

<b>Kalaj v Tortola Salon</b>
2015 NY Slip Op 32229(U)
November 23, 2015
Supreme Court, New York County
Docket Number: 156556/15
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
TOMA and ANAMARIA KALAJ,

Plaintiffs,

Index No. 156556/15

-against-

**DECISION/ORDER**

TORTOLA SALON,

Defendant.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmation in Opposition .....	2
Replying Affidavits.....	3
Exhibits.....	4

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Plaintiffs Toma and Anamaria Kalaj commenced the instant action against defendant Tortola Salon (“Tortola”) seeking to recover for injuries they allegedly sustained when they slipped and fell on the sidewalk in front of premises occupied by defendant. Tortola now moves for an Order pursuant to CPLR §§ 3211(a)(1) and (7) dismissing the complaint. For the reasons set forth below, Tortola’s motion is denied.

The relevant facts according to the complaint are as follows. On or about January 19, 2015, the plaintiffs sustained injuries when they slipped and fell on ice on the sidewalk (the “accident”) in front of the premises located at 28 Ericsson Place, New York, NY (the “subject premises”). Tortola operated a salon at the subject premises. Thereafter, plaintiffs commenced the instant action against Tortola asserting that Tortola’s negligence in failing to properly maintain the sidewalk in front of the subject premises was the proximate cause of their injuries.

Tortola now moves to dismiss the complaint.

The court first turns to that portion of Tortola's motion to dismiss the complaint pursuant to CPLR § 3211(a)(7). On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1<sup>st</sup> Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1<sup>st</sup> Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

In the instant action, Tortola's motion to dismiss the complaint pursuant to CPLR § 3211(a)(7) must be denied on the ground that this court finds that the complaint states a cause of action against Tortola. It is well-settled that pursuant to New York Administrative Code § 7-210, an owner of real property abutting a public sidewalk has a non-delegable duty to maintain the sidewalk in a reasonably safe condition. Thus, an owner may be held liable for personal injuries sustained as a result of its failure to do so. Here, the complaint sufficiently alleges a negligence claim against Tortola as it asserts that Tortola was the owner of the subject premises on the date of the accident, that Tortola was negligent in failing to properly maintain the sidewalk in front of its premises as required by statute and that said failure was the proximate cause of plaintiffs' accident. Thus, as the complaint sufficiently states a claim for negligence against Tortola, Tortola's motion to dismiss the complaint pursuant to CPLR § 3211(a)(7) must be denied.

The court next turns to that portion of Tortola's motion to dismiss the complaint pursuant

to CPLR § 3211(a)(1). In order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim. See *Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1<sup>st</sup> Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

In the instant action, Tortola's motion to dismiss the complaint pursuant to CPLR § 3211(a)(1) must be denied on the ground that the documentary evidence provided by Tortola in support of its motion fails to definitively dispose of plaintiffs' claim or resolve all factual issues as a matter of law. In support of its motion, Tortola provides the following documentary evidence: a deed dated May 28, 1997 which purports to show that the entire building in which the salon is located was owned by non-party 27 North Moore Associates, LLC ("27 North Moore") on the date of the accident; the Condominium Declaration for the premises known as 27 North Moore Street, New York, New York; a deed dated September 26, 2002 which purports to show that the subject premises was owned by non-party TK & JC Real Estate LLC ("TK") on the date of the accident; and an affidavit of Thomas Kollar, the owner of Tortola, in which he affirms that Tortola does not own the subject premises but rather leases the subject premises from TK, that the building is owned by 27 North Moore, that Tortola did not create the condition which caused plaintiffs' injuries, that it did not make any special use of the sidewalk in front of the subject premises and that it was not required to maintain the sidewalk in front of the subject premises.

However, this court finds that the above documentary evidence fails to definitively dispose of plaintiffs' claim. As an initial matter, both the building deed, which has a 1997 date, and the deed for the subject premises, which has a 2002 date, are insufficient to dispose of

plaintiffs' claim as they fail to establish as a matter of law that the building was owned by 27 North Moore at the time of the accident and that the subject premises was owned by TK at the time of the accident. Further, the Condominium Declaration for the building fails to definitively dispose of plaintiffs' claim as it also fails to establish as a matter of law that the building was owned by 27 North Moore at the time of the accident. Finally, Mr. Kollar's affidavit also fails to definitively dispose of plaintiffs' claim as such affidavit may not be used as evidentiary support on a motion to dismiss pursuant to CPLR § 3211(a)(1). It is well-settled that while affidavits may be considered on a motion to dismiss, unless the motion has been converted by the court to a motion for summary judgment, the affidavits will not be considered to determine whether there is evidentiary support for a properly pleaded claim but will only be accepted from a plaintiff for the limited purpose of remedying pleading defects in the complaint. *See Nonnon v. City of New York*, 9 N.Y.3d 825, 827 (2007); *see also Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633 (1976). Indeed, although "[t]he most common source of proof that supports a dismissal motion under CPLR 3211 is the affidavit, [] it is quite plain that an affidavit cannot qualify as 'documentary evidence' so as to support a dismissal based on paragraph 1." Siegel, *Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10*. "Affidavits submitted by a [defendant] will almost never warrant dismissal under CPLR 3211 unless they 'establish conclusively that petitioner has no claim or cause of action.'" *Lawrence v. Graubard Miller*, 11 N.Y.3d 588, 595 (2008).

Accordingly, Tortola's motion is denied in its entirety. This constitutes the decision and order of the court.

Dated: 11/23/15

Enter: \_\_\_\_\_

  
J.S.C.

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**CYNTHIA S. KERN**  
J.S.C.