

**Hall v FV-1, Inc.**

2015 NY Slip Op 31102(U)

June 26, 2015

Supreme Court, New York County

Docket Number: 153177/2015

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

\_\_\_\_\_x  
DENIS HALL,

Plaintiff,

Index No. 153177/2015

-against-

**DECISION/ORDER**

FV-1, INC. and MORGAN STANLEY MORTGAGE  
CAPITAL HOLDINGS, LLC.

Defendants.

\_\_\_\_\_x  
CAROL ROBINSON EDMEAD, J.S.C.

**MEMORANDUM DECISION**

Defendants FV-1, Inc. and Morgan Stanley Mortgage Capital Holdings, LLC (“defendants”) move for an Order, pursuant to CPLR 3211(a)(1) and (7), dismissing the complaint of plaintiff Denis Hall (“plaintiff”).

*Defendants’ Contentions*

On March 7, 2009, the Queens County Supreme Court in an action entitled Central Mortgage Company v. Greta Jusino (Index No. 24233/07) entered a Judgment of Foreclosure directing that Plaintiff therein was entitled to foreclosure of the Property.

Pursuant to the Judgment, the Premises was sold at a public auction on or about April 28, 2008, at which the Federal National Mortgage Association (“FNMA.”) was the successful bidder and a Referee’s Deed was executed to FNMA.

By Deed dated March 16, 2011 FNMA. transferred title to the Property to Morgan Stanley Mortgage Capital Holdings LLC (“Morgan Stanley”).

By Deed dated September 19, 2012, Morgan. Stanley transferred title to the Property to

FV-1, in trust for Morgan Stanley Mortgage Capital Holdings LLC as evidenced by a Deed. That on or about November 20, 2014, Defendant. Morgan Stanley sold. the Property to Amarjit S, Multani, for the amount of \$280,000,00.

Plaintiff contends in his Complaint that the Plaintiff's alleged injuries on February 9, 2015 were caused by the "gross negligence, carelessness, recklessness and wanton actions of the defendant...for permitting the ice to be on the sidewalk, in failing to clear away the ice...". Complaint (¶29). However, as demonstrated above, Defendants were not the owner of the property at the time of the injury and therefore had no duty to maintain the property. Moreover, the Plaintiff fails to allege any damages or injuries sustained suffered from the alleged slip and fall on the sidewalk. As a result, Plaintiff has wholly failed to allege a viable cause of action against the Defendants herein and the action should thus be dismissed.

*Plaintiff's Opposition*

Defendants' failure to fulfill their statutory obligation to keep the abutting sidewalk clear of snow and ice not only contributed to plaintiff's accident, but was a competent producing cause of the resulting injuries.

Since defendants' motion is one to dismiss pursuant to CPLR 3211, defendants have not interposed an Answer and, thus, for the purpose of this motion, all of the allegations set forth in plaintiff's Complaint must be deemed true.

Defendants contend that they were not the owner of the building at the time of the accident and, thus, they are not responsible for the accident. However, defendants' evidence in support of that claim is not based on any admissible or documentary evidence as required by CPLR 3211(a)(1). Specifically, all of the documents in support of defendants' position are

appended to defendants' motion as Exhibit "F". The most important document submitted by the defendants is what purports to be a filed Deed. However, the document indicates that it was recorded/filed on April 28, 2015, almost three months after plaintiff's accident. Thus, even if the document were in admissible form, if anything, it shows that at the time of the filing of the Deed, the owner of the premises was defendant FV-1, Inc, and not the alleged new buyer Mr. Multani. Thus, on its face, the document appended by the defendants does not support their position.

Next, defense counsel appends what is titled to be an "indenture" that purports to be dated November 20, 2014. However, the document itself is not in admissible form and simply has a written-in date and, indeed, on its face, purports to be signed by a "Scott Keeter." The document also notes that a Power of Attorney is to be recorded with it but there is no Power of Attorney attached. Thus, on its face, the document is inadmissible and not probative of any proof issues of ownership. Even if it were admissible, it only shows that there was a contract, but, pointedly, does not show if, or, more importantly, when title to the property passed. At best, the document, even if admissible, which it is not, is only a binder for a proposed sale of the property.

Next, defense counsel appends some document that purports to be something from the State of Colorado, but is not properly certified pursuant to CPLR 2309, and is otherwise irrelevant. In any event, the document does not even purport to evidence when, or even if, title passed.

Next, defense counsel appends what purports to be a Contract of Sale. The contract itself is not in admissible form and there is no proof that the signatures are of the buyer and seller of the property. Indeed, the contract is not even signed by the seller and only purports to be signed by the proposed buyer. The signatures are not dated and are not probative of anything! Indeed,

the contract provides that the sale price be \$280,000.00, yet the only check (which itself is not in admissible form) appended shows that only \$5,000.00 was paid, which seems to be only a binder. Indeed, there is absolutely no proof that the monies were even paid, or, more importantly, when they were paid. Most importantly, even if the "contract" were admissible, which it is not, the contract does not show when title was passed.

Next, defense counsel appends what is termed a "Wire Transfer Inquiry Detail" that purports to be two pages, but is only one page, has no signatures, is not in any way in admissible form and does not in any way prove when the sale took place. Going back to the filing of the Deed, it would appear that the sale did not take place until April, 2015, months after plaintiff's accident.

In sum, there is simply not any admissible documentary evidence proving to show that the defendants were not the owners of the premises on the date of the accident.

Next, defendants argue that the Summons & Complaint fails to state a cause of action. First, defendants claim (para. 13) that they did not owe a duty to the plaintiff in that "there existed no privity between Plaintiff and Defendants...." In explanation of this absurd argument, defendants claim that "an owner has no duty to trespassers...." Suffice it to say, walking on a public sidewalk in front of a building does not make someone a trespasser.

Next, defendants argue that plaintiff has failed to allege that the defendants had actual or constructive notice of the icy condition of the sidewalk. Suffice it to say, defendants have neglected to read paragraphs 20-24 of plaintiff's Complaint.

Next, defendants argue that they, as owners, were not responsible to remove snow and ice from the front of the premises.

Next, defendants argue (para. 17) they were not the proximate cause of plaintiff's injuries. It is beyond cavil that an owner is responsible to maintain its property, including the public sidewalk in front of it and the defendants' failure properly to maintain the sidewalk free of snow and ice is actionable.

In sum, defendants have failed to carry their burden on CPLR 3211 motion. Indeed, defendants' moving papers are so devoid of merit, costs and sanctions should be imposed.

*Defendants' Reply*

The crux of plaintiff's Opposition, as well as the Complaint, is that Defendants owned the property and therefore were responsible for the sidewalk maintenance where the alleged slip and fall occurred. As Defendants' Motion clearly demonstrates, through documentary evidence, neither of the Defendants owned the property at the alleged slip and fall, therefore rendering the Defendants improper parties to said action. See Defendants' Exhibit F. Said Exhibit contains a copy of the deed, contract of sale, a check and wire transfer which demonstrates the sale of the property from Morgan Stanley to Amarjit S. Multani, the owner of the premises.

Plaintiff's allegation concerning the recording of the deed is of no merit. Recording of the deed is not required to demonstrate delivery of same. Pursuant to RPL § 244, once a deed is delivered by the grantor and accepted by the grantee, a conveyance of real property takes place immediately so as to vest the estate or interest intended to be conveyed. Therefore, the fact that the Deed was not recorded until months after does not negate the ownership and that neither Defendant was the owner at the time of the alleged slip and fall.

The ample case law that Defendants cited in its Motion to Dismiss demonstrates that, even if, Defendants owned the property, which is not admitted, they did not breach a duty owed

to the Plaintiff.

Within Plaintiff's opposition, there is still no evidence provided that demonstrates any slip and fall occurred nor any injuries allegedly sustained by the Plaintiff.

### DISCUSSION

#### CPLR 3211 [a] [1]: Defense is founded upon documentary evidence

Pursuant to CPLR 3211 [a] [1], a party may move for judgment dismissing one or more causes of action asserted against him on the ground that “a defense is founded upon documentary evidence.” A motion to dismiss on the basis of a defense founded upon documentary evidence may be granted “only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law” (*DKR Soundshore Oasis Holding Fund Ltd. v. Merrill Lynch Intern.*, 80 AD3d 448, 914 NYS2d 145 [1<sup>st</sup> Dept 2011] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). “Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*VisionChina Media Inc. v Shareholder Representative VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 967 NYS2d 338 [1<sup>st</sup> Dept 2013]).

To be considered “documentary,” evidence must be unambiguous and of undisputed authenticity (*Fontanetta v Doe*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010] *citing* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10, at 21–22; *Raske v Next Management, LLC*, 40 Misc 3d 1240(A), Slip Copy, 2013 WL 5033149 (Table) [Supreme Court, New York 2013]; *Philips South Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 867 NYS2d 386 [1<sup>st</sup> Dept 2008] (documentary evidence “apparently aims at paper whose

content is essentially undeniable and which assuming the verity of its contents and the validity of its execution will itself support the ground on which the motion is based”). To constitute documentary evidence, the papers must be “essentially undeniable” and support the motion on its own (*Amsterdam Hospitality Group, LLC v. Marshall-Alan Associates, Inc.*, --- N.Y.S.2d ----, 2014 WL 4232688, 2014 N.Y. Slip Op. 06007 [1<sup>st</sup> Dept 2014] *citing* Siegel, Practice

CPLR 3211 [a] [7]: Dismiss for Failure to State a Cause of Action

“A CPLR 3211(a)(7) motion may be used by a defendant to test the facial sufficiency of a pleading in two different ways. On the one hand, the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law. On the other hand, the motion may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action. As to the latter, the Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim (*Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 980 N.Y.S.2d 21 [1<sup>st</sup> Dept 2014]). When documentary evidence is submitted by a defendant “the standard morphs from whether the plaintiff has stated a cause of action to whether it has one” (*Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, *supra*, citing John R. Higgitt, CPLR 3211[A][7]: Demurrer or Merits–Testing Device?, 73 Albany Law Review 99, 110 [2009]).

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court’s role is deciding “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at

law a motion for dismissal will fail” (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1<sup>st</sup> Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1<sup>st</sup> Dept 2013]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR §3026; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra*). On a motion to dismiss made pursuant to CPLR § 3211, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs “the benefit of every possible favorable inference,” and “determine only whether the facts as alleged fit into any cognizable legal theory” (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra*; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]). However, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not” presumed to be true or accorded every favorable inference (*David v Hack*, 97 AD3d 437, 948 NYS2d 583 [1<sup>st</sup> Dept 2012]; *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81, 692 NYS2d 304 [1st Dept 1999], *affd* 94 NY2d 659, 709 NYS2d 861, 731 NE2d 577 [2000]; *Kliebert v McKoan*, 228 AD2d 232, 643 NYS2d 114 [1st Dept], *lv denied* 89 NY2d 802, 653 NYS2d 279, 675 NE2d 1232 [1996], and

the criterion becomes “whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150, 730 NYS2d 48 [1st Dept 2001]; *WFB Telecom., Inc. v NYNEX Corp.*, 188 AD2d 257, 259, 590 NYS2d 460 [1<sup>st</sup> Dept], *lv denied* 81 NY2d 709, 599 NYS2d 804, 616 NE2d 159 [1993] [CPLR 3211 motion granted where defendant submitted letter from plaintiff’s counsel which flatly contradicted plaintiff’s current allegations of prima facie tort]). “In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint’s allegations against the defendant’s contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims” (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]). “On a motion to dismiss for failure to state claim on which relief could be granted, the court is not obligated to accept plaintiff’s bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like” (*San Geronimo Caribe Project, Inc. v. Vila*, 663 F. Supp. 2d 54 (D.P.R. 2009)).

For a defendant to be held liable in tort, it must have owed the injured party a duty of care (*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 584, 611 N.Y.S.2d 817, 634 N.E.2d 189; *Alnashmi v Certified Analytical Group, Inc.*, 89 A.D.3d 10, 13, 929 N.Y.S.2d 620; *Forbes v Aaron*, 81 A.D.3d 876, 877, 918 N.Y.S.2d 118). “The existence and extent of a duty is a question of law” (*Alnashmi v Certified Analytical Group, Inc.*, 89 A.D.3d at 13, 929 N.Y.S.2d 620). 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 Sanchez v*

*1710 Broadway, Inc.*, 79 A.D.3d 845, 846, 915 N.Y.S.2d 272; *Kydd v Daarta Realty Corp.*, 60 A.D.3d 997, 998, 877 N.Y.S.2d 352; *Gover v Mastic Beach Prop. Owners Assn.*, 57 A.D.3d 729, 869 N.Y.S.2d 593; *Dugue v 1818 Newkirk Mgt. Corp.*, 301 A.D.2d 561, 756 N.Y.S.2d 51).

Where none of these factors is present, a party cannot be held liable for injuries caused by a dangerous or a defective condition ( *see Sanchez v 1710 Broadway, Inc.*, 79 A.D.3d at 846, 915 N.Y.S.2d 272; *Kydd v Daarta Realty Corp.*, 60 A.D.3d at 998, 877 N.Y.S.2d 352; *Gover v Mastic Beach Prop. Owners Assn.*, 57 A.D.3d at 729, 869 N.Y.S.2d 593; *Dugue v 1818 Newkirk Mgt. Corp.*, 301 A.D.2d at 561, 756 N.Y.S.2d 51).

Here, defendants demonstrated, *prima facie*, their entitlement to judgment as a matter of law through, *inter alia*, the deed, contract of sale, a check and wire transfer which demonstrates the sale of the property from Morgan Stanley to Amarjit S. Multani, the owner of the premises at the time of plaintiff's alleged injury. ( *see Forbes v Aaron*, 81 A.D.3d at 877, 918 N.Y.S.2d 118; *Pollard v Credit Suisse First Boston Mtge. Capital, LLC*, 66 A.D.3d 862, 863, 887 N.Y.S.2d 626; *Rinzler v Jafco Assoc.*, 21 A.D.3d 360, 361, 800 N.Y.S.2d 719; *see also Demant v Town of Oyster Bay*, 23 A.D.3d 333, 334, 804 N.Y.S.2d 107).

And, the evidence submitted by defendants suffices as documentary evidence.

“Documentary evidence,” for purposes of a motion to dismiss, is usually limited to the type of evidence that tends to be self-proving, such as a deed or contract ( *New York Tel. Co. v Mobil Oil Corp.*, 99 A.D.2d 185, 192 [1st Dept 1984] ). “[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence’ in the proper case.” ( *Fontanetta v. John Doe I*, 73 AD3d 78, 84–85 [2d Dept 2010] quoting Siegel, Practice

Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10 at 21-22).

In opposition, the plaintiff failed to raise a triable issue of fact. And, there court does not reach the remaining arguments.

As Defendants' Motion clearly demonstrates, through documentary evidence, neither of the Defendants owned the property at the alleged slip and fall, therefore rendering the Defendants improper parties to said action.

#### CONCLUSION

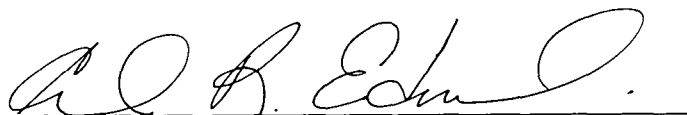
Based on the foregoing, it is hereby

**ORDERED** that the application of defendants Defendants FV-1, Inc. and Morgan Stanley Mortgage Capital Holdings, LLC for an Order, pursuant to CPLR 3211(a)(1) and (7), dismissing the complaint of plaintiff Denis Hall, is granted. And it is further

**ORDERED** that the Clerk of the Court shall enter judgment accordingly. And it is further

**ORDERED** that counsel for defendants shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for plaintiff.

Dated: June 26, 2015



Carol Robinson Edmead, J.S.C.

**JUD. CAROL EDMOAD**