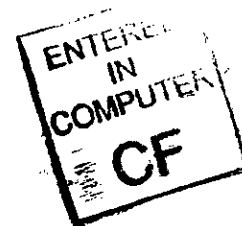


Parker v Oceanside Cove Home Owners Assn., Inc.
2019 NY Slip Op 34654(U)
July 23, 2019
Supreme Court, Nassau County
Docket Number: Index No.: 601545/19
Judge: Denise L. Sher
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This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

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

ANDREW PARKER,

Plaintiff,

- against -

OCEANSIDE COVE HOME OWNERS ASSOCIATION,
INC., OCEANSIDE COVE II APARTMENT CORP.,
OCEANSIDE COVE III RESIDENTS, CORP.,
OCEANSIDE COVE IV TENANTS CORP. and
ALEXANDER WOLF & COMPANY, INC.,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 601545/19
Motion Seq. Nos.: 01, 02
Motion Dates: 05/30/19
05/30/19

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation and Exhibits	<u>1</u>
Notice of Cross-Motion (Seq. No. 02), Affirmation and Exhibits	<u>2</u>

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

Defendant Oceanside Cove IV Tenants Corp. moves (Seq. No. 01), pursuant to CPLR §§ 3211(a)(7), 3211(c) and 3212, for an order dismissing plaintiff's Verified Complaint as against it, as well as any and all cross-claims as against it. No opposition was submitted to the motion.

Defendant Oceanside Cove II Apartment Corp. cross-moves (Seq. No. 02), pursuant to CPLR §§ 3211(a)(7), 3211(c) and 3212, for an order dismissing plaintiff's Verified Complaint as

against it, as well as any and all cross-claims as against it. No opposition was submitted to the cross-motion.

In support of defendant Oceanside Cove IV Tenants Corp.'s motion (Seq. No. 01), its counsel submits, in pertinent part, that, "[t]his lawsuit arises out of a claimed incident that allegedly occurred on March 1, 2018 on a sidewalk curb area in front of a parking space designated as 2811 located at 100 Daly Blvd., Oceanside New York 11572 (hereinafter referred to as the 'accident location'). As set forth below, Cove IV does not own, operate, manage, maintain or control the subject premises nor did it have any responsibilities over the subject premises and did not do so at the time of the alleged incident. Accordingly, Cove IV owed no duty of care to plaintiff and cannot be liable for plaintiff's claimed incident. Cove IV is therefore an improper party to this lawsuit and dismissal of plaintiff's Complaint and all cross-claims against it should be granted." *See* Defendant Oceanside Cove IV Tenants Corp.'s Affirmation in Support Exhibit A.

In further support of the motion (Seq. No. 01), defendant Oceanside Cove IV Tenants Corp. submits the Affidavit of Michael Mulhern ("Mulhern"), the General Manager of Oceanside Cove Home Owners Association, Inc. *See* Defendant Oceanside Cove IV Tenants Corp.'s Affirmation in Support Exhibit F. Counsel for defendant Oceanside Cove IV Tenants Corp. asserts that Mulhern confirms, in pertinent part, that, "Cove IV does not own or lease the lot where the accident location is situated and did not have responsibilities over the operation, maintenance, management or control of that area." *See id.*

Defendant Oceanside Cove IV Tenants Corp. also submits a 2019 Statement of Taxes from the Town of Hempstead, County of Nassau for the subject premises reflecting that

defendant Oceanside Cove IV Tenants Corp. is not the owner of the subject premises. *See*

Defendant Oceanside Cove IV Tenants Corp.'s Affirmation in Support Exhibit G.

"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*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBLA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). 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 the 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).

However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). “In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint.” *Leon v. Martinez, supra* at 88.

As previously indicated, no opposition was submitted to the motion (Seq. No. 01).

Accordingly, based upon the above, defendant Oceanside Cove IV Tenants Corp.’s motion (Seq. No. 01), pursuant to CPLR §§ 3211(a)(7), 3211(c) and 3212, for an order dismissing plaintiff’s Verified Complaint as against it, as well as any and all cross-claims as against it, is hereby **GRANTED**.

With respect to defendant Oceanside Cove II Apartment Corp.’s cross-motion (Seq. No. 02), its counsel submits, in pertinent part, that, “[i]n the interest of saving the Court’s limited judicial resources, your affirmant adopts the factual scenario set forth in the motion submitted by counsel for defendant OCEANSIDE COVE IV TENANTS CORP. (hereinafter referred to as ‘COVE IV’). It is respectfully submitted that COVE II (*sic*) in the same exact factual and legal position as COVE IV as COVE II did not own, operate or manage, maintain or control the subject premises where the plaintiff alleges his trip and fall occurred. COVE II did not have any responsibilities for maintenance over the subject premises where the plaintiff alleged his trip and fall occurred.... COVE II did not owe any duty of care to the plaintiff herein, cannot be liable for the plaintiff’s claimed accident and is therefore not a proper party to this lawsuit.”

In further support of the cross-motion (Seq. No. 02), defendant Oceanside Cove IV Tenants Corp. submits the Affidavit of Mulhern, the General Manager of Oceanside Cove Home Owners Association, Inc. *See* Defendant Oceanside Cove II Apartment Corp.’s Affirmation in

Support Exhibit F. Counsel for defendant Oceanside Cove II Apartment Corp. asserts that Mulhern confirms, in pertinent part, that, "Cove II does not own or lease the lot where the accident location is situated and did not have responsibilities over the operation, maintenance, management or control of that area." *See id.*

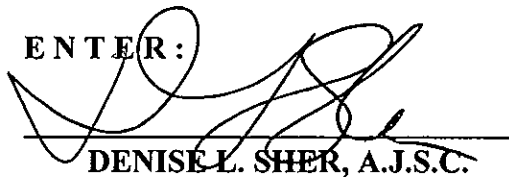
Defendant Oceanside Cove II Apartment Corp. also submits a 2019 Statement of Taxes from the Town on Hempstead, County of Nassau for the subject premises reflecting that defendant Oceanside Cove II Apartment Corp. is not the owner of the subject premises. *See* Defendant Oceanside Cove II Apartment Corp.'s Affirmation in Support Exhibit G.

As previously indicated, no opposition was submitted to the cross-motion (Seq. No. 02).

Accordingly, based upon the above, defendant Oceanside Cove II Apartment Corp.'s cross-motion (Seq. No. 02), pursuant to CPLR §§ 3211(a)(7), 3211(c) and 3212, for an order dismissing plaintiff's Verified Complaint as against it, as well as any and all cross-claims as against it, is hereby **GRANTED**.

The remaining parties shall appear for a Compliance Conference in IAS Part 32, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on November 19, 2019, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

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

Dated: Mineola, New York
July 23, 2019

ENTERED
JUL 24 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE