Urena v City of New York
2014 NY Slip Op 31239(U)
May 9, 2014
Supreme Court, New York County
Docket Number: 160126/2013
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

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ANTHONY URENA an infant by his mother and natural guardian DORALISA CANELA and DORALISA CANELA,

Plaintiffs,

-against-

DECISION/ORDER
Index No. 160126/2013
Seq. No. 001

THE CITY OF NEW YORK, THE NEW YORK CITY HOUSING AUTHORITY, NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION and NEW YORK CITY HOUSING PRESERVATION AND DEVELOPMENT,

Defendants.

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KATHRYN E. FREED, J.S.C:

RECITATION, AS REQUIRED BY CPLR2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ATTACHED	1-2.(Exs. A-E)
ORDER TO SHOW CAUSE	.....
ANSWERING AFFIDAVITS	...3.(Ex. 1).....
REPLYING AFFIDAVITS	....4.(Ex.1).....
EXHIBITS	.....
OTHER	.....

UPON THE FORGOING CITED PAPERS, THIS DECISION/ORDER OF THE MOTION IS AS FOLLOWS:

Defendant The City of New York ("the City") moves for an Order, pursuant to CPLR 3211(a)(7), dismissing the complaint and all cross-claims against it or, in the alternative, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and all cross-claims against it. Plaintiff opposes the motion. After a review of the papers presented, all relevant statutes and case law, this Court **denies** the motion.

Factual and Procedural Background:

Infant plaintiff Anthony Urena, by his mother and guardian, Doralisa Canela, seeks monetary damages for personal injuries he allegedly sustained on a spring toy in a playground located outside of 484 East Houston Street, the location of the Lillian Wald Houses, on July 31, 2013. In his notice of claim dated September 19, 2013, Urena alleges that he was injured due to the negligence of the City and co-defendants New York City Housing Authority ("NYCHA"), New York City Department of Parks and Recreation, and New York City Housing Development and Preservation because one of the rides in the playground was "missing the seated toy apparatus." (Ex. A).[1]

The instant action was commenced by the filing of a summons and verified complaint on November 1, 2013. Ex. B. In the complaint, Canela, who asserts a claim for loss of services, and Urena assert that Urena was injured on July 31, 2013 due to the negligence of the defendants. Ex. B. They asserted, inter alia, that the City owned the playground and negligently maintained, operated, controlled, managed, and supervised the premises. Ex. B.

In its verified answer dated November 25, 2013, the City denied all substantive allegations of wrongdoing and asserted cross claims against the NYCHA for contribution and common law and contractual indemnification. Ex. C.

The City now moves for an order, pursuant to CPLR 3211(a)(7), dismissing the complaint and all cross claims asserted against it. In the alternative, the City moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it. In support of its motion, the City submits an attorney affirmation, the notice of claim (Ex. A), the summons and verified complaint (Ex. B), its verified answer (Ex. C), the December 4, 2013 affidavit of David Schloss, a Senior Title Examiner for the City, who attests to the fact that the NYCHA owned the

[1]Unless otherwise noted, all references are to the exhibits annexed to the City's motion.

premises (Ex. D), and a 1947 deed of the premises to the NYCHA. Ex. E.

In opposition to the motion, plaintiffs submit an attorney affirmation as well as the NYCHA's answer to the verified complaint.

In its reply affirmation in further support of its motion, the City annexes the January 27, 2014 affidavit of Vivian Louie, Assistant Commissioner of the Division of Property Management and Client Services of the City's Department of Housing Preservation and Development ("HPD") attesting to the fact that the subject playground was not owned or managed by the City or the HPD but rather by the NYCHA.

The Parties' Positions:

The City argues that it is entitled to dismissal of the complaint because it did not "own, operate, maintain, control or supervise" the premises where the alleged incident occurred. City's Aff. In Support, at par. 3. It further asserts that it is entitled to summary judgment on the ground that it "did not own, operate, manage, maintain or control the premises on the date of [the alleged incident]." City's Aff. In Support, at par. 6.

In opposition to the motion, plaintiffs argue that the City failed to establish its entitlement to dismissal of the complaint since it has set forth a valid cause of action sounding in negligence. Plaintiffs further assert that the City failed to establish its prima facie entitlement to summary judgment dismissing the complaint. Specifically, plaintiffs assert that counsel's conclusory statement that the City did not maintain, manage, operate or control the subject premises is insufficient to warrant the granting of summary judgment, especially given the denial by the NYCHA, which the City claims owns the premises, that it was lessor or lessee thereof or that it had a duty to maintain the same. Plaintiffs also maintain that the City's motion must be denied since it

is premature given that no discovery has been conducted.

In its reply affirmation in further support of the motion, the City argues that it is entitled to dismissal of the complaint pursuant to CPLR 3211(a)(7) because, based on the evidentiary material it submitted, plaintiff does not have a valid cause of action against it. The City further asserts that it is entitled to summary judgment dismissing all claims and cross claims against it based on the affidavits of Schloss and Louie.

Conclusions of Law:

The City's Motion to Dismiss

The City moves to dismiss pursuant to CPLR 3211(a)(7). "When evidentiary material is considered [on a motion pursuant to CPLR 3211(a)(7) for failure to state a cause of action], the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it . . . dismissal should not eventuate." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977).

"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." *Suero-Sosa v Cardona*, 112 AD3d 706, 707 (2d Dept 2013) (*citations omitted*). Here, plaintiff alleges not only that the City owned the playground, but negligently maintained, operated, controlled, managed, and supervised it. Ex. B. However, the affidavit submitted by Schloss (Ex. D) merely establishes that the City did not own the premises and did not address whether it occupied, controlled, or made special use thereof. Although the City has shown that it did not own the subject premises, it did not establish that it had no other relation to the playground. Since it cannot be said that "no significant

dispute exists" regarding the allegations in the complaint (*see Guggenheimer v Ginzburg, supra* at 275), the City's motion pursuant to CPLR 3211(a)(7) is denied.

The City's Motion for Summary Judgment

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence" to eliminate any material issue of fact from the case. *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 (2008) (*internal quotation marks and citation omitted*). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). The failure to establish one's prima facie entitlement to summary judgment "requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Kebbeh v City of New York*, 113 AD3d 512 (1st Dept 2014).

As an initial matter, the City's motion for summary judgment must be denied on procedural grounds, since it failed to annex all of the pleadings in this case to its motion. "It is well settled that the failure to attach all of the pleadings is a fatal procedural defect requiring the denial of a motion for summary judgment." *Weinstein v Gindi*, 92 AD3d 526, 527 (1st Dept 2012) (*citations omitted*); CPLR 3212(b). Although the City seeks summary judgment dismissing the complaint and all cross claims asserted against it, it does not submit a copy of any such cross claims. Thus, this Court cannot grant summary judgment to the City.

In any event, the City is not entitled to summary judgment on the merits. As noted above, liability for a dangerous or defective condition on real property generally arises from ownership, occupancy, control, or special use of the property. *Suero-Sosa v Cardona, supra* at 707 (2d Dept 2013). Although the City submits Schloss' affidavit (Ex. D) demonstrating that it did not own the

premises where the alleged incident occurred, it did not establish that it did not occupy, control, or make special use of the property and has thus failed to establish its prima facie entitlement to summary judgment. *Cf.*, *Suero-Sosa v Cardona*, *supra*; *Rodgers v City of New York*, 34 AD3d 555 (2d Dept 2006); *White v New York City Trans. Auth.*, 308 AD2d 341 (1st Dept 2003).

Although the City's attorney asserts in her affirmation in support of the motion that "the City did not own, operate, manage, maintain or control the premises" (City's Aff. In Support, at par. 6), a conclusory attorney affirmation is insufficient to establish the City's entitlement to summary judgment as a matter of law. *See Mahoney v Jackson's Marina, Inc.*, 305 AD2d 555 (2d Dept 2003).

Since the City failed to establish its prima facie entitlement to summary judgment dismissing the complaint, there is no need for this Court to consider the plaintiff's opposing papers. *See Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Kebbeh v City of New York, supra* at 512; *Emigrant Mortgage Co., Inc. v Karpinski*, 76 AD3d 1044 (2d Dept 2010).

This Court further notes that, although the City attempts to establish its entitlement to summary judgment by submitting Louie's affidavit, in which she attests to the fact that the City neither owned nor managed the playground, the City could not "remedy a fundamental deficiency in the moving papers by submitting evidentiary material with the reply." *Mulqueen v Live*, 111 AD3d 585 (1st Dept 2013) (*citations omitted*).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendant The City of New York is denied in all respects; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: May 9, 2014

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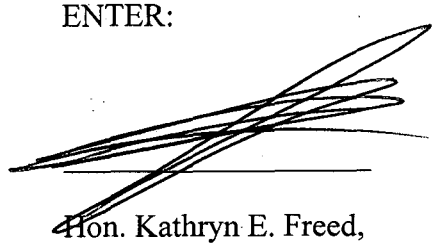

Hon. Kathryn E. Freed,
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT