

Puntiel v 177 Wadsworth LLC
2017 NY Slip Op 31417(U)
June 30, 2017
Supreme Court, New York County
Docket Number: 156726/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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CALVIN PUNTIEL,

Plaintiff,

-against-

DECISION/ORDER

Index No.: 156726/2016

Mot. Seq. 001

177 WADSWORTH LLC and BURGER HEIGHTS
LLC,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for personal injury. Defendant, 177 Wadsworth LLC (“Defendant”) now moves to dismiss Plaintiff, Calvin Puntiel’s (“Plaintiff”) complaint (“Complaint”) pursuant to CPLR §§ 3211(a)(7) and 3013.

Discussion

In determining a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the Court’s role is deciding “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 a motion for dismissal will fail” (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A..D.3d 204, 968 N.Y.S.2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A..D.3d 401, 960 N.Y.S.2d 404 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR § 3211, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs “the benefit of every possible favorable inference,” and “determine only whether the facts as alleged fit into any cognizable legal theory” (*Siegmund Strauss*, 104 A.D.3d

401; *Nonnon v. City of New York*, 9 N.Y.3d 825 [2007]). Moreover, “[i]n assessing a motion under CPLR 3211(a)(7), . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint” (*Mamoon v. Dot Net Inc.*, 135 A.D.3d 656, 657, 25 N.Y.S.3d 85, 87 [1st Dept 2016], quoting *Leon v. Martinez*, 84 N.Y.2d at 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]; see *High Definition MRI, P.C. v. Travelers Cos., Inc.*, 137 A.D.3d 602, 603, 29 N.Y.S.3d 23, 24 [1st Dept 2016] [citing to CPLR 3013, plaintiff’s affidavit submitted opposition to defendant’s motion to dismiss sufficiently particular to give the court and parties notice of the cause of action]). A court may also consider plaintiff’s bill of particulars to determine whether a claim is stated (see *Kellogg v. All Saints Hous. Dev. Fund Co.*, 146 A.D.3d 615, 616, 46 N.Y.S.3d 30, 33 [1st Dept 2017] [noting that, plaintiff’s complaint, bill of particulars and deposition testimony, taken together was sufficient to state a cause of action for negligence], citing *R.H. Sanbar Projects, Inc. v. Gruzen P’ship*, 148 A.D.2d 316, 318, 538 N.Y.S.2d 532, 533 [1st Dept 1989]; see Siegel, N.Y. Prac. § 238, at 401 [4th ed.]).

A complaint must “be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions” that form the basis of the complaint and “the material elements of each cause of action” (CPLR § 3013).

As to whether a complaint satisfies CPLR § 3013(a), “particularity as to plaintiff’s alleged cause of action may be obtained by a demand for a bill of particulars or by means of disclosure proceedings” (*Pernet v. Peabody Engineering Corp.*, 20 A.D.2d 781, 248 N.Y.S.2d 132 [1st Dept 1964] [citing to CPLR § 3013]; see also *Kraft v. Sheridan*, 134 A.D.2d 217, 218, 521 N.Y.S.2d 238, 239 [1st Dept 1987] [citing to CPLR § 3013, the court noted that “particularity as to the theory of recovery may be obtained by a demand for a bill of particulars”]).

“The purpose of a bill of particulars is to amplify the pleadings, limit the proof and prevent surprise at trial” (*Harris v. Ariel Transp. Corp.*, 37 A.D.3d 308, 309, 830 N.Y.S.2d 121 [2007]; *Twiddy v. Standard Mar. Transp. Servs.*, 162 A.D.2d 264, 265, 556 N.Y.S.2d 622 [1990]), but may not add new theories of liability (*Kolb v. Beechwood Sedgewick LLC*, 78 A.D.3d 481, 482, 910 N.Y.S.2d 437, 439 [1st Dept 2010], citing *Castleton v. Broadway Mall Props., Inc.*, 41 A.D.3d 410, 411, 837 N.Y.S.2d 732 [2d Dept 2007]).

In order to prevail on a negligence claim, “a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom” (*Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 825, 59 N.E.3d 485, 490, [2016], quoting *Solomon v. City of New York*, 66 N.Y.2d 1026, 1027 [1985]).

Here, Defendant correctly argues that the Complaint standing alone failed to state a claim and appraise Defendant of the basic pertinent information to put it on notice of the claims against it. Specifically, the Complaint failed to “identify the location of the incident, the occurrence or occurrences upon which the cause of action is based, and the nature of [D]efendants’ alleged negligence” (Johnson Aff. ¶3). Moreover, the Complaint failed to allege where Defendant’s premises is located or whether the alleged incident occurred at Defendant’s premises. The allegations contained in the Complaint alleges that Defendant failed to maintain the sidewalk abutting the premises located at 177 Wadsworth Street, New York, New York (“Premises”) in a reasonably safe and suitable condition (Compl. ¶¶25, 37), and that Defendant’s “negligence, carelessness, and recklessness” caused Plaintiff’s accident (¶51), are bare legal conclusions not entitled to be accepted as true (*Simkin v. Blank*, 19 NY3d 46, 52 [2012]).

However, in opposition to Defendant's motion to dismiss, Plaintiff submits his affidavit and Verified Bill of Particulars ("Bill of Particulars") providing sufficient facts to state a claim for negligence. Specifically, Plaintiff indicates that his alleged accident occurred on the sidewalk abutting the Premises, which is owned by Defendant (Puntiel Aff. ¶4, 8; Kratter Aff. Ex. B, Bill of Particulars, ¶¶3, 5). Further, Plaintiff alleges that his injury occurred when he stepped and fell into open cellar doors located on the subject sidewalk (Puntiel Aff. ¶8; Kratter Aff. Ex. B, ¶¶3, 5). Moreover, Plaintiff alleges specific injuries he incurred by his accident (Puntiel Aff., ¶10; Kratter Aff. Ex. B, ¶8).

Defendant's Reply argues that the Complaint itself fails to state a claim, and therefore, the facts contained in Plaintiff's affirmation and Bill of Particulars are being used to supply a new cause of action not pleaded in the Complaint. However, as addressed above, the Complaint, Plaintiff's affirmation, and Bill of Particulars together contain sufficiently particular facts to appraise Defendant of the "transactions, occurrences, or series of transactions" that form the basis of the Complaint (CPLR 3013).

CONCLUSION

Accordingly, it is hereby

ORDERED that Defendant's, motion to dismiss Plaintiff's Complaint pursuant to CPLR §§ 3211(a)(7) and 3013 (mot. seq. 001), is denied. It is further

ORDERED that Defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: June 30, 2017



Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL R. EDMEAD
J.S.C.**