

<b>Compagnone v Murphy</b>
2016 NY Slip Op 33134(U)
June 15, 2016
Supreme Court, Westchester County
Docket Number: 65071/2015
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X  
FRANCO COMPAGNONE,

Plaintiff,

-against-

JAMES D. MURPHY, KRISTIN H. MURPHY, FERRO  
MURPHY RYE PARTNERSHIP AND THE L.M. REID  
GROUP, L.L.C.,

Defendants.

-----X  
THE L.M. REID GROUP, LLC.

Third-Party Plaintiff,

-against-

ARENA CONTRACTING, INC., and MLA MASONRY  
WORKS, INC.,

Third-Party Defendants.  
-----X

The following papers were read on the defendant's motion seeking an order, pursuant to C.P.L.R. 3211(a)(7), dismissing the plaintiff's action for failure to state a cause of action and on the defendant's motion seeking to amend his complaint:

**PAPERS**

Notice of Motion/Affirmation/Exhibits A  
Notice of Cross-Motion/Affirmation/Exhibits A-D

**NUMBERED**

1-3  
4-9

Upon the foregoing papers, the defendants' motion is denied and the plaintiff's cross-motion is granted.

#### Factual and Procedural Background

This is an action to recover for personal injuries sustained by the plaintiff, who alleges that he was injured on October 27, 2013, upon entering 75 Wapanocca Street, Rye, New York ("the premises") to perform a routine patrol of the premises, within the scope of his duties as a City of Rye Police Officer. Plaintiff commenced this action on September 14, 2015, by filing a summons and complaint alleging that the defendants owed a duty to the public to use reasonable care to maintain, control and manage the premises and breached such duty by failing to keep the premises in a reasonably safe condition and was negligent in allowing an unsafe condition to exist. Plaintiff further alleges that his injury as a police officer, occurred directly or indirectly as a result of the neglect, omission, willful or culpable negligence of the defendants, solely and wholly or jointly by failing to comply with the requirements of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus and that the defendants are liable to the plaintiff pursuant to New York General Municipal Law 205.

Defendants James D. Murphy, Kristin H. Murphy, Ferro Murphy Rye Partnership ("the defendants") filed this pre answer motion seeking dismissal of the plaintiff's action as against them, pursuant to CPLR 3211(a)(7), arguing that the pleading fails to state a cause of action. Defendant, The L.M. Reid Group, LLC., filed an answer on October 22, 2015 and also filed a third-party complaint against Arena Contracting, Inc., and MLA Masonry Works, Inc., on November 6, 2015. Plaintiff then filed an amended complaint on December 30,

2015 and a cross-motion seeking an order allowing the plaintiff to amend or supplement his complaint. Both third-party defendants filed answers to the third-party complaint, The L.M. Reid Group LLC., filed an answer to the amended complaint and a reply to third-party counterclaims.

### Discussion

Rule 3211 of the Civil Practice Law and Rules provides, in relevant part that,

"[a] party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that:

(7) the pleading fails to state a cause of action..."

N.Y. Civ. Prac. L. & R. 3211(a)(7) (McKinney 2012). In such motions, the facts alleged in the complaint are accepted as true, and the only determination is whether the facts alleged fit within any recognizable legal theory of recovery. However, this rule does not apply to legal conclusions lacking factual support, or to factual claims that are contradicted by documentary evidence. See, *Doria v. Masucci*, 230 A.D.2d 764 (2d Dept. 1996).

Under CPLR 3211(a)(7), initially "[t]he sole criterion is 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...". *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182 (1977). On a motion to dismiss for failure to state a cause of action, the court must view the challenged pleading in the light most favorable to the non-moving party, and determine whether the facts as alleged fit within any cognizable legal theory. *Brevtman v Olinville Realty, LLC*, 54 AD3d 703 (2d Dept. 2008). See, also, *EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, (2005); *Leon v Martinez*, 84 NY2d 83 (1994).

Thus, a motion to dismiss pursuant to CPLR 3211 (a) (7) will not succeed if, taking all facts alleged as true and affording them every possible inference favorable to the nonmoving party, the complaint states in some recognizable form any cause of action known to law (see *Leon v Martinez*, supra; *Fisher v DiPietro*, 54 AD3d 892 (2d Dept 2008); *Shava B. Pac., LLC v Wilson. Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, (2d Dept. 2006). “Indeed, a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied ‘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’”. *Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d 682, 683, 941 N.Y.S.2d 675, 677 (2d Dept. 2012).

The defendants argue that the “firefighter rule” bars the plaintiff from recovery under a theory of common law negligence. “[T]he firefighter rule provides that “[p]olice and firefighters may not recover in common-law negligence for line-of-duty-injuries resulting from risks associated with the particular dangers inherent in that type of employment”” *Gammons v. City of New York*, 109 A.D.3d 189, 972 N.Y.S.2d 559 (2d Dept. 2013) *aff’d* 24 N.Y.S.3d 562, 2 N.Y.S.3d 45, 25 N.E.3d 958 (2014). ‘The rule bars a police officer’s or a firefighter’s recovery “when the performance of his or her duties increased the risk of the injury happening, and did not merely furnish the occasion for the injury.”’ *Id.* However, “a common-law negligence claim may proceed where an officer is injured in the line of duty merely because he or she happened to be present in a given location, but was not engaged in any specific duty that increased the risk of receiving that injury.” *Zanghi v. Niagara Frontier Transp. Commn*, 85 N.Y.2d 423, 436, 626 N.Y.S.2d 23, 649 N.E.2d 1167.

Here, the Court does not have sufficient information regarding the alleged incident and injury to determine if the officer's duties increased the risk of his injury happening. Therefore, the defendant's motion is denied. A bill of particulars has not been provided to the Court and discovery has not been conducted. Therefore, without more information, it is this Court's determination that the first cause of action states a cause of action known to law.

The defendants also seek to dismiss the plaintiff's cause of action pursuant to General Municipal Law 205-e, because the plaintiff failed to assert the violation of a specific statute or ordinance and therefore failed to comply with the requirements of the statutes, ordinances, rules, orders, and requirements of the federal, state, county, village, town or city governments.

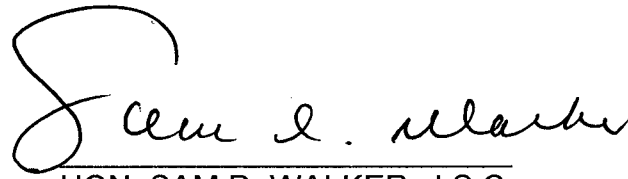
Plaintiff has since filed an amended complaint and has also cross-moved for leave to amend the complaint to include the specific statute or ordinance. Plaintiff has attached the amended complaint as an exhibit to the motion. Under CPLR 3025(b), leave to amend a pleading shall be freely granted absent prejudice to the adverse party. On a motion for leave to amend a pleading before trial, the opposing party cannot successfully claim prejudice where the proposed amendment would not change the fundamental nature of the allegations in the original pleading [*Pepe v. Tannenbaum*, 262 A.D.2d 381 (2d Dept. 1999)], or where the opposing party has had full knowledge of the facts [*Pejcinovic v. City of New York*, 258 A.D.2d 365 (1st Dept. 1999)] and an opportunity to present an opposing theory of the case is allowed. (*Stow v. City of New York*, 122 A.D.2d 45 (2d Dept. 1986).

Based on the foregoing and in the absence of any compelling showing of prejudice by the defendants, the Court now grants the plaintiff's motion seeking leave to amend the complaint. Therefore, the defendants' motion to dismiss the second cause of action is also denied.

The Court deems the amended complaint as filed and defendants that have not previously answered the amended complaint shall file and serve their answer within thirty days of the filing of this Decision and Order.

The parties are directed to appear before the preliminary conference part on August 1, 2016 in Courtroom 811 at 9:30 a.m. The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York  
June 15, 2016

  
HON. SAM D. WALKER, J.S.C.