable as a matter of law.

In general, in considering a motion to dismiss pursuant to CPLR 3211, the court's role is limited to "determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint [citations omitted]" (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121, 741 NYS2d 9, 12 [1st Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). Also, the pleading "is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory [citations omitted]" (*Id.*, at 120-121, 12). In addition, the court shall consider allegations as true in any affidavits in support of the complaint and in opposition to a motion to dismiss pursuant to CPLR 3211 (*see Grossfield v Grossfield*, 224 AD2d 583, 639 NYS2d 712 [2d Dept 1996]).

In this case, Northport does not indicate which of the eleven grounds for dismissal under CPLR 3211(a) it is espousing. Through a process of elimination, it would appear that Northport is relying on CPLR 3211(a)(7) which provides for a dismissal for failure to state a cause of action. A review of the pleadings as well as the affidavit of the plaintiff, however, reveals sufficient evidentiary support for the stated causes of action resulting from the alleged accident (*see Grossfield v Grossfield*, 224 AD2d 583, 639 NYS2d 712 [2d Dept 1996]; *Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121, 741 NYS2d 9, 12 [1st Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). The plaintiff alleges that she tripped and fell, was injured, and the alleged cause of the trip was a defective sidewalk which was arguably caused by one or more of the named defendants.

Accordingly, that part of the motion seeking a dismissal pursuant to CPLR 3211 is denied.

Turning now to that part of the motion seeking summary judgment, on a motion for summary judgment the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

In support of its application for summary judgment, Northport submits an affidavit from the Northport Village Clerk in which she states that she caused a search to be undertaken of the village records for a three-year period preceding the alleged accident and that the search revealed no records indicating any repairs to that portion of the sidewalk as well as no repair requests and no written notices of the defect in question. Northport, therefore, contends that since the records show that Northport did not undertake any repairs of the subject sidewalk and had no prior written notice of any defects at that location, it was not liable for any

accident as a matter of law (*see Pittel v Town of Hempstead*, 154 AD2d 581, 546 NYS2d 411[1989]).¹

In view of these submissions in support of Northport's motion, the court finds that Northport made a *prima facie* showing of entitlement to summary judgment. Based upon its submissions, Northport showed it did not cause the defect and had no prior written notice of the defect.

In opposition, however, the co-defendants refer to an investigation they had undertaken which concluded that it was and is the responsibility of Northport to undertake repairs of the sidewalk and not the abutting property owners. These co-defendants did not submit an affidavit from their investigator to this effect with their initial opposition papers and while such an affidavit was attached to their "Affirmation in Further Opposition," the court agrees with counsel for the plaintiff that the latter submission was untimely, not permitted under the CPLR 2214 and, accordingly, the "Affirmation in Further Opposition" and its supporting papers were not considered on this motion.

In any event, Northport does not contest that it bore the responsibility for sidewalk repairs; it merely contends that no such repairs were done and there was no record that any such repairs were required.

The plaintiff's opposition to this motion includes photographs of the subject area of the sidewalk and an affidavit by the plaintiff. These submissions show defects in the sidewalk which could possibly cause a trip and fall and, more to the point, show what appears to be evidence of prior repair work to the area in question. In addition, the plaintiff states in her affidavit that the photographs are a "fair and accurate representation" of the condition and appearance of the sidewalk at the time of the accident and, furthermore, she herself had observed that there was a "large gap in the sidewalk" which "had been partially filled in with blacktop type material" and although it appeared level it was actually "depressed and uneven."

The plaintiff contends that there had obviously been a repair, that Northport was concededly responsible for such repairs and that although the search of the records conducted on behalf of the village clerk revealed no repairs had been done, the physical evidence, on its face, raises questions of fact as to the contentions of Northport.

The court agrees with the plaintiff that there is evidence of repair work and a question of fact as to which entity was responsible for the repair work. Moreover, if Northport did undertake the repair work, then the prior written notice issue no longer remains the dispositive issue in the action. Under these facts and circumstances, the affidavit of the village clerk is insufficient to support summary judgment. At this point,

¹ In support of this proposition, Northport cites a decision of this court which dismissed an action against a municipality based upon the lack of a prior written notice (*Schultz-Prepscius v Village of Port Jefferson*, Sup Ct, Suffolk County, January 4, 2007, Baisley, J, Index No. 20702/06). While the legal propositions stated in that case are applicable, the parties should be aware of the fact that that decision and order was subsequently vacated (*Schultz-Prepscius v Village of Port Jefferson*, Sup Ct, Suffolk County, February 7, 2007, Baisley, J, Index No. 20702/06) and upon additional submissions this court then denied the municipality's motion to dismiss and found a question of fact existed as to prior written notification

Mullen Vs. Incorporate Village of Northport
Index No. 19353/2006
Page Four

evidence from Northport employees with actual knowledge as to work performed or not performed is needed - either through discovery, trial, or both - before the underlying issues can be resolved.

In conclusion, the plaintiff has sufficiently met her burden in establishing the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*). This motion for dismissal pursuant to CPLR 3211 is denied and, as to CPLR 3212, it is denied without prejudice to being sought again if timely made and supported by additional evidence.

This decision constitutes the order of the court.

Dated: *June 4, 2007*

HON. PAUL J. BAISLEY, JR.
HON. PAUL J. BAISLEY, JR. J.S.C.