

Velasco v New York Paving Inc.

2020 NY Slip Op 34551(U)

May 12, 2020

Supreme Court, Nassau County

Docket Number: 617008/2019

Judge: Sharon M.J. Gianelli

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 17
Present: Hon. Sharon M.J. Gianelli

ALIXDIANA VELASCO, X

Plaintiff,

Index No: 617008/2019

-against -

Motion Seq. No: 001

NEW YORK PAVING INC.,
INCORPORATED VILLAGE OF HEMPSTEAD
and COUNTY OF NASSAU,

Decision and Order

Defendants.

Papers submitted on this motion: X

Defendant County of Nassau Notice of Motion
and Affirmation in Support _____ X
Plaintiff Affirmation in Opposition _____ X
Defendant County of Nassau Reply _____ X

This action was commenced by the filing of a Summons and Complaint on December 6, 2019, which alleged personal injuries sustained on September 17, 2018, as a result of Defendants' negligence.

Defendant County of Nassau now moves, pre-answer, for an Order dismissing Plaintiff's Summons and Verified Complaint, as well as any cross-claims, seeking relief against Defendant, County of Nassau.

Factual History

Plaintiff alleges that she sustained certain burns to her person and/or other injuries resulting from a hot and/or other hot sticky substance, which adhered

to Plaintiff's skin while crossing W. Columbia Street in front of 150 W. Columbia Street, Hempstead, New York, 11550.

On November 15, 2018, the Office of the Nassau County Attorney was served with a Notice of Claim by Plaintiff. On December 6, 2019, Plaintiff filed a Summons and verified Complaint. On December 18, 2019, the Office of the Nassau County Attorney was served with Plaintiff's Summons and Verified Complaint.

Defendant County of Nassau argues that the matter should be dismissed as Defendant County of Nassau did not owe Plaintiff a duty of care. Specifically, Defendant County of Nassau states that it did not own the subject premises and proffers a Deed demonstrating that on or about April 18, 2013, the premises was conveyed from the entity "Hempstead Stellar Plaza LLC c/o Stellar Management" to the entity "Manchester I, LLC." Accordingly, Defendant County of Nassau argues that it has proffered documentary evidence demonstrating that it does not own, operate, manage, maintain and/or control the premises at issue.

Plaintiff submits Opposition arguing that the accident occurred in the street, which is a public thoroughfare, not privately owned property. At the time of the occurrence, the public street was being re-paved. Plaintiff further argues that there exist viable questions as to what entities contracted to perform such work. Plaintiff maintains that as the accident location is a public thoroughfare within the County of Nassau, until discovery and deposition testimony occur to answer such questions, the County of Nassau is a necessary and rightful party to the lawsuit.

Plaintiff states that it should have an opportunity to conduct discovery, including depositions, to explore the issues of ownership, maintenance and control of the subject area, as well the re-paving work at issue.

Further, Plaintiff argues that dismissal of a Complaint pursuant to *CPLR § 3211(a)(1)* is only warranted where the documentary evidence submitted utterly refutes and resolves Plaintiff's factual allegations and conclusively establishes a defense to the asserted claims as a matter of law. Plaintiff states that in the present matter, Defendant has failed to meet its burden. The offered Deed on its face, fails to address key questions, which may only be answered through discovery. The deed does not "utterly refute" the allegations contained in the Complaint.

Defendant County of Nassau submits a Reply arguing that the Deed submitted should result in the dismissal of the instant action. Further that Plaintiff fails to meet its evidentiary burden necessary to defeat the Defendant County of Nassau's pre-answer motion to dismiss.

Analysis

In a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact. *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2D 395 (1957); *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 (1979); *Zuckerman v. City of New York*, 49 NY2d 5557 (1980); *Alvarez v. Prospect Hospital*, 68 NY2d 320 (1986).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v. New York University Medical Center*, 64 NY2d 851 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, *supra*. The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact. *Andre v. Pomeroy*, 35 NY2d 361 (1974).

In this matter, Defendant County of Nassau has failed to meet its burden of establishing a *prima facie* case of entitlement to summary judgment. Further, Defendant has failed to submit any evidence whatsoever regarding the paving work being performed at the subject area in question. Accordingly, Defendant County of Nassau has failed to prove that it does not own, operate, manage, control, maintain, repair, or inspect the subject premises.

Furthermore, Defendant County of Nassau has not submitted a single affidavit of any individual with personal knowledge in support of its motion for an Order dismissing Plaintiff's Summons and Verified Complaint, as well as any cross-claims, seeking relief against Defendant, County of Nassau.

Accordingly,

It is

ORDERED, that Defendant County of Nassau's motion for an Order dismissing Plaintiff's Summons and Verified Complaint, as well as any cross-claims as against Defendant County of Nassau, is Denied; and

It is

ORDERED, Defendant County of Nassau is hereby directed to file an Answer within sixty (60) days of the date of this Order; and

It is

ORDERED, that the parties are directed to appear for a Preliminary Conference on June 2, 2020, at the Preliminary Conference Part, Lower Level, 100 Supreme Court Drive, Mineola, New York 11501. This date is subject to the right of the Preliminary Conference Clerk to set an alternate date should scheduling so require.

All applications not specifically addressed herein are Denied.

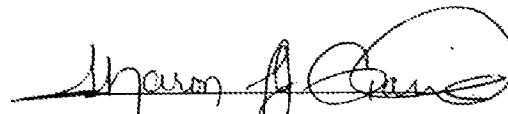
This constitutes the Decision and Order of the Court.

DATED: Mineola, New York
May 12, 2020

ENTERED

May 18 2020

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**


HON. SHARON M.J. GIANELLI,
Justice of the Supreme Court

The conformed signature on this Order and copies thereof shall be deemed original.