

**Williams v Sumkin Family Ltd. Partnership XVIII**

2016 NY Slip Op 33183(U)

March 22, 2016

Supreme Court, Nassau County

Docket Number: Index No. 606917/2015

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

**RASHON WILLIAMS,**

**Plaintiff,**

**Index No. 606917/2015**

**-against-**

**Motion Submitted: 02/02/16**

**Motion Sequence: 001**

**SUMKIN FAMILY LIMITED PARTNERSHIP  
XVIII, SUMKIN REALTY CORP., VILLAGE OF  
HEMPSTEAD, TOWN OF HEMPSTEAD, and THE  
COUNTY OF NASSAU,**

**Defendants.**

\_\_\_\_\_ x

The following papers read on this motion:

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

Defendant County of Nassau (the County) moves this Court for an Order dismissing the complaint in lieu of answering. 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 August 24, 2015, at 12:45 a.m., he was lawfully riding his bicycle in front of 31 Sammis Place, located in the Village of Hempstead, when he was caused to fall striking his leg on the dangerous and exposed metal rods/pipes/posts located thereat. Plaintiff also claims that the County failed to provide a safe place for him to traverse the area, that garbage and debris were permitted to accumulate on the sidewalk area, and that there was a failure to provide proper lighting (Notice of Claim, ¶ 3).

In support of its motion, the County has submitted the affidavits of Anthony Esposito, its Landscape Architect II with the Department of Public Works (DPW), James Corcoran, Real Estate Inspector I of the Municipal Transactions Bureau, and Veronica Cox, assigned to the Bureau of Claims.

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]).

Plaintiff’s papers submitted in opposition to the instant motion refer to “facts that are essential to oppose the motion for *summary judgment*” (emphasis added), which this motion is not. The instant motion is being treated as a motion for dismissal pursuant to CPLR § 3211 (a)(7). The Court is not treating this motion as one for summary judgment pursuant to CPLR § 3211(c).

The complaint alleges that the County owned, inspected, repaired, designed, constructed, and controlled the sidewalk abutting 31 Sammis Place, and that the County

constructed, controlled, and maintained the rod, post and/or pipe involved in the accident.

Anthony Esposito's affidavit establishes that he was asked by the County Attorney to conduct an investigation regarding plaintiff's claim. Toward that end, Mr. Esposito searched the records of the DPW, which consist of contracts, sidewalk 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 a Landscape Architect II, he attests that the subject location is not under the County's jurisdiction. The County does not maintain, control, possess, repair, contract for, supervise, direct, construct, inspect, renovate, rehabilitate, or alter that location, nor does it have any authority to do so. Moreover, the County does not perform any of those functions specifically with respect to the sidewalk at that location; accordingly, Mr. Esposito's search did not reveal any complaint or repair records related to the sidewalk at that location.

Mr. Corcoran's affidavit further establishes the same facts, which are that the County does not own, operate, maintain, repair, perform construction, or provide snow removal services to either 31 Sammis Place, or the sidewalk adjacent to those premises, both of which are located in the Village of Hempstead. Mr. Corcoran states that the records of the Nassau County Clerk's Office reveal that the six-unit apartment building at 31 Sammis Place is presently owned by defendant Sumkin Family Limited Partnership XVIII. Mr. Corcoran has annexed the two deeds on file that are related to the subject location. Those documents confirm that 31 Sammis Place is located within the Village of Hempstead.

Not surprisingly, Ms. Cox's affidavit establishes that, for the five years prior to plaintiff's accident, the County's Notice of Claim and Notice of Defect Files do not contain any prior notices of claim or prior written complaints involving any dangerous or defective conditions, including the presence of pipes and/or rods protruding from the lawn area adjacent to the sidewalk in front of 31 Sammis Place.

The Court finds that the County's affidavits submitted in support of the instant motion are sufficient to establish that the allegations as to the County's ownership, inspection, repair, design, construction, and control of the sidewalk abutting 31 Sammis Place, and the allegations as to construction, control and maintenance of the rod, post and/or pipe involved in the accident are not facts at all. Since the County does not perform any of those functions, or have ownership of the premises at 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 County's motion is premature because discovery has not been completed; however, plaintiff's assertion that he "should be entitled to depose Mr. Esposito and investigate the relationship and responsibilities of the various Defendants" 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;" the property ownership records are available to the public, and none of the other defendants have contested the County's representations. In this Court's view, no significant dispute exists about the fact that the County does not own, inspect, repair, design, construct, or control the subject location, and thereby it does not owe a duty of care to plaintiff.

Accordingly, the County's motion is granted, and the complaint is dismissed as to the County of Nassau only, pursuant to CPLR § 3211 (a) (7).

The foregoing constitutes the Order of this Court.

Dated: March 22, 2016  
Mineola, N.Y.

  
J. S. C.  
**ENTERED**

MAR 23 2016  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE