

Krisztin v County of Nassau

2019 NY Slip Op 34257(U)

January 16, 2019

Supreme Court, Nassau County

Docket Number: Index No. 611284/18

Judge: Jeffrey S. Brown

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT : HON. JEFFREY S. BROWN
JUSTICE

-----X TRIAL/IAS PART 11
JOANNE KRISZTIN,
Plaintiff, INDEX # 611284/18
-against- Mot. Seq. 1
THE COUNTY OF NASSAU and THE TOWN OF Mot. Date 10.5.18
OYSTER BAY, Submit Date 1.4.19
Defendants.
-----X MD

Table with 2 columns: The following papers were read on this motion: and Documents Numbered. Rows include Notice of Motion/Cross Motions, Verified Answer, and Reply Affidavit.

Defendant County of Nassau moves pursuant to CPLR 3211 (a) (1) and (7) to dismiss this action against it.

In this action, plaintiff alleges that she tripped and fell while crossing a street in front of the premises known as 72 School House Road near the intersection with Barry Road in Old Bethpage, Town of Oyster Bay, State of New York.

In support of this motion, the County attaches a notice of claim where plaintiff alleges that on August 23, 2017 she fell as a result of a pothole on the roadway in front of 61 and 72 School House Road in Old Bethpage.

contains a legend but no explanation as to the shading on each roadway on the map, and there is no affidavit making reference to this map to demonstrate that the County of Nassau does not have jurisdiction over the subject location.

Also in support of the motion is an affidavit from Veronica Cox, an employee of the County assigned to the Bureau of Claims and Investigation. Part of her job is to maintain the files containing notices of claim and notices of defect. She personally conducted a search for a period of six years prior to the accident as to whether the County received any prior written notice of a dangerous or defective condition located in front of 72 School House Road. Her search revealed no prior notice of claim or prior written notice of any defect.

There is also an affidavit from William Nimmo, the Deputy Commissioner of the Department of Public Works. He is familiar with the appurtenances, roadways and sidewalks under the jurisdiction of the County. He was requested and personally made a search of the records of the Department of Public Works which includes contracts, permits, complaints and repair records as a result of an accident that occurred in front of 61 School House Road. As a result of the search as well as his personal knowledge, he states that the subject location is not under the jurisdiction of the County. Further, the County did not issue any permits, contracts for work or make any repair or excavations of the roadway at the subject location.

In opposition, counsel for the plaintiff argues that such motion is premature since plaintiff has not had an opportunity to conduct discovery. Further, the Town of Oyster Bay by its answer also denies ownership, maintenance and repair of the roadway. Thus, discovery is necessitated by the discrepancy. Further, plaintiff contends that the map is unauthenticated and there is no explanation of what the map is supposed to reveal. Also, each of the affidavits states that the affiant searched the records for a different address – Ms. Cox discusses 72 School House Road while Mr. Nimmo discusses 61 School House Road.

In reply, counsel for defendant County submits corrected affidavits for Ms. Cox and Mr. Nimmo where each one of them states they searched the records for the subject defect in front of both 61 and 72 School House Road. Further, the County argues that the map irrefutably demonstrates that it does not have jurisdiction over the street in question.

There is no opposition from the co-defendant Town of Oyster Bay.

To succeed on a motion to dismiss based on documentary evidence under CPLR 3211(a)(1), “dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law,” thereby definitively disposing of the opposing party’s claims. (*Leon v Martinez*, 84 N.Y.2d 83, 88 [1994]; *see also Fischbach & Moore v Howell Co.*, 240 A.D.2d 157 [1st Dept 1997]). In sum, the analysis is two-pronged: the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

“In order to be documentary, the evidence must be unambiguous, authentic, and undeniable; thus, affidavits are not considered documentary evidence’ (*Treeline 1 OCR, LLC v. Nassau County Indus. Dev. Agency*, 82 A.D.3d 748, 918 N.Y.S.2d 128; *see Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996, 997, 913 N.Y.S.2d 668).” (*Summer v. Severance*, 85 AD3d 1011, 1012 [2d Dept 2011]).

The map annexed to the motion does not meet the criteria of CPLR 3211 (a) (1). Significantly, the map is of unknown origin. None of the affidavits submitted in support of this motion make any reference to the map. There is no explanation on the map revealing what it is supposed to show. Counsel’s statements that the map is definitive and conclusive of the issue of jurisdiction has no weight on this motion. Here, the affidavits relied upon by the defendant in support of the motion do not qualify as documentary evidence under CPLR 3211 (a) (1).

On a motion to dismiss for failure to state a cause of action, pursuant to CPLR § 3211 (a) (7), the court must determine whether, from the four corners of the pleading “factual allegations are discerned, which taken together, manifest any cause of action cognizable at law.” (*Salvatore v. Kumar*, 45 AD3d 560 [2d Dept 2007], lv to app den. 10 NY3d 703 [2008], quoting *Morad v. Morad*, 27 AD3d 626, 627 [2006]). Further, the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiffs accorded the benefit of every possible favorable inference. (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). However, “[w]hile the allegations in the complaint are to be accepted as true when considering a motion to dismiss . . . , ‘allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration.’” (*Garber v. Board of Trustees of State Univ. of N.Y.*, 38 AD3d 833, 834 [2d Dept 2007] [quoting *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91 [1999]]).

Accordingly, consideration of evidentiary materials will almost never warrant dismissal under CPLR 3211 (a) (7) unless the materials “‘establish conclusively that [the plaintiff] has no [claim or] cause of action.’” (*Lawrence v. Graubard Miller*, 11 N.Y.3d 588, 595 [quoting *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 636]).

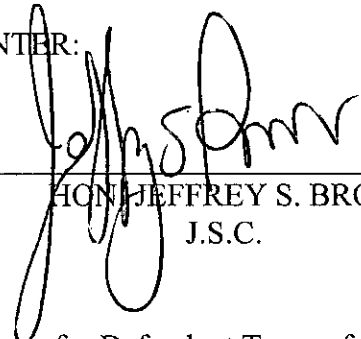
Here plaintiff’s complaint states a cause of action with respect to a standard “trip and fall” case against the County. The County’s arguments are premature and are not suited to a motion to dismiss for failure to state a cause of action. “Whether the complaint will withstand a subsequent motion for summary judgment, or whether the plaintiff will be able to prove his claim, is irrelevant to the determination of a pre-disclosure CPLR 3211 motion to dismiss (*see Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34 [2006]). (*Nasca v. Sgro*, 101 AD3d 963 [2d Dept 2012]).

Defendants motion to dismiss is, therefore, **denied**.

ORDERED, that counsel for the parties shall appear at a preliminary conference at the supreme courthouse, 100 Supreme Court Drive, Mineola, N.Y., lower level, on **February 4, 2019 at 9:30 a.m.** No adjournments of this conference will be permitted absent the permission of or order of this court. All parties are forewarned that failure to attend the conference may result in judgment by default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
January 16, 2019

ENTER:


HON. JEFFREY S. BROWN
J.S.C.

Attorney for Plaintiff
Grey & Grey, LLP
360 Main Street
Farmingdale, NY 11735
516-249-1342

Attorneys for Defendant Town of Oyster Bay
Esq. Office of the Oyster Bay Town Attorney
54 Audrey Avenue
Oyster Bay, NY 11771
516-624-6150
5166246196@fax.nycourts.gov

Attorneys for Defendant County of Nassau
John A. Genua, Esq.
Jared A. Kasschau
County Attorney of Nassau County
One West Street
Mineola, NY 11501
516-571-3056
5165716604@fax.nycourts.gov
first initial plus last
name@nassaucountyny.gov

ENTERED
JAN 17 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE