

Morak v Incorporated Vil. of Cedarhurst

2019 NY Slip Op 34527(U)

May 14, 2019

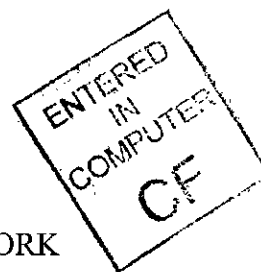
Supreme Court, Nassau County

Docket Number: Index No. 616227/18

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.



SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MARSHA MORAK,

Plaintiff,

- against -

THE INCORPORATED VILLAGE OF CEDARHURST,
THE TOWN OF HEMPSTEAD and THE COUNTY OF
NASSAU,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 616227/18
Motion Seq. No.: 01
Motion Date: 01/17/19

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition</u>	<u>2</u>
<u>Affirmation in Reply and Exhibit</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant The County of Nassau ("Nassau") moves, pursuant to CPLR § 3211(1) and (7), for an order dismissing plaintiff's Complaint as against it, as well as any and all cross-claims as against it, or, in the alternative, moves, pursuant to CPLR § 3211(c), for an order granting conversion of the instant application to summary judgment and dismissing plaintiff's Complaint as against it, as well as any and all cross-claims as against it. Plaintiff opposes the motion.

The instant action was brought to recover for personal injuries allegedly sustained by plaintiff on September 7, 2017, at approximately 2:00 p.m., when she tripped and fell on the

street/roadway while crossing on Columbia Avenue, in between the Orly and Banana Republic stores, located at 431 Central Avenue, Cedarhurst, County of Nassau, State of New York. *See* Defendant Nassau's Affirmation in Support Exhibit A. The action was commenced with the filing of a Summons and Complaint on or about December 4, 2018. *See* Defendant Nassau's Affirmation in Support Exhibit C.

In support of the motion, counsel for defendant Nassau submits that, "the COUNTY's proof is founded upon documentary evidence, which refutes Plaintiff's allegations herein, and conclusively establishes that the COUNTY lacked jurisdiction over the subject location, and further, that the COUNTY lacked prior written notice and no exceptions to the prior written notice requirement exist."

Counsel for defendant Nassau asserts, in pertinent part, that, "[t]he COUNTY did not owe Plaintiff a duty because the COUNTY does not have jurisdiction over the subject location. New York courts have consistently held that in order for a plaintiff to establish a *prima facie* case of negligence against a municipality, the plaintiff must first demonstrate the existence of a duty owed by the defendant to the plaintiff. [citation omitted].... It is respectfully submitted that Plaintiff's action against the COUNTY should be dismissed, as the COUNTY has no jurisdiction over the subject location and therefore owed no duty to Plaintiff. The subject location is not along a COUNTY roadway and the COUNTY lacks ownership or other property interest with the adjacent properties identified in Plaintiff's notice of claim, as such, the subject location falls outside the jurisdiction of the COUNTY, and the COUNTY owed no duty to the Plaintiff.... As seen in the [Nassau County] jurisdictional map, the subject roadway, Central Avenue, is not a COUNTY owned roadway, and further, there are no COUNTY owned roadways for several

blocks in all directions, at or near the subject location. As such, the COUNTY owned (*sic*) no duty to the Plaintiff herein. Further, as identified on the Nassau County Land Record Viewer ..., the owner of the subject location is recorded as 'KAUFMAN ETAL MYRON L'. In the instant action, the subject location is not along a COUNTY roadway, the COUNTY is a separate and distinct legal entity from the owner of the adjacent real property at the subject location, and the COUNTY has no real property interests in the subject location, owned by 'KAUFMAN ETAL MYRON L'. As such, through (*sic*) submission of irrefutable documentary evidence, publically (*sic*) available on the official Nassau County website, kept in the normal course of business, and through the supporting affidavit of the COUNTY's keeper of records, the COUNTY has established that it lacks jurisdiction over the subject location and adjacent surrounding roadways and the instant action should be dismissed in its entirety against the COUNTY." *See* Defendant Nassau's Affirmation in Support Exhibits D and E.

Counsel for defendant Nassau further submits that, "[a]ssuming arguendo, that the COUNTY has jurisdiction over the subject location, liability nevertheless still cannot be assessed against the COUNTY, because the COUNTY did not have prior written notice of the alleged condition. Plaintiff's Complaint alleges, in sum and substance, that the COUNTY was negligent in its ownership, leasing, operation, control or repair of the subject location. However, as evidenced by the affidavit of VERONICA COX, and set forth more fully below, the COUNTY lacked prior written notice of the purported defect, as is required under the General Municipal Law and the Nassau Administrative Code. The Court's attention is respectfully directed to *Nassau County Administrative Code § 12-4(e),....*"

Defendant Nassau submits the Affidavit of Veronica Cox (“Cox”), who works in the Bureau of Claims and Investigations in the Office of the Nassau County Attorney. *See* Defendant Nassau’s Affirmation in Support Exhibit F. Cox indicates that she conducted a search of the Notice of Claim Files and Notice of Defect Files for the period of six (6) years prior to and including September 7, 2017. With respect to the subject location, Cox found that “there were no records of any prior notices of claim or prior written complaints, for a period of six (6) years prior to and including the date of loss.” *See id.*

In opposition to the motion (Seq. No. 05), counsel for plaintiff argues, in pertinent part, that, “[d]efendant’s motion must be denied as a matter of law as it fails to present documentary evidence that warrants dismissal of the complaint under CPLR §3211(a)(1).... Here, the sole documentary evidence that defendant, COUNTY, submit to contend a lack of jurisdiction over the subject roadway is an **uncertified, unauthenticated** roadway map.... For several reasons, this document is insufficient to refute Plaintiff’s allegations that defendant, COUNTY, exercised some control over the roadway. First, the map is uncertified and the County has not submitted anything to show that it was prepared in the normal course of business. [citations omitted]. This is required prior to this Court deeming it admissible evidence. [citation omitted]. Second, the COUNTY has not offered an affidavit from any of its employees to authenticate or interpret the map’s contents. Notably, the affidavit from County employee, Veronica Cox, ..., neither authenticated nor interprets the contents of the annexed map. Third, the defendant does not submit any records to show who performed the search for the map or whether it shows the area where the subject accident occurred. An attorney affirmation attesting to the contents of a map that he lacks personal knowledge about is unequivocally insufficient to eliminate any and all issues of fact. [citations omitted].” *See* Defendant Nassau’s Affirmation in Support Exhibits

D- F.

Counsel for plaintiff also argues that, “concerning defendant, COUNTY’s claim that it did not receive prior written notice of the defective condition that caused Plaintiff’s accident, this contention fails to eliminate all triable issues of fact.... Here, Defendant COUNTY raises its argument without affording the Plaintiff the opportunity to conduct any discovery, including a deposition from the individual from the County who conducted the search and the measures/efforts utilized in obtaining any search results. The affidavit that defendant, COUNTY, submits from its employee, Veronica Cox, simply states in a conclusory manner that a search was conducted and she did not find records.... She does not show that she conducted a search for any records showing the COUNTY previously performed repairs to the roadway or that is inspected and produced records about the roadway’s condition. Without allowing Plaintiff the opportunity to depose this person about her search methods or serving discovery demands for any additional records within the COUNTY’s possession regarding the subject accident location, defendant’s motion is premature and must be denied. [citation omitted]. In addition, even assuming *arguendo* that the COUNTY did not receive prior written notice of a dangerous condition existing on the roadway, it still has not eliminated all triable issues of fact entitling it to summary judgment. The defendant does not establish that one of the recognized exceptions to the prior written notice rule does not apply.... Here, defendant, COUNTY, has not submitted any evidence to refute that its actions created the dangerous condition on the subject roadway. Whether the COUNTY performed work on the subject roadway prior to the accident resulting in the defective condition remains unanswered. The Court should not sanction this conspicuous absence from the COUNTY’s motion. Finally, defendant, COUNTY, is not permitted to submit additional proof or Affidavits in their Reply papers in order to cure any deficiencies in their moving papers, as it is

well established that a party may not rely on the proof submitted in its reply affidavits in order to meet its burden of proof on its motion in chief. [citations omitted].”

In reply to the opposition, counsel for defendant Nassau submits, in pertinent part, that, “[p]laintiff argues that the COUNTY failed to address the issue of affirmative creation in its initial moving papers, thereby creating an question of fact as to the affirmative creation to the prior written notice exception and may not cure its purportedly defective Motion papers through the introduction of an affidavit in its Reply Affirmation.... Plaintiff’s contention is inconsistent with law and logic, as the COUNTY properly asserted in its initial Affirmation in Support, that it moved upon” “the grounds that the COUNTY’s proof is founded upon documentary evidence, which refutes the Plaintiff’s allegations herein and conclusively establishes that the COUNTY lacked jurisdiction over the subject location, and further, that the COUNTY lacked prior written notice and **no exceptions to the prior written notice requirement exist.**’ [emphasis added].... Plaintiff argues that the COUNTY was require to address the affirmative creation exception to the prior written notice requirement in its initial Affirmation in Support and that further, the COUNTY’s failure to address same precludes it from doing so in its Reply Affirmation. However, Plaintiff misapprehends that law, insomuch as the burden of demonstrating prior written notice or an exception thereto, is upon Plaintiff, and the COUNTY may properly address any issues raised by Plaintiff in its Reply Affirmation that were raised in the COUNTY’s initial moving papers.”

Counsel for defendant Nassau further asserts that, “it is procedurally proper for the COUNTY to address a ground upon which it moved in its initial moving papers (no exceptions to the prior written notice requirement) ... and to which Plaintiff has opposed in the instant Opposition. As such, it is clear that Plaintiff’s procedural arguments are unsubstantiated by

statutory authority, supporting case law, or common sense and the instant Application should be GRANTED in its entirety. As opined in *Yarborough v. City of N.Y.*, 10 N.Y.3d 726, 728 (2008): **‘Where such a municipality establishes that it lacked prior written notice of an alleged defect, the burden shifts to the plaintiff to demonstrate the applicability of one of the two recognized exceptions to the prior written notice requirement.** The only two recognized exceptions to a prior written notice requirement are the municipality’s affirmative creation of defect or where the defect is created by the municipality’s special use of the property.’ [emphasis added].”

Counsel for defendant Nassau adds that, “[r]esponsive to Plaintiff’s contention with respect to the ‘possibility’ of the applicability of the affirmative creation exception to the prior written notice requirement and in furtherance of the grounds upon which the COUNTY initially moved, the COUNTY submits an Affidavit of Mr. ANTHONY ESPOSITO ..., Landscape Architect II with the Nassau County Department of Public Works,... In said affidavit, Mr. ESPOSITO affirms that after conducting a search of the records concerning the issuance of permits at the subject location, he found no records of: inspections, contracts, complaints, repair, and permits, covering a period of six (6) years prior to and including the date of loss.” See Defendant Nassau’s Affirmation in Reply Exhibit A.

Counsel for defendant Nassau also contends that, “[i]n the instant action, the COUNTY has satisfied its burden of establishing its lack of jurisdiction over the subject location, through submission of a jurisdictional map and land record, publically available online though the official Nassau County website, recorded and maintained by the Officer of the Nassau County Clerk and categorized by Owner, Section, Block and Lot number. Further, as the COUNTY’s offer of proof is maintained and recorded by the Office of the Nassau County Clerk, specifically identified in an

enumerated list of irrefutable documentary evidence by the New York Court of Appeals, Plaintiff's arguments as to the inapplicability of same must fail as a matter of law. Simply put, no amount of speculation or well wishes can refute the fact that the subject location does not fall under the jurisdiction of the COUNTY and Plaintiff's speculation that further discovery *may* lead to some evidence to refute the COUNTY's showing is insufficient to warrant denial of the instant Application." See Defendant Nassau's Affirmation in Support Exhibits D and E.

CPLR § 3211(a)(1) states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that...a defense is founded upon documentary evidence." To obtain dismissal of a complaint pursuant to CPLR § 3211(a)(1), a defendant must submit documentary evidence which "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002) citing *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). An application predicated upon this section of law will be granted only upon a showing that the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010) quoting *Scadura v. Robillard*, 256 A.D.2d 567, 683 N.Y.S.2d 108 (2d Dept. 1998). "[T]o be considered documentary evidence, it must be unambiguous and of undisputed authenticity." *Fontanetta v. John Doe 1*, *supra*, citing SIEGEL, PRACTICE COMMENTARIES, MCKINNEY'S CONS LAWS OF NY, BOOK 7B, CPLR 3211:10 pp. 21-22. "[T]hat is, it must be 'essentially unassailable.'" *Torah v. Dell Equity, LLC*, 90 A.D.3d 746, 935 N.Y.S.2d 33 (2d Dept. 2011) quoting *Schumacher v. Manana Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686 (2d Dept. 2010). However, in order to make such a showing neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR § 3211(a)(1). See *Granada*

Condominium III Ass'n v. Palomino, 78 A.D.3d 996, 913 N.Y.S.2d 668 (2d Dept. 2010).

A complaint may be dismissed pursuant to CPLR § 3211(a)(1), based on documentary evidence, only if the factual allegations are definitively contradicted by the evidence or a defense is conclusively established. *See Yew Prospect v. Szulman*, 305 A.D.2d 588, 759 N.Y.S.2d 357 (2d Dept. 2003). A motion to dismiss based on documentary evidence may be granted only where such documentary evidence utterly refutes the plaintiffs' factual allegations, resolves all factual issues as a matter of law and conclusively disposes of the claims at issue. *See Yue Fung USA Enters., Inc. v. Novelty Crystal Corp.*, 105 A.D.3d 840, 963 N.Y.S.2d 678 (2d Dept. 2013). In sum, the analysis is two-pronged - the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

The Court finds that the documentary evidence submitted by defendant Nassau resolves all factual issues as a matter of law and conclusively dispose of the claims at issue as against defendant Nassau. *See Defendant Nassau's Affirmation in Support Exhibits D and E.*

CPLR § 3211(a)(7) states that a party may move to dismiss a complaint for failure to state a cause of action. On such an application, the complaint is to be liberally construed and the plaintiff afforded every favorable inference which may be drawn therefrom. *See Leon v. Martinez, supra; Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007). The facts as alleged are to be accepted as true, although bare legal conclusions, in addition to factual assertions which are squarely contradicted by the record, are not entitled to any such consideration. *See Doria v. Masucci*, 230 A.D.2d 764, 646 N.Y.S.2d 363 (2d Dept. 1996); *Mayer v. Sanders*, 264 A.D.2d 827, 695 N.Y.S.2d 593 (2d Dept. 1999). In entertaining such an application, the function of the motion court is only to determine whether the facts, as alleged, fall within a cognizable legal theory. *See Leon v. Martinez, supra; Nonnon v. City of New York*,

supra.

“In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), “the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) quoting *Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) quoting *Nonnon v. City of New York, supra*; *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011). See also *Stein v. Chiera*, 130 A.D.3d 912, 14 N.Y.S.3d 133 (2d Dept. 2015) citing *East Hampton Union Free School Dist. v. Sandpebble Bldrs., Inc.*, 66 A.D.3d 122, 884 N.Y.S.2d 94 (2d Dept. 2009) *affd* 16 N.Y.3d 775, 919 N.Y.S.2d 496 (2011). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiff can succeed on any reasonable view of facts stated. See *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (see *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiff can ultimately establish the truth of its allegations. See *219 Broadway Corp. v. Alexander’s Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the Complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. See *Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). “If ... the allegations do not fit within any cognizable legal theory even after they are accorded every favorable inference, the motion to dismiss should be granted.” *Stein v. Chiera, supra* at 914

citing *Fisher v. DiPietro*, 54 A.D.3d 892, 864 N.Y.S.2d 532 (2d Dept. 2008).

In derogation of the common law, a municipality may avoid liability for injuries sustained as a result of defects or hazardous conditions on its public property by means of prior written notification laws. *See Amabile v. City of Buffalo*, 93 N.Y.2d 471, 693 N.Y.S.2d 77 (1999). An exception to the prior written notice laws exists where the municipality creates the defective condition through an affirmative act of negligence. *See id.* Actual or constructive notice of a condition are insufficient to satisfy the requirement of prior written notice under the Administrative Code of Nassau County. *See id.*; *Magee v. Town of Brookhaven*, 95 A.D.3d 1179, 945 N.Y.S.2d 177 (2d Dept. 2012)

“Where, as here, a municipality has enacted a prior written notice statute, it may not be subject to liability for personal injuries caused by a defective street or sidewalk condition unless it has received prior written notice of the defect or an exception to the notice requirement applies. *See Despositio v. City of New York*, 55 A.D.3d 659, 866 N.Y.S.2d 248 (2d Dept. 2008); *Sollowen v. Town of Brookhaven*, 43 A.D.3d 816, 841 N.Y.S.2d 351 (2d Dept. 2007); *Katsoudas v. City of New York*, 29 A.D.3d 740, 815 N.Y.S.2d 243 (2d Dept. 2006); *Borgorova v. Incorporated Village of Atlantic Beach*, 51 A.D.3d 840, 858 N.Y.S.2d 359 (2d Dept. 2007). *See also Poirier v. City of Schenectady*, 85 N.Y.2d 310, 624 N.Y.S.2d 555 (1995).

The Court holds that Nassau County Administrative Code § 12-4.0(e) would apply to the instant action. Therefore, since said statute would apply in the instant matter, no civil action based on the alleged defective condition of the subject roadway could be maintained against defendant Nassau unless defendant Nassau had written notice of the subject condition prior to the accrual of the claim. Through the Affidavit of Veronica Cox, defendant Nassau has demonstrated that no such written notice was received in this matter pertaining to the subject area of the alleged

defect that caused plaintiff's injuries. Based upon the evidence and legal arguments presented by defendant Nassau, the Court finds that defendant Nassau has established a *prima facie* showing that it had no prior written notice of the condition alleged to have caused plaintiff's fall. *See Gianna v. Town of Islip*, 230 A.D.2d 824, 646 N.Y.S.2d 707 (2d Dept. 1996); *Goldberg v. Town of Hempstead*, 156 A.D.2d 639, 549 N.Y.S.2d 138 (2d Dept. 1989).

Once defendant Nassau satisfied its burden, the non-moving parties were required to come forward with admissible evidence to raise an issue of fact as to whether written notice was given or whether defendant Nassau "created the defect or hazard through an affirmative act of negligence [and] where a 'special use' confers a special benefit upon the locality." *See Amabile v. City of Buffalo, supra*. The Court finds that plaintiff has not offered any evidence to demonstrate the existence of any material triable issue of fact with respect to the liability of defendant Nassau for the injuries allegedly sustained by plaintiff.

Moreover, the Court finds that defendant Nassau's motion was not premature, since plaintiff failed to offer an evidentiary basis to suggest that the discovery may lead to relevant evidence. Plaintiff's "hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery was an insufficient basis for denying the motion." *Conte v. Frelen Assoc., LLC*, 51 A.D.3d 620, 858 N.Y.S.2d 258 (2d Dept. 2008). *See also Lopez v. WS Distrib., Inc.*, 34 A.D.3d 759, 825 N.Y.S.2d 516 (2d Dept. 2006).


Accordingly, based upon the above, defendant Nassau's motion, pursuant to CPLR § 3211(1) and (7), for an order dismissing plaintiff's Complaint as against it, as well as any and all cross-claims as against it, and, in the alternative, pursuant to CPLR § 3211(c), for an order granting conversion of the instant application to summary judgment and dismissing plaintiff's Complaint as against it, as well as any and all cross-claims as against it, is hereby **GRANTED in**

its entirety.

It is further ordered that the remaining parties shall appear for a Preliminary Conference on July 1, 2019, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This shall constitute the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
May 14, 2019

ENTERED
MAY 16 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE