Attwood v County of Westchester
2019 NY Slip Op 34434(U)
May 6, 2019
Supreme Court, Westchester County
Docket Number: Index No. 67642/2018
Judge: John P. Colangelo
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.

To commence the statutory time period for appeals as of right (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

DAWN ATTWOOD,

Plaintiff,

-against-

THE COUNTY OF WESTCHESTER, CITY OF NEW ROCHELLE and RAYMOND JAMES,

Defendants.

DECISION AND ORDER
Index No. 67642/2018
Sequences #1 & 2

COLANGELO, J.

The following papers were read on the Motions filed by Defendants County of Westchester and City of New Rochelle to dismiss Plaintiff's complaint pursuant to CPLR §3211(a)(7) and General Municipal Law §50-h(5) and §50-i:

	NYSCEF
Sequence #1	
Notice of Motion, Affirmation Exhibits A-D	3-8
Sequence #2	
Notice of Motion, Affirmation Exhibits A-E	15-21
Affirmation in Opposition to #1	24
Reply to #1, Exhibit A	26-27
Reply to #2	29

Upon the foregoing papers it is ORDERED that the motions are disposed of as follows:

Background and Procedural History

Plaintiff Dawn Attwood ("Plaintiff") commenced an action against Defendants County of

Westchester (the "County"), City of New Rochelle (the "City") and Raymond James by electronic filing of a Summons and Verified Complaint on October 18, 2018. (Exh. C to City's Motion).

A Notice of Claim was timely served by Plaintiff upon the City on October 13, 2017 and filed electronically on November 6, 2018. (Exh. A to City's Motion). As set forth in the Notice of Claim, Plaintiff alleges that she was injured on June 23, 2017 on the grassy area adjacent to the sidewalk at 668 Webster Avenue in New Rochelle, New York when she fell due to "a metal spike protruding from the ground." (*Id.* ¶3).

The City's Motion

The City maintains that in response to the Notice of Claim, Plaintiff was served with a demand dated October 24, 2017 to appear for a General Municipal Law §50-h examination that was scheduled for November 28, 2017. (Exh. B to City's motion). According to Deputy Corporation Counsel for the City of New Rochelle Brian J. Powers (Powers Affirmation), Plaintiff failed to appear on February 9, 2018 for the examination, failed to contact the City with an explanation for her nonappearance and failed to contact the City to reschedule the examination. (Powers Aff. ¶7).

General Municipal Law §50-h(5) provides, in relevant part, that where a demand for examination has been served as provided in subdivision two of this section, no action shall be commenced against the city, county. . . . against which the claim is made unless the claimant has duly complied with such demand for examination.

The Complaint filed in this action states that Plaintiff "has satisfied all conditions precedent to file a lawsuit" against Defendants, which has not occurred in light of the fact that

the examination required by General Municipal Law §50-h(5) has not taken place. The City seeks dismissal of the action based upon Plaintiff's failure to establish a necessary precondition to bringing the action.

It is well-settled that "[a] party who has failed to comply with a demand for examination pursuant to General Municipal Law § 50-h is precluded from commencing an action against a municipality" (*Palmieri v. Yown of Babylon*, 139 A.D.3d 927 [2d Dept. 2016]; *see Bernoudy v County of Westchester*, 40 AD3d 896, 897 [2d Dept. 2007]). The City argues that Plaintiff has failed to proffer exceptional circumstances, such as extreme physical or psychological incapacity that would excuse her failure to submit to the examination. *Hymowitz v. City of New York*, 122 A.D.3d 681 (2d Dept. 2014).

Plaintiff argues in opposition that the City was responsible for the first two adjournments of the examination, never confirmed the date of February 9th and took no steps to reschedule the examination from February 2018 through the commencement of the lawsuit on October 18, 2018.

In this case, the Court is presented with conflicting representations as to why the examination has not taken place. Therefore, the City's motion is granted to the extent that Plaintiff must submit to a 50-h(5) examination on or before May 31, 2019. Should she fail to so, the action will be deemed dismissed on that date. The City is directed to promptly contact Plaintiff to schedule said examination at a mutually convenient date.

The County's Motion

Defendant County of Westchester has moved to dismiss Plaintiff's Complaint pursuant to CPLR §3211(a)(7) on the grounds that the Complaint fails to state a cause of action, or in the alternative pursuant to CPLR §3212 granting summary judgment in favor of the County and

dismissing the Complaint and all cross-claims. The Affirmation of Senior Assistant County Attorney Syma B. Funt, Esq. and the Affidavit of William Makar (Exh. D to County's motion), Assistant Superintendent of Road Maintenance of the County's Department of Public Works and Transportation are submitted in support of the motion.

Mr. Makar has been employed by the County for approximately 29 years and has held the title of Assistant Superintendent of Road Maintenance of the County's Department of Public Works and Transportation for 4 years. (Makar Aff. ¶1). According to his Affidavit, he is responsible for overseeing the maintenance of County owned and/or operated roads within Westchester County and personally familiar with the names and locations of the roadways, sidewalks and surrounding areas that are serviced by the County's Department of Public Works and Transportation. (*Id.* ¶2). Based upon his review of official records within the County's Department of Public Works and Transportation, the County does not own, operate, manage, maintain, control or repair either Webster Avenue and its public shoulder and sidewalk, including its public shoulder of the roadway or grassy area adjacent to the sidewalk, or the sidewalk apron abutting Webster Avenue in the area of 668 Webster Avenue in New Rochelle. (*Id.* ¶4). Plaintiff has filed no opposition to the County's motion.

CPLR §3212(b) states in pertinent part that a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

In Andre v Pomeroy, 35 NY2d 361, 364 (1974), the Court of Appeals held that:

> "[s]ummary judgment is designed to expedite all civil cases by eliminating from

the Trial Calendar claims which can properly be resolved as a matter of law . . . when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

It is well established that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York University Medical Center*, 64 N.Y.2d 851, 853 (1985); *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 (1993); *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 341 (1974); *Finkelstein v. Cornell University Medical College*, 269 A.D.2d 114, 117 (1st Dept. 2000).

If and only if the "moving party carries this initial burden of making a prima facie showing of entitlement to judgment as a matter of law, does the burden shift to the opposing party to come forward with evidence showing an issue of fact." *Alverez v. Prospect Hospital*, 68 N.Y.2d 320 (1986).

Based upon the Affidavit of William Makar, Defendant County has made a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Plaintiff has filed no opposition to the motion and has failed to raise a triable issue of fact as to the County's negligence. The County motion for summary judgment is granted and the Complaint and all cross-claims against the County are dismissed.

Accordingly and based upon the foregoing, it is hereby

ORDERED that the City's motion is granted to the extent that Plaintiff must submit to a

50-h(5) examination on or before May 31, 2019. Should she fail to so, the action will be deemed dismissed on that date. The City is directed to promptly contact Plaintiff to schedule said examination at a mutually convenient date; and it further

ORDERED that the County's motion for summary judgment is granted, and the Complaint and all cross-claims are dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 6, 2019
White Plains, New York

HONORABLE JOHN P. COLANGELO, J.S.C.