

Panzavecchia v County of Nassau
2017 NY Slip Op 33459(U)
September 7, 2017
Supreme Court, Nassau County
Docket Number: Index No. 602825/17
Judge: Antonio I. Brandveen
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ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

SHEILA PANZAVECCHIA,

Plaintiff,

- against -

THE COUNTY OF NASSAU and THE TOWN
OF HEMPSTEAD,

Defendant.

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 602825/17

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The County of Nassau, a defendant in this personal injury action, moves pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the complaint and any cross claims against the County. The movant asserts a lack of jurisdiction and a failure to state a cause of action.

The plaintiff bicyclist alleged a fall on June 10, 2016, at Bayside Drive and Lynbrook Avenue, County of Nassau, State of New York. The plaintiff claimed the incident resulted from a dangerous or defective condition comprising sand on the street

without any warning, signs, cones or rope.

The plaintiff opposes the motion. The plaintiff asserts summary judgment is unwarranted because it is premature and untimely. The plaintiff contends it appears from the documents submitted by the County that facts essential to justify opposition may exist, but cannot now be stated. The plaintiff maintains further discovery, including depositions of the County and the Town of Hempstead, the other defendant is needed. The plaintiff claims there are some questions of fact regarding whether the County or the Town owns the subject roadway. The plaintiff notes the defendant failed to show it lacked prior written notice of the subject defect or that the County did not cause or create the subject defect.

The County replies to the plaintiff's opposition. The County contends the plaintiff incorrectly argues that the Court should apply the standards for a summary judgment motion rather than a motion to dismiss. The County points out the plaintiff failed to demonstrate the County had jurisdiction over the subject accident location. The County indicates the plaintiff proffers the County's employee was not previously disclosed by the County, but offers nothing to rebut the subject location is not owned, operated, maintained or controlled by the County.

“On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” A motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1) may be appropriately granted “only

where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" [citations omitted]

Janker v. Silver, Forrester & Lesser, P.C., 135 A.D.3d 908, 909 [2d Dept. 2016]).

"Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" [citations omitted]

Rabos v. R & R Bagels & Bakery, Inc., 100 A.D.3d 849, 851-852 [2d Dept. 2012], *as amended* (Apr. 15, 2013).

Here, both sides submitted evidentiary material to be considered on this motion to dismiss the complaint against the County. As a general rule, "[l]iability for a dangerous or defective condition on property is . . . predicated upon ownership, occupancy, control or special use of the property . . . Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property [citations omitted]" (*Ruffino v New York City Transit Auth.*, 55 A.D.3d 817, 818 [2d Dept. 2008]).

The motion is not converted to into a motion for summary judgment, but the issue here is not whether the plaintiff stated a cause of action against the County as to ownership or control over the subject accident location, but rather whether the County owned or controlled the subject accident location as claimed by the plaintiff to be a material fact is not a fact at all. Also, it cannot be said that a significant dispute exists regarding the County's ownership or control over the subject accident location (*Dinger v.*

Cefola, 133 A.D.3d 816 [2d Dept. 2015]).

This Court determines the County fails to satisfy its CPLR 3211(a)(1) burden, but does satisfy its CPLR 3211(a)(7) burden to dismiss the complaint and any cross claims. The County provides sufficient evidence that it did not exercise ownership or control over the subject accident location. The affidavit dated May 2, 2017, by William Nimmo, the Deputy Commissioner of the County's Department of Public Works establishes the County did not exercise ownership or control over the subject location. Nimmo personally searched the public records of the Department of Public Works, including its contracts, permits, complaints and repair records. Nimmo states those public records show the subject location is not under the jurisdiction of the County. Nimmo also states those public records reveal the County does not own, operate, maintain, control, inspect or repair the subject location. Nimmo further states those public records indicate the County did not issue any permits for the subject location, contract any work at that subject location and did not make any repairs, excavation, repair or maintenance there or to the sidewalk, roadway or curb there.

In opposition, the plaintiff fails to show ownership, occupancy, control, or special use of the property by the County where the public records show the County does not own, occupy, control or special use of the subject property by the County (*Figueroa-Corser v. Town of Cortlandt*, 107 A.D.3d 755 [2d Dept. 2013]). Upon the denial of ownership or control by a municipality, the burden shifts to the plaintiff to

submit facts showing responsibility for maintenance of the premises. Furthermore, the motion is not premature. The plaintiff fails to demonstrate how discovery may reveal or lead to relevant evidence, or that crucial facts in opposition to the motion are exclusively within the County's knowledge and control. The ownership of the subject accident location is a matter of public records and, does not represent information only in the County's exclusive possession (*see* CPLR 3212[f]; *see also Kenworthy v. Town of Oyster Bay*, 116 A.D.2d 628 [2d Dept. 1986]).

ORDERED that the motion by the County of Nassau is GRANTED to dismiss the complaint and any cross claims against the County of Nassau.

This decision will constitute the order and judgment of the Court.

So ordered.

Dated: **September 7, 2017**

ENTERED

SEP 20 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:



J. S. C.

NON FINAL DISPOSITION