

**Chavez v Misir**

2017 NY Slip Op 33244(U)

September 20, 2017

Supreme Court, Nassau County

Docket Number: 608785/16

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

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

\_\_\_\_\_  
DAGOBERTO CHAVEZ,

Plaintiff,

- against -

VISHAL D. MISIR, THE VILLAGE OF ROCKVILLE  
CENTRE, COUNTY OF NASSAU and THE TOWN OF  
HEMPSTEAD,

Defendants.  
\_\_\_\_\_

TRIAL/IAS PART 35  
NASSAU COUNTY

Index No.: 608785/16  
Motion Seq. Nos.: 01, 02  
Motion Dates: 04/10/17  
07/12/17

**The following papers have been read on these motions:**

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation and Exhibits	1
Notice of Cross-Motion (Seq. No. 02), Affirmation and Exhibits	2
Reply Affirmation in Support of Motion (Seq. No. 01)	3

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

Defendant County of Nassau ("County") moves (Seq. No. 01), pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing plaintiff's Amended Verified Complaint as against it, and any and all cross-claims as asserted against it.

Plaintiff opposes the motion and cross-moves (Seq. No. 02), pursuant to CPLR § 3025(b), for an order adding PSEG-Long Island as a defendant and amending the caption to reflect the same. No opposition was submitted to the cross-motion.

This action arises out of a motor vehicle accident which occurred on October 14, 2015, at approximately 8:30 a.m., at the intersection of Sunrise Highway and North Village Avenue, Rockville Centre, County of Nassau, State of New York. *See* Defendant County's Affirmation in Support Exhibit A. Plaintiff commenced the action with the filing of a Summons and Verified Complaint on or about November 11, 2016. On or about December 21, 2016, plaintiff filed a Supplemental Summons and Amended Verified Complaint. *See* Defendant County's Affirmation in Support Exhibit B.

Counsel for defendant County submits, in pertinent part, that, "[p]laintiff further claims that County Defendant was 'in control of maintaining the intersection [at the Subject Location].'... Plaintiff goes on to alleged (*sic*) that "[d]ue to the negligence, carelessness and recklessness of ... COUNTY OF NASSAU ... in its failure to maintain the intersection by properly directing traffic at the time of a defective traffic light and intersection at the above mentioned location, Plaintiff ... sustained sever (*sic*) and permeant (*sic*) personal injuries; and Plaintiff ... was otherwise damanged (*sic*)['].... However, as argued herein, liability cannot be assessed against County Defendant because it had no jurisdiction, ownership, responsibility, or control over the traffic signal at the Subject Location." *See id.*

In support of its motion, defendant County submits the Affidavit of Sheila M. Dukacz ("Dukacz"), Traffic Engineer II/Signal Management Section Head of the Nassau County Department of Public Works. *See* Defendant County's Affirmation in Support Exhibit C. Dukacz submits that, "I was asked to conduct an investigation by the Office of the County Attorney about a claim alleging an injury which involved a motor vehicle accident occurring on October 14, 2015, at the intersection of Sunrise Highway and North Village Avenue, Rockville Centre, New York (hereinafter shall be referred to as the 'Subject Location'). I am advised that Plaintiff alleges that the motor vehicle accident occurred in part due to a defective traffic light. 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, and found that the County of Nassau did not own, operate, maintain or control the traffic signal at the Subject Location. As a result of this search as well as my personal knowledge as Traffic Engineer II/Signal Management Section Head, I attest that the Subject Location is not under the jurisdiction of the County of Nassau. The County of Nassau does not own, operate, maintain, control, inspect or repair the traffic signal at the Subject Location.” *Id.*

In opposition to the motion (Seq. No. 01), counsel for plaintiff argues, in pertinent part, that “[d]efendant COUNTY OF NASSAU’s motion does not address any facts and/or arguments about Plaintiff’s third cause of action regarding maintaining the intersection and directing traffic during the time of the defective street light.... Defendant COUNTY OF NASSAU’s motion to dismiss only discusses that it did not have jurisdiction of the defective light and it did not have prior written notice of the defective light.... This only addresses Plaintiff’s second cause of action for the Defendants’ failure to maintain the traffic control device at the intersection.... Plaintiff’s complaint does not allege that Defendant COUNTY OF NASSAU had control over the traffic control device in the second cause of action.... Defendant COUNTY OF NASSAU does not discuss in its motion anything regarding its obligation to maintain the intersection by properly directing traffic during the time of the defective traffic light. It is still unknown what (*sic*) Defendant COUNTY OF NASSAU’s duty was to have its employees or agents, i.e. Nassau County Police, or Nassau County Crossing Guards, at the intersection to direct traffic. No depositions of any party has (*sic*) been taken and no party has testified to its procedure in contacting the Nassau County Police Department in such situations where traffic control is needed because of a defective traffic light.... Furthermore, it is unclear how long COUNTY OF NASSAU was aware of the defective light and if anyone had made any 911 calls or any of the other governmental entities advised it of the defective (*sic*) requesting that personnel be dispatched to control traffic at the subject intersection. Upon further investigation, it became

clear that there was a power outage which caused the traffic light to malfunction. A copy of a news article discussing the power outage is attached hereto.... Per the article, a power outage occurred on the date of the accident, when a transmission feed from PSEG-LI was interrupted.... As stated above it is still unknown if Defendant COUNTY OF NASSAU was aware of the situation and the duty it had to control traffic at the intersection; therefore, Defendant's motion to dismiss must be denied as there is still a triable issue of fact regarding Defendant COUNTY OF NASSAU's duty and obligations." See Plaintiff's Affirmation in Opposition and in Support Exhibit G.

In support of the cross-motion (Seq. No. 02), counsel for plaintiff submits that, "[a]s stated above, upon further investigation, Plaintiff's counsel became aware that the traffic light at the subject intersection may have occurred (*sic*) because of a power outage from PSEG-LONG ISLAND.... Plaintiff seeks to add PSEG-LONG ISLAND as a defendant, based upon information and belief it owed a duty to Plaintiff to ensure properly working traffic control devices and/or to alert authorities of the issue to ensure proper traffic control at intersections. Based on the foregoing, the moving plaintiff's proposed [Second] Amended Verified Complaint has merit and it is respectfully requested that this Court grant plaintiffs' (*sic*) motion to amend its Complaint. [citation omitted]. Moreover, allowing plaintiff to amend its (*sic*) complaint will not prejudice defendant in any manner." See Plaintiff's Affirmation in Opposition and in Support Exhibit H.

In reply to plaintiff's opposition, counsel for defendant County argues, "[p]laintiff seemingly argues that this Court should apply standards for a (*sic*) summary judgment as to County Defendant's motion rather than that of a motion pursuant to CPLR 3211. Moreover, Plaintiff seeks to create an issue of fact where none exists by arguing (*sic*) Plaintiff has not been afforded an opportunity to conduct discovery. Plaintiff has failed to meet his burden in demonstrating that County Defendant maintained ownership and/or control over the traffic signal. In opposition, Plaintiff seeks to rebuff Ms. Dukacz' affidavit by simply arguing that

Plaintiff had not been afforded discovery or that County Defendant failed to prove that it properly maintained control over the intersection. However, Plaintiff offers nothing to rebut the fact that County Defendant is not responsible for maintaining the traffic signal.”

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).

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.

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).

Even when viewing plaintiff's Amended Verified Complaint in light of the criteria set forth above, the Court finds that plaintiff has failed to state any valid causes of action against defendant County. On the record before the Court, defendant County has demonstrated, in uncontroverted proof in proper admissible form, that it did not own, operate, maintain or control the traffic signal at the subject location, nor was the subject location under the jurisdiction of defendant County. *See* Defendant County's Affirmation in Support Exhibit C.

With respect to plaintiff's contention that the instant motion is premature since discovery remains outstanding, counsel for plaintiff's "hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery [is] an insufficient basis for denying the motion." *Conte v. Frelen Assoc., LLC*, 51 A.D.3d 620, 858 N.Y.S.2d 258 (2d Dept. 2008). *See also Lopez v. WS Distrib., Inc.*, 34 A.D.3d 759, 825 N.Y.S.2d 516 (2d Dept. 2006).

Accordingly, defendant County's motion (Seq. No. 01), pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing plaintiff's Amended Verified Complaint as against it, and any and all cross-claims as asserted against it, is hereby **GRANTED**.

With respect to plaintiff's cross-motion (Seq. No. 02), generally, leave to amend a pleading should be freely granted. *See* CPLR § 3025(b). The party seeking such amendment

must demonstrate a proper basis for same. *See Wieder v. Scala*, 168 A.D.2d 355, 563 N.Y.S.2d 76 (1<sup>st</sup> Dept. 1990). Such an application must be supported by an affidavit that the proposed amendment is meritorious. *See Zaid Theatre Corp. v. Suna Realty Co.*, 18 A.D.3d 352, 797 N.Y.S.2d 434 (1<sup>st</sup> Dept. 2005). A motion for leave to serve an amended pleading will only be denied where the amendment is wholly devoid of merit or is significantly prejudicial to the non-moving party. *See Norman v. Ferrara*, 107 A.D.2d 739, 484 N.Y.S.2d 600 (2d Dept. 1985). The merits of the proposed amended pleading will not be reviewed "... unless the insufficiency or lack of merit is clear and free from doubt." *Id.* at 740, 741.

Therefore, based upon the above, plaintiff's cross-motion (Seq. No. 02), pursuant to CPLR § 3025(b), for an order adding PSEG-Long Island as a defendant and amending the caption to reflect the same, is hereby **GRANTED**. And it is further

**ORDERED** that the caption shall be amended to read as follows:

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DAGOBERTO CHAVEZ,

Plaintiff,

- against -

VISHAL D. MISIR, THE VILLAGE OF ROCKVILLE  
CENTRE, THE TOWN OF HEMPSTEAD and  
PSEG-LONG ISLAND,

Defendants.

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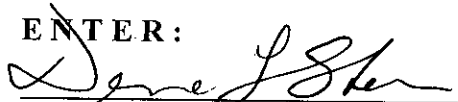
And it is further

**ORDERED** that plaintiff shall serve a Second Amended Summons and Second Amended Verified Complaint upon all of the parties now herein by October 5, 2017. A copy of this Decision and Order shall be served with those papers. And it is further

It is further ordered that the parties shall appear for a Preliminary Conference on November 6, 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.

**ENTERED**

Dated: Mineola, New York  
September 20, 2017

SEP 26 2017

NASSAU COUNTY  
COUNTY CLERK'S OFFICE