| **Hamilton v County of Westchester** |
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| 2017 NY Slip Op 33148(U) |
| September 14, 2017 |
| Supreme Court, Westchester County |
| Docket Number: 50302/2017 |
| Judge: Charles D. Wood |
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To commence the statutory time period 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**

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GREGORY HAMILTON and BENITA HAMILTON,

**Plaintiffs,**

**-against-**

**DECISION & ORDER**
**Index No. 50302/2017**
**Sequence Nos. 1**

THE COUNTY OF WESTCHESTER, VARK STREET HOUSES, INC., and RELATED MANAGEMENT COMPANY L.P.

**Defendants.**

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**WOOD, J.**

The following papers were read and considered in connection with motion brought by defendant County of Westchester ("the County"):

County's Notice of Motion, Counsel's Affirmation, Exhibits.
Defendants' Counsel's Affirmation in Opposition, Exhibit.
County's counsel's Reply Affirmation, Exhibit.

In this action plaintiffs allege that on August 15, 2016, injured plaintiff was injured at the residence known as 47 Riverdale Avenue, Apartment A3-24 in Yonkers, when he tripped and fell over a rubber and/or plastic stip that was allegedly improperly secured on the step. Plaintiffs further allege that injured plaintiff's accident was the result of the County's alleged negligence in its ownership, operation, management, control, maintenance, repair, installation, construction and cutting of the aforementioned premises. In opposition, the County claims that it has not ownership interest, nor other relationship or involvement with the premises, the

County owed no duty to injured plaintiff and therefore cannot be liable to plaintiffs as a matter of law.

Upon the foregoing papers, the motion is decided as follows:

**County's Motion to Dismiss**

It is well settled that pursuant to CPLR (a)(7) "upon a motion to dismiss [for failure to state a cause of action], the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory"[1] (Esposito v Noto, 90 AD3d 825 [2d Dept 2011]; (Sokol v Leader, 74 AD3d 1180 [2d Dept 2010]); (Bua v Purcell & Ingrao, P.C., 99 AD3d 843, 845 [2d Dept 2012] lv to appeal denied, 20 NY3d 857, 984 NE2d 324 [2013]). However, this does not apply to legal conclusions or factual claims which were either inherently incredible or flatly contradicted by documentary evidence (West Branch Conservation Assn. v County of Rockland, 227 AD2d 547 [2d Dept 1996]). Moreover, if the court considers evidence submitted by a defendant in support of a motion to dismiss under CPLR 3211 (a) (7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint," and if the court does so, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Leon v Martinez, 84 NY2d 83, 88 [1994]; Uzzle v Nunzie Ct. Homeowners Ass'n, Inc., 70 AD3d 928, 930 [2d Dept 2010]); Greene v Doral Conference Ctr. Assoc., 18 AD3d 429, 430 [2d Dept 2005]). Thus, affidavits and other evidentiary material may also be considered to "establish conclusively that

[1]Internal citations omitted.

plaintiff has no cause of action" (Simmons v Edelstein, 32 AD3d 464, 465 [2d Dept 2006]). The court may also consider further affidavits where a meritorious claim lies within inartful pleadings (Lucia v Goldman, 68 AD3d 1064, 1065 [2d Dept 2009]).

More succinctly, under CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, but if the court considers evidentiary material, the criterion then becomes "whether the proponent of the pleading has a cause of action" (Sokol v Leader, 74 AD3d 1180, 1181-82 [2010]). Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus (Dee v Rakower, 112 AD3d 204 [2d Dept 2013]).

To support its motion to dismiss this action against it, the County claims it is not a proper party to this action. The County offers the Affidavit of Acting Commissioner of Planning for the County, who attest that based upon her review of the official records maintained by the County of Department of Planning, the County did not own, operate, control, maintain the subject premises, including the area in said building where injured plaintiff alleges that he slipped and fell. Moreover, in her Reply Affidavit, in response to defendants, Vark Street houses, Inc., and Related management Company, LP. ("defendants") opposition to the motion, the Acting Commissioner states that since January 1, 2011, the County has had no involvement with NYS Section 8 Housing Program and has not been a local administrator for NYS since December 31, 2010. However since the County has been involved with the County Funded Fair and Affordable Housing Developments, the County may conduct periodic inspections pursuant to its funding obligations, and not as a mandate under any section 8 Housing Program. The County will list on its websites the properties or units that are part of its Fair and affordable Housing developments for informational purposes only. Under the County's Fair and Affordable Housing developments program, the County provides funding to

facilitate private developers to create affordable housing opportunities. Under this program, the landlord, or landlord's agent is reasonable to maintain and repair its properties, as required.

Even so, as defendants raise a triable issue of fact as there is evidence that the County had indeed inspected the subject premises, and there is some evidence that the County may be in possession of documentation regarding the condition of plaintiff's unit prior to and after his accident.

Based upon the parties' arguments, the evidentiary material, including affidavits and from the reading of the complaint, the court finds that plaintiffs have a cognizable cause of action against the County at this early juncture in this matter. For purposes of a summary judgment analysis the court reaches the conclusion that there is a triable issue of fact regarding the County's inspections of the property, and its role in the subject property.

NOW, THEREFORE for all the reasons set forth above, it is hereby

ORDERED, that the County's motion to dismiss or in the alternative motion for summary judgment is denied; and it is further

ORDERED, that defendants' counsel shall serve a copy of this order with notice of entry upon all parties and the Westchester County Clerk within ten (10) days of entry, and file proof of service on NYSCEF within five (5) days of service; and it is further

**ORDERED, that the parties are directed to appear in the Preliminary Conference Part on** October 23 **, 2017 at** 9:30 AM **in Room 811, of the Westchester County Courthouse .**

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

**Dated: September 14, 2017**
**White Plains, New York**

**HON. CHARLES D. WOOD**
**Justice of the Supreme Court**

To: All Parties by NYSCEF