Short Form Order

SUPREME COURT - STATE OF NEW YORK

D.C.M. PART - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Charles Bennett

Plaintiff,

-against-

County of Suffolk, Town of Brookhaven, Keyspan Corporation and Keyspan Gas East Corporation

Defendants.

Motion Sequence No.: 001-MG
Motion Date: April 14, 2008
Submitted: May 14, 2008

Index No.: 06222/2008

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Upon the following papers numbered 1 to 19 read on this motion to dismiss: Notice of Motion and supporting papers 1 - 7; Affidavit in Opposition and supporting papers 8 - 13; Affirmation in Opposition 14 - 16; Reply Affirmation 17 - 19.

This action arises from an alleged motor vehicle accident involving a pot hole. The named defendants are the County of Suffolk (hereinafter the County), the Town of Brookhaven (hereinafter the Town), Keyspan Corporation and Keyspan Gas East Corporation (hereinafter collectively referred to as Keyspan).

The County brings this pre-answer motion to dismiss the complaint and any cross claims for failure to state a cause of action pursuant to CPLR §3211(a)(7) and for summary judgment pursuant to CPLR 3212. In support of this motion, the County submits no answers on behalf of any of the defendants and makes no representation that either the Town or Keyspan has filed an answer. In addition, its Request for Judicial Intervention does not indicate that issue has been joined. Without such submissions and representations, there is no basis to entertain that part of this application which seeks to dismiss cross claims.

Insofar as summary judgment is requested, since issue has not been joined as to the County, it is premature to seek such relief (see, CPLR §3212[a]). Accordingly, that part of the County's application is denied without prejudice.

Turning now to that part of the County's motion seeking dismissal of the complaint for failure to state a cause of action pursuant to CPLR §3211(a)(7), that request for relief is also denied. This request for relief is opposed by the Town and by Keyspan but is not opposed by the plaintiff. The County submits with its reply affirmation a stipulation signed on behalf of the plaintiff and the County to discontinue the action against the County only with prejudice. This stipulation, however, is of no force and effect as it is not signed by the attorneys of record for all the parties (see, CPLR §3217[a][2]).

The arguments made in support of this part of the County's application are based upon the County's contention that it did not own, maintain or control the roadway in issue and, furthermore, did not contract with other party to do; that there was no prior written notice as to the defect or dangerous condition in issue; and, that the purported Notice of Claim served upon the County was a nullity.

It is well settled that 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 [First Dept., Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). In addition, 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).

Affidavits attacking the accuracy of the allegations in the complaint are not proper for consideration by the court on a motion to dismiss for failure to state a cause of action (see, Tsimerman v. Janoff, 40 AD3d 242 [First Dept., 2007]) unless such affidavits show, without significant dispute, that an alleged material fact is not a fact at all (see, Quesada v. Global Land, Inc., 35 AD3d 575 [Second Dept., 2006]).

The County submits three affidavits in support of this motion. Two affidavits are from County employees responsible for keeping track of written notices or written complaints with regard to roadway defects or dangerous conditions. These affidavits are not disputed - other than the co-defendants asking for the opportunity to conduct their own discovery in this regard - and, thus, adequately support the contention that there was no prior written notice with the County regarding the pot hole in issue.

The absence of a prior written notice, however, is not dispositive of this matter where it is alleged in the complaint, as it is here, that there was constructive notice of the defect of dangerous condition (complaint, ¶ 64). This particular allegation is not addressed at all by the County.

The County submits a third affidavit from an employee of the County's Department of Public Works in which the affiant states that she conducted a search of the records maintained by the County for the date of the alleged accident and prior thereto and found that the County "did not own, maintain, or control the roadway at the aforesaid location, nor did it contract to do so with any other party prior to, during, or on [blank]." A date was omitted from this affidavit which would have indicted the period of time up to which the County had no responsibility for the roadway. This omission in the affidavit cannot be cured on the basis of an assumption. This omission was pointed out in opposition papers on this motion but the County, in its reply, did not address this issue.

Lastly, the County argues for dismissal based upon the purported lack of a proper Notice of Claim. This contention is without merit and the County's rejection of the Notice of Claim in this action was improper. The stated reasons for the rejection were:

> "The purported Notice of Claim was not served in accordance with the requirements of the General Municipal Law. In addition, the roadway described in the Notice of Claim is neither owned nor maintained by the County of Suffolk."

Stating that the roadway was neither owned nor maintained by the County is not a proper basis for the County to reject a notice of claim under GML §50-e. Section 50-e(3)(c)of the General Municipal Law provides that the only reason for the return or rejection of a notice of claim is for a "defect in the manner of service."

The contention that a premises or roadway is neither owned nor maintained by the County may bear upon the ultimate merits of the claim but it does not relate to the manner of service of the notice. Accordingly, a rejection based upon such a reason is without effect.

As to the County's other reason that the Notice of Claim was not served in accordance with the requirements of the General Municipal Law, such a reason in insufficient as a matter of law in that it fails to specify the actual defect in the manner of service (see, GML §50-e[3][d]).

In the instant case, in looking within the four corners of the complaint the plaintiff adequately pleaded causes of action against the County and that the County has failed to meet its burden in showing that the plaintiff failed to state a cause of action. Accordingly, it is

ORDERED that this motion (001) by the defendant County of Suffolk for an order dismissing the complaint and any cross claims as to it, pursuant to CPLR §3211(a)(7) or CPLR §3212 is denied without prejudice; and it is further

ORDERED that the parties are directed to appear for a preliminary conference pursuant to 22 NYCRR 202.8(f) on July 10, 2008 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.

Dated: May 27, 2008

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.