Whales v 500 Dale Plaza Corp.
2019 NY Slip Op 34699(U)
September 20, 2019
Supreme Court, Nassau County
Docket Number: Index No. 606719/2019
Judge: Steven M. Jaeger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 35

Present: **HON. STEVEN M. JAEGER**

TATIA WHALES,

Plaintiff,

-against-

500 DALE PLAZA CORP., CORNER REALTY, INC., TOWN OF HEMPSTEAD and COUNTY OF NASSAU,

Defendants.

Index No.: 606719/2019
Motion Seq. Nos.: 001
Motion Date: 08/30/19
Decision & Order

Papers submitted:
Notice of Motion…….....x

Upon the foregoing papers, the unopposed motion by the Defendant, County of Nassau (hereinafter the "County"), seeking an Order pursuant to CPLR §§ 3211(a)(1) and (7) dismissing Plaintiff's complaint along with any and all cross-claims against Defendant County is determined as hereinafter provided.

In this action, the Plaintiff seeks to recover damages for personal injuries allegedly sustained when she tripped and fell on the sidewalk of a street surrounding a shopping center at the premises known as 508 Uniondale Avenue/644 Hempstead Boulevard, Uniondale, NY, on September 8, 2018. Plaintiff served a notice of claim on the County on

or about October 1, 2018. Plaintiff commenced this action on May 16, 2019 by filing a Summons and Verified Complaint.

The County now moves, pre-answer, pursuant to CPLR §§ 3211(a) 1 and (7) for dismissal of the claim as against the County on the grounds (1) that the premises wherein Plaintiff tripped and fell entering the elevator is not within the County's jurisdiction, and therefore, the County neither owned, operated, controlled or maintained the premises and (2) that the County did not receive prior written notice of the alleged defect as required by General Municipal Law §50-e and Nassau County Administrative Code §12-4.0(e).

In support of its motion, the County submits an Affidavit from James Corcoran, a Real Estate Inspector I employed by the County. Mr. Corcoran states in his Affidavit that he is assigned to the Municipal Transactions Bureau in the County and that he is fully familiar with the properties and jurisdictions that the County owns, operates and maintains. He attests that based on his personal search of the Nassau County Department of Assessment roll, and records of the Nassau County Clerk, which are kept in the normal course of business, the County does not own, operate, control or maintain the subject premises, including the side street surrounding the shopping center known as Hempstead Avenue/Andrew Quarless Way. Finally, the County alleges that per County Clerk records, the premises is owned by 500 Dale Plaza Corp.

The County also submits an affidavit from Veronica Cox, an employee in the County Attorney's Bureau of Claims and Investigations. Cox is responsible for maintaining the County's prior written notice and notice of claims files. Cox personally searched said

files and found the County received no prior notices of claim or written complaints for the six years prior to the date of the incident for any defects at the subject location.

On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the Court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory." (*Simkin v. Blank*, 19 N.Y.3d 46, 52 [2012]; *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 [2001]; *Polonetsky v. Better Homes Depot*, 97 N.Y.2d 46, 54 [2001]; *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). "Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]). Indeed, the plaintiff has no obligation on a motion to dismiss to demonstrate evidentiary facts to support the allegations contained in the complaint. (*Stuart Realty Co. v. Rye Country Store*, 296 A.D.2d 455 [2d Dept. 2002]; *Paulsen v. Paulsen*, 148 A.D.2d 685, 686 [2d Dept. 1989]).

"To succeed on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) based on a defense founded upon documentary evidence, the documentary evidence must resolve all factual issues as a matter of law and conclusively dispose of the plaintiffs' claim." (*DiGiacomo v. Levine*, 76 A.D.3d 946, 949 [2d Dept. 2010], citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]; *Fontanetta v. John Doe 1*, 73 A.D.3d 78 [2d Dept. 2010]; *Newcomb v. Sims*, 63 A.D.3d 1022, 1023 [2d Dept. 2009]). Bare legal conclusions and factual allegations that are "flatly contradicted by documentary evidence in the record

are not presumed to be true, and '[i]f the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211 (a) (7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (citations omitted)' ". (*Deutsche Bank National Trust Co. v. Sinclair*, 68 A.D.3d 914, 915 [2d Dept. 2009], quoting *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 46 A.D.3d 530, 530 [2d Dept. 2007]).

The Court finds that the evidence submitted on behalf of the County is sufficient to establish that the County does not own or maintain the premises where the Plaintiff's accident occurred.

Further, where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained [sidewalk] unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies. (*Leiserowitz v City of New York*, 81 AD3d 788 [2nd Dept. 2011]; *De La Reguera v City of New York*, 74 AD3d 1127 [2nd Dept. 2010]; *Schleif v City of New York,* 60 AD3d 926 [2nd Dept. 2009]; *Poirer v City of Schenectady*, 83 NY2d 310, 314-315 [1995]). There are, however, two exceptions to this rule: (1) "where the locality created the defect or hazard through an affirmative act of negligence" which "immediately results" in the existence of a dangerous condition;" and (2) "where a 'special use' confers a special benefit upon the locality" (*see, San Marco v Village/Town of Mount Kisco*, 16 NY3d 111 [2010]; *Yarborough v City of New York*, 10 NY3d 726 [2008]; *Oboler*

v City of New York, 8 NY3d 888, 890 [2007]; *Delgado v County of Suffolk*, 40 AD3d 575, 576 [2d Dept. 2007]).

The Court finds that the evidence submitted on behalf of the County is sufficient to establish that the County did not have any prior written notice of the alleged defect.

Plaintiff and co-Defendant Town of Hempstead did not oppose the County's motion (the remaining Defendants had not appeared or answered as of the date the motion was filed).

Accordingly, it is hereby

ORDERED, that the motion submitted by the Defendant, County, seeking an order pursuant to CPLR §§ 3211 (a) (1) and (7), dismissing the Complaint against it and any and all cross-claims asserted against it, is **GRANTED**.

This decision constitutes the decision and order of the court.

Dated: September 20, 2019
Mineola, NY

Steven M. Jaeger
Acting Justice of the Supreme Court

ENTERED
SEP 26 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE