

Tinsley v City of New Rochelle
2018 NY Slip Op 34066(U)
May 2, 2018
Supreme Court, Westchester County
Docket Number: 70675/17
Judge: David F. Everett
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To commence the 30-day statutory time period for appeals as of right under 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

-----X
JASMINE TINSLEY,

Plaintiff,

-against-

Index No. 70675/17
Motion Sequence No. 001
Decision and Order

THE CITY OF NEW ROCHELLE, THE DEPARTMENT
OF PUBLIC WORKS OF NEW ROCHELLE, COUNTY
OF WESTCHESTER, NATIONAL GRID USA SERVICE
COMPANY, INC. AND NATIONAL GRID ENERGY
MANAGEMENT, LLC,

Defendants.

-----X
EVERETT, J.

The following papers were read on the motion:

Notice of Motion/Affirmation in Supp/Exhibits A-D/Affs of Serv (docs 12-19)

Defendant County of Westchester (County) moves for an order, pursuant to CPLR 3211 (a) (7) and/or CPLR 3212, dismissing the complaint and all cross claims against it. Upon the foregoing papers, the unopposed motion is granted.

The following facts are taken from the pleadings, motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

Plaintiff commenced the instant action by filing a summons and complaint in the Office of the Westchester County Clerk on December 20, 2017, to recover damages for injuries she allegedly sustained when, on May 8, 2017, she was caused to trip and fall due to the defective condition of the public roadway in the vicinity of 345 and 361 Main Street in New Rochelle, New York. The complaint sounds in negligence and charges the various named defendants with

negligent ownership, operation, management, maintenance, control, repair, construction and/or inspection of the subject roadway. While issue was joined by service, on or about January 29, 2018, of a joint answer by defendants City of New Rochelle i/s/h/a The City of New Rochelle (City) and The Department of Public Works (DPW), together with several affirmative defenses and a cross claim for contribution and/or indemnification against defendants National Grid USA Service Company, Inc., National Grid USA Energy Management, LLC and the County. The County responded by submission of the instant motion. For the reasons set forth below, the County is entitled to a dismissal of the complaint and cross claim under CPLR 3212.

It is well settled that:

“[t]o obtain summary judgment it is necessary that the movant establish [her] cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in [her] favor (CPLR 3212, subd [b]), and [she] must do so by tender of evidentiary proof in admissible form”

(*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citations omitted]).

To make the requisite showing, the County submits, among other things, the sworn affidavit of William Maker (Maker), its Assistant Superintendent of County Road Maintenance in the County's Department of Public Works and Transportation (DPW&T), who been employed by the County since 1997. In his affidavit, Maker asserts that he is responsible for overseeing the maintenance of County owned and operated roads located within its borders, and that he is familiar with the names and locations of the roadways, sidewalks and surrounding areas that are serviced by the County's DPW&T. Maker provides a list of the records which he reviewed in conjunction with plaintiff's complaint, those being the official records of the DPW&T's Division

of Road Maintenance, and he submits a copy of the *Laws of Westchester County*, which contains a listing of the names and locations of the roads maintained by the County. Based on his review of these documents, together with his knowledge of the County's roadways as the Assistant Superintendent of the DPW&T's Division of Road Maintenance, Maker concludes and affirmatively states that, at no time relevant to the action has the County, or any of its agents, servants, employees and/or representatives owned, operated, managed, maintained, controlled, repaired, constructed or inspected the subject roadway in the vicinity of 345 and 361 Main Street, New Rochelle, New York (*see* notice of motion, exhibit D).

The County contends, and the Court agrees, that, by this evidence, it has established: (1) that it neither owns, nor controls the roadway or other property where the alleged accident occurred; (2) that it owes no duty to plaintiff or co-defendants with respect to the Tinsley's accident that allegedly occurred on the subject roadway; and (3) that it therefore, cannot be held liable in the above-captioned action as a matter of law (*see Zuckerman v City of New York*, 49 NY2d at 562).

The Court further finds that, by failing to oppose or to otherwise contest the County's assertions, Tinsley and the co-defendants have, "in effect, [conceded] that no question of fact exists" which would preclude a summary judgment dismissal of the complaint and cross claim against it (*Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *see also Admiral Ins. Co. v Marriott Intl., Inc.*, 79 AD3d 572, 577 [1st Dept 2010]).

Accordingly, it is

ORDERED that defendant County of Westchester's motion is granted to the extent that the complaint and cross claim are severed and dismissed as against defendant County of

Westchester, and the Clerk is directed to enter judgment in favor of said defendant with costs and disbursements as taxed by the Clerk; and it is further

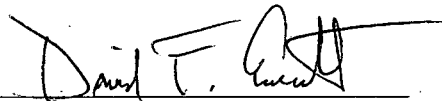
ORDERED that the remainder of the action shall continue; and it is further

ORDERED that counsel for plaintiff and the remaining defendants appear in the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York, at the Preliminary Conference Part, Courtroom 811, on Monday, June 11, 2018, at 9:30 a.m.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
May 2, 2018

ENTER:



HON. DAVID F. EVERETT, A.J.S.C.

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