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| <b>Jourdain v Metropolitan Transp. Auth.</b>   |
| 2019 NY Slip Op 34300(U)   |
| October 11, 2019   |
| Supreme Court, Rockland County   |
| Docket Number: Index No. 035562/2018   |
| Judge: Sherri L. Eisenpress  |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
MERLANDE JOURDAIN,

*Plaintiff,*

*-against-*

METROPOLITAN TRANSPORTATION AUTHORITY, COUNTY  
OF ROCKLAND AND TOWN OF CLARKSTOWN,

*Defendants.*  
-----X

Sherr L. Eisenpress, J.

**DECISION AND ORDER**

Index No. 035562/2018

(Motion #1)

The following papers, numbered 1 to 9, were considered in connection with the Defendant's Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3211(a)(1) and (7), dismissing the Verified Complaint, on the grounds that Plaintiff has failed to state a cause of action and upon documentary evidence:

**PAPERS**

**NUMBERED**

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| NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-C/AFFIDAVIT OF JUSTIN SWEET/MEMORANDUM OF LAW IN SUPPORT | 1-4 |
| AFFIRMATION IN OPPOSITION BY CO-DEFENDANT/MEMORANDUM OF LAW IN OPPOSITION TO MOTION                         | 5-6 |
| AFFIRMATION IN OPPOSITION BY PLAINTIFF/EXHIBIT A  | 7   |
| AFFIDAVIT OF FRANK DIZENZO/EXHIBIT A/AFFIRMATION IN REPLY   | 8-9 |

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

Plaintiffs filed a Summons and Complaint through the NYSCEF system on September 14, 2018. The Complaint alleges that on June 19, 2017, while plaintiff was operating a motor vehicle on the south side of Lawrence Street, at or near the intersection of

North Pascack Road, in the Town of Clarkstown, Rockland County, she was caused to sustain serious personal injuries when a large tree adjacent to the side of the road, fell on top of her stopped vehicle. The action was discontinued against the County of Rockland on November 5, 2018. On December 12, 2018, Defendant Metropolitan Transportation Authority ("MTA") interposed an Answer with cross-claims. Defendant Clarkstown filed the instant Notice of Motion to Dismiss.

Plaintiff alleges that defendant Town of Clarkstown owned, operated, maintained, managed and controlled the south side of the road on Lawrence Street, at or near its intersection with North Pascack Road, and more specifically, the trees thereat. Among the allegations made, she alleges that Defendant Town was negligent in the ownership, operation, maintenance, management and control of the above location by permitting the location to be and remain in a dangerous and hazardous condition; in failing to have a system in place whereby trees located along the area would be inspected; in failing to properly build the roadway; in improperly designing the roadway; and in failing to trim, barricade, secure or remove trees near the roadway.

Defendant moves to dismiss the Complaint pursuant to CPLR Sec. 3211(a)(7), on the ground that the Complaint fails to state a cause of action and upon CPLR 3211(a)(1), a defense founded on documentary evidence. In support of the motion, the Town submits the affidavit of Clarkstown Town Clerk Justin Sweet, who states that the Town did not own, maintain, control, or manage the accident site and therefore could not have a duty to maintain the land and tree in question. Additionally, the Town argues that it did not receive any prior written notice concerning a claim of a defective or unsafe condition.

In opposition thereto, Plaintiff and co-Defendant MTA maintain that a certification from the Town Clerk alone does not dispel ownership and control of Lawrence Street itself, and common law imposes a nondelegable duty upon Clarkstown to maintain its roadways in a safe manner, which duty extends to the trees adjacent to the roadways. Plaintiff notes that moving

Defendant fails to produce documents showing exactly where Clarkstown's property line ends or begins. They argue that absent discovery, it is premature to dismiss the Complaint and cross-claims. Additionally, they contend that Section 188-2 of the Clarkstown Code regarding prior written notice does not mention trees specifically, and argues that case law supports their position that prior written notice laws do not relieve a municipality from liability based upon fallen trees. They argue that discovery is warranted.

In reply, moving Defendant submits the affidavit of Clarkstown Highway Superintendent Frank Dizenzo, who states that the Town Highway Department does not maintain the tree or area in question. Additionally Mr. Dizenzo states that the Highway Department took no immediate action prior the accident on June 19, 2017. Defendant argues that based upon these affidavits, it has established its entitlement to dismissal of the action based upon documentary evidence.

On a motion to dismiss for failure to state a cause of action [§ 3211(a)(7)], the Court initially must accept the facts alleged in the complaint as true and then determine whether those facts fit within any cognizable legal theory, irrespective of whether the plaintiff will likely prevail on the merits. Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 318, 631 N.Y.S.2d 565 (1995); Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972 (1994); People v. New York City Transit Authority, 59 N.Y.2d 343, 348, 465 N.Y.S.2d 502 (1983); Morone v. Morone, 50 N.Y.2d 481, 429 N.Y.S.2d 592 (1980); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-275, 401 N.Y.S.2d 182 (1977); Cavanaugh v. Doherty, 243 A.D.2d 92, 98, 675 N.Y.S.2d 143 (3d Dept. 1989); Klondike Gold, Inc. v. Richmond Associates, 103 A.D.2d 821, 478 N.Y.S.2d 55 (2d Dept. 1984). The complaint must be given a liberal construction and will be deemed to allege whatever cause of action can be implied by fair and reasonable reading of same. Shields v. School of Law of Hofstra University, 77 A.D.2d 867, 431 N.Y.S.2d 60 (2d Dept. 1980); Penato v. George, 52 A.D.2d 939, 383 N.Y.S.2d 900 (2d Dept. 1976). Whether the Plaintiff will ultimately be able to prove his claims, of course, plays no part in the

determination of a pre-discovery CPLR 3211 motion to dismiss. See EBE I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170 (2005).

A motion to dismiss founded upon documentary evidence [§ 3211(a)(1)] will only be granted if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. Sunset Café, Inc. v. Mett's Surf & Sports Corp., 103 A.D.3d 707, 959 N.Y.S.2d 700 (2d Dept. 2013); Jones v. Rochdale Village, Inc., 96 A.D.3d 1014, 948 N.Y.S.2d 80 (2d Dept. 2012); Fontanetta v. Doe, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010).

In the instant matter, upon examination of the Complaint, Plaintiff has alleged a cognizable legal theory of negligence. There exists a duty to maintain roadways in a reasonably safe condition, and that duty extends to trees adjacent to the road which could reasonably be expected to pose danger to travellers. Guido v. State, 248 A.D.2d 592, 670 N.Y.S.2d 524 (2d Dept. 1998). In Piscitelli v. County of Suffolk, 121 A.D.3d 878, 879, 994 N.Y.S.2d 388 (2d Dept. 2014), a case similar to the matter at bar, the court rejected the Town's argument that it owed no duty to Plaintiff by virtue of the fact that it did not own, maintain, or control the subject tree or the location of the tree which was adjacent to a town road and which fell on Plaintiff's vehicle in which they were traveling. The Court noted that "the exact location of the tree with respect to the Town's right of way is not dispositive" of the issue of the Town's liability. Id. See also Machicado v. Paradise, 112 A.D.3d 680, 977 N.Y.S.2d 66 (2d Dept. 2013). Here, no discovery has taken place and the affidavits produced by Defendant Town do not foreclose any and all possibility that a duty may be owed to Plaintiff and/or that the Town was negligent. Additionally, the Second Department has held that prior written notice requirements do not apply to a fallen tree, since such "statutes apply to 'actual physical defects in the surface of a street highway [or] bridge...of a kind which do not immediately come to the attention of the [Town] officers unless they are given actual notice thereof.'" Bright v. Village of Great Necks Estates, 54 A.D.3d 704, 863 N.Y.S.2d 752, 753 (2d Dept. 2008).

Accordingly, it is hereby

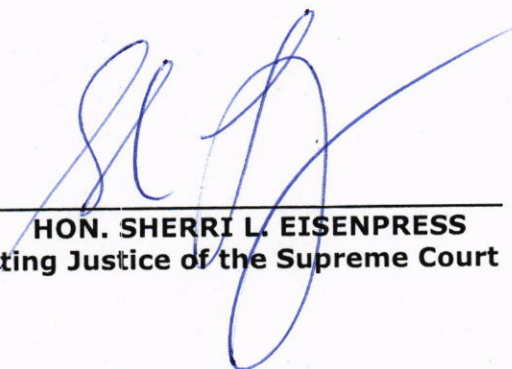
**ORDERED** that Defendants' Notice of Motion to dismiss Plaintiff's Complaint is DENIED; and it is further

**ORDERED** that Defendant Town of Clarkstown is directed to file an Answer within twenty (20) days of this Order; and it is further

**ORDERED** that all parties are ordered to appear for a Preliminary Conference on **THURSDAY, NOVEMBER 7, 2019** at 9:45 a.m.

The foregoing constitutes the Decision and Order of this Court on Motion # 1.

Dated: New City, New York  
October 11, 2019



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**HON. SHERRI L. EISENPRESS**  
**Acting Justice of the Supreme Court**

TO:  
**All Parties (via- NYSCEF)**