

Cooper v County of Nassau
2019 NY Slip Op 34682(U)
October 8, 2019
Supreme Court, Nassau County
Docket Number: Index No. 607960/19
Judge: Denise L. Sher
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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

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

CAROL COOPER and WILLIAM COOPER,

Plaintiffs,

- against -

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 607960/19
Motion Seq. No.: 01
Motion Date: 08/12/19

COUNTY OF NASSAU, INCORPORATED VILLAGE OF
EAST ROCKAWAY, TOWN OF HEMPSTEAD, LONG
ISLAND POWER AUTHORITY, NATIONAL GRID
SERVICES, INC., NATIONAL GRID ELECTRIC
SERVICES, LLC, NATIONAL GRID USA SERVICE
COMPANY, INC. and NEW YORK PAVING, INC.,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion, Affidavit and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>2</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>3</u>
<u>Affirmation in Opposition</u>	<u>4</u>
<u>Affirmation in Reply</u>	<u>5</u>
<u>Affirmation in Reply and Exhibits</u>	<u>6</u>
<u>Affirmation in Reply</u>	<u>7</u>

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

Defendant County of Nassau (“Nassau”) moves, pursuant to CPLR § 3211(1) and (7), for an order dismissing plaintiffs’ Verified 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 plaintiffs' Verified Complaint as against it, as well as any and all cross-claims as against it. Plaintiffs opposes the motion. Defendant Long Island Power Authority ("LIPA") also opposes the motion. Defendant New York Paving, Inc. also opposes the motion.

The instant action was brought to recover for personal injuries allegedly sustained by plaintiff Carol Cooper on December 19, 2018, at approximately 11:30 a.m., when she tripped and fell on the street/roadway in front of 7 Smith Street, East Rockaway, County of Nassau, State of New York, due to a broken and missing asphalt patch that was not flush with the surrounding roadway, thereby creating a hole. *See* Defendant Nassau's Affirmation in Support Exhibit C. The action was commenced with the filing of a Summons and Verified Complaint on or about June 12, 2019. *See* Defendant Nassau's Affirmation in Support Exhibit D.

In support of the motion, counsel for defendant Nassau submits, in pertinent part, that, "[d]efendant COUNTY did not owe Plaintiffs a duty because the COUNTY did 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 Plaintiffs' action against the COUNTY should be dismissed, as the COUNTY has no jurisdiction over the subject location and therefore owed no duty to Plaintiffs. The street, which is the subject of the instant action, was and currently remains, outside the jurisdiction of the COUNTY, and as such, the COUNTY owed no duty to the Plaintiffs and the instant application should be GRANTED. The Court's attention is respectfully directed to the official Nassau County Clerk's jurisdictional map.... As identified in the

jurisdictional map, ... , the street, which is the subject of the instant action, was and currently remains outside the jurisdiction of the COUNTY.... As identified in the jurisdictional map, the subject location, ..., is not a COUNTY owned roadway, and as such, the COUNTY owned (*sic*) no duty to the Plaintiffs herein. As such, through (*sic*) submission of documentary evidence namely the jurisdictional map, the COUNTY has provided irrefutable evidence, demonstrating that the COUNTY lacks jurisdiction over the subject location, and the instant Application should be GRANTED in its entirety.” See Defendant Nassau’s Affirmation in Support Exhibit E.

Counsel for defendant Nassau further submits that, “[a]ssuming *arguendo*, that the COUNTY has jurisdiction over the subject location, and to the extent that the instant Application is converted, liability nevertheless still cannot be assessed against the COUNTY, because the COUNTY did not have prior written notice of the alleged condition. Under Highway Law § 139, the COUNTY is authorized to enact its prior written notice requirement in connection with, amongst other things, property damage sustained on its roadways:... 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 Highway 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 the date of loss. With respect to the subject location, Cox found that, “there were no records of any prior notices of claim or prior written complaints involving any dangerous or defective conditions at the subject location for a period of six (6) years prior to and including the date of loss.” *See id.*

Also in support of the motion, defendant Nassau submits the Affidavit of Anthony Esposito (“Esposito”), Landscape Architect II with the Nassau County Department of Public Works. *See* Defendant Nassau’s Affirmation in Support Exhibit E. Esposito states, in pertinent part, that “I was asked to conduct an investigation by the Office of the County Attorney about a claim, alleging an injury which occurred on December 19, 2018 (hereinafter ‘date of loss’) as a result of a trip and fall accident, sustained while traversing the roadway in front of 7 Smith Street, East Rockaway, County of Nassau, State of New York (hereinafter the ‘subject location’), due to a broken and missing asphalt patch that was not flush with the surrounding roadway, thereby creating a hole. In response to this request from the County Attorney’s Office, I attest that I personally searched for records of the Nassau County Department of Public Works, which include contracts, inspection, complaints, permits and repair records, kept at department offices located at 1194 Prospect Avenue, Westbury, New York. A review of the records of the Department of Public Works shows that the COUNTY did not perform or contract for any work related to the subject location, nor did it make any repairs in the vicinity thereat, for a period of one (1) year prior to and including Plaintiff’s date of loss. Further, I attest that the jurisdictional map, annexed to the COUNTY’s Application to Dismiss, is a true and accurate representation of roadway jurisdiction within the COUNTY.” *See id.*

Counsel for defendant Nassau further asserts, in pertinent part, that, “[p]laintiffs argue that the COUNTY created the defective condition alleged; however, as discussed more fully herein, Plaintiffs will fail to meet her (*sic*) burden in rebutting the COUNTY’s showing, by demonstrating that the defective condition alleged was the ‘immediate result’ of the COUNTY’s purported negligence. As such the instant application must be GRANTED in its entirety. The affirmative negligence exception to the prior written notice requirement ‘is **limited to work ... that immediately results in the existence of a dangerous condition**’ [citation omitted].... The instant action, ..., involves Plaintiffs who alleged the affirmative creation exception to the prior written notice requirement and in opposition thereto, a Defendant (the COUNTY) who has demonstrated that it did not receive prior written notice of the defective condition alleged.... Any claim by Plaintiffs that the Defendant COUNTY’s Motion should be denied pending further discovery must fail. The COUNTY has submitted proof in admissible form, namely the official Nassau County jurisdictional map, along with (*sic*) supporting affidavits of VERONICA COX and ANTHONY ESPOSITO, which clearly establish its entitlement to dismissal of Plaintiff’s (*sic*) Complaint, inasmuch as there exists no records of prior written notice for the purported defect at the subject location, no records of affirmative acts thereat and further that the subject location is outside the jurisdiction of the COUNTY. There is no amount of discovery that will change the fact that the COUNTY does not own, operate, manage, inspect, supervise or repair the location in questions, nor performed any affirmative acts thereat.”

In opposition to the motion, counsel for plaintiffs argues, in pertinent part, that, **“[d]efendant COUNTY’S motion for summary judgment must be denied in its’ (*sic*) entirety because:** This application is entirely premature. Discovery necessary to oppose this motion is in the exclusive knowledge and possession of the Defendant. The affidavits provided in

support of defendant's motion create more questions than they resolve. The Court should note that no party depositions have been conducted yet."

Counsel for plaintiffs further asserts, in pertinent part, that, "[t]he County argues first that is has no liability because the street where the incident occurred is not within the jurisdiction of the COUNTY. In support of this they provide a *black and white* copy of a jurisdictional map with an affidavit from a law intern that the 'orange' color designates roadways owned by the County.... Ms. Amick has not established any personal knowledge as to what the colors on the map mean. Your affirmant is not disputing the accuracy of what the map may show. However, the black and white map provided and the lack of (*sic*) affidavit from someone with personal knowledge as to what the map is, what the legend means, and what the colors signify is detrimental to the County's motion. The black and white map and lack of (*sic*) affidavit from someone with knowledge cannot be relied on to (*sic*) prima facie evidence in support of the County's motion. The County also fails to prima facie establish that it did not create the condition that caused plaintiff's fall. Without discovery and (*sic*) deposition of the County, plaintiff is without the necessary discovery to oppose this motion. In support of the County's argument that they did not create the condition, they provide the Affidavit of Anthony Esposito, Architect II within the Nassau County Department of Public Works. This affidavit creates more questions that it answers[.] Although not nearly an exhaustive list of questions that are presently unanswered by reading this affidavit, the following is unknown: What is the Department of Public Works; when are permits filed with the Department of Public Works, when looking at the area depicted in photographs of the subject incident can Mr. Esposito tell whether a permit would have had to have been filed by the County with the Department of Public Works; is there any other County Department with whom a permit would have been filed for the work done in the

subject roadway. No where in Esposito's affidavit does he establish that prior to December 19, 2018, roadway permits were only filed with the Department of Public Works. Thus, the COUNTY has failed to establish its prima facie burden that the County did not create the subject condition that caused plaintiff's fall." See Defendant Nassau's Affirmation in Support Exhibit G.

Also in opposition to the motion, counsel for defendant LIPA submits, in pertinent part, that, "[i]t is respectfully asserted however that COUNTY's motion should be denied as it is entirely premature since no party (*sic*) have been afforded the opportunity to conduct any discovery in this matter prior to this application. Further the allegations and evidence provided by the COUNTY in its motion do not adequately demonstrate its entitlement to dismissal or a finding of summary judgment on the bases asserted. Instead they raise questions regarding their sufficiency which the parties have not been able to address as no discovery has been permitted to proceed prior to this application.... In its motion, the COUNTY first asserts that it is entitled to dismissal of this action on the claim that it had no duty to maintain the roadway where the incident occurred, due to the roadway existing outside of its jurisdiction. To support this allegation, the COUNTY submits a map that allegedly depicts the roadways under and outside of its jurisdiction along with a sworn statement by Mr. Esposito asserting the map's authenticity. However, review of this evidence clearly shows that the map is not date stamped. As such, even assuming that the map is an accurate representation of the County's jurisdiction, the map, on its own does not confirm that this was the scope of the County's roadway jurisdiction at the time of the accident. Also, review of the webpage used by the COUNTY to support its motion, reveals that different maps depicting the COUNTY's roadway jurisdiction have been prepared over the years, thereby strongly suggesting that the scope of the COUNTY's roadway jurisdiction has not remained constant.... The webpage also shows that the map relied upon by the COUNTY to

support its argument was prepared in 2016, two years before the subject occurrence. Finally, while Mr. Esposito asserts that the map provided by the COUNTY is an accurate representation of the COUNTY's roadway jurisdiction, he does not specify what time period the map applies to. As such, he does not affirm that the provided map is an accurate representation of the COUNTY's roadway jurisdiction at the time of the incident. Thus, as the map does not clearly define the scope of the COUNTY's roadway jurisdiction at the time of the accident, it does not unambiguously demonstrate that the subject roadway did not fall within the scope of the County's jurisdiction at the time of the accident. Instead, discovery is necessary to determine: (a) if the scope of the COUNTY's jurisdiction had changed between 2016 to the date of the accident, (b) had the scope of the COUNTY's jurisdiction ever changed prior to the 2016 map to include the roadway where the plaintiff's incident is asserted to have occurred and (c) what is the process by which changes or amendments are made to the roadway jurisdictional maps to access whether there (*sic*) any records regarding whether the COUNTY ever received or relinquished the duty to maintain the subject roadway prior to this incident." See Defendant LIPA's Affirmation in Opposition Exhibit C; Defendant Nassau's Affirmation in Support Exhibits E and G.

Counsel for defendant LIPA further asserts, in pertinent part, that, "[t]he COUNTY next argues in its motion that it is entitled to dismissal of this action on the grounds that it did not receive prior written notice of the condition plaintiffs assert caused the subject accident and this suit. To support this allegation, the COUNTY offers affidavits from Ms. Veronica Cox and Mr. Anthony Esposito who each assert that their department did not receive notice of any defects or claims regarding the subject location prior to the incident.... [R]eview of the affidavits revealed that neither witness asserts that their respective department is the sole party that receives

or maintains notices or complaints, on behalf of the COUNTY, regarding any defective roadway conditions. Additionally, neither witness asserts that their search for all records of any complaints or notices of the subject condition given to the COUNTY, went beyond the records held solely by their respective departments. Therefore, these affidavits fail to constitute unambiguous evidence confirming that (*sic*) County did not receive prior notice of the subject roadway condition plaintiff (*sic*) asserts caused the underlying accident.” See Defendant Nassau’s Affirmation in Support Exhibits F and G.

Counsel for defendant LIPA adds, in pertinent part, that, “[s]imilar to its Motion to Dismiss, the COUNTY’s alternative application for summary judgment must also be denied as insufficient and premature in light of the COUNTY’s application for this relief being made prior to any party having an opportunity to conduct relevant discovery. Specifically, no party has exchanged any written discovery relevant to this action. Additionally, no party has had the opportunity to depose any party or nonparty witness concerning the facts and allegations asserted in the pleadings and affidavits so far produced in this action.... Here, as noted above, the supporting evidence provided by the COUNTY in its motion does not unambiguously or clearly demonstrate that the COUNTY had no duty to maintain (*sic*) subject roadway or confirm that it did not receive prior notice of the condition that is asserted to have caused the subject occurrence. More (*sic*), the parties have not been able to fully assess these issues, and affirmatively demonstrate the deficiencies and issues of fact raised that would refute the COUNTY’s motion since they have not yet been afforded any opportunity to conduct or obtain discovery from the COUNTY. Specifically, the non-moving parties (*sic*) have not been able to access the other jurisdictional maps referenced but not accessible on the County’s website or the records held by all department of the COUNTY regarding any notices or complaints about the

subject conditions and such records are within the exclusive control and possession of the COUNTY. [citation omitted]. However the defects in the evidence submitted by the COUNTY alone clearly demonstrate the existence of facts that would oppose the COUNTY's motion which the parties would be able to access during the discovery proceedings and depositions."

Counsel for defendant LIPA also argues, in pertinent part, that, "[f]inally, even if the Court were to entertain the merits of the COUNTY's motion for summary judgment as pled, this Court must deny their (*sic*) application to dismiss all actions asserted against it due to the COUNTY's failure to address all bases of liability asserted against it in this action.... Here, the COUNTY's motion asserts arguments that only attack the claims proffered by plaintiff and the defendants against it arising out of common law negligence. However, the COUNTY's motion in no way addresses or refutes the allegations of breach of contract asserted against The (*sic*) County by the defendant TOWN OF HEMPSTEAD. Indeed, within the Answer of defendant TOWN OF HEMPSTEAD ..., it asserts a cross claim against the COUNTY for allegedly breaching the contract entered between it and the COUNTY regarding the location of the accident and the condition plaintiff asserts caused his (*sic*) alleged accident. Further, in its motion, the COUNTY in no way denies the existence of this contractual relationship, denies the TOWN's claim that it either expressly or implicitly breached its duty arising from that contract, or that the breach was not the cause or a contributing factor to the subject condition the plaintiff asserts caused his (*sic*) alleged accident and injuries. As such, this cross-claim, (*sic*) remains an issue and (*sic*) uncontested basis of liability against the COUNTY relevant to this action. Furthermore, as this claim of breach of contract is asserted to be a cause in fact if not the proximate cause of the subject incident underlying the action, the plaintiff (*sic*) and other defendants are entitled to discovery to determine the scope of this asserted contractual

relationship and whether or not the COUNTY's asserted breach of that contract is either the sole cause or contributing factor to the alleged incident underlying this action in order to assess and properly defend the allegations of liability asserted against them." See Defendant LIPA's Affirmation in Opposition Exhibit B.

Also in opposition to the motion, counsel for New York Paving, Inc. submits, in pertinent part, that, "[i]nitially, it should be noted that while the (*sic*) Nassau has submitted an affidavit in support of its position, its motion is premature since none of the defendants have been provided with the opportunity to conduct depositions in connection with this lawsuit. Further, plaintiff, Carol Cooper, has not yet been deposed, as such, there are no known details as to the precise location of her fall or the cause of her fall. Additionally, the parties should be afforded the opportunity to cross-examine the County's witness, Anthony Esposito, with respect to his conclusory affidavit, the alleged search he conducted to determine that the subject location was not in the County of Nassau's jurisdiction as well as whether the County of Nassau ever performed any maintenance at the subject location." See Defendant Nassau's Affirmation in Support Exhibit G.

Counsel for defendant New York Paving, Inc. further asserts, in pertinent part, that, "[i]n the instant matter, defendant, Nassau, argues that it is entitled to summary judgment dismissing the Complaint in this matter since it does not have jurisdiction over the area in which the accident took place. However, while it may or may not have jurisdiction over the subject area there is a question of fact as to whether the (*sic*) Nassau created the alleged defective condition. In this regard there is no indication in the affidavit of Anthony Esposito as to whether Nassau created the condition.... Thus, although co-defendant's application makes the assertion that it did not have the requisite jurisdiction over the roadway, co-defendant's application is devoid of any

showing that it did not create the condition complained of in plaintiff's Complaint." *See id.*

Counsel for defendant New York Paving, Inc. adds, in pertinent part, that, "[a]lthough co-defendant's application makes the assertion that it did not have the requisite prior written notice of any alleged defective condition, co-defendant's application is devoid of any showing that it did not create the condition complained of in plaintiff's (*sic*) Complaint."

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." *Fotanetta 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, the Nassau County Clerk's jurisdictional map, coupled with the Affidavit of Anthony Esposito, resolve 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 E and G.*

With respect to defendant Nassau's alternative argument, 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 Highway Law § 139 and Nassau County Administrative Code § 12-4.0(e) apply to the instant action. Therefore, since said statutes 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 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 Carol Cooper'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 Carol Cooper's fall. See Defendant Nassau's Affirmation in Support Exhibit F; *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 the non-moving parties have 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 Carol Cooper.

Moreover, the Court finds that defendant Nassau's motion was not premature, since the non-moving parties failed to offer an evidentiary basis to suggest that the discovery may lead to relevant evidence. Said non-moving parties' "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 plaintiffs' Verified 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 plaintiffs' Verified 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 November 25, 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
October 8, 2019

ENTERED

OCT 09 2019

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**