

**Mahler v North Shore Camp, LLC**

2015 NY Slip Op 32622(U)

September 22, 2015

Supreme Court, Nassau County

Docket Number: 600380/15

Judge: Daniel R. Palmieri

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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**

**P R E S E N T : HON. DANIEL PALMIERI  
J.S.C.**

**TRIAL/IAS PART 20**

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**ROSLYN MAHLER,**

**Plaintiff,**

**Index No. 600380/15**

*-against-*

**Mot. Seq. #001**

**Mot. Seq. #002**

**NORTH SHORE CAMP, LLC.**

**Defendant.**

**Mot. Date: 5-21-15**

**Submit Date: 9-18-15**

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**The following papers were read on this motion:**

- Notice of Motion, dated 4-30-15 (#001).....1**
- Notice of Cross Motion (#002) and Affirmation in Opposition, dated 8-13-15.....2**
- Affirmation In Opposition to Cross Motion and Reply, dated 9-16-15.....3**

Defendant’s motion (#001) to dismiss pursuant to CPLR §3211(a)7, failure to state a cause of action is denied and plaintiff’s motion (#002) to amend the complaint pursuant to CPLR §3025(b) is granted.

All requests for relief not specifically addressed are denied.

The complaint alleges in substance that plaintiff slipped and fell on July 29, 2014 in front of premises, owned, maintained, operated, managed, controlled, supervised and put to special use by defendant. The special use alleged is that plaintiff was directed by camp personnel to a defective, broken and unsafe area, did not provide for safe parking or keep the area in a safe condition.

Defendant, relying in part on *Breland v Bayridge Air Rights, Inc.*, 65 AD3d (2d Dept. 2009) argues that the complaint fails to state a cause of action because *inter alia* an abutting landowner is not liable for a defect in an abutter’s sidewalk unless it created the defect or makes a special use thereof.

The Court must look within the four corners of the complaint, and if any cause of action is discernable therefrom the motion should fail. *See, e.g., Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). In making this determination, the factual allegations asserted in the pleading are to be accepted as true, and the plaintiff is to be accorded the benefit of every favorable inference that may be drawn therefrom. *Leon v Martinez*, 84 NY2d 83 (1994); *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 (2d Dept. 2004). If from its four corners factual allegations are discerned which taken together manifest any cognizable cause of action, a motion to dismiss will fail. *Ruffino v New York City Tr. Auth.*, 55 AD3d 817 (2d Dept. 2008). Whether a plaintiff can ultimately establish its allegations is not part of the calculus. *Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682 (2d Dept. 2012).

A court may consider evidence outside a pleading to test if a plaintiff has a cause of action including affidavits received for the limited purpose of remedying defects. *Morris v. Morris*, 306 AD2d 449 (2d Dept. 2003); *Davis v. CCF Capital Corp.*, 277 AD2d 342 (2d Dept. 2000).

As noted above, on a motion to dismiss pursuant to CPLR §3211(a)7, failure to state a cause of action, the Court will accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. The complaint must be construed liberally the factual allegations deemed to be true and the nonmoving party granted the benefit of every favorable inference. *QK Healthcare, Inc. v. Insource, Inc.*, 108 AD3d 56, 63 (2d Dept. 2013).

Based on the foregoing the Court finds that the complaint states a cause of action and defendant's motion to dismiss is denied.

The cross motion of plaintiff for leave to serve an amended complaint in the form annexed to the moving papers, amending paragraphs 4 and 14 of the complaint to include the area in front of the premises and to refer to a special use of the premises is granted. CPLR 3025(b).

The action is still in the discovery phase and no Note of Issue has been filed.

An amended complaint in the form attached to the motion is deemed served upon the defendant as of the date of this order. The defendant shall have 30 days from the date of this Decision and Order to respond to the amended complaint.

In the absence of prejudice or surprise to the opposing party, leave to amend pleadings is to be freely given, provided the proposed amendment is not palpably insufficient or patently devoid of merit. *Trataros v Constr., Inc. v New York City School Constr. Auth.*, 46 AD3d 874 (2d Dept. 2007); *see also, Edenwald Contr. Co. v City of New York*, 60 NY 957 (1983); *Janssen v Incorp. Vil. of Rockville Centre*, 59 AD3d 15 (2d Dept. 2008)

Under the liberal standards to be accorded newly pleaded claims in an amended complaint, the Court is to determine only whether the new claim is patently devoid of merit (*see, Lucido v Mancuso*, 49 AD3d 220 [2d Dept. 2008]; *Trataros v Constr., Inc. v New York City School Constr. Auth.*, 46 AD3d 874, *supra*). Here the “new claims” if they be such, are not patently devoid of merit.

The Court finds that there is no surprise and no prejudice here. The case is in its early stages and the complaint leaves no doubt as to the theory of the claim.

Prejudice to the nonmoving party is shown where that party is hindered in the preparation of its case or has been prevented from taking some measure in support of its position. *AnCor, Inc. v. BSB Bank & Trust Company*, 34 AD3d 1282 (4<sup>th</sup> Dept. 2006). There is no prejudice alleged or

perceived as to the proposed amendment. *Giuffre v. DiLeo*, 90 AD3d 602 (2d Dept. 2011).

This case is still in the discovery phase, the underlying facts remain substantially the same and a court will not examine the merits of a proposed amendment unless the insufficiency or lack of merit is clear and free from doubt. It cannot be said here that the proposed amendment is palpably insufficient as a matter of law or totally devoid of merit and no prejudice or surprise has been demonstrated. *Long Island Title Agency, Inc., v. Frisa*, 45 AD3d 649 (2d Dept. 2007). See *Lucido v. Mancuso*, 49 AD3d 220 (2d Dept. 2008), which held that it is not necessary for the movant to establish the merit of a proposed amendment in the first instance. *Id* at 229. See also *Kahan v. Spira*, 88 AD3d 964 (2d Dept. 2011) and *Joazard v. Joazard*, 83 AD3d 664 (2d Dept. 2011).

The brief affidavit of defendant's director does not establish that the amendment is palpably insufficient. The affidavit does not state that it is based on personal knowledge of the events on the date of the incident and does not address the allegations that plaintiff was directed by camp personnel to park in a certain area. Moreover, the *Ruffino* case, *supra*, is not persuasive as the accident there was on part of the subway station.

Based on the above, the motion to amend is granted.

The attorneys shall appear at a previously scheduled conference before the undersigned at the Supreme Courthouse, 100 Supreme Court Drive, Mineola, N.Y., on October 7, 2015, at 9:30 a.m. No adjournments of this conference will be permitted absent the permission of or Order of this Court. All parties are forewarned that failure to attend the conference may result in Judgment by Default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This shall constitute the Decision and Order of this Court.

DATED: September 22, 2015

ENTER:

  
HON. DANIEL PALMIERI  
Supreme Court Justice

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**ENTERED**  
SEP 24 2015  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE