Collins v County of Nassau

2018 NY Slip Op 34074(U)

October 29, 2018

Supreme Court, County of Nassau

Docket Number: Index No. 604367/2018

Judge: Leonard D. Steinman

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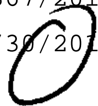

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MARYANN COLLINS,

Plaintiff,

-against-

COUNTY OF NASSAU, TOWN OF HEMPSTEAD, and INCORPORATED VILLAGE OF FLORAL PARK,

Defendants.

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IAS Part 17
Index No. 604367/2018
Mot. Seq. No. 001

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following papers, in addition to any legal memoranda of law submitted by the parties, were reviewed in preparing this Decision and Order:

Defendant County of Nassau's Notice of Motion, Affidavit & Exhibits..1
Plaintiff's Affirmation in Opposition..2
Defendant County of Nassau's Reply Affirmation, Affidavit & Exhibits...........3

In this action, plaintiff seeks to recover for personal injuries she allegedly sustained following a trip and fall on the roadway in front of 117 Floral Parkway, located in the County of Nassau ("the County") and the Incorporated Village of Floral Park ("the Village"). Plaintiff alleges that she was caused to trip as a result of a broken, cracked, depressed section of the roadway.

The County now seeks to dismiss the claim pursuant to CPLR 3211(a)(7) for failure to state a cause of action. Plaintiff opposes the application.

LEGAL STANDARD

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept as true the facts "alleged in the complaint and submissions in opposition to the motion, and

accord ... the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409, 414 (2001); *see People ex rel. Cuomo v. Conventry First LLC*, 13 N.Y.3d 108 (2009). But "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to such consideration." *Myers v. Schneiderman*, 30 N.Y.3d 1, 3 (2017).

When evidentiary material is submitted by a party in connection with a CPLR 3211(a)(7) motion a court must determine whether the proponent of a pleading has a cause of action, not whether the proponent has stated one. *Stinner v. Epstein*, 162 A.D.3d 819 (2d Dept. 2018). If the evidence submitted disproves an essential allegation of the complaint, dismissal is warranted even if the allegations standing alone, could withstand a motion to dismiss for failure to state a cause of action. *Id.; see also Guggenheim v. Ginnzburg*, 43 N.Y.2d 268, 275 (1977)(dismissal may be appropriate where there is no significant dispute that an alleged material fact is shown not to be a fact at all); *Peter F. Gaito Architecture, LLC v. Simone Development Corp.*, 46 A.D.3d 530 (2d Dept. 2007).

The County argues that it does not own or maintain the location where plaintiff was allegedly caused to slip and, even if it did, its prior written notice law precludes liability.

The County submitted certain records from the Land Records Viewer provided by the County's Department of Assessment which reflects that the location is within the Village. The County has also submitted the affidavit of William Nimmo, Deputy Commissioner of the County's Department of Public Works, who attests that he reviewed the records maintained by this department, including contracts, permits, complaints, and repair records. Specifically, he states that the County "does not own, operate, maintain, control, construct, inspect or repair the SUBJECT LOCATION." He further attests that the County was "in no way involved in the excavation or repair of the roadway at the SUBJECT LOCATION."

The County has demonstrated that it does not own the area in question. Without control or ownership, the County does not owe a duty—a requisite element of a claim of

negligence—and therefore there can be no recovery by plaintiff. *Horn v. Town of Clarkstown*, 46 A.D.3d 621, 622 (2d Dept. 2007).

Furthermore, the County has established that it did not receive any written notice of a defect at the subject location. In support of its application, the County relies on the affidavit of Veronica Cox, assigned to the Claims and Investigations Division of the Nassau County Attorney's Office. Cox attests that a search of the relevant records for a six-year period prior to the incident revealed that the County received no complaints or defect notices for the area in question.

Where a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained roadway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies. *Griesbeck v. County of Suffolk*, 44 A.D.3d 618, 619 (2d Dept. 2007). No exception is applicable here. Therefore, even assuming the County owned or maintained the area at issue, the County has demonstrated that liability may not be imposed. *Pulka v. Edelman*, 40 N.Y.2d 781, 782 (1976), *see also Sola v. Vil. Of Great Neck Plaza,* 115 A.D.3d 661 (2d Dept. 2014); *Masotto v. Village of Lindenhurst*, 100 A.D.3d 718 (2d Dept. 2012).

Plaintiff argues that the County's motion is premature because discovery is needed regarding ownership of the location. However, there is sufficient evidence regarding ownership and the lack of prior written notice as it relates to the County. The mere speculation that additional discovery will yield evidence to defeat an application is an insufficient basis for denying this application. *Conte v. Frelen Associates, LLC*, 51 A.D.3d 620 (2d Dept. 2008). In all events, ownership of a location is clearly not within the sole and exclusive control of the County; it is a matter of public record and can be obtained by plaintiff. *See Martens v. County of Suffolk*, 100 A.D.3d 839 (2d Dept. 2012).

Accordingly, the application to dismiss is granted in its entirety. *See Ganzenmuller v. Incorporated Village of Port Jefferson*, 18 A.D.3d 703 (2d Dept. 2005); *see also Odell v. Town of Riverhead,* 305 A.D.2d 477 (2d Dept. 2003).

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: October 29, 2018
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.

ENTERED

OCT 30 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE