

Mellor v Incorporated Vil. of Port Jefferson
2019 NY Slip Op 34739(U)
September 11, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 621020-16
Judge: Denise F. Molia
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PUBLISH

Index No.: 621020-16

SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice

LORRAINE MELLOR,

Plaintiff,

- against -

INCORPORATED VILLAGE OF PORT
JEFFERSON, TOWN OF BROOKHAVEN,
DANFORDS HOTEL & MARINA, and WESTPORT
CAPITAL PARTNERS, LLC,

Defendants.

CASE DISPOSED: NO
MOTION R/D: 2/24/17
SUBMISSION DATE: 3/30/18
MOTION SEQUENCE NO.: 001 MOT D
002 MG
003 MOT D

ATTORNEY FOR PLAINTIFF
Greenstein & Milbauer, LLP
1825 Park Avenue, 9th Floor
New York, New York 10035

ATTORNEYS FOR DEFENDANT
Brookhaven Town Attorney
One Independence Hill
Farmingville, New York 11738

Martin Clearwater & Bell, LLP
90 Merrick Avenue, Suite 401
East Meadow, New York 11554

Law Office of Andrea G. Sawyers
3 Huntington Quadrangle, Suite 102S
Melville, New York 11747

Danfords Hotel & Marina
25 East Broadway
Port Jefferson, New York 11777

Upon the following papers filed and considered relative to this matter:

Notice of Motion dated January 26, 2017 (001); Affirmation in Support dated January 26, 2017; Exhibits A through C annexed thereto; Affirmation in Opposition dated March 15, 2017; Affidavit dated March 8, 2017; Exhibits A through C annexed thereto; Reply Affirmation dated April 24, 2017; Supplemental Affirmation dated June 29 2018; Notice of Motion dated January 31, 2017 (002); Affirmation dated January 31, 2017; Exhibits A through D annexed thereto; Reply Affirmation dated April 19, 2017; Exhibits A through C annexed thereto; Supplemental Affirmation dated July 6, 2018; Exhibits A through E annexed thereto; Notice of Motion dated March 13, 2017 (003); Affirmation in Support dated March 13, 2017; Exhibits A through F annexed thereto; Affirmation in Opposition dated March 23, 2017; Reply Affirmation dated May 1, 2017; Supplemental Affirmation dated July 2, 2018; Exhibits A through C annexed thereto; and upon due deliberation; it is

ORDERED, that the motion by defendant Town of Brookhaven (002), for an Order directing the entry of summary judgment in favor of Town of Brookhaven, is granted.

The instant action arises from an accident that occurred on March 19, 2016, on the sidewalk in front of Mary Bayles Park, south of Danfords, 25 East Broadway, Port Jefferson, New York. The plaintiff alleges that the plaintiff was injured when she was caused to trip and fall and to be violently precipitated to the ground as a result of the obstructed, cracked, uneven, raised, depressed, missing, patched and/or deteriorated sidewalk and sidewalk area.

It is well settled that liability in tort is an incident of occupation and control (see, Rochette v. Town of Newburgh, 88 A.D.2d 614, 449 N.Y.S.2d 1013) and it is control of land which gives rise to a duty of care to those who enter upon it (see, Scurti v. City of New York, 40 N.Y.2d 433, 387 N.Y.S.2d 55, 354 N.E.2d 794). A municipality will not be held in negligence for the condition of property it does not control (see, Ferris v. County of Suffolk, 174 A.D. 270, 579 N.Y.S.2d 436). “[T]he threshold question in a negligence case is whether the defendant owned the plaintiff a duty” Mualllem v. City of New York, 82 A.D.2d 420, 441 N.Y.S.2d 834, *aff’d* 56 N.Y.2d 866, and absent such a duty, an action may not be maintained against a defendant (see, Vogel v. West Mountain Corp., 97 A.D.2d 46, 470 N.Y.S.2d 475).

In support of its motion for summary judgment, the defendant Town of Brookhaven (“Town”) has submitted the affidavits of various town employees addressing the issue of ownership and control of the site where the plaintiff is alleged to have fallen.

Ronald F. Devine, Jr., the Sole Assessor for the Town of Brookhaven has averred in his affidavit dated June 21, 2018:

“2. I have made a diligent search of the records maintained and kept in the regular course of its business by this Department regarding the sidewalk and sidewalk area in front of Mary Bayles Park, south of Danfords, 25 East Broadway, Port Jefferson, County of Suffolk, State of New York, identified as Suffolk County Tax Map #0206-008.00-01.00-015.000.

3. The aforementioned diligent search of records, maintained and kept by the Town’s Assessor’s Office in the regular course of its business, revealed the parcel/location is located within the geographical boundaries of the Incorporated Village of Port Jefferson presently and on March 19, 2016, the date the plaintiff alleges to have sustained injuries at the aforementioned location.”

The affidavit dated June 19, 2018, by Town Highway Department employee, Marie Angelone states:

“2. My duties include searching Highway Department records, maintained and kept in the regular course of its business, to ascertain whether the Town of Brookhaven owns, maintains, controls or exercises jurisdiction over the location of an incident.

3. I have made diligent search of the above records, maintained and kept by the Town’s Highway Department in the regular course of its business, regarding the ownership, maintenance and control of the sidewalk and sidewalk area in front of Mary Bayles Park,

south of Danfords, 25 East Broadway, Port Jefferson, County of Suffolk, State of New York.

4. The aforementioned diligent search of records, maintained and kept by the Town's Highway Department in the regular course of its business, revealed the Town of Brookhaven does not own, maintain, manage, design or control the sidewalk and sidewalk area in front of Mary Bayles Park, south of Danfords, 25 East Broadway, Port Jefferson, County of Suffolk, State of New York, either presently or on March 19, 2016, the date the plaintiff alleges to have sustained injuries at the aforementioned location."

The Town has also submitted the affidavit of Robert Maag, the Deputy Commissioner of the Department of Parks, Recreation and Sports and Cultural Resources, dated July 2, 2018, in which he states:

"2. My office maintains files regarding the official records of the Town of Brookhaven, specifically those maintained and kept in the regular course of its business, within the Department of Parks, Recreation and Sports and Cultural Resources, and ascertaining whether the Town of Brookhaven owns, maintains, controls or exercises any jurisdiction over incident locations.

3. My office has made a diligent search of the records maintained and kept in the regular course of its business by this Department regarding the sidewalk and sidewalk area in front of Mary Bayles, south of Danfords, 25 East Broadway, Port Jefferson, New York identified as Suffolk County Tax Map #0206-008.00-01.00-015.000.

4. The aforementioned diligent search of records, maintained and kept by the Town of Brookhaven Department of Parks, Recreation and Sports and Cultural Resources, revealed the Town of Brookhaven does not own, maintain, manage, control, or design the aforementioned sidewalk and sidewalk area, in front of Mary Bayles Park, south of Danfords, 25 East Broadway, Port Jefferson, County of Suffolk, State of New York, either presently or on March 19, 2016, the date the plaintiff alleges to have sustained an injury at the aforementioned location."

The affidavits of a municipal official charged with the responsibility of keeping indexed records and/or with knowledge are legally sufficient to establish the content of those records and/or control of property (see, Scafidi v. Town of Islip, 34 A.D.3d 669, 824 N.Y.S.2d 410). The sworn representations by the Town have not been disputed by the defendant Village of Port Jefferson nor has the Village opposed the Town's application. Neither has plaintiff submitted any evidence to contradict the findings of the Town's affiants. There has been no submission of an ordinance or statute to establish a duty for an adjacent landowner to maintain a public sidewalk adjoining a public roadway owned by another municipality.

Plaintiff's contention to the contrary, the Town's motion is not premature since it does not appear that the disclosure process will reveal or lead to relevant evidence to dispute the Town's representations, nor are there any "facts essential to opposing the motion that are exclusively within another party's knowledge or control." Espada v. City of New York, 74 A.D.3d 1276,

1277; see also, CPLR 3212(f). Here, the Town has demonstrated its entitlement to summary judgment and the plaintiff and co-defendants have failed to raise any issues of fact sufficient to deny such relief.

ORDERED, that the motion by defendant Incorporated Village of Port Jefferson (001), pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7), for an Order dismissing this action and deleting said moving defendant from the caption, is denied with leave to renew upon the completion of disclosure.

To be successful on a motion to dismiss pursuant to CPLR 3211, the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (see, Gould v. Decolator, 121 A.D.3d 845, 847, 994 N.Y.S.2d 368).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading must be afforded a liberal construction, the facts as alleged in the complaint are accepted as true and the plaintiff is afforded the benefit of every favorable inference (see, Leon v. Martinez, 84 N.Y.2d 83, 87-88). The standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (see, Thaw v. North Shore Univ. Hosp., 129 A.D.3d 937, 938). The party bringing the action is not required to prove the allegations in the complaint to survive dismissal (see, Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275), rather, it is enough that the complaint sets forth sufficient facts that fit within any cognizable theory of law (see, East Hampton Union Free School Dist. v. Sandpebble Builders, Inc., 66 A.D.3d 122, 884 N.Y.S.2d 94).

Here, a plain reading of the Complaint demonstrates a sufficiently stated cause of action for negligence against the Village of Port Jefferson ("Village"). The Village contends that the alleged defect on which plaintiff alleges to have tripped and fell is a non-actionable trivial defect. Photographs of the accident site have been submitted in support of the Village's motion to dismiss. However, it is noted that no disclosure has taken place to date and the exact location and condition of the sidewalk where plaintiff fell remains unclear. The photographic evidence is insufficient to refute the plaintiff's factual allegations or resolve the issues surrounding the accident location and condition of the sidewalk. Accordingly, it is necessary to proceed with the disclosure process before a motion by the Village for dismissal or summary judgment is ripe for consideration.

ORDERED, that the motion by defendant Westport Capital Partners LLC (003), pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of moving defendant and dismissing the Complaint and all cross-claims as asserted against movant, is denied with leave to renew upon the completion of depositions.

As noted above, questions of fact remain regarding location, ownership and condition of the subject sidewalk area where the plaintiff fell. Although movant denies ownership, management or control of the accident site, there is insufficient disclosure at present to confirm same and grant the requested relief to movant.

The foregoing constitutes the Order of this Court.

Dated: September 11, 2019


HON. DENISE F. MOLIA, A.J.S.C.