

**Oakley v County of Nassau**

2014 NY Slip Op 33515(U)

May 14, 2014

Supreme Court, Nassau County

Docket Number: 005979/2012

Judge: Randy Sue Marber

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**  
**JUSTICE**

TRIAL/IAS PART 13

\_\_\_\_\_  
SAMUEL OAKLEY,

X

Plaintiff,

-against-

Index No.: 005979/2012  
Motion Sequence...04  
Motion Date...05/06/14

XXX

COUNTY OF NASSAU,

Defendant.

\_\_\_\_\_  
X

Papers Submitted:

- Notice of Motion.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Upon the foregoing papers, the motion by the Defendant, COUNTY OF NASSAU, (hereinafter the "County") seeking an order pursuant to CPLR § 3211 (a) (7) dismissing the complaint is determined as provided herein.

In this action, the Plaintiff seeks to recover damages for personal injuries allegedly sustained when his wheelchair tipped over on a bus owned by the County on March 30, 2011. The Plaintiff served a notice of claim on the County on June 22, 2011. The Notice of Claim states that the Plaintiff was a passenger on a bus when the driver made a sharp turn causing his unsecured wheelchair to fall down the bus stairs resulting in his injuries. The Notice of Claim further states that the driver of the bus failed to secure the Plaintiff's wheelchair using the available overhead strap.

The Plaintiff served a Summons and Verified Complaint on the County on May 12, 2012. The Plaintiff commenced this action against the County, the Metropolitan Suburban Bus Authority (“MSBA”) and Nassau Inter County Express (“NICE”). The Complaint was later dismissed as to MSBA and NICE. (See Copy of Order, Phelan, J., dated July 24, 2012, annexed to the Notice of Motion as Exhibit “E”) On May 22, 2012, the County served its Verified Answer with Cross-Claims and Demand for Bill of Particulars on the Plaintiff.

Thereafter, the Plaintiff served his Verified Bill of Particulars, dated March 27, 2013, on the County. The Plaintiff’s Verified Bill of Particulars alleged that:

“The plaintiff, a double amputee was riding the MTA bus Number 27 in his wheelchair when the driver of said bus made a sharp turn and the unsecured wheelchair in which claimant was sitting was caused to fall down the bus stairs after being catapulted across the bus resulting in injury to the plaintiff...Additionally, the driver of the bus failed to secure the plaintiff’s wheelchair using the available overhead strap.”

“The defendants were negligent in the ownership operation, maintenance and control of the aforementioned bus. Upon information and belief, the vehicle was operated in an unsafe and negligent manner in that the vehicle was traveling at an unsafe rate of speed, made an unsafe and sudden turn causing injury to the plaintiff...Additionally, the bus was in disrepair as the apparatus and equipment used to secure wheelchairs for disabled individuals was not in proper condition, was not properly serviced and was not properly maintained....Additionally, the apparatus used to secure wheelchairs was not

properly used and implemented by the bus driver on the day of the occurrence.”

Thereafter, the County moved to dismiss the Complaint pursuant to CPLR § 3211 (10) for failure to join necessary and indispensable parties. The Court denied the motion by Order dated September 12, 2013. (*See Copy of Order, Phelan, J., dated September 12, 2013, annexed to the Notice of Motion as Exhibit “F”*)

In support of the instant motion to dismiss, the County contends that the Plaintiff failed to state a cause of action against the County. Specifically, the County contends that the Plaintiff has failed to allege a single act of negligence by the County. The County argues that the only allegations made by the Plaintiff about the County were regarding ownership. All acts of negligence alleged in the Complaint were regarding the conduct of the bus driver. The County contends that it is not liable for the acts of the bus driver because it did not employ the bus driver. The bus driver was employed by MSBA. (*See Notice of Motion, Exhibit “I”*)

The County further contends that the Plaintiff’s allegation that the apparatus was not properly maintained, which was first alleged in the Bill of Particulars, was not properly set forth in the Notice of Claim. However, despite the Plaintiff not giving the County proper notice of this allegation, the County contends that it is not liable because it had no duty to maintain or repair the bus. The County was the owner of the bus, but on the date of the accident it was not responsible for maintenance pursuant to the lease between the County and MSBA, which made MSBA responsible for the operation and maintenance of

the bus. (See Copy of Agreement annexed to the Notice of Motion as Exhibit "J")

In opposition, the Plaintiff contends that the County's motion is improper, pursuant to CPLR § 3211 (e). The Plaintiff argues that the County is barred from making this motion under the "single motion rule" because it had previously made a motion pursuant to CPLR § 3211 (10). Alternatively, the Plaintiff argues that the County's motion should be denied on the merits of the case. The Plaintiff contends that because it alleges that the bus was in disrepair and that the apparatus used to secure wheelchairs was not in proper condition it should have the opportunity to depose the County as owners of the bus. The Plaintiff contends that since discovery has not proceeded, it is premature to determine if the County had any involvement with this particular bus.

In its Reply in further support of the instant motion, the County argues that the Plaintiff's reliance on CPLR § 3211 (e) and the "single motion rule" is misplaced. The County contends that the Court of Appeals has clarified that the rule applies only to pre-answer motions. The County argues that since its motions were made after issue was joined and the prior motion was made pursuant to a different section of CPLR § 3211, its current motion is proper. The County further alleges that the Plaintiff's mere assertion that the County owns the bus without any further factual allegations of negligence cannot support its claim against the County.

The County properly cited to *Held v. Kaufman*, 91 N.Y.2d 425 [1998], where the Court of Appeals held that, "[t]he purpose of CPLR § 3211 (e) is to prevent the delay before answer that could result from a series of motions." The County is not barred from

making successive motions pursuant to different sections of CPLR § 3211 when issue has already been joined. Accordingly, the instant motion is proper.

With regard to the merits of the instant motion, in considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211 (a) (7), the pleading is to be afforded a liberal construction. The court must accept the facts alleged as true, accord the plaintiff the benefit of every possible inference and determine only whether the facts, as alleged, fit within any cognizable legal theory. If there is a discernible claim, that is where the inquiry must end. (*Hurrell-Harring v. State of New York*, 15 N.Y.3d 8, 20 [2010]) Factual allegations, however, presumed to be true may properly be negated by affidavits and documentary evidence. Where documentary evidence establishes that the allegations of the complaint fail to state a cause of action, dismissal of the complaint is warranted. (*Siracusa v. Sager*, 105 A.D.3d 937, 938 [2nd Dept. 2013])

To establish a *prima facie* case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty and that the breach was the proximate cause of the plaintiff's injury. (*Arango v. Vasquez*, 89 A.D.3d 875, 876 [2d Dept. 2011]) With respect to a tort claim such as the Plaintiff alleges against the County, the threshold question is whether the alleged tortfeasor owed a duty of care to the injured Plaintiff. (*Neidhart v. K.T. Brake & Spring Co.*, 55 A.D.3d 887, 889 [2nd Dept. 2008]) "Without a duty running directly to the injured person, there can be no liability in damages however careless the conduct or foreseeable harm." (*Lauer v. City of New York*, 95 N.Y.2d 95, 100 [2000]; *Fox v. Marshall*, 88 A.D.3d 131, 135 [2nd Dept. 2011])

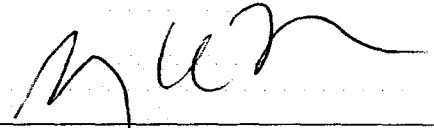
Here, accepting all of the facts alleged by the Plaintiff as true and giving the Plaintiff the benefit of every favorable inference, he has failed to set forth a cognizable cause of action against the County. The Plaintiff has not set forth a *prima facie* negligence claim because he has not established the existence of a duty owed by the County nor did he allege any negligent conduct by the County. The County did not employ the bus driver or operate the bus. Nor did it have a duty to maintain or repair the bus. As such, the branch of the motion by the County seeking to dismiss the complaint, pursuant to CPLR § 3211 (a) (7), should be is **GRANTED**.

Accordingly, it is hereby

**ORDERED**, that the motion, pursuant to CPLR § 3211 (a) (7), by the Defendant, COUNTY OF NASSAU, to dismiss the Plaintiff's complaint for failure to state a cause of action is **GRANTED**.

This constitutes the decision and order of the Court.

Dated: Mineola, New York  
May 14, 2014

  
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Hon. Randy Sue Marber, J.S.C.  
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**ENTERED**  
MAY 15 2014  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE