Nunez v Kazes
2020 NY Slip Op 32495(U)
June 16, 2020
Supreme Court, Queens County
Docket Number: 714847/2019
Judge: Ulysses B. Leverett

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------X

KAREN NUNEZ,

Plaintiff,

-against-

ACHILLES KAZES AND HELEN KAZES,

Defendants.

----------X

Index No.714847/2019
Motion Seq. No. 001

Decision and Order

Present: **HONORABLE ULYSSES B. LEVERETT:**

	Papers Numbered
Notice of Motion-Affirmation – Affidavit to Dismiss Complaint	---------(1)----------
Affirmation in Opposition to Motion.....	---------(2)----------
Reply Affirmation in Support of Dismissal.....	---------(3)----------

Upon the foregoing papers, the decision and order on this motion is as follows:

Defendants Achilles Kazes, by Helen Kazes as his alleged sole heir, and Helen Kazes (hereinafter "defendants Kazes") bring this pre-answer motion to dismiss the complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action; pursuant to CPLR §3211(a)(1) founded on documentary evidence that resolves all factual issues; and pursuant to CPLR §3211(a)(10) for proceeding in the absence of a person who shall be a party.

Plaintiff commenced this action for personal injuries sustained on April 9, 2019 as a result of a fall allegedly caused by a sidewalk abutting defendant Kazes' residence located at 41-29 42nd Street, Sunnyside, NY (subject premises).

Defendants' claim that the subject premises were purchased by defendant Achilles Kazes and his wife Sophia Kazes on or about March 2, 1978. Defendant Achilles Kazes and his wife Sophia are deceased as of April 25, 2006, and October 16, 2009 respectively. Defendant Helen Kazes states she is the daughter and sole heir of Achilles and Sophia Kazes, that she resides on the first floor of the subject three family residential property and that the premises have been owner occupied and exclusively used for residential purposes since 1978. Defendant Helen Kazes states that the interest in the subject premises vested in her pursuant to the Surrogate Court Procedures Act Article 19, as heirs of the decedent.

Defendants' claim as an abutting property owner that they are not liable for personal injury under New York City Administrative Code §7-210. The New York City Administrative Code §7-210 provides in pertinent part: Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition.

> "a. It shall be the duty of the owner of real property abutting any sidewalk, ..., to maintain such sidewalk in a reasonably safe condition.
> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, ..., shall be liable for any injury to property or personal injury, ..., proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. This subdivision shall not apply to one-two-or three family residential real property that (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes."

Defendant seeks to dismiss plaintiff's complaint because it fails to state a cause of action in that defendants fall within the exception of the NYC Administrative Code §7-210 as an owner occupant of a three-family residential real property.

However, plaintiff has asserted in its complaint or affidavit in opposition to defendant's motion that plaintiff fell on the portion of the sidewalk that is used as a driveway; and that defendants use of the driveway constituted a "special use" which caused the defect in the sidewalk for which defendants would remain liable despite the exceptions under NYC Administrative Code §7-210 for abutting owner/occupant of three-family dwellings. *See Katz v. City of New York*, 18 A.D.3d 818 (2005), *Zektser v. City of New York*, 18 A.D.3d 869 (2005), and *Munnich v. Bellmore Dog Grooming*, 201 A.D.2d 631 (1994).

Generally, on a motion to dismiss the complaint brought pursuant to CPLR §3211 the Court must accept the facts alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts alleged fit into a cognizable legal theory, unless the factual assertions are plainly contradicted by documentary evidence. *See Bishop v. Maurer*, 33 A.D.3d 497 (2006).

On a CPLR §3211(a)(7) motion to dismiss for failure to state a cause of action, the plaintiff's affidavits may be used freely to preserve the inartfully pleaded, but potentially meritorious claim. *See Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633 (1976). The focus of modern pleading is whether the pleader has a cause of action and not whether the pleader has properly stated a cause of action. *See Meyer v. Guinta*, 262 A.D.2d 463 (1999) and *Gawrych v. Astoria Federal Savings and Loan*, 148 A.D.3d 681 (2017).

The Court finds that plaintiffs complaint states a cause of action for personal injury arising from her fall on sidewalk driveway of defendants' premises on April 9, 2019, based upon defendant's alleged special use of its driveway as an exception to defendant's claim of non-liability under NYC Administrative Code §7-210.

Defendants seek to dismiss the complaint in its entirety because there exists documentary evidence that refutes plaintiff's allegation and conclusively establishes a defense as a matter of law pursuant to CPLR §3211(a)(1). To dismiss a complaint based upon documentary evidence pursuant to CPLR §3211(a)(1), the documentary evidence must utterly refute plaintiff's factual

allegations, conclusively establishing a defense as a matter of law. The documentary evidence must be unambiguous, authentic and undeniable. Plaintiff also argues that defendant's documentary evidence of owner occupancy, three-family residential property was not admissible form or was insufficiently conclusive.

The Court notes that defendants did not present her birth certificate, her mother's death certificate, or affidavit of heirship. However, plaintiff's complaint alleges upon information and belief that the defendant Helen Kazes owned, operated, maintained, managed and controlled the subject premises. Plaintiff does however dispute defendants exclusive residential/non-commercial use of the premises by building occupants. The defendants offered documents from the Department of Building and the NYC Department of Finance, which were not certified or authenticated. Nor has defendant's documents conclusively prove actual use of the premises at the time of the accident on April 9, 2019.

Accordingly, the Court finds defendant's documents are insufficient to utterly refute plaintiff's factual allegations, and establish a complete defense as a matter of law.

Defendants move to dismiss plaintiffs complaint because it failed to join a necessary party to the proceeding pursuant to CPLR §3211(a)(10). Defendant Kazes argues that as an owner/occupant of the three-family residential subject premises she is not liable as per the exception of NYC Administrative Code §7-210 and therefore the City remains the liable and necessary party.

The CPLR §3211(a)(10) provides in pertinent part as follows:

> "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that ..... the Court should not proceed in the absence of a person who should be a party."

"The Court should grant a CPLR §3211(a)(10) motion to dismiss only when the unnamed party is not subject to the jurisdiction of the Court and will not appear voluntarily, no remedy is available under CPLR §1001(b) and the party which is not named is so essential to the litigation that the action cannot proceed in the absence of the party." *See Lewis v. Proctor & Gamble, Inc.*, 18 Misc. 3d 1110(A), 2007 N.Y. Slip Op. 52488(U) and Siegel Practice Commentaries C3211:34 (McKinney's 2005).

Here, the City of New York is within the jurisdiction of the Court, joinder is available and defendants have not shown that the plaintiff's cause of action may show the owner created defect or the owners special use.

Accordingly, defendant's motion to dismiss the complaint for failure to add the City of New York as a party is denied. The defendant's motion to dismiss the complaint is denied in its entirety.

The defendants time to serve responsive pleadings to the cause of action is extended ten days after the service of the notice of entry of this decision and order.

This is the decision and order of this Court.

Dated: June 16, 2020

Ulysses B. Leverett, JSC

FILED
JUL 10 2020
COUNTY CLERK
QUEENS COUNTY