

Civitella v County of Westchester

2012 NY Slip Op 33260(U)

October 22, 2012

Supreme Court, Westchester County

Docket Number: 53322/2012

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**FILED
AND
ENTERED**
ON 10/22 2012
WESTCHESTER
COUNTY CLERK

**SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER , J.S.C.**

-----X
MARY CIVITELLA,

Plaintiff,

-against-

Index No. 53322/2012
Decision & Order
Motion Seq. 1&2

COUNTY OF WESTCHESTER, SEARCHING FOR
INVENTORY, LLC, TOWNSHIP OF RYE, VILLAGE OF
PORT CHESTER,

Defendants.
-----X

The County of Westchester moves this Court pursuant to CPLR 3211(a)(7) to dismiss Plaintiff's complaint as against them. The Township of Rye also moves to dismiss the complaint pursuant to CPLR §3211 and CPLR §3212. Both Defendants contend that they do not own, operate, maintain, control, inspect or repair the sidewalk located in front of, adjacent to, or near the premises 170 Highland Street, Port Chester, New York, the situs of Plaintiff's alleged accident. The following papers were received and considered in deciding the present motion:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion to Dismiss/Affirmation in Support/ Exhibits A&B/Exhibit C- Statini Affidavit	1-5
Notice of Motion/Affirmation in Support/ Vespia Affidavit/Exhibits A-C	6-11
Memorandum of Law in Support	12
Affirmation in Opposition to Motion to Dismiss	13
Reply Affirmation	14

This action arises from personal injuries allegedly sustained by Plaintiff when she was walking on a sidewalk abutting a parcel of property at 170 Highland Street, in the Township of Rye and the Village of Port Chester. Plaintiff allegedly tripped and fell and sustained serious injuries requiring surgery. As a result, Plaintiff filed a notice of claim on February 16, 2011. On March 6, 2012 Plaintiff filed a summons and complaint against Defendants. Issue was joined when Defendants answered Plaintiff's complaint. Defendants, the County of Westchester and the Township of Rye, now move pursuant to CPLR 3211(a)(7) and CPLR §3212 to dismiss Plaintiff's complaint.

As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property. See *Forbes v. Aaron*, 81 AD3d 876, (2nd Dept 2011); See also *Galindo v. Town of Clarkstown*, 2 N.Y.3d 633, 636 [2004] (“[A]s a general matter ...person who lacks ownership or control of property cannot fairly be held accountable for injuries resulting from a hazard on the property.”) Defendants, the County of Westchester and the Township of Rye each move to dismiss Plaintiff's complaint on the grounds that they do not own, operate, control, maintain inspect or repair the sidewalk where Plaintiff allegedly sustained her injuries. As such, Defendant allege that no duty is owed to Plaintiff at the time of the incident.

On a motion for dismissal pursuant to CPLR §3211(a)(7) for failure to state a cause of action, “[the Court’s] well-settled task is to determine whether, ‘accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated’” *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307,318 (1995)(internal citations and quotation marks omitted). In performing that task, the Court “[is] required to accord plaintiff[] the benefit of all favorable inferences which may be drawn from [its] pleading, without expressing [any] opinion as to whether [it] can ultimately establish the truth of [its] allegations before the trier of fact” *Ibid*.

In support of its motion to dismiss, the County offers the affidavit of James Statini, Superintendent of Road Maintenance of the County’s Department of public Works. Mr. Statini avers that the County of Westchester does not own inspect repair maintain supervise or control the sidewalk, and further avers that the County has no responsibility with respect to Highland Street that is at or near the sidewalk in question where plaintiff allegedly fell. As such, the County contends that it cannot be held liable as a matter of law. *See Hoberman v. Kids R Us*, 187 A.D.2d 187, 190 (1st Dept. 1993). In opposition, Plaintiff contends that Defendant failed to make a *prima facie* showing as the affidavit of Mr. Statini is insufficient because it relies on his review of documents that have not yet been received as discovery has not been conducted.

Here, affording Plaintiff every favorable inference, this Court finds that Defendant, the County of Westchester has proven its entitlement to dismissal of Plaintiff’s complaint. The affidavit of Mr. Statini proves that the County does not own operate or control the area of Plaintiff’s alleged accident, and as such, Defendant cannot be liable for Plaintiff’s accident. *Forbes*, 81 A.D.3d 876. Furthermore, Plaintiff

fails to offer any evidence to rebut the averments in Defendant's affidavit. See *Kenworthy v. Town of Oyster Bay* (2nd Dept. 1986)(Plaintiff failed to submit facts to dispute or impeach information provided by the town supporting denial of ownership, and said information would not likely be in the sole exclusive possession of Defendant, Defendant entitled to summary judgment dismissing Plaintiff's Complaint). As such, Defendant is entitled to dismissal of Plaintiff's complaint.

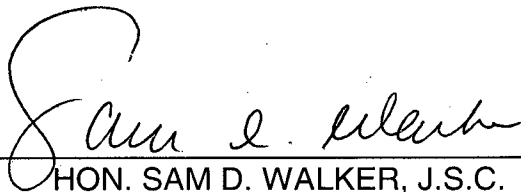
The Township of Rye also moves to dismiss pursuant to CPLR 3211(a)(7) and CPLR §3212. It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 (1985). A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 (1985); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572 (1986). To obtain summary judgment it is necessary that the movant establish its claim via the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor. CPLR 3212(b). Failure of a moving party to tender sufficient evidence to demonstrate as a matter of law its *prima facie* entitlement to summary judgment requires denial of the motion, regardless of the sufficiency of the opposing papers. *McDonald v. Mauss*, 38 A.D.3d 727, 832 N.Y.S.2d 291 (2nd Dept., 2007).

In support of its motion, the Township of Rye offers the affidavit of Hope Vespia, Town Clerk, who avers that the Township of Rye does not own, operate maintain or

control the sidewalk in question. In opposition, Plaintiff again challenges the validity of Ms. Vespia's affidavit and the averments made in same. As discussed, *supra*, without any factual proof that said averments are incorrect or inaccurate, or without proof that Defendant does in fact own, operate, or control the area of Plaintiff's alleged accident, Plaintiff has failed to raise a triable issue of fact. As such, Defendant, the Township of Rye, is entitled to the relief it seeks.

Accordingly, Defendants' motions are hereby GRANTED, and Plaintiff's complaint is hereby dismissed as against the County of Westchester and the Township of Rye. To the extent any relief requested in Motion Sequence 1&2 was not addressed by the Court, it is hereby deemed denied. The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
October 22, 2012


HON. SAM D. WALKER, J.S.C.