

**Murphy v City of New York**

2011 NY Slip Op 34261(U)

May 2, 2011

Supreme Court, New York County

Docket Number: 112907/10

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 52

-----X  
JOHN MURPHY,

Plaintiff,

Index No. 112907/10

-against-

DECISION/ORDER

THE CITY OF NEW YORK, 1164 THIRD AVENUE  
LLC and THE CHILDREN'S PLACE RETAIL STORES,  
INC.,

Defendants.

**FILED**

MAY 05 2011

-----X  
HON. CYNTHIA S. KERN, J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	<u>          </u>
Answering Affidavits to Cross-Motion.....	<u>          </u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action to recover damages for personal injuries he allegedly sustained when he fell on the sidewalk in front of the premises located at 1164 Third Avenue, New York, New York on January 23, 2010. Defendant The Children's Place Retail Stores, Inc. ("TCP") now moves pursuant to CPLR § 3211(a)(1), (a)(5) and (a)(7) to dismiss plaintiff's complaint on the grounds of documentary evidence, res judicata and failure to state a cause of action. For the reasons set forth below, TCP's motion is denied.

The relevant facts are as follows. On January 23, 2010, plaintiff alleges that as he was

walking west on the sidewalk in front of 1164 Third Avenue, New York, New York, he tripped and fell in front of TCP's retail store at a tree well located at the above location. In his complaint, plaintiff alleged that "while [he] was lawfully walking at the aforesaid location, [he] was caused to trip, fall and sustain severe and permanent injuries" which he alleged was caused by the "negligence of the defendants...in causing, allowing and permitting said roadway, and more specifically said pedestrian sidewalk...[to] become and remain for a period of time after notice...in a broken, defective, cracked, uneven, unlevel, depressed, irregular, dangerous and/or hazardous condition obstructing pedestrian travel."

Plaintiff filed a previous complaint based on the same accident in which he did not name the City as a defendant. In his prior complaint, plaintiff alleged that the accident occurred on the sidewalk at 1164 Third Avenue, New York, New York and alleged that the relevant sidewalk was "on the south side of East 68<sup>th</sup> Street approximately forty yards west of the southwest corner of East 68<sup>th</sup> Street and Third Avenue." Plaintiff asserts that he included that approximation in an effort to be helpful but states that the distance was solely an approximation rather than a specific measurement obtained through a survey. TCP moved to dismiss that original complaint arguing that "approximately 40 yards" placed the accident 20 feet beyond TCP's premises and thus it could not be held liable for plaintiff's accident. Plaintiff alleges that because at that time the City needed to be joined as a defendant, rather than amending the complaint, plaintiff withdrew the prior complaint and recommenced the action against the City along with the other parties while deleting the unnecessary approximation to which TCP objected. Plaintiff filed a stipulation of discontinuance with the court and the court ordered dismissal of the action without prejudice.

TCP's motion to dismiss on the ground that plaintiff failed to state a cause of action is

denied as the court finds that plaintiff has stated a cause of action against TCP by alleging that plaintiff tripped and fell on the sidewalk in front of 1164 Third Avenue, a fact the court must deem to be true for purposes of this motion. On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference.

*Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover “a complaint should not be dismissed on a pleading motion so long as, when plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1<sup>st</sup> Dept. 1990). “Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to ‘whether it states in some recognizable form any cause of action known to our law.’” *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 (1<sup>st</sup> Dept 1977) (citing *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). Contrary to TCP’s assertions, plaintiff does not allege his accident occurred in a tree well but only mentions a tree well as a point of reference. Thus, TCP’s motion to dismiss on the ground of failure to state a cause of action must be denied.

TCP’s motion to dismiss on the ground of documentary evidence is likewise denied as the deed submitted by TCP for 1164 Third Avenue does not dispose of plaintiff’s claim. In order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211 (a)(1), the documents relied upon must definitively dispose of plaintiff’s claim. See *Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1<sup>st</sup> Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002). The deed submitted by TCP indicates that the property deeded to 1164 Third Avenue LLC ran westerly along the south side of 68<sup>th</sup> Street 100 feet to the point or place of beginning. This was described as 100 feet from the southwest corner

