Weimar v City of Mount Vernon
2013 NY Slip Op 34129(U)
January 17, 2013
Supreme Court, Westchester County
Docket Number: 67079/12
Judge: Mary H. Smith
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DECISION AND ORDER

FILED & ENTERED
1/17/13

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

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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CHRISTIN WEIMAR,

Plaintiff,

MOTION DATE: 1/11/13
INDEX NO.: 67079/12

-against-

THE CITY OF MOUNT VERNON,

Defendant.

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The following papers numbered 1 to 8 were read on this pre-answer motion by defendant City of Mount Vernon for an Order dismissing this action pursuant to CPLR 3211, subdivision (a), paragraph 7, based upon a failure to state a cause of action.

	Papers Numbered
Notice of Motion - Affirmation (Sherwani) - Affidavit (Roland) - Exhs. (A-F)	1-4
Answering Affirmation (Kuczinski) - Exhs. (Collectively)[1] - Memorandum of Law	5-7
Replying Affirmation (Sherwani)	8

Upon the foregoing papers, it is Ordered that this pre-answer

[1]This Part's published Rules require separately tabbed exhibits.

motion by defendant City of Mount Vernon ("City") for an Order dismissing this action pursuant to CPLR 3211, subdivision (a), paragraph 7, based upon a failure to state a cause of action is disposed of as follows:

This is a negligence premises liability action wherein then 17 year old plaintiff seeks to recover for personal injuries she allegedly had sustained, on August 22, 2010. At the time, plaintiff had been walking inside a Westchester County-owned park commonly known as Scout Field Park ("Field"), which is located adjacent to the Bronxville Metro-North train station. Plaintiff and a companion had walked up a dirt path situated at the far end of the Field, which path leads up to the train tracks. Plaintiff then had stepped onto the tracks whereupon she had been struck by a Metro-North train. Plaintiff alleges in her complaint that the Field is owned and/or controlled by defendant City, that defendant City had been negligent in its ownership and control of the Field in failing to post warnings regarding the dangerous condition presenting, in failing to fence or cordon off the portion of the Field and the footpath adjoining the train tracks, in failing to inspect and supervise the Field, and in creating and/or maintaining a dangerous and/or trap-like condition.

Defendant City presently is moving to dismiss this action, arguing that plaintiff has failed to plead as a condition precedent

[* 3]

compliance with the prior written notice requirements set forth in section 265 of the City Charter, that the City did not own the Field and it had owed no duty to plaintiff, that the City did not own, control or operate the train and/or the offending train tracks which instead are all owned, controlled and operated by Metro-North, and that plaintiff's own conduct of crouching on the train tracks had been an intervening and superseding event which had severed any causal nexus between the occurrence of the accident and any negligence on defendant City's part. Defendant relies in support of its motion upon the MTA Police Incident Report which establishes that the Metro-North Police Department, the Eastchester Fire Department and the Bronxville Police Department all had responded to the 911 August 22, 2010, emergency call involving plaintiff, but that Mount Vernon never had dispatched any personnel to the scene. Further, defendant argues that it is entitled to dismissal because it "did not own the [Field] property in order to possess proprietary rights to build or erect a fence or barricade," and because the property adjacent to the tracks actually is located in Bronxville and not in Mount Vernon. Moreover, defendant argues that plaintiff had not been an invitee of defendant, nor a permit holder for the Field, and that she had not been using the Field at the time of this accident's occurrence, and thus that no special relationship existed between plaintiff and the City at the time of

her accident. Lastly, according to defendant City, plaintiff had not been struck by the train because the dirt path had been unfit or unsafe for passers by but solely because, immediately prior to plaintiff's being struck, she had crouched on the train tracks, which activity defendant argues was so fraught with danger that it evinced a wanton disregard for plaintiff's own safety, which precludes her recovery herein.

Plaintiff opposes the motion, arguing with supporting evidence that Scout Field is part of the Bronx River Reservation, which is owned by the County of Westchester, and leased both to Bronxville and the City of Mount Vernon. Plaintiff argues that there is no dispute that she had been hit by the Metro-North train after she and a companion had walked along the Field's dirt path and up on to the tracks, and that it matters not that the tracks technically may have been located in Bronxville since the adjoining path which leads to the train tracks is located within leased Scout Field, which indisputably is operated, managed, maintained and supervised by Mount Vernon, and thus that the City consequently had a duty to operate and maintain the Field in a non-negligent safe manner. Moreover, contrary to defendant City's argument, plaintiff argues that no special relationship needed to be pleaded with respect to defendant City's operation of the Field because said municipality operates same in its quasi-private capacity and not in its

governmental capacity, and thus that the City does not have immunity for this claim. Further, defendant contends that compliance with the prior written notice requirements of the City's Charter need not have been pleaded and established because said requirement applies only to "streets," and plaintiff is not alleging any negligence regarding a street. Finally, plaintiff argues that defendant's lack of proximate cause argument is misplaced and premature given that issue has not been joined and no discovery conducted.

It is well-settled that on a motion to dismiss for failure to state a cause of action, the Court initially must accept the facts alleged in the complaint as true and then determine whether those facts fit within any cognizable legal theory, irrespective of whether the plaintiff will likely prevail on the merits. See Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 318 (1995); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); People v. New York City Transit Authority, 59 N.Y.2d 343, 348 (1983); Morone v. Morone, 50 N.Y.2d 481 (1980); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-275 (1977); Cavanaugh v. Doherty, 243 A.D.2d 92, 98 (3rd Dept. 1989); Klondike Gold, Inc. v. Richmond Associates, 103 A.D.2d 821 (2nd Dept. 1984). The complaint must be given a liberal construction and will be deemed to allege whatever cause of action can be implied by fair and reasonable intendment. See Shields v.

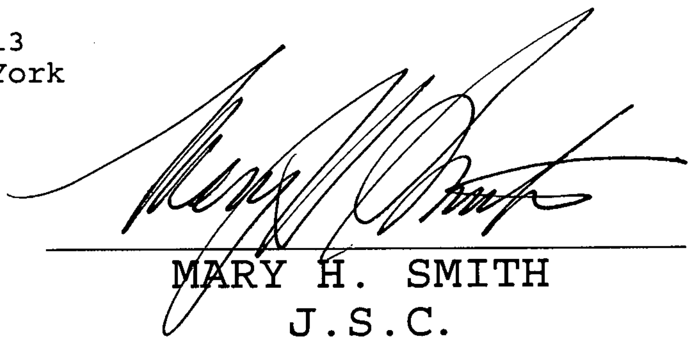
School of Law of Hofstra University, 77 A.D.2d 867, 868 (2nd Dept. 1980); Penato v. George, 52 A.D.2d 939 (2nd Dept. 1976). The test is whether the pleading gives notice of the transactions relied upon by the plaintiff and whether sufficient material elements of the cause of action have been asserted. See Stoianoff v. Gahona, 248 A.D.2d 525, 526 (2nd Dept. 1998). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claim, is irrelevant to the determination of a pre-disclosure motion to dismiss." Porcelli v. Key Food Stores Co-op., Inc., 44 A.D.3d 1020 (2nd Dept. 2007).

Applying the foregoing legal standard to the record at bar, defendant City's motion to dismiss is denied. The Court finds that plaintiff sufficiently has pleaded that the dirt path which leads from Scout Field onto the train tracks had presented a dangerous condition and that the City of Mount Vernon, which at the time had leased the Field, had been negligent in its maintenance, operation and control of said Field, and specifically in its failure to have posted warnings and/or to have constructed fencing blocking off access to the train tracks. While there obviously remain factual questions regarding this dirt path, whether it had been included in the City's leasing of the County-owned Field and/or whether it had been controlled and/or maintained by the City, or whether the dirt

path is separate and apart from the Field and had remained under the exclusive care and maintenance of the County cannot be determined as a matter of law on the record at bar. Moreover, the issue of proximate cause and whether plaintiff's own actions herein severed the chain of causation present jury questions not properly determined on a dismissal motion predicated upon a failure to state a cause of action. See generally, Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 314-315 (1980).

Defendant shall serve its answer within twenty (20) days after the date hereof. The parties shall appear in the Preliminary Conference Part at 9:30 a.m., on March 11, 2013.

Dated: January 17, 2013
White Plains, New York



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