

Junger v County of Nassau

2020 NY Slip Op 35108(U)

April 17, 2020

Supreme Court, Nassau County

Docket Number: Index No. 610642/19

Judge: Denise L. Sher

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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

.....
JANICE JUNGER and OSWALD JUNGER,

Plaintiffs,

-against-

COUNTY OF NASSAU, TOWN OF HEMPSTEAD,
PANRAD AUTOMOTIVE INDUSTRIES INC.,
GARDINERS PROPERTY HOLDINGS LLC and
H & A LANDSCAPE OF LONG ISLAND INC.,

Defendants.
.....

TRIAL/IAS PART 33
NASSAU COUNTY

Index No.: 610642/19
Motion Seq. No.: 02
Motion Date: 02/27/2020

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmations and Exhibits, Affidavit and	
Memorandum of Law	1

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

Defendant Gardiners Property Holdings LLC (“GPH”) moves, pursuant to CPLR § 3211(a)(7), for an order dismissing plaintiffs’ Verified Complaint and Amended Verified Complaint as against it, as well as any and all cross-claims against it. No opposition was submitted to the motion.

In support of the motion, counsel for defendant GPH submits, in pertinent part, that, “plaintiff, Janice Junger, is seeking damages for personal injuries arising out of a trip and fall accident on April 1, 2019 that occurred in front of the property located at 180 Gardiner (*sic*) Avenue, Levittown, New York. Immediately adjacent to 180 Gardiners Avenue is Gardiner Plaza with the designated street address of 128-176 Gardiners Avenue, Levittown, New York.

The evidence and the pleadings served to date unequivocally establish that GPH does not and has never owned, operated, maintained or controlled the properties situated at 180 Gardiners Avenue and 128-176 Gardiners Avenue, Levittown, New York. As such, GPH did not owe a duty to plaintiff and the Complaint must be dismissed as against GPH in its entirety.” *See* Defendant GPH’s Affirmation in Support Exhibits A and F.

In support of the motion, defendant GPH submits the Affidavit of Andrew Kaplan (“Kaplan”), Managing Member of defendant GPH. *See* Defendant GPH’s Affidavit in Support. Kaplan asserts, in pertinent part, that, “I have reviewed the Complaint which was filed in connection with the above captioned litigation. Based upon my review of the Complaint, it is alleged that on April 1, 2019 plaintiff Janice Junger, tripped on a sidewalk in front of and/or abutting the property located at 180 Gardiner (*sic*) Avenue, Levittown, New York. The property immediately adjacent to 180 Gardiner (*sic*) Avenue, Levittown, New York is a shopping center, known as Gardiner Plaza, located at 128-176 Gardiner (*sic*) Avenue, Levittown, New York. GPH does not own and has never owned or maintained an ownership interest in the properties located at 180 Gardiner (*sic*) Avenue and 128-176 Gardiner (*sic*) Avenue, Levittown, New York. GPH does not own and has never owned, maintained, controlled or managed the properties located at 180 Gardiner (*sic*) Avenue and 128-176 Gardiner (*sic*) Avenue, Levittown, New York.” *See id.*

Counsel for defendant GPH contends, in pertinent part, that, “it is clear by the documentary evidence that plaintiff cannot maintain a viable cause of action for negligence against GPH since GPH does not and never did own the properties located at 180 Gardiners Avenue and 128-176 Gardiners Avenue.... For a defendant to be liable in tort, it must have owed the injured party a duty of care. [citations omitted]. As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or

special use of that property. [citations omitted]. Where none of these factors is (*sic*) present, a party cannot be held liable for injuries caused by a dangerous or defective condition. [citations omitted]. Applying the above cited case law to the present case, it is clear that GPH did not own, occupy, control or make special use of the subject property(ies) and, as such, the Complaint must be dismissed against GPH. As set forth in the (*sic*) Andrew Kaplan's affidavit, GPH does not and did not own, maintain, manage or control the subject properties. Moreover, Panrad in its Answer to the Complaint admits that it owns the building(s) situated at and abutting the sidewalk in front of the properties. As such, it is clear that all of the documentary evidence clearly establishes that GPH does not own the property(ies) and, as a result, does owe the plaintiff a duty, warranting dismissal of the Complaint as against GPH."

As previously indicated, no opposition was submitted to the motion.

"In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), 'the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) quoting *Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) quoting *Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiffs can succeed on any reasonable view of facts stated. See *Campaign for Fiscal Equity v.*

State of New York, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiffs can ultimately establish the truth of their allegations. *See 219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the Verified Complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). “In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint.” *Leon v. Martinez, supra* at 88.

When viewing plaintiffs’ Verified Complaint and Amended Verified Complaint in light of the criteria set forth above, the Court finds that plaintiffs have failed to state a cause of action against defendant GPH that falls within a cognizable legal theory.

Therefore, based upon the above, defendant GPH’s motion, pursuant to § CPLR 3211(a)(7), for an order dismissing plaintiffs’ Verified Complaint and Amended Verified Complaint as against it, as well as any and all cross-claims against it, is hereby **GRANTED**.

The remaining parties shall appear for a Compliance Conference in IAS Part 33, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on June 9, 2020, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

_____/S/_____
DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
April 17, 2020

ENTERED

Apr 21 2020

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**