

Donat v Village of Mamaroneck
2017 NY Slip Op 33123(U)
June 8, 2017
Supreme Court, Westchester County
Docket Number: 60440/16
Judge: David F. Everett
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To commence the 30-day statutory time period for appeals as of right under 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

-----X
JOCELYN DONAT,

Plaintiff,

-against-

Index No. 60440/16
Motion Sequence No. 003
Decision and Order

VILLAGE OF MAMARONECK, AVC PROPERTIES,
LLC, STEPHEN PSHERER, and EDWARD
MANCUSO,

Defendants.

-----X
EVERETT, J.

The following papers were read on the motion:

- Notice of Motion/Affirmation in Supp/Exhibits A-B/Memorandum of Law
- Affirmation in Opp/Affidavit in Opp/Exhibit A
- Reply Memorandum of Law/Exhibits A-B

Under motion sequence number 003, defendant Village of Mamaroneck (Village) moves for an order, pursuant to CPLR 3211 (a), dismissing the amended complaint for failure to state a cause of action for negligence. Plaintiff Jocelyn Donat (Donat) opposes the motion. Upon the forgoing papers, the motion is resolved as set forth below.

The following facts are taken from the pleadings, motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

Plaintiff commenced the instant action by filing a summons and complaint in the Office of the Westchester County Clerk on July 29, 2016, to recover damages due to defendants' alleged negligence. Defendant AVC Properties, LLC (AVC) joined issue by service of its answer with affirmative defenses on or about October 10, 2016, and the Village responded by service of a

preanswer motion to dismiss, under motion sequence number 001. By written stipulation of the parties, the Village's motion was withdrawn without prejudice to renew with respect to Donat's amended complaint. The Village now moves for an order, pursuant to CPLR 3211 (a), dismissing the amended complaint for failure to state a cause of action for negligence. Donat opposes the motion.

Donat is the owner of real property located at 670 Hampshire Road, Mamaroneck, New York. Abutting the back of her property is a .94 acre parcel of property, with a street address of 1017 Grove Street, Mamaroneck, New York (1017 Grove Street), which has been subdivided into three smaller lots, Lots 1 through 3, and is currently under redevelopment by AVC. The planned house foundation, located on Lot 1, is in close proximity to a large, older maple tree on Donat's property. It is undisputed that, when, on May 27, 2015, the Village's Planning Board gave final plat approval for the subdivision of 1017 Grove Street, it conditioned its approval on compliance with 33 conditions, and condition number 31 pertained to tree protection.

According to Donat, who made regular complaints to Village officials about noncompliance with various conditions as the project progressed, both the Village Manager and AVC's principal, Marc Castaldi (Castaldi) assured her, between May 2015 and December 2015, that there would be a properly certified arborist on site during all times relevant to the protection of her maple tree. Donat contends that she continued to express her concerns to the Village Manger, hired her own arborist in early February 2016, to consult with her and with the Village about the health and protection of her maple tree, and that, on February 24, 2016, she sent an e-mail to the Village Manager summarizing what she considered violations of certain of the 33 conditions, including those pertaining to trees.

When, on or about March 24, 2016, Donat discovered that her maple tree had been aggressively trimmed while she was out of town, she contacted the Village and obtained the name of the arborist who oversaw the work. That person, Donat discovered through her own research, was not a certified arborist, and she advised the Village of this issue. On or about March 30, 2016, the Village Manager advised Donat that a new certified arborist, Edward Manucso (Mancuso) of Manor Tree Service (Manor Tree), had been retained by Castaldi to oversee the tree work.

Donat further contends that, on the morning of April 1, 2016, she observed a large excavator/backhoe digging within four feet of her property line and maple tree, and went over to inquire as which person was the certified arborist. She contends that Castaldi instructed his crew to ignore her and to keep digging. Donat contacted Manor Tree the same morning and was advised that Mancuso was not working at 1017 Grove Street, and that Manor Tree did not have the job of supervising the tree work at 1017 Grove Street. Donat reported this to the Village Building Inspector and Village Manager, who reportedly told her that they would stop construction on Lot 1 while things were sorted out. However, the work continued until approximately 4:00 p.m., when the Village Assistant Building Inspector arrived. By the next day, AVC was permitted to continue working in Lot 1, and Donat was advised that Mancuso opined that the best thing for the maple tree was to pour a foundation to fill the hole. Donat's own certified arborist opined that, because the tree roots had been extensively damaged, the maple tree would need to be removed.

Claiming that the Village was negligent with respect to its obligations to monitor the redevelopment of Lots 1 through 3, so as to prevent damage to her maple tree, Donat

commenced the instant action for damages.

The Village seeks a dismissal of the amended complaint on the basis that it cannot be held liable for its discretionary acts relating to the development of the neighboring lots by AVC. In support of its motion, the Village argues that Donat's previously commenced Article 78 proceeding in which she challenged the building permits issued to AVC by the Village Building Inspector permitting AVC to construct residential homes on the three lots, which was dismissed by the Honorable Barbara Zambelli, is conclusive against Donat on many of the same issues. The Village also argues that: (1) only AVC can be held liable for any damage caused by its digging too close to the maple tree; (2) as a municipality, it owes no duty to Donat as individual member of the general public, unless she can establish that a special relationship exists between her and the Village, which she did not allege in her amended complaint, and which she cannot show; and (3) because its actions were discretionary and not ministerial, Donat's negligence cannot be maintained against it, even if a special relationship were found to exist.

A motion to dismiss for failure to state a cause of action seeks relief under CPLR 3211 (a) (7), and it is well settled that on a motion to dismiss a claim pursuant to CPLR 3211 (a) (7), the motion court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87 - 88 [1994]). For the following reasons, the Village is not entitled to a preanswer dismissal of Donat's amended complaint.

"[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 a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Moreover, in addressing a motion to dismiss under CPLR 3211 (a) (7), the motion court may consider an affidavit submitted by a plaintiff to remedy any defects in the complaint (see *Leon v Martinez*, 84 NY2d at 90).

With respect to that aspect of the motion that demands a dismissal of the amended complaint on the ground that the Village did not owe her a special duty, a prerequisite for establishing liability against a municipality, the motion is denied. Whether the Village voluntarily assumed a “special relationship” with Donat beyond that which is owed to the general public, requires the presence of four elements to avoid dismissal on this ground:

“(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking”

(*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 430-431 [2013] [internal quotation marks and citations omitted]; and see *Lauer v City of New York*, 95 NY2d 95, 100 [2000]).

There is little question that the inartfully drafted amended complaint fails to include the term “special relationship.” However, the averments in the amended complaint, in conjunction with her sworn affidavit, are sufficient to state a cause of action against the Village for breaching a duty owed to her that is more than it owes to the public generally (see *Leon v Martinez*, 84 NY2d at 90.). Read together, the amended complaint and affidavit sufficiently detail: (1) the steps taken by Donat to protect her tree; (2) the interactions she had with various members of the Village to get them to enforce the 33 conditions it imposed upon AVC, including its alleged

promise to protect her tree during construction of the three lots (condition 31); (3) her reliance on the Village's affirmative undertaking; and (4) the resulting damages.

As to that aspect of the Village's motion that seeks a dismissal on the ground that its actions and/or inactions were discretionary (*see McLean v City of New York*, 12 NY3d 194, 203 [2009]), the motion is denied.

As pointed out by the Village, in the Article 78 proceeding, issuing building permits to AVC was adjudicated to be a discretionary, and not ministerial, act on the part of the Village's building inspector, and "[a]s a rule, municipalities are immune from tort liability when their employees perform discretionary acts" (*id.*). However, in her plenary action, Donat charges the Village with failing to perform the ministerial acts of ensuring compliance with the conditions upon which plat approval and/or building permits were issued, one of which allegedly involves protecting her maple tree. Therefore, the central question in this action is whether the Village undertook, and then failed to perform the ministerial tasks attendant to the special duty it owed toward the protection of Donat's maple tree, and as stated by the Court of Appeals in *McClellan* "[i]n a narrow exception to the rule, we have upheld tort claims when plaintiffs have established a 'special relationship' with the municipality" (*id.*).

Finally, to the extent the Village criticizes the amended complaint for failing to provide certain details, such as which specific violations occurred prior to the Village meeting held on December 16, 2015, or when a certain stop work order was lifted, their assertions are inadequate to support a dismissal of the amended complaint. The purpose of a complaint is for a plaintiff to advise a defendant of its alleged actions or inactions, which entitle the plaintiff to some type of relief. The purpose of a bill of particulars is for a plaintiff to amplify the pleadings, limit the

proof and prevent any surprise to a defendant at trial (*Linker v County of Westchester*, 214 AD2d 652, 652 [2d Dept 1995]). Given that this is a preanswer motion to dismiss the amended complaint, where no discovery or bill of particulars has been exchanged, the lack of such detail at this juncture does not state a basis for dismissal.

Accordingly, it is

ORDERED that, to the extent that plaintiff alleges a claim against defendant Village of Mamaroneck based on a special relationship with respect to the maple tree, the motion to dismiss the amended complaint is denied; and it is further

ORDERED that defendant Village of Mamaroneck is directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in room 811, Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York on July 24, 2017, at 9:30 a.m.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
June 8, 2017

ENTER:



HON. DAVID F. EVERETT, A.J.S.C.

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