

Dukes v Wilfreth
2008 NY Slip Op 31909(U)
July 8, 2008
Supreme Court, Wayne County
Docket Number: 0064141/2008
Judge: Dennis M. Kehoe
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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

BRENDA L. DUKES,

Plaintiff,

-VS-

CURTIS WILFRETH, NEWARK HOUSING
AUTHORITY and VILLAGE OF NEWARK,

Defendants.

DECISION
AND
ORDER

Index No. 64141

2008

Cellino & Barnes, P.C.

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The Defendant Newark Housing Authority ("NHA") has moved
pursuant to CPLR §3211(a)(1) and §3211(a)(7), for an Order dismissing

the Complaint of the Plaintiff Brenda L. Dukes. The motion has been opposed by the Defendant Curtis Wilfreth ("Wilfreth").

The Court has received correspondence from the office of Cellino & Barnes, as counsel for the Plaintiff, stating that the Plaintiff does not oppose NHA's motion to dismiss the Complaint as to the authority.

This action was commenced by the Plaintiff to recover money damages as compensation for personal injuries she sustained on or about March 13, 2007, while leaning on a porch rail of a house located at 7241 Route 14, Sodus Point, New York which she had rented from the Defendant Wilfreth. The rail allegedly collapsed, causing her to fall to the ground and sustain injuries. In November 2006, the Plaintiff and Wilfreth had entered into a "Model Lease for Regular Tenancy Section 8 Tenant - Based on Assistance Housing Choice Voucher Program", for which the Defendant NHA was the local administrator on behalf of the United States Department of Housing and Urban Development. The Plaintiff's Complaint indicates that NHA conducted an inspection of the house prior to the Plaintiff's execution of the lease and occupancy of the premises. Aside from that inspection, there is no evidence before the Court suggesting any further contact between the Plaintiff and any representative of the NHA.

Nevertheless, the Plaintiff named NHA as a Defendant in the action, based on allegations of its negligence and/or carelessness in conducting said inspection.

“Public entities are immune from negligence claims arising out of the performance of their governmental functions unless the injured person establishes a special relationship.” (*Miller v State of New York*, 62 NY2d 506 (1984)). The Defendant NHA maintains that it never assumed a special duty toward the Plaintiff, and that its inspection of the premises was performed “in a governmental capacity rather than a proprietary capacity”, thereby rendering it immune from suit. In order to prove the existence of a special relationship, a plaintiff must establish the following elements:

- (1) assumption of the public entity through promises or actions of an affirmative duty to act on behalf of the party who was injured;
- (2) knowledge on the part of the municipality’s agents that inaction could lead to harm;
- (3) some form of direct contact between the municipality’s agents and the injured party; and
- (4) that party’s justifiable reliance on the municipality’s affirmative undertaking (*Cuffy v City of New York*, 69 NY2d 255, 260 (1987)).

NHA contends that the Plaintiff has failed to allege any affirmative

undertaking or assumption of any duty by NHA to act on her behalf. The Defendant also maintains that federal regulations regarding Section 8 housing confer immunity upon NHA, and further, that the New York courts have historically held that governmental liability does not arise from an alleged failure to enforce compliance with statutes, ordinances or regulations.

As stated above, the Plaintiff has not opposed NHA's motion to dismiss and has indicated her intent to discontinue the action as to NHA. However, the Defendant Wilfreth has opposed the motion, maintaining that the motion is premature, in that no discovery has been conducted in the action. Wilfreth also argues that NHA's moving papers do not meet the "documentary evidence" standard for dismissal as established by the courts. Finally, Wilfreth contends that NHA's motion papers are defective, in that they fail to specifically address the exceptions to the general rule that a governmental agency is immune from suit in such circumstances. These exceptions as carved out by case law include: 1) breach of a statutory duty; 2) voluntary assumption of a duty generating justifiable reliance (discussed above); and, 3) assumption of direction and control by an entity. In its Reply Memorandum, NHA maintains that there is no

evidence that any of these exceptions apply.

After careful consideration of the arguments presented by the respective parties, including a review of the pertinent case law, applicable regulations and the Plaintiff's sworn testimony at the §50-h hearing, the Court concludes that the Plaintiff has failed to state a cause of action against NHA. Wilfreth's argument that NHA's motion to dismiss should be denied, in order to allow discovery to go forward, is based on speculation and conjecture as to what, if any, additional facts might be revealed. The Court agrees that the situation is analogous to those cases in which the appellate courts have rejected arguments that summary judgment should be denied, based on allegations that such a motion was premature. In those cases, the appellate courts have found that, where the non-moving party offered nothing to show that disclosure would lead to the discovery of competent evidence, "the mere hope that evidence sufficient to defeat the motion may be uncovered during discovery is insufficient." (*Younger v Spartan Chemical Company, Inc.*, 252 AD2d 265, 268 (3rd Dept, 1999)).

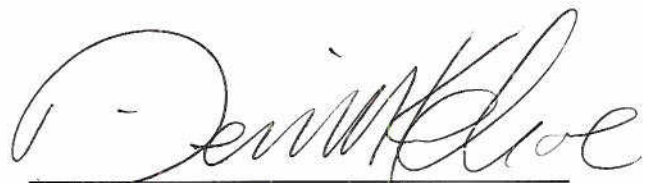
Based on Wilfreth's opposing papers, this Court must conclude that the Defendant has failed to make the necessary threshold showing that facts essential to justify opposition to NHA's motion may exist. (See, e.g.

Moukarzel v Montefiane Medical Center, 235 AD2d 239 (1st Dept, 1997)).

Therefore, the Newark Housing Authority's motion to dismiss the Plaintiff's Complaint as to the authority is granted, and based on this ruling, Wilfreth's cross-claim against NHA is also dismissed.

This Decision constitutes the Order of the Court.

Dated: July 8, 2008
Lyons, New York



Honorable Dennis M. Kehoe
Acting Supreme Court Justice

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SUPREME COURT