

Frischia v Village of Geneseo

2019 NY Slip Op 34223(U)

November 25, 2019

Supreme Court, Livingston County

Docket Number: 001039-2018

Judge: Dennis S. Cohen

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At a Special Term of the Supreme Court held in and for the County of Livingston, at the Livingston County Courthouse in the Village of Geneseo, New York on the 30th day of January 2019.

PRESENT: HON. DENNIS S. COHEN
Acting Supreme Court Justice

DOMINIC FRISCIA,
Plaintiff,

DECISION & ORDER

v.

Index No. 001039-2018

VILLAGE OF GENESEO,
Defendant.

Appearances:

For Plaintiff:

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For Defendant:

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The following papers filed with NYSCEF were reviewed and considered for this decision:

- 1) SUMMONS and COMPLAINT; Filed: 12/10/2018
- 2) NOTICE OF MOTION (Motion #01); Filed: 01/03/2019
- 3) AFFIDAVIT/AFFIRMATION IN SUPPORT OF MOTION (Motion #01); Filed: 01/03/2019
- 4) EXHIBIT(S) - A (Motion #01) Plaintiff's Notice of Claim; Filed: 01/03/2019
- 5) MEMORANDUM OF LAW IN SUPPORT (Motion #01); Filed: 01/03/2019
- 6) RJI -RE: NOTICE OF MOTION (Motion #01); Filed: 01/03/2019
- 7) PROOF OF SERVICE; Filed: 01/09/2019
- 8) COMPLAINT (AMENDED) Filed: 01/23/2019
- 9) AFFIRMATION; Filed: 01/23/2019
- 10) EXHIBIT(S) - A Notice of Claim; Filed: 01/23/2019
- 11) EXHIBIT(S) - B Summons and Complaint; Filed: 01/23/2019
- 12) EXHIBIT(S) - C Amended Complaint filed on January 23, 2019, red-lined; Filed: 01/23/2019
- 13) EXHIBIT(S) - D Transcript of 50-h Hearing held on March 28, 2018; Filed: 01/23/2019
- 14) MEMORANDUM of Law Opposing Defendant's Motion to Dismiss; Filed: 01/23/2019

- 15) EXHIBIT(S) - D (Motion #01) Transcript of 50-h Hearing; Filed: 01/24/2019
- 16) AFFIDAVIT OR AFFIRMATION IN REPLY (Motion #01; Filed: 01/29/2019
- 17) MEMORANDUM OF LAW IN REPLY (Motion #01; Filed: 01/29/2019

DECISION

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

The Plaintiff owns residential property located at 8 Main Street in the Village of Geneseo. The property is primarily used as college student rental property and is one of eight other properties owned by the Plaintiff in the Village of Geneseo.

In June 2015, the Village of Geneseo began a public works project to replace drainage and water lines on Main Street. The Plaintiff alleges that this project caused water to flow along side his property located at 8 Main Street. This purported flow of water was especially pronounced when there was heavy rainfall.

In October 2015, Plaintiff indicates that he notified the Defendant that his landscaping at 8 Main Street had a greater slope toward house.

In June 2016, the Defendant re-paved Main Street. The Plaintiff alleges the re-paving exacerbated the water drainage problem at the 8 Main Street address. In particular, the Plaintiff cites a rainstorm in November 2016 where he witnessed water on both sides of the house and water in the basement of the residence.

The Plaintiff alleges he contacted the Defendant in November 2016 and again during summer of 2017 about informed the Defendant about these alleged water drainage issues.

A code enforcement inspection of the property on August 11, 2017 revealed a collapsed foundation. The Plaintiff alleges the cost to repair to foundation was \$8,320.00.

On or about December 19, 2017, the Plaintiff filed a Notice of Claim against the Defendant.

A General Municipal Law ("GML") §50-h Hearing was held at the Livingston County Government Center on March 28, 2018.

On December 10, 2018, a Summons and Complaint was filed by the Plaintiff seeking a permanent injunction and alleging four causes of action against the Village of Geneseo: 1) Negligence; 2) Trespass; 3) Nuisance and 4) Taking.

The Defendant filed a motion to dismiss on January 3, 2019 and alleged that all of the Plaintiff's claims were untimely pursuant GML §50-i, as the action was commenced more than 1 year and 90 days after the happening of the negligent event. The Defendant's motion also averred the following: 1) there was no basis for permanent injunction; 2) that a municipality cannot be liable for increased flow in surface water; 3) that there can be no trespass as there is no causal nexus between the village and alleged damages and 4) there was no taking of the property because there was no permanent physical occupation of property.

On January 24, 2019, the Plaintiff filed an Amended Complaint in an attempt to correct a failure to note the service of his Notice of Claim. The Plaintiff opposed the Defendant's motion to dismiss. His opposition is primarily based upon a plea for additional discovery. Although he conceded that any negligence claims for damages that occurred after the expiration of the one-year-and--ninety-day statute of limitation are time barred, the Plaintiff argued that the nuisance, trespass and taking actions survive. The Plaintiff also contended that injunctive relief does not require notice of claim.

The Defendant filed a reply on January 29, 2019.

The argument of motion took place on January 30, 2019 and the Court reserved decision.

Now, after due consideration of all moving and responding papers listed above, the Court makes the following rulings:

MOTION TO DISMISS

It is well settled that on a motion to dismiss a complaint pursuant to CPLR §3211 all allegations in the complaint are deemed to be true; all reasonable inferences which can be drawn from the complaint and the allegations therein must be resolved in favor of the plaintiff. *See, Sokoloff v Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414. "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration." *Simkin v Blank*, 19 N.Y.3d 46, 52.

NECESSITY OF DISCOVERY

Pursuant to CPLR §3211(d), the opposing party must specify the facts that need to be developed in discovery and explain why those facts are material to the opposition. See, *Koepfel v Volkswagen Group of Am., Inc.*, 128 A.D.3d 441, 441-442 ; *Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Longmire*, 106 AD3d 536, 537.

Here, the Court finds the Plaintiff has failed to explain why any facts are material to his opposition. “[I]f the [claim] fails to state a cause of action as a matter of law and no amount of discovery can salvage the claim, it must be dismissed and no discovery is warranted.” *Herzog v Town of Thompson*, 216 A.D.2d 801, 803-804. “[T]he mere hope that discovery may reveal [facts essential to justify opposition] does not warrant denial of the motion.” *Cracolici v Shah*, 127 AD3d 413, 413.

Accordingly, the Court holds that the Plaintiff’s unspecified plea for discovery is insufficient to warrant denial of the Defendant’s motion to dismiss.

CPLR §3211(a)(5) (STATUTE OF LIMITATIONS GROUND

On a motion to dismiss a complaint pursuant to CPLR §3211(a)(5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. See, *Beizer v Hirsch*, 116 A.D.3d 725; *Baptiste v Harding-Marin*, 88 A.D.3d 752, 753. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period. See, *Zaborowski v Local 74, Serv. Empls. Intl. Union, AFL-CIO*, 91 AD3d 768, 768-769; *Baptiste v Harding-Marin*, 88 AD3d at 753; *Coleman v. Wells Fargo & Co.*, 125 A.D.3d 716.

The Defendant in the present matter has met its initial burden of establishing, prima facie, that the causes of action sounding in negligence, trespass, nuisance and taking were time-barred as they are based upon acts alleged to have occurred more than one year and 90 days prior to the commencement of the action. See, General Municipal Law § 50-i; *Greco v. Inc. Vill. of Freeport*, 66 A.D.3d 836, 836-37.

Although the Court acknowledges that “[i]t is well established that compliance with General

Municipal Law §§ 50-i and 50-e is not required where the plaintiffs seek equitable relief to abate and enjoin a nuisance and the demand for money damages is incidental to the requested injunctive relief.” See, *Stanton v. Town of Southhold*, 266 A.D.2d 277; *Rist v. Town of Cortlandt*, 56 A.D.3d 451.

However, in the instant matter, the Court finds the Plaintiffs are seeking money damages and said damages are not incidental to their prayer for equitable relief. As such, the Court holds that the Plaintiff’s contention that General Municipal Law §§ 50-e and 50-i do not apply is without merit. See, *Smith v. Town of Ellisburg*, 234 A.D.2d 938, 939.

As the Plaintiff filed his notice of claim more than 90 days after his claim arose and did not seek leave to file a late notice of claim within one year and 90 days after the claim accrued, the Court must grant the Defendant’s motion to dismiss.

CPLR §3211(a)(7) (FAILURE TO STATE A CAUSE OF ACTION)

Pursuant to CPLR §3211(a)(7), a court must determine whether a complaint fails to state a cause of action. Said court is required to “accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” *Daley v. County of Erie*, 59 A.D.3d 1087, 1087; *Stevens v. Perrigo*, 122 A.D.3d 1430, 1431–32.

Unlike a motion for summary judgment where the court will search the record and assess the sufficiency of the parties’ evidence, on a motion to dismiss under CPLR §3211(a)(7) the court will, in the first instance, merely examine the adequacy of the pleadings. Step one has the court determining whether the complaint asserts a viable cause of action. When making this evaluation, the court will construe the complaint liberally in favor of the plaintiff, accepting the facts alleged therein as true, and will determine whether those facts fit into any recognizable legal theory. However imperfectly, illogically or informally the plaintiff may have stated the facts, the plaintiff will nonetheless be given every possible favorable factual inference. The complaint will be deemed to allege not only that which is obvious from its face, but also whatever additional facts that may be fairly and reasonably inferred from its statements. If those facts

indicate that a plaintiff may be entitled to relief, the court's inquiry is over and it must declare the complaint legally sufficient. For example, if the court finds that the facts alleged in the complaint constitute a cognizable cause of action, the action will not be dismissed even if a plaintiff had labeled its cause of action incorrectly.

Therefore, in order to prevail on a motion to dismiss, defendant must convince the court that nothing the plaintiff can reasonably be expected to prove would establish a valid claim, or that none of the facts asserted by plaintiff fits within any cognizable legal theory. In other words, a CPLR §3211(a)(7) motion to dismiss will be granted only where the dispute pertains to a matter of law, not facts; and only evidence that utterly refutes plaintiff's allegations, conclusively establishing a defense as a matter of law, will warrant dismissal.

The Court holds the present Defendant has met this threshold.


CONCLUSION

For all of the foregoing reasons, the Court must grant the Defendant's motion to dismiss.

ORDER

ORDERED, that the Defendant's motion to dismiss is **GRANTED**.

Date: November 25, 2019



Hon. Dennis S. Cohen
Acting Supreme Court Justice