Salzman v Belcastro
2017 NY Slip Op 33411(U)
September 16, 2017
Supreme Court, Nassau County
Docket Number: Index No. 605196/19
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

TRIAL/IAS, PART 21
NASSAU COUNTY

LINDA H. SALZMAN,

Plaintiff(s),

Index No. 605196/19

-against-

ANGELO BELCASTRO, MARIA BELCASTRO, COUNTY OF NASSAU and TOWN OF HEMPSTEAD,

Defendant(s).

Motion Seq. No.: 001
Motion Submitted: 7/18/19

The following papers read on this motion:

Notice of Motion/Supporting Exhibits..X
Affirmation in Opposition..X
Reply Affirmation..X

Defendant, County of Nassau (County), moves this court for an order, pursuant to CPLR §§3211(a)(1) and (7), or in the alternative, CPLR §3211(c), dismissing the complaint against it. Plaintiff, Linda H. Salzman (Salzman), opposes the motion. Defendants, Angelo Belcastro, Maria Belcastro and the Town of Hempstead do not submit papers either in support of, or opposition to the motion.

Salzman commenced this action, sounding in negligence, by service of a summons and complaint dated April 16, 2019. This motion was made in lieu of an answer.

A motion to dismiss a complaint based on CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations conclusively establishing a defense as a matter of law (*Gosch v Mutual Life Ins. Co.* of N.Y., 98 NY2d 314, 326 [2002]; *Bibbo v 31-30, LLC,* 105 AD3d 791, 792 [2d Dept 2013]). To be considered documentary, for the purposes of a motion to dismiss based on documentary evidence, the evidence must be unambiguous and of undisputed authenticity. Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are "essentially undeniable," qualify as "documentary evidence" in the proper case. If the document does not reflect an out-of-court transaction, and is not essentially undeniable, it is not documentary evidence within the intendment of CPLR 3211(a)(1) (*see Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). Neither affidavits, deposition testimony or letters are considered documentary evidence within the intendment of CPLR 3211(a)(1) (*Integrated Constr. Servs., Inc. v Scottsdale Ins. Co.*, 82 AD3d 1160, 1163 [2d Dept 2011]).

In reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court is to accept all facts alleged in the complaint as being true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (see *Delbene v. Estes*, 52

AD3d 647 [2nd Dept. 2008]; see also *511 W.232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2D 144 [2002]. Pursuant to CPLR § 3026, the complaint is to be liberally construed. *Leon v. Martinez*, 84 NY2d 83 [1994]. It is not the court's function to determine whether plaintiff will ultimately be successful in proving the allegations. *Aberbach v. Biomedical Tissue Services*, 48 AD3d 716 [2nd Dept. 2008]; see also *EBCI, Inc. v. Goldman Sachs & Co.*, 5 NY3D 11 [2005].

The pleaded facts, and any submissions in opposition to the motion, are accepted as true and given every favorable inference *(see 511 W. 323nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d at 151-152; *Dana v. Malco Realty, Inc.*, 51 AD3d 621 [2d Dept 2008]; *Gershon v. Goldberg*, 30 AD3d 372, 373 [2d Dept 2006]). However, a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) (*see* CPLR § 3211[c]; *Sokol v. Leader*, 74 AD3d at 1181). "When evidentiary material is considered" on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether they have properly stated one, and unless it has been shown that a material fact as claimed is not a fact at all or that no significant dispute exists, the dismissal should not be granted (*Guggenheimer v. Ginzburg*, 43 NY2d at 275; *see Sokol v. Leader*, 74 AD3d at 1182).

One cannot be held liable for a dangerous or defective condition on property unless ownership, occupancy, control or special use of the property has been established.

(Ruggiero v. City School District of New Rochelle, 109 A.D.3d 894 [2nd Dept 2013]; *Soto v. City of New York*, 244 A.D.2d 544 [2nd Dept. 1997], *James v. Stark*, 183 A.D.2d 873 [2nd Dept. 1982]).

Herein, Salzman alleges she tripped and fell on an alleged defective strip of sidewalk in front of 180 Court House Road, Franklin Square, County of Nassau, causing her injury. The County alleges it does not own or maintain that particular street or sidewalk. In support of its motion, the County offers, *inter alia*, a jurisdictional map which indicates that Court House Road in Franklin Square is not within the County's jurisdiction. Further, a deed submitted as an exhibit shows that Angelo Belcastro and Maria Belcastro own the property, and not the County. Based upon the documentary evidence the County argues that the complaint must be dismissed.

Aside from not owning or maintaining the property, the County also argues it had no prior written notice of any defect. "Where, as here, a municipality has enacted a prior written notice law, it may not be subject to liability for injuries caused by a dangerous roadway condition unless it has received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies" (*Wald v City of New York*, 115 AD3d 939 [2d Dept 2014]; *Phillips v City of New York*, 107 AD3d 774, [2d Dept 2013]; *see Martinez v City of New York*, 105 AD3d 1013, 1014 [2d Dept 2013]). "The only recognized exceptions to the statutory prior written notice requirement involve situations in which the municipality created the defect or hazard through an affirmative

act of negligence, or where a special use confers a benefit upon the municipality" (*Wald v City of New York, supra; Long v City at Mount Vernon*, 107 AD3d 765 [2d Dept 2013]; *Oboler v City of New York*, 8 NY3d 888, 889-890 [2007]; *Miller v Village of E. Hampton*, 98 AD3d 1007, 1008 [2d Dept 2012]). In addition, "the affirmative negligence exception is limited to work by the [municipality] that immediately results in the existence of a dangerous condition" (*Wald v City of New York, supra*, quoting *Yarborough v City of New York*, 10 NY3d 726, 728 [2007], quoting *Oboler v City of New York, supra* at 889).

Furthermore, neither actual nor constructive notice of a given defect is sufficient to overcome the requirement of prior written notice (*Amabile v City of Buffalo,* 93 NY2d 471, 474 [1998]; *Caramancia v City of New Rochelle*, 268 AD2d 496 [2d Dept 2000]). In order for a municipality to be held liable for a condition where no prior written notice was given, a plaintiff must set forth competent evidence that the municipality affirmatively created the alleged offending condition in issue (*see Walker v Incorporated Village of Northport*, 304 AD2d 823 [2d Dept 2003]; *Monteleone v Incorporated Village of Floral Park*, 74 NY2d 917 [1989]).

In further support of the motion, the County submits the affidavits of Veronica Cox and Anthony Esposito. Ms. Cox works for the Nassau County Attorney's Office in the Bureau of Claims and Investigation. Her job duties include maintaining the files containing notices of claim and notices of defect. She searched the records related to the sidewalk in front of and near 180 Court House Road in Franklin Square for a period of

six years prior to the accident. Her search yielded no records of any notice of defect in the subject area. Mr. Esposito is a Landscape Architect II in the Nassau County Department of Public Works (DPW). He states that he searched DPW's records which contain records of inspections, maintenance, contracts, complaints, repairs and permits, for a period of six years prior to the subject accident. His search yielded no such records for 180 Court House Road in Franklin Square. He further confirms that the jurisdictional map, referenced, *supra*, is a true and accurate representation of the subject area.

In opposition, Salzman only offers the affirmation of counsel, and claims the motion should be denied because she has not yet had the opportunity to conduct discovery. However, Salzman has neglected to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. "The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion" (*Hanover Ins. Co. v. Prakin,* 81 AD3d 778 [2d Dept. 2011]; *see also Essex Ins. Co. v. Michael Cunningham Carpentry,* 74 AD3d 733 [2d Dept. 2010]; *Peerless Ins. Co. v. Micro Fibertek, Inc.*, 67 AD3d 978 [2d Dept. 2009]; *Gross v. Marc,* 2 AD3d 681 [2d Dept. 2003]). As Salzman does not challenge any of the arguments raised by the County, the court finds the County has established that it did not own or maintain the subject sidewalk and that it had no prior written notice of any defect.

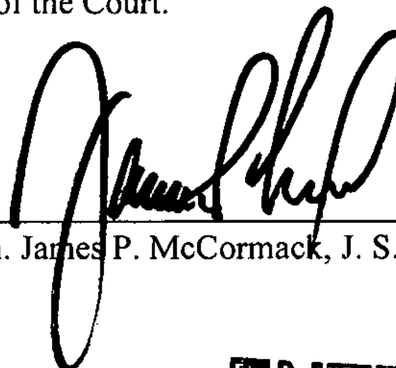
Accordingly, it is hereby

ORDERED, that the County's motion to dismiss the complaint against it is

GRANTED. The complaint and any cross claims are dismissed as to the County only.

This constitutes the Decision and Order of the Court.

Dated: September 16, 2017
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.

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SEP 18 2019
NASSAU COUNTY
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