

Carlucci v Town of Oyster Bay

2007 NY Slip Op 34240(U)

December 17, 2007

Supreme Court, Nassau County

Docket Number: 5792-05/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

REGINA CARLUCCI,

Plaintiff,

- against -

THE TOWN OF OYSTER BAY, ZMG, INC.,
ZMG BROADWAY LLC and SHELDON P.
BLAU, M.D.,

Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 15792/05

Motion Sequence No. 001, 002,
003, ~~004~~

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2, 3, 4</u>
Answering Affidavits	<u>5</u>
Replying Affidavits	<u>6, 7, 8</u>
Briefs: Plaintiff's / Petitioner's	<u> </u>
Defendant's / Respondent's	<u> </u>

The defendant Town of Oyster Bay moves for summary judgment pursuant to CPLR 3212 against the plaintiff, and dismissal of the complaint and all cross claims on the ground there are no triable issues of fact regarding liability on behalf of this defendant. The defendants ZMG, Inc. and Sheldon P. Blau, M.D. cross move for summary judgment pursuant to CPLR 3212, and dismissal of the complaint and all cross claims against these defendants. The defendant Town of Oyster Bay cross moves for summary judgment against the plaintiff if the action against the defendants ZMG, Inc. and Sheldon P. Blau, M.D. is dismissed, the cross claims by the defendant Town of Oyster Bay should be converted to a third party action without any further process

having to be served. The plaintiff cross moves pursuant to CPLR 3025 (b) to amend the complaint to plead prior written notice¹. The plaintiff opposes the motion by the defendant Town of Oyster Bay, and the cross motion by the defendants ZMG, Inc. and Sheldon P. Blau, M.D. . The defendant Town of Oyster Bay replies to the plaintiff's opposition, and opposes the plaintiff's cross motion pursuant to CPLR 3025 (b) to amend the complaint to plead prior written notice. The plaintiff replies to opposition by the defendant Town of Oyster Bay to the plaintiff's cross motion to amend the complaint to plead prior written notice. The defendant Town of Oyster Bay partly opposes the cross motion of the defendants ZMG, Inc. and Sheldon P. Blau, M.D. The defendants ZMG, Inc. and Sheldon P. Blau, M.D. reply to the opposition, in part, by the defendant Town of Oyster Bay to the cross motion of the defendants ZMG, Inc. and Sheldon P. Blau, M.D. by opposing it, and the defendants ZMG, Inc. and Sheldon P. Blau, M.D. reply to the plaintiff's opposition to their cross motion. The underlying personal injury action arises from an alleged accident on a sidewalk at 566 Broadway, Massapequa, New York on or about March 15, 2005. The plaintiff alleges walking on the sidewalk adjacent to the subject premises, and tripping, falling, and sustaining injuries.

The attorney for the Town of Oyster Bay provides, in detail, in a supporting affirmation dated July 5, 2007, to the Town's motion, the procedural history of this matter, and the evidence submitted regarding it. The attorney for the Town of Oyster Bay contends the plaintiff's own testimony is that she does not know what caused her fall, and that is fatal to the plaintiff's complaint. The attorney for the Town of Oyster Bay asserts the alleged defect is, as a matter of

¹ This cross motion by the plaintiff is not contained in case management, but was date stamped as received by the Nassau County Clerk and the Clerk of the Supreme Court, Nassau County on September 21, 2007.

law, too trivial to be actionable. The attorney for the Town of Oyster Bay avers the plaintiff cannot establish a proximate cause between the alleged defect and the happening of her accident.

The attorney for the defendants ZMG, Inc. and Sheldon P. Blau, M.D. points, in a supporting affirmation dated July 25, 2007, to their cross motion, to the deposition testimony of various witnesses, and other evidence. The attorney for the defendants ZMG, Inc. and Sheldon P. Blau, M.D. asserts the plaintiff testified she does not know what caused her fall. The attorney for the defendants ZMG, Inc. and Sheldon P. Blau, M.D. avers the Assistant to the Commissioner of the Town's Department of Public Works testified he searched the records of this defendant, and found there was an inspection of the subject property in 2003, and there were some sidewalk flags that needed to be replaced, and trees needed to be removed. The Town's employee also testified there was a tree removal application and a letter sent to the property owner which asked the property owner if they wanted to sign up with the Town to replace the sidewalk flags, or whether they privately could do it. The Town's employee testified the property owner sent the Town a check to do the sidewalk repairs, signed off on a tree and sidewalk application, and the Town undertook to repair the sidewalk there. The attorney for the defendant Town of Oyster Bay avers the alleged defect is trivial. The attorney for the defendants ZMG, Inc. and Sheldon P. Blau, M.D. asserts the defendant ZMG, Inc. had a special relationship with the Town that absolves them from any responsibility in failing to repair the dangerous defect in the sidewalk.

The attorney for the plaintiff states, in an affirmation dated September 19, 2007, in opposition the motion by the defendant Town of Oyster Bay and cross motions by the defendant Town of Oyster Bay and the defendants ZMG, Inc. and Sheldon P. Blau, M.D., the defendants

have failed to set forth a *prima facie* entitlement to summary judgment based on their claims. The attorney for the plaintiff points out, in detail, the raised slab of cement in the sidewalk was not trivial; the Town notified Dr. Blau of the hazard two years prior to the accident; and the nature of the fall, injury sustained, testimony, and photographs raise a material issue of fact about the sidewalk defect as a cause of the plaintiff's fall and injuries. The attorney for the plaintiff asserts the Town's failure to repair the sidewalk prior to the accident does not absolve the defendants ZMG, Inc. and Sheldon P. Blau, M.D. of the statutory duty to repair and maintain the sidewalk. The attorney for the plaintiff contends the sidewalk defect was the proximate cause of the plaintiff's fall and injuries as shown in the testimony and other relevant evidence. The attorney for the plaintiff avers the defendants Town of Oyster Bay and the defendants ZMG, Inc. and Sheldon P. Blau, M.D. failed to make timely repair of the sidewalk, and are individually and jointly liable to the plaintiff. The attorney for the plaintiff asserts this affirmant filed with the Town a Freedom of Information request, prior to the commencement of this action, asking for any information pertaining to prior notice of the alleged defect in the sidewalk in front of 566 Broadway, and a subsequent investigation was done by the Town. The attorney for the plaintiff maintains there is no prejudice to any defendant to allow an amendment of the complaint to include prior written notice.

The attorney for the defendant Town of Oyster Bay states, in an affirmation dated September 25, 2007, in part opposition to the cross motion by the defendants ZMG, Inc. and Sheldon P. Blau, M.D., and in support of the cross motion by the defendant Town of Oyster Bay, to extent the codefendant arguments expand or supplement this defendant's arguments, the Town adopts those arguments. The attorney for the defendant Town of Oyster Bay asserts the Town

opposes the cross motion of the defendants ZMG, Inc. and Sheldon P. Blau, M.D. to the extent, in the event the plaintiff's action against Town is not also dismissed, the Town opposes the dismissal of its cross claims against the defendants ZMG, Inc. and Sheldon P. Blau, M.D., and requests the cross claims by the Town against the defendants ZMG, Inc. and Sheldon P. Blau, M.D. be converted into a third party complaint without any further need for the Town to serve process on the defendants ZMG, Inc. and Sheldon P. Blau, M.D. The attorney for the defendant Town of Oyster Bay retorts the alleged special relationship between the defendants ZMG, Inc. and Sheldon P. Blau, M.D. and the defendant Town of Oyster Bay is not grounds for summary judgment in favor of the defendants ZMG, Inc. and Sheldon P. Blau, M.D. because it was not plead in the cross complaint by the defendants ZMG, Inc. and Sheldon P. Blau, M.D. The attorney for the defendant Town of Oyster Bay avers, even if the defendants ZMG, Inc. and Sheldon P. Blau, M.D. plead a special relationship between the defendants ZMG, Inc. and Sheldon P. Blau, M.D. and the defendant Town of Oyster Bay, there are questions of fact as to the reasonableness of the reliance by the defendants ZMG, Inc. and Sheldon P. Blau, M.D. on the alleged special relationship between the defendants ZMG, Inc. and Sheldon P. Blau, M.D. and the defendant Town of Oyster Bay being sufficient to prevent summary judgment in favor of the defendants ZMG, Inc. and Sheldon P. Blau, M.D. on the cross claims of the defendant Town of Oyster Bay. The attorney for the defendant Town of Oyster Bay reiterates the prior assertions made by the Town.

The attorney for the defendant Town of Oyster Bay states, in another affirmation dated September 25, 2007, in opposition to the cross motion of the plaintiff seeking to amend the complaint to plead prior written notice, the plaintiff failed to establish extraordinary

circumstances justifying the amendment of the complaint on the eve of trial. The attorney for the defendant Town of Oyster Bay also states the plaintiff has failed to establish there is a reasonable excuse for the delay in seeking the amendment or that the proposed amendment has any merit. The attorney for the defendant Town of Oyster Bay asserts, given the plaintiff's admission of the lack of viable grounds for an action against the Town, the plaintiff's action should be dismissed.

The attorney for the defendant Town of Oyster Bay states, in another affirmation dated September 28, 2007, in reply to the affirmation in opposition by the plaintiff's attorney to the motion by the Town seeking summary judgment and dismissing the plaintiff's action and any cross claims, on the issue of proximate cause, the plaintiff has failed to make a showing that anything other than speculation supports the inference the injury was caused by the negligence of the Town rather than some other cause. The attorney for the defendant Town of Oyster Bay contends the Town has presented sufficient evidence in admissible form to make out a *prima facie* case for its entitlement to summary judgment. The attorney for the defendant Town of Oyster Bay avers the plaintiff has failed to demonstrate the alleged defect is any thing more than trivial. The attorney for the defendant Town of Oyster Bay maintains, given the plaintiff's admission of the lack of viable grounds for an action against the Town, the plaintiff's action should be dismissed. The attorney for the defendant Town of Oyster Bay asserts the plaintiff failed to establish any grounds to recover under the Town Code §§ 207-7 or 205-9.1, and there is no basis for a finding any failure to repair the sidewalk was a proximate cause of the plaintiff's accident or resulted in any actionable danger to the plaintiff.

The attorney for the defendants ZMG, Inc. and Sheldon P. Blau, M.D. states, in a reply affirmation dated October 3, 2007, to the plaintiff's affirmation in opposition, the plaintiff failed

to identify the cause of her fall, and the failure to do so is fatal to her case. The attorney for the defendants ZMG, Inc. and Sheldon P. Blau, M.D. asserts the plaintiff is only speculating it was the raised flag that caused the fall. The attorney for the defendants ZMG, Inc. and Sheldon P. Blau, M.D. contends the issue is not whether there a raised flag of concrete, but whether the raised slab was raised enough to be considered more than a trivial defect here.

The attorney for the defendants ZMG, Inc. and Sheldon P. Blau, M.D. states, in another reply affirmation dated October 3, 2007, but this time in reply to opposition, in part, by the defendant Town of Oyster Bay, the defendants ZMG, Inc. and Sheldon P. Blau, M.D. demonstrated, through testimony and exhibits, they accepted the Town's sidewalk replacement program, and made payment to the Town to repair the sidewalk, so the duty reverted back to the defendant Town of Oyster Bay which repaired it nearly two full years after the payment. The attorney for the defendants ZMG, Inc. and Sheldon P. Blau, M.D. retorts the legal authority cited by the Town and plaintiff are misplaced here. The attorney for the defendants ZMG, Inc. and Sheldon P. Blau, M.D. states, while the defendants ZMG, Inc. and Sheldon P. Blau, M.D. concede the grounds for the special relationship were not plead in the cross complaint, this lack does not absolve the Town of the failure to do its job for which it was paid.

The attorney for the plaintiff states, in a reply affirmation dated October 5, 2007, to the opposition by the defendant Town of Oyster Bay to the plaintiff's cross motion to amend the complaint, the Town does not claim it will be prejudiced by the amendment which conforms the pleading to the facts uncovered during discovery. The attorney for the plaintiff points to testimony and other relevant evidence to support these assertions. The attorney for the plaintiff avers the plaintiff's request to amend the complaint is with merit; the defendant failed to timely

respond to discovery demands; and that failure delayed bringing this cross motion to amend. The attorney for the plaintiff contends the plaintiff had actual notice of the defect, and there was no need for prior written notice under these circumstances. The attorney for the plaintiff argues there are material issues of fact about the Town's breach of its non-delegable duty to repair that sidewalk, and whether the writing received by the Town prior to the accident satisfies statutory rules of prior written notice.

"Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (*Ugarriza v. Schmieder*, 46 N.Y.2d 471, 474). Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact."

Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446).

The court's role is issue finding rather than issue determination (*see, e.g., Sillman v.*

Twentieth Century-Fox Film Corp., 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra*; see, *Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff'd* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (see, *Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*).

This Court has carefully reviewed and considered all of the submissions by the parties. The Court finds there are triable issues of fact needing resolution by the trier of fact. The Court permits the plaintiff to amend the complaint to plead prior written notice.

Accordingly, the motion and all of the cross motions are denied except the plaintiff’s cross motion pursuant to CPLR 3025 (b) to amend the complaint to plead prior written notice.

So ordered.

Dated: **December 17, 2007**

ENTER:



HON. ANTONIO I. BRANDVEEEN

ENTERED

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

DEC 21 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE