

Blocke v Port Washington Public Library
2011 NY Slip Op 33738(U)
July 6, 2011
Sup Ct, New York County
Docket Number: 3251/11
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

GERTRUDE BLOCKE,

Plaintiff,

- against -

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 3251/11
Motion Seq. No.: 01
Motion Date: 05/24/11

PORT WASHINGTON PUBLIC LIBRARY and
PORT WASHINGTON UNION FREE SCHOOL DISTRICT,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant Port Washington Union Free School District ("School District") moves, pursuant to CPLR §§ 3211(a)(7) and 3211(c), for an order dismissing the Verified Complaint and any and all cross-claims against defendant School District. Defendant School District requests that the Court treat the instant motion as one for summary judgment pursuant to CPLR § 3211(c) as defendant School District is laying bear its proof in support of the motion. Defendant Port Washington Public Library ("Library") opposes the motion. No papers were submitted by plaintiff with respect to the instant motion.

This is a personal injury action sounding in negligence. It is alleged that, on April 16, 2010, plaintiff tripped and fell while on the premises of defendant Library while attending a Library book club. Plaintiff filed a Summons and Verified Complaint on March 3, 2011.

Defendant Library joined issue on or about April 19, 2011. Defendant School District makes the instant motion in lieu of an Answer.

Defendant School District argues that defendant Library maintains its own budget, programs and separately elected Board of Trustees. Defendant School District has no interest or control in defendant Library's book club and is in no way involved in any of defendant Library's programs. Plaintiff was not an employee of defendant School District at the time of the alleged incident. Defendant School District was in no way involved with the construction and/or renovation projects at defendant Library at any time and did not contract with, hire, retain, supervise or direct any of the work or personnel/entities working in connection with defendant Library. Defendant Library has total control over the hiring and firing of its employees. Defendant Library pays its own bills and maintains and controls its own premises.

Defendant School District submits that, based upon all of the above, plaintiff's Verified Complaint fails to state a cause of action against defendant School District. In support of this argument, defendant School District submits the Affidavit of Mary Callahan, Assistant Superintendent for Business for defendant School District. *See* Defendant School District's Affirmation in Support Exhibit D. Ms. Callahan states that defendant School District merely holds the debt for defendant Library since defendant Library is unable to do so. Ms. Callahan adds that defendant Library is a completely separate and distinct entity from defendant School District over which defendant School District has no authority or control. Defendant School District is not involved in the maintenance or upkeep of defendant Library since defendant Library has its own custodial staff and maintenance staff. Ms. Callahan asserts that there is no circumstance wherein defendant School District would be notified of any conditions or need to repair any conditions at defendant Library as such conditions are the sole responsibility of defendant Library.

Defendant School District also argues that, in the "Unverified Answer of the Port Washington Public Library...The Library denied that the District was 'careless and or negligent in its acts or omissions in failing to ensure that the staircase and railing at the aforementioned location was in a safe condition and or properly designed and installed so as to provide a safe means to traverse up and down the staircase and or serve the functions railing are provided for

including safety from falling.’...This appears to be an admission from Co-defendant, The Library, that there was no negligence on behalf of the District with respect to maintaining the Library. There is no negligence as all Defendants agree that the School District has no duty to maintain or operate the Library.”

In opposition to defendant School District’s motion, defendant Library submits that, since this case is in the initial discovery stages with a Bill of Particulars not yet served and no depositions having been conduct to date, defendant School District’s motion is premature and therefore should be denied at this time.

In reply, defendant School District argues that, even though the instant matter is in the initial stages of discovery, defendant School District has proffered evidence that it did not owe a duty to plaintiff and therefore the Verified Complaint fails to state a cause of action against defendant School District. This is a question of law. There is no question of fact for a jury to consider. It is argued that, as a matter of law, defendant School District owed no duty to plaintiff.

The Court once again notes that plaintiff failed to submit any opposition to defendant School District’s instant motion.

In determining a motion to dismiss pursuant to CPLR 3211(a)(7) for plaintiff’s alleged failure to state a cause of action, the court will afford the complaint a liberal construction, accept the facts contained therein as true, accord plaintiff every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *See Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys “R” Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001).

However, even when viewing plaintiff’s Verified Complaint in light of the criteria set forth above, the Court finds that plaintiff fails to set forth a cause of action against defendant School District. Defendant School District owed no legal duty to plaintiff when the subject incident allegedly occurred. Defendant School District has established in its papers that defendant Library is a completely separate and distinct entity from defendant School District over which defendant School District has no control. Defendant Library failed to submit any

evidence, in any form, which would raise a question of fact as to defendant School District's duty to plaintiff.

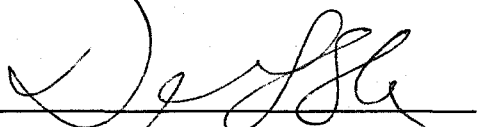
Moreover, defendant School District's motion was not premature, since defendant Library failed to offer an evidentiary basis to suggest that the discovery may lead to relevant evidence. Defendant Library's "hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery was an insufficient basis for denying the motion." *Conte v. Frelen Assoc., LLC*, 51 A.D.3d 620, 858 N.Y.S.2d 258 (2d Dept. 2008). *See also Lopez v. WS Distrib., Inc.*, 34 A.D.3d 759, 825 N.Y.S.2d 516 (2d Dept. 2006).

Accordingly, defendant School District's motion, pursuant to CPLR §§ 3211(a)(7) and 3211(c), for an order dismissing the Verified Complaint and any and all cross-claims against defendant School District is hereby **GRANTED**.

It is further ordered that the remaining parties shall appear for a Preliminary Conference on July 25, 2011, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
July 6, 2011

ENTERED
JUL 11 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE