

Mazzei v County of Nassau

2020 NY Slip Op 35290(U)

August 18, 2020

Supreme Court, Nassau County

Docket Number: Index No. 616897/19

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

KATHLEEN MAZZEL,

TRIAL/IAS PART 33
NASSAU COUNTY

Plaintiff,

-against-

Index No.: 616897/19
Motion Seq. No.: 01
Motion Date: 07/15/2020

THE COUNTY OF NASSAU and LONG ISLAND
CHILDREN'S MUSEUM,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1

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

Defendant Long Island Children's Museum ("LICM") moves, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it, along with any and all cross-claims as against it. No opposition was submitted to the motion.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on October 16, 2018, at approximately 11:30 a.m., when she was caused to trip and fall due to a raised concrete condition on the sidewalk near the corner of Davis Avenue and Roosevelt Avenue, East Garden City, County of Nassau, State of New York. Said sidewalk is adjacent to defendant LICM. The action was commenced with the filing and service of a Summons and Verified Complaint on or about December 4, 2019. *See* Defendant LICM's Affirmation in Support Exhibit A. Issue was joined by defendant LICM on or about March 9, 2020. *See* Defendant LICM's Affirmation in Support Exhibit B.

In support of defendant LICM's motion, its counsel submits, in pertinent part, that, "[t]he LICM leases the building and the parking from Nassau County. There is a written lease for the building.... The lease states that Nassau County 'shall be responsible for all repairs outside the building, including without limitation, repairs to the parking fields, driveways, walkways, landscaping.'... Prior to the accident, Defendant LICM did not make any repairs to the subject sidewalk.... Defendant LICM did not make a special use of the public sidewalk.... The sidewalk in the case at bar is located in the hamlet of East Garden City, which is located in the Town of Hempstead and County of Nassau. Neither the Town of Hempstead Code nor the County of Nassau Code imposes tort liability on abutting property owners or lessees for failing to repair a sidewalk defect. [citations omitted]." See Defendant LICM's Affirmation in Support Exhibits C-E.

Also in support of the motion, counsel for defendant LICM submits the Affidavit of Audrey O'Malley, Associate Director of Visitor Experience at defendant LICM. See Defendant LICM's Affirmation in Support Exhibit E.

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

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. See *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering

sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See CPLR § 3212 (b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp., supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Summary judgment is a drastic remedy which should not be granted when there is any doubt about the existence of a triable issue of fact. *See Sillman v. Twentieth Century-Fox Film Corp., supra*. It is nevertheless an appropriate tool to weed out meritless claims. *See Lewis v. Desmond*, 187 A.D.2d 797, 589 N.Y.S.2d 678 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N.A.*, 82 A.D.2d 168, 442 N.Y.S.2d 610 (3d Dept. 1981).

Issue finding, rather than issue determination, is the key to summary judgment. *See In re Cuttitto Family Trust*, 10 A.D.3d 656, 781 N.Y.S.2d 696 (2d Dept. 2004); *Greco v. Posillico*, 290 A.D.2d 532, 736 N.Y.S.2d 418 (2d Dept. 2002); *Gniewek v. Consolidated Edison Co.*, 271 A.D.2d 643, 707 N.Y.S.2d 871 (2d Dept. 2000); *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 (2d Dept. 2000). The court should refrain from making credibility determinations (*see S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 357 N.Y.S.2d 478 (1974); *Surdo v. Albany Collision Supply, Inc.*, 8 A.D.3d 655, 779 N.Y.S.2d 544 (2d Dept. 2004); *Greco v. Posillico, supra*; *Petri v. Half Off Cards, Inc.*, 284 A.D.2d 444, 727 N.Y.S.2d 455 (2d Dept. 2001)), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion. *See Glover v. City of New York*, 298 A.D.2d 428, 748 N.Y.S.2d 393 (2d Dept. 2002); *Perez v. Exel Logistics, Inc.*, 278 A.D.2d 213, 717 N.Y.S.2d 278 (2d Dept. 2000).

Generally, liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks is placed on the municipality, and not the abutting landowner. *See Hauser v. Giunta*, 88 N.Y.2d 449, 646 N.Y.S.2d 490 (1996). Liability to abutting landowners for injuries sustained as a result of negligent maintenance of or existence of dangerous and defective conditions of public sidewalks will generally be imposed where the sidewalk was constructed in a special manner for benefit of the abutting landowner, the abutting owner affirmatively caused the defect, the abutting landowner negligently constructed or repaired the sidewalk or a local ordinance or statute specifically charges the abutting landowner with a duty to maintain and repair sidewalks and imposes liability for injuries resulting from a breach of that duty. *See id.*

The Court finds that, based upon the evidence before it, defendant LICM neither caused, nor contributed to, any alleged defect in the subject sidewalk. Additionally, defendant The

County of Nassau has no provision whereby liability shifts from the municipality to the abutting landowner for injuries to third parties on public sidewalks. *See Lagawo v. Myers*, 146 A.D.3d 1056, 52 N.Y.S.3d 487 (2d Dept. 2017). Furthermore, there is no evidence of special use by defendant LICM.

Therefore, based upon the above, defendant LICM's motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it, along with any and all cross-claims as against it, is hereby **GRANTED**.

It is further ordered that the remaining parties shall complete a Preliminary Conference on October 5, 2020, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. The parties are hereby directed to the court website (<http://ww2.nycourts.gov/COURTS/10JD/nassau/cicgeneralforms.shtml>) where they will find a fillable PC form with instructions on how to fill it out and when and how to return it. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:



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

Dated: Mineola, New York
August 18, 2020

ENTERED

Aug 20 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE