

Cisek v Town of N. Hempstead
2015 NY Slip Op 32999(U)
April 6, 2015
Supreme Court, Nassau County
Docket Number: Index No. 606948/2015
Judge: Karen V. Murphy
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

DANIELLE CISEK,

Plaintiff,

Index No. 606948/2015

-against-

Motion Submitted: 001

Motion Sequence: 02/22/16

**TOWN OF NORTH HEMPSTEAD, TOWN OF
NORTH HEMPSTEAD-DEPARTMENT OF
PUBLIC WORKS-HIGHWAYS DEPARTMENT,
COUNTY OF NASSAU and COUNTY OF
NASSAU-DEPARTMENT OF PUBLIC WORKS,**

Defendants.

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Defendant County of Nassau (the County)¹ moves this Court for an Order dismissing the complaint in lieu of answering, as well as any and all cross-claims asserted against it. Plaintiff opposes the requested relief. None of the other named defendants have submitted any papers in opposition to the instant motion.

Plaintiff claims that, on September 3, 2014, she sustained personal injury while she

¹Counsel for the County states in her Affirmation in Support that the County of Nassau is incorrectly sued herein as "County of Nassau and County of Nassau-Department of Public Works."

was lawfully traversing “on the roadway, defacto crosswalk on Orchard Street at the intersection of Plandome Road, Manhasset, New York” (County Exhibit A, Amended Notice of Claim, ¶ 2). Specifically, plaintiff states in her Amended Notice of Claim that “the defect is in the roadway of Orchard Street between the intersection with Plandome Road and the white stop line for vehicles on Orchard Street . . . [consisting of] a broken, extended, misaligned, raised, uneven, extended section of cracked portion of the roadway. Said roadway having a hole in the roadway and/or hazardous depression thereat. . .”

In support of its motion, the County has submitted the affidavit of William Nimmo, Deputy Commissioner with the Nassau County Department of Public Works (DPW).

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211 (a) (7), the facts pleaded must be presumed to be true and accorded every favorable inference, and the sole criterion is whether “from [the complaint’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275[1977]; see *Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]; *Sokol v. Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]; *Gershon v. Goldberg*, 30 AD3d 372, 373 [2d Dept 2006]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]).

“When evidentiary material is considered, 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, supra* at 275; see also *Vertical Progression, Inc. v. Canyon Johnson Urban Funds*, 126 AD3d 784 [2d Dept 2015]; *YDRA, LLC v. Mitchell*, 123 AD3d 1113 [2d Dept 2014]; *Korsinsky v. Rose*, 120 AD3d 1307 [2d Dept 2014]).

“In sum, in instances in which a motion to dismiss made under CPLR 3211 (subd [a], par 7) is not converted to a summary judgment motion, affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint, although there may be instances in which a submission by plaintiff will conclusively establish that he has no cause of action. It seems after the amendment of 1973 affidavits submitted by the defendant will seldom, if ever, warrant the relief he seeks, *unless too the affidavits establish conclusively that plaintiff has no cause of action*” (*Rovello v. Orofino Realty Co.*, 40 NY2d 633, 636 [1976] [emphasis added]).

The Court is not treating this motion as one for summary judgment pursuant to

CPLR § 3211(c).

The amended verified complaint alleges that the County owns, maintains, operates, controls, manages, inspects, and repairs the subject location, and that it is the County's duty to maintain the roadway in a safe and suitable condition.

William Nimmo's affidavit establishes that he was asked by the County Attorney to conduct an investigation regarding plaintiff's claim. Toward that end, Mr. Nimmo searched the records of the DPW, which consist of contracts, complaints, and repair records. These records are kept at the DPW offices in Westbury, New York. Based upon his search and his own personal knowledge as Deputy Commissioner, he attests that the subject location is not under the County's jurisdiction. Furthermore, the County does not own, maintain, manage, control, operate, repair, construct, or inspect the subject location, nor does it have any authority to issue permits, contract for work, or make any repairs thereat. Accordingly, Mr. Nimmo's search did not reveal any complaint or repair record related to the subject location.

The Court finds that the County's affidavit submitted in support of the instant motion is sufficient to establish that the allegations as to the County's ownership, management, maintenance, inspection, repair, operation, and control of the subject location are not facts at all. Since the County does not perform any of those functions, or have ownership of the subject location, the County does not owe a duty of care to plaintiff; consequently, there can be no recovery in negligence (*Pulka v. Edelman*, 40 NY2d 781 [1976]; *Miglino v. Bally Total Fitness of Greater New York, Inc.*, 92 AD3d 148 [2d Dept 2011], *aff'd*, 20 NY3d 342 [2013]).

Plaintiff's opposition papers, consisting of counsel's affirmation, do not contain any evidence controverting the County's position. Plaintiff simply maintains that the instant motion cannot be resolved upon the affidavit of William Nimmo, because the County's motion is not one for summary judgment, and because the County's motion is premature, as discovery has not yet commenced.

Plaintiff's opposition is insufficient to defeat the instant motion pursuant to CPLR § 3211 (d). "The main burden on the opposing party . . . is to convince the court in the opposing affidavits that facts 'may exist' whereby to defeat the motion" (*David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:49*). Plaintiff has not presented any affidavits tending to convince this Court that contrary facts "may exist," and none of the other municipal defendants has contested the County's representations. In this Court's view, no significant dispute exists that the County does not owe a duty of care to plaintiff.

Accordingly, the County's motion is granted, and the complaint is dismissed as against the County (including the "County of Nassau-Department of Public Works), pursuant to CPLR § 3211 (a)(7). Also dismissed without opposition is the cross-claim for contribution asserted against the County by co-defendant Town of North Hempstead.

The foregoing constitutes the Order of this Court.

Dated: April 6, 2015
Mineola, N.Y.


J. S. C.

ENTERED

APR 11 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE