

**Bader v Breslin Realty Dev. Corp.**

2020 NY Slip Op 35185(U)

August 10, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 620151/2018

Judge: John H. Rouse

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This opinion is uncorrected and not selected for official publication.

Index Number 620151/2018

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 12 - SUFFOLK COUNTY

**PRESENT:**

Hon. John H. Rouse  
Acting Supreme Court Justice

MOTION DATE: 05/22/2019  
ADJ. DATE: 07/29/2020  
Mot. Seq. 001-MG

MOTION DATE: 05/22/2019  
ADJ. DATE: 07/29/2020  
Mot. Seq. 002-MG

MOTION DATE: 07/15/2019  
ADJ. DATE: 07/29/2020  
Mot. Seq. 003-MG

MOTION DATE: 11/20/2020  
ADJ. DATE: 07/29/2020  
Mot. Seq. 004-MG

MOTION DATE: 07/29/2020  
ADJ. DATE:  
Mot. Seq. 006-MD  
*e-filed full participation*

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Diane Bader,

Plaintiff

-against-

Breslin Realty Development Corp., Incorporated Village of  
Lake Grove, Town of Brookhaven, County Of Suffolk,  
C&B Realty #2 LLC, and Colin Development LLC,

Defendant

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**COUNTY CLERK  
DIRECTIVE**

with

**DECISION & ORDER**

**TO:**

THE BONGIORNO LAW FIRM, PLLC  
ATTORNEYS FOR PLAINTIFF  
1415 KELLUM PLACE, STE. 205  
GARDEN CITY, NY 11530  
516-741-4170

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631-300-4964

BARTLETT LLP  
ATTORNEYS FOR DEFENDANT  
INCORPORATED VILLAGE  
OF LAKE GROVE  
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GARDEN CITY, NY 11530  
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HON. ANNETTE EADERESTO  
BROOKHAVEN TOWN ATTORNEY  
1 INDEPENDENCE HL FL 3,  
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HON. DENNIS BROWN  
SUFFOLK COUNTY ATTORNEY  
PO BOX 6100  
H LEE DENNISON BLDG  
HAUPPAUGE, NY 11788  
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WILSON ELSER MOSKOWITZ,  
EDELMAN & DICKER, LLP  
ATTORNEYS FOR DEFENDANTS  
C&B REALTY #2, LLC AND COLIN  
DEVELOPMENT, LLC  
150 EAST 42ND STREET  
NEW YORK, NY 10017  
212-915-5788

**U**pon the filing and reading of: (1) Notice of Motion (Sequence 001) by Defendant Town of Brookhaven for an Order, pursuant to CPLR §3211(a), dismissing plaintiff's Complaint against the defendant, Town Of Brookhaven, based upon the Town of Brookhaven's lack of involvement with the accident situs, and for such other or further relief as this Honorable Court deems just, proper and/or equitable;

(2) Notice of Cross Motion (Sequence 002) by Defendant Breslin Realty Development Corp. An Order pursuant to CPLR §3211(a), dismissing Plaintiff's Complaint, and any and all cross claims, as against Defendant, Breslin Realty Development Corp., based upon the Defendant's lack of involvement with the accident location, together with b) Such other and further relief as to the Court may seem just and proper;

(3) Notice of Motion (Sequence 003) by Defendant Suffolk County for an Order pursuant to CPLR §3212 granting summary judgment dismissing the plaintiff's complaint and all crossclaims against Defendant County of Suffolk; and for such other further relief as this Court deems just and equitable;

(4) Notice of Motion (Sequence 004) by Defendant Incorporated Village of Lake Grove for an Order pursuant to CPLR § 3211(a) for dismissal, and pursuant to CPLR § 3212 for summary judgment, dismissing plaintiff's complaint in its entirety with prejudice as against defendant the Incorporated Village Of Lake Grove as well as any and all cross claims which have been or could have been filed on behalf of the codefendants, due to this moving defendant's lack of involvement with the alleged accident site; and due to the lack of prior written notice pursuant to

New York State Village Law § 6-628, the Village written notice statute; and such other, further and different relief as this Court deems just, equitable and proper;

(5) Notice of Motion (Sequence 006) by Defendants C&B Realty #2, LLC and Colin Development, LLC for an Order: Pursuant to CPLR § 3212 granting summary judgment in favor of the Moving Defendants thereby dismissing each and every one of the plaintiff's claims in their entirety and dismissing any and all crossclaims asserted as against these Moving Defendants; b) Pursuant to 22 NYCRR 130-1.1 awarding costs and reasonable attorneys' fees to the Moving Defendants in light of the frivolous nature of the claims asserted against them; For such other and further relief as this Court deems just and proper; and

(6) E-filed documents 1-164; it is:

**ORDERED** that the Motion (Sequence 001) by Defendant Town of Brookhaven for an Order, pursuant to CPLR §3211(a), dismissing plaintiff's Complaint against the defendant, Town Of Brookhaven, as recast as a motion for summary judgment pursuant to CPLR § 3212 is granted and the case is dismissed; and it is further

**ORDERED** that the Cross Motion (Sequence 002) by Defendant Breslin Realty Development Corp. for an Order pursuant to CPLR§3211(a), dismissing Plaintiff's Complaint, and any and all cross claims, as against Defendant, Breslin Realty Development Corp., as recast as a motion for summary judgment pursuant to CPLR § 3212 is granted and the case is dismissed; and it is further

**ORDERED** that Motion (Sequence 003) by Defendant Suffolk County for an Order pursuant to CPLR §3212 granting summary judgment dismissing the plaintiff's complaint and all crossclaims against Defendant County of Suffolk is granted; and it is further

**ORDERED** that Motion (Sequence 004) by Defendant Incorporated Village of Lake Grove for an Order pursuant to CPLR § 3211(a) for dismissal, and pursuant to CPLR § 3212 for summary judgment, dismissing plaintiff's complaint in its entirety with prejudice as against defendant the Incorporated Village Of Lake Grove as well as any and all cross claims which have been filed is granted; and it is further

**ORDERED** that the Motion (Sequence 006) by Defendants C&B Realty #2, LLC and Colin Development, LLC for an Order: Pursuant to CPLR § 3212 granting summary judgment in favor of the Moving Defendants thereby dismissing each and every one of the plaintiff's claims in their entirety is denied; and it is further

**ORDERED** that the Suffolk County Clerk is directed to amend the caption of this action to be as follows:

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Diane Bader,

Plaintiff

-against-

C&B Realty #2 LLC, and Colin Development LLC,

Defendant

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And it is further

**ORDERED** that the movants: Defendant Town of Brookhaven; Defendant Breslin Realty Development Corp.; Defendant Suffolk County; and Defendant Incorporated Village of Lake Grove; are directed to serve notice of this decision upon the Suffolk County Clerk in accordance with CPLR § 8019(c)

See: <https://iappscontent.courts.state.ny.us/NYSCEF/live/forms/notice.to.county.clerk.pdf>

And it is further

**ORDERED** that the movants: Defendant Town of Brookhaven; Defendant Breslin Realty Development Corp.; Defendant Suffolk County; and Defendant Incorporated Village of Lake Grove; are directed to serve a copy of this decision and order with notice of entry upon all other parties to this action.

**ENTER**

#### **DECISION**

Plaintiff commenced this action on October 16, 2018 to recovery for injuries she alleges she sustained in a trip and fall on a sidewalk located adjacent to premises known as "Smith Haven Plaza" this sidewalk being on the eastern side of Moriches Road between Route 347 and Burr Lane. A separate action was brought under Suffolk County Index 620687/2019 against Defendants C&B Realty #2, LLC and Colin Development, LLC. These actions were consolidated by order of the court dated May 8, 2020. Issue was joined by Defendant: Suffolk County on October 31, 2018; Incorporated Village of Lake Grove on November 15, 2018; Breslin Realty Development Corp. on November 16, 2018; and both C&B Realty #2, LLC and Colin Development, LLC on January 23, 2020. No note of issue has been filed. The parties have successively adjourned these motions (Sequence 001, 002, 003, 004 and 006) that are now submitted before this court for determination.

MOTION SEQUENCE 001

Defendant Town of Brookhaven's motion for an Order, pursuant to CPLR §3211(a), dismissing plaintiff's Complaint against the defendant, Town of Brookhaven, based upon the Town of Brookhaven's lack of involvement with the accident situs is, in truth a motion for summary judgment pursuant to CPLR § 3212 and it is granted. Issue has been joined and the moving Defendant has submitted the affidavit of Marie Angelone, e-filed document 22, who is employed in the Town Highway Department and she has searched the records which reflect the Town has no ownership interest in the sidewalk where the Plaintiff fell. Defendant Town of Brookhaven has also submitted the affidavit of Michelle Albanese who is employed in the office of the Town Clerk, e-filed document 23, and she alleges that Defendant Town of Brookhaven has not undertaken any contractual obligation to maintain the sidewalk where Plaintiff fell.

Defendant has plainly charted a course that is, in fact, a motion for summary judgment CPLR § 3212. The Hon. Jerry Gargiulo, in a comprehensive decision, addressed a motion identified as a motion made pursuant to CPLR § 3211 when it was plainly a motion made pursuant to CPLR § 3212 and determined it was proper for the court to proceed upon it as a motion for summary judgment. *See Passanante v Town of Brookhaven, 2013 NY Slip Op 31198[U] (Sup Ct, Suffolk County 2013)*.

This motion was returnable on May 22, 2019 and was adjourned until now and Plaintiff has had every opportunity examine the public records of land ownership and raise a question of fact with respect to whether Defendant Town of Brookhaven had any legal duty with respect to the sidewalk. Plaintiff has not raised a material issue of fact. Accordingly, motion by Defendant Town of Brookhaven to dismiss is granted.

MOTION SEQUENCE 002

The Cross Motion (Sequence 002) by Defendant Breslin Realty Development Corp. an Order pursuant to CPLR§3211(a), dismissing Plaintiff's Complaint, and any and all cross claims, as against Defendant, Breslin Realty Development Corp., based upon the Defendant's lack of involvement with the accident location is granted. Issue has been joined and the moving Defendant has submitted the affidavit of Betha Alderman, e-filed document 33, an Executive Vice President of Defendant Breslin Realty Development Corp. Ms. Alderman alleges that this defendant is only a management company and has no ownership interest in any real property. Alderman further alleges that Defendant Breslin Realty Development Corp. does not manage any property in Lake Grove and did not on the date of Plaintiff's fall.

Defendant Breslin Realty Development Corp., as did Defendant Town of Brookhaven, has plainly charted a course that is, in fact, a motion for summary judgment CPLR § 3212. It is proper for this court to proceed upon this cross motion as a cross motion for summary judgment. *See Passanante v Town of Brookhaven, 2013 NY Slip Op 31198[U] (Sup Ct, Suffolk County 2013)*.

This cross motion was returnable on May 22, 2019 and was adjourned until now and Plaintiff has had every opportunity examine the public records of land ownership and raise a question of fact

with respect to whether Defendant Breslin Realty Development Corp. had legal duty with respect to the sidewalk. Plaintiff has not raised a material issue of fact. Accordingly, motion by Defendant Breslin Realty Development Corporation's motion to dismiss is granted.

#### MOTION SEQUENCE 003

The motion (Sequence 003) by Defendant Suffolk County for an Order pursuant to CPLR §3212 granting summary judgment dismissing the plaintiff's complaint and all crossclaims against Defendant County of Suffolk is granted. Defendant Suffolk County has moved for summary judgment upon the ground that it neither owned nor controlled the sidewalk where Plaintiff fell. In support of its motion Defendant Suffolk County has submitted the affidavit of Paul Morano, e-filed document 44, in which Mr. Morano alleges that Defendant Suffolk County has no ownership interest and no legal obligation to repair or maintain the sidewalk. Defendant Suffolk County further alleges, in an affidavit by John Donovan, e-filed document 45, wherein he alleges he has searched the records of the County Clerk for notices of defect and has found there was no notice of defect filed with the County of Suffolk. Suffolk County has adopted a prior written notice local law. *Suffolk County Charter § C8-2A(2)* Defendant Suffolk County has made a *prima facie* case that it was not the owner of the sidewalk where Plaintiff fell and further that it had not received prior written notice of the alleged defect. *Gori v City of NY, 171 AD3d 1025 (2d Dept 2019)*. In opposition Plaintiff has failed to raise a material issue of fact. Accordingly, the motion by Defendant Suffolk County for summary judgment is granted.

#### MOTION SEQUENCE 004

Motion (Sequence 004) by Defendant Incorporated Village of Lake Grove for an Order pursuant to CPLR § 3211(a) for dismissal, and pursuant to CPLR § 3212 for summary judgment, dismissing plaintiff's complaint in its entirety with prejudice against defendant the Incorporated Village of Lake Grove is granted. Defendant alleges that it is not the owner of the sidewalk where Plaintiff fell, but that the property is privately owned. Plaintiff has raised a material issue of fact with respect to whether the property was, in fact, owned by Defendant Incorporated Village of Lake Grove. However, Defendant Incorporated Village of Lake Grove, has made a *prima facie* case that it did not have prior written notice of the defect and Plaintiff has failed to raise a material issue of fact that such a notice had been filed. *Village Law § 6-628 and CPLR § 9804*. Accordingly, the motion by Defendant Incorporated Village of Lake Grove for an Order pursuant to CPLR § 3211(a) for dismissal, and pursuant to CPLR § 3212 for summary judgment, dismissing plaintiff's complaint in its entirety with prejudice as against defendant the Incorporated Village of Lake Grove is granted.

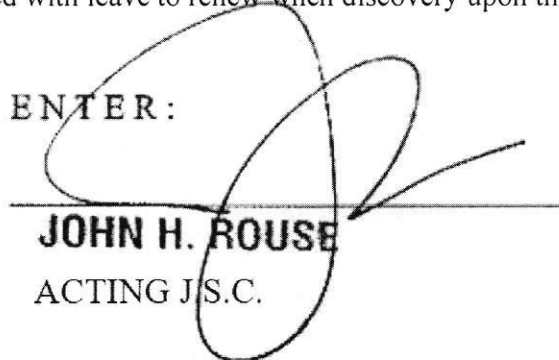
#### MOTION SEQUENCE 006

Defendants C&B Realty #2 LLC, and Colin Development LLC move for summary judgment upon their contention that they did not own, occupy or control the sidewalk where the Plaintiff fell. The Plaintiff in opposition has raised a material issue of fact insofar as whether the movants exercised dominion and control over the subject sidewalk as after the Plaintiff fell the sidewalk was repaired as well as a portion that was within the bounds of the Defendants property. At this

juncture, prior to the completion of discovery, the issue of whether these moving Defendants undertook responsibility for the portion of the sidewalk where Plaintiff fell remains an unresolved question. Accordingly, the motion by Defendants C&B Realty #2 LLC, and Colin Development LLC is denied with leave to renew when discovery upon this issue is completed.

Dated: August 10, 2020

ENTER:

A large, stylized handwritten signature in black ink, appearing to read 'John H. Rouse', is written over a horizontal line. The signature is somewhat circular and loops back to the right.

**JOHN H. ROUSE**

ACTING J.S.C.

NON-FINAL DISPOSITION