Umana v County of Nassau
2017 NY Slip Op 33168(U)
October 13, 2017
Supreme Court, Nassau County
Docket Number: 604160/17
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 35
NASSAU COUNTY

MARINA UMANA,

Plaintiff,

- against -

Index No.: 604160/17
Motion Seq. No.: 01
Motion Date: 07/22/17

COUNTY OF NASSAU, TOWN OF HEMPSTEAD, NEW YORK AMERICAN WATER AND AQUA SERVICES INC and NY AMERICAN WATER COMPANY INC,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affidavit and Exhibits	1
Affirmation in Opposition and Exhibit	2
Affirmation in Opposition	3
Reply Affirmation	4

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant County of Nassau ("Nassau") moves, pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing plaintiff's Verified Complaint as against it, and any and all cross-claims as asserted against it. Plaintiff opposes the motion. Defendant New York American Water Corp. d/b/a New York American Water i/s/h/a New York American Water and Aqua Services Inc. and New York American Water Company Inc. ("Water") also opposes the motion.

The instant action was brought to recover for personal injuries allegedly sustained by plaintiff on September 27, 2016, at approximately 6:30 a.m., when she fell after stepping into a hole/depression surrounding a water cap on the roadway of Locust Avenue, directly abutting the premises of 2112 Stirrup Path, Seaford, County of Nassau, State of New York. The action was commenced by the filing of a Summons and Verified Complaint on or about May 11, 2017. *See* Defendant Nassau's Affidavit in Support Exhibit C.

Counsel for defendant Nassau submits, in pertinent part, that, "[p]laintiff alleges in her Complaint that on September 27, 2016, at approximately 6:30 a.m., she purportedly suffered an injury after stepping into a hole/depression surrounding a water cap in the road at Subject Location.... The Complaint further alleges that County Defendant 'negligently and carelessly maintained said roadway' by allowing (*sic*) hole/depression surrounding the water cap to exist. Plaintiff claims that this created an unsafe and dangerous condition, consisting of a 'trap and nuisance.'... However, liability cannot be assessed against County Defendant because it had no jurisdiction, ownership, responsibility, or control over the roadway at the Subject Location." *See id.*

In support of its motion, defendant Nassau submits the Affidavit of William Nimmo ("Nimmo"), a Deputy Commissioner of the Nassau County Department of Public Works. *See* Defendant Nassau's Affidavit in Support Exhibit B. Nimmo submits, in pertinent part, that, "I was asked to conduct an investigation by the Office of the County Attorney about this claim alleging an injury, which purportedly occurred on September 27, 2016. The Plaintiff's injury was alleged to have been caused by the defective, negligent, and hazardous condition created by a hole/depression surrounding a water cap in the road on Locust Avenue, directly abutting the

premises 2112 Stirrup Path, in Seaford, County of Nassau, State of New York. Hereinafter referred to as the 'SUBJECT LOCATION.' In response to this request from the County Attorney's Office, I attest that I personally searched the records of the Nassau County Department of Public Works, which include contracts, permits, complaints, and repair records, which are kept at department offices located at 1194 Prospect Avenue, Westbury, New York. As a result of this search as well as my personal knowledge as Deputy Commissioner of the Nassau County Department of Public Works, I attest that the SUBJECT LOCATION is not under the jurisdiction of the County of Nassau. The County of Nassau does not, (*sic*) own, operate, maintain, control, inspect or repair the SUBJECT LOCATION. I also found in my search of Department of Public Works' records that the COUNTY OF NASSAU did not issue any permits for the SUBJECT LOCATION , contract for any work at the SUBJECT LOCATION, nor did it make any repairs at the SUBJECT LOCATION. The COUNTY OF NASSAU was in no way involved in the excavation, repair or maintenance of the sidewalk, roadway or curb at the SUBJECT LOCATION." *Id.*

Counsel for defendant Nassau further argues that, "New York courts have consistently held that in order for a plaintiff to establish a *prima facie* case of negligence against a municipality, the plaintiff must first demonstrate the existence of a duty owed by the defendant to the plaintiff. [citation omitted].... It is respectfully submitted that Plaintiffs' (*sic*) action against County Defendant should be dismissed as County Defendant clearly had no jurisdiction over the alleged accident location and therefore owed no duty to Plaintiffs (*sic*). Furthermore, County Defendant is exempted from jurisdiction over sidewalks or roads located within Villages as provided pursuant to § 12-4.0(c) of the Nassau County Administrative Code:..."

In opposition to the motion, counsel for plaintiff argues, in pertinent part, that "[m]ovant relies on their (*sic*) self-serving affidavit as 'documentary evidence,' in support of their (*sic*) motion to dismiss under CPLR 3211(a)(1). However, the Second Department provides that: ... **'neither affidavits, deposition testimony, nor letters are considered documentary evidence' within the intendment of** CPLR **3211(a)(1)** [emphasis supplied]. [citations omitted]. As the affidavits in support of defendant's motion do not constitute 'documentary evidence,' within the meaning of the statute, their (*sic*) motion should be denied on that basis."

Counsel for plaintiff further contends that, "[i]n the case at bar, based on the face of the plaintiff's Complaint, it is clear from the Complaint that the facts support, under a liberal interpretation, (*sic*) negligence action. Defendant's legal arguments fail as defendant inappropriately applies the standard for summary judgment motions, rather than CPLR §3211(a)(7) motions to dismiss. As a general rule, a motion for summary judgment may not be made before issue is joined and the requirement is strictly adhered to. [citation omitted].... Since the motion to dismiss was not converted to a motion for summary judgment, the plaintiff is not required to make an evidentiary showing in support of her Complaint. [citations omitted]. Without waiving the aforesaid arguments, it is submitted that the movant has failed to dispute the County's jurisdiction over the accident site. Nassau County Administrative Code § 12-3.0(a) & (b) provides that the Board of Supervisors may adopt a county road system and may, (*sic*) layout, construct, reconstruct and maintain or cause to be designated as county roads such portions as they deem advisable; furthermore, it states that the Board shall file in the office of the County Clerk a description of each new highway designated as a county road, together with a map of such roads. Section 12-4.0(a) of the Nassau County Administrative Code states that 'The County shall have the sole jurisdiction over county roads laid out or designated as such pursuant

to this title.' The affidavit of William Nimmo, on which movant relies, fails to set forth whether he reviewed or has any knowledge of the map of the county roads filed with the County Clerk's office, pursuant to Nassau County Administrative Code § 12-3.0(b). Therefore, his affidavit is insufficient to rebut the County's jurisdiction over the accident location. Section 12-4.0(c) of the Nassau County Administrative Code, on which movant relies is inapplicable as the section refers to sidewalks and curbs, not roadways. As the accident location was in the roadway, the section fails to establish the County's lack of jurisdiction. It is further submitted that defendant's motion to dismiss is premature, as the parties have not had a meaningful opportunity to conduct discovery. Depositions have not yet been conducted. In the case at bar, with respect to the affidavits submitted in support of defendants' (*sic*) motion, a witness is incompetent to testify, where his/her testimony proffers mere opinion and legal conclusion, based on facts not in evidence. [citation omitted]. Mr. Nimmo's affidavit fails to state how he conducted his search, what the time period or location of his search entailed. Furthermore, he fails to refute whether the water cap/hardware at the accident location was owned, operated or maintained by the County. Insofar as Plaintiff has not been afforded the opportunity to cross-examine defendant's witness, he is incompetent to serve as witness and his affidavit should be deemed inadmissible. Plaintiff will be severely prejudiced if not permitted to complete discovery prior to a decision on the merits of the case."

Plaintiff submits her own affidavit in opposition to the motion. *See* Plaintiff's Affirmation in Support Exhibit A.

Also in opposition to the motion, defendant Water argues that, "[t]he motion should be denied. Your affirmant incorporates by reference, the legal arguments and exhibits in the

affirmation in opposition of the plaintiff to the COUNTY OF NASSAU'S motion. The COUNTY OF NASSAU'S motion is premature and should be denied."

In reply to the opposition, counsel for defendant Nassau argues, "[p]laintiff and American Water erroneously argue that the County Defendant applied the standard for summary judgment. This is clearly incorrect, as a plain reading of the County defendant's moving papers make no mention of the purported standard for summary judgment. Thus, any portion of Plaintiff's moving papers making mention of such a standard should be disregarded in its entirety. Notwithstanding, Plaintiff and American Water fail to address the fact that the County has no jurisdiction over the accident situs. Plaintiff and American Water attempt to discount Mr. Nimmo's sworn affidavit without offering any substantive argument or evidence to the contrary, and completely ignore the issue of jurisdiction. Plaintiff and American Water incorrectly state that Nassau County Administrative Code § 12-4.0(c) only apply (*sic*) to sidewalks and curbs and not roadways. Again, a plain reading of the Section indicates it applies to sidewalks, curbs, and roads. Furthermore, Plaintiff and American Water's argument that the County Defendant's motion is premature as they have not been afforded an opportunity to conduct discovery is insufficient. Neither Plaintiff nor American Water offer any indication of what conducting further discovery would accomplish as it pertains to the County Defendant's jurisdiction in this matter."

CPLR § 3211(a)(1) states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that...a defense is founded upon documentary evidence." To obtain dismissal of a complaint pursuant to CPLR § 3211(a)(1), a defendant must submit documentary evidence which "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins.*

Co. of N.Y., 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002) *citing Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). An application predicated upon this section of law will be granted only upon a showing that the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010) *quoting Scadura v. Robillard*, 256 A.D.2d 567, 683 N.Y.S.2d 108 (2d Dept. 1998). "[T]o be considered documentary evidence, it must be unambiguous and of undisputed authenticity." *Fotanetta v. John Doe 1*, *supra*, *citing* SIEGEL, PRACTICE COMMENTARIES, MCKINNEY'S CONS LAWS OF NY, BOOK 7B, CPLR 3211:10 pp. 21-22. "[T]hat is, it must be 'essentially unassailable.'" *Torah v. Dell Equity, LLC*, 90 A.D.3d 746, 935 N.Y.S.2d 33 (2d Dept. 2011) *quoting Schumacher v. Manana Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686 (2d Dept. 2010). However, in order to make such a showing neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR § 3211(a)(1). *See Granada Condominium III Ass'n v. Palomino*, 78 A.D.3d 996, 913 N.Y.S.2d 668 (2d Dept. 2010).

A complaint may be dismissed pursuant to CPLR § 3211(a)(1), based on documentary evidence, only if the factual allegations are definitively contradicted by the evidence or a defense is conclusively established. *See Yew Prospect v. Szulman*, 305 A.D.2d 588, 759 N.Y.S.2d 357 (2d Dept. 2003). A motion to dismiss based on documentary evidence may be granted only where such documentary evidence utterly refutes the plaintiffs' factual allegations, resolves all factual issues as a matter of law and conclusively disposes of the claims at issue. *See Yue Fung USA Enters., Inc. v. Novelty Crystal Corp.*, 105 A.D.3d 840, 963 N.Y.S.2d 678 (2d Dept. 2013). In sum, the analysis is two-pronged - the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

Inasmuch as defendant Nassau failed to submit any admissible documentary evidence that would conclusively dispose of plaintiff's claims, defendant Nassau is not entitled to the dismissal of the Verified Complaint as against it pursuant to CPLR § 3211(a)(1). *See Scadura v. Robillard*, 256 A.D.2d 567, 683 N.Y.S.2d 108 (2d Dept. 1998).

Accordingly, the branch of defendant Nassau's motion, pursuant to CPLR § 3211(a)(1), for dismissal of the Verified Complaint, and cross-claims as asserted against it, based upon documentary evidence, is hereby **DENIED**.

CPLR § 3211(a)(7) states that a party may move to dismiss a complaint for failure to state a cause of action. On such an application, the complaint is to be liberally construed and the plaintiff afforded every favorable inference which may be drawn therefrom. *See Leon v. Martinez*, *supra*; *Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007). The facts as alleged are to be accepted as true, although bare legal conclusions, in addition to factual assertions which are squarely contradicted by the record, are not entitled to any such consideration. *See Doria v. Masucci*, 230 A.D.2d 764, 646 N.Y.S.2d 363 (2d Dept. 1996); *Mayer v. Sanders*, 264 A.D.2d 827, 695 N.Y.S.2d 593 (2d Dept. 1999). In entertaining such an application, the function of the motion court is only to determine whether the facts, as alleged, fall within a cognizable legal theory. *See Leon v. Martinez*, *supra*; *Nonnon v. City of New York*, *supra*.

"In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), '"the court will 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 within any cognizable legal theory."' *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) *quoting Matter of Walton v. New York State Dept. of Correctional Servs.*, 13

N.Y.3d 475, 893 N.Y.S.2d 453 (2009) *quoting Nonnon v. City of New York, supra*; *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011). *See also Stein v. Chiera*, 130 A.D.3d 912, 14 N.Y.S.3d 133 (2d Dept. 2015) *citing East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, 66 A.D.3d 122, 884 N.Y.S.2d 94 (2d Dept. 2009) *affd* 16 N.Y.3d 775, 919 N.Y.S.2d 496 (2011). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiff can succeed on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiff can ultimately establish the truth of its allegations. *See 219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the Complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). "If ... the allegations do not fit within any cognizable legal theory even after they are accorded every favorable inference, the motion to dismiss should be granted." *Stein v. Chiera*, *supra* at 914 *citing Fisher v. DiPietro*, 54 A.D.3d 892, 864 N.Y.S.2d 532 (2d Dept. 2008).

When viewing plaintiff's Verified Complaint in light of the criteria set forth above, the Court finds that plaintiff has indeed stated cause of action against defendant Nassau that falls within a cognizable legal theory. The Affidavit of Nimmo fails to sufficiently rebut defendant Nassau's jurisdiction over the subject location.

Accordingly, defendant Nassau's motion, pursuant to CPLR § 3211(a)(7), for an order dismissing the Verified Complaint as against it, and any and all cross claims as asserted against it, is hereby **DENIED**.

It is further ordered that the parties shall appear for a Preliminary Conference on November 27, 2017, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This shall constitute the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
October 13, 2017

ENTERED
OCT 16 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE