

DeMatteo v Celwyn Co., Inc.

2021 NY Slip Op 33803(U)

June 1, 2021

Supreme Court, Nassau County

Docket Number: Index No. 610704/2020

Judge: James P. McCormack

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

_____ X

**TRIAL/IAS, PART 12
NASSAU COUNTY**

VICTORIA DEMATTEO,

Plaintiff(s),

Index No.: 610704/2020

-against-

Motion Seq. No.: 003

Motion Submitted: 4/6/21

**CELWYN COMPANY, INC, TOWN OF
HEMPSTEAD, NASSAU INTER-COUNTY
EXPRESS and METROPOLITAN
TRANSPORTATION AUTHORITY,**

Defendant(s).

_____ X

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply AffirmationX

Defendants, Nassau Inter-County Express (NICE), moves this court for an order, pursuant to CPLR §3212, and CPLR §3211(a)(7), dismissing the complaint against it.

Plaintiff, Victoria DeMatteo (DeMatteo), opposes the motion.¹

The procedural and factual history of this matter were recounted in a prior order

¹The complaint was dismissed against the County of Nassau by short form order January 27, 2021. Co-Defendants Celwyn Company Inc. and the Metropolitan Transportation Agency have not appeared and were found in default by short form order dated March 22, 2021.

and need not be restated herein. For the purposes of this motion is it relevant to know that DeMatteo alleges she tripped and fell over a broken-off steel or metal sign post sticking out of the sidewalk in front of the Tri-County Flea Market in Levittown, County of Nassau. NICE moves to dismiss the complaint alleging both that it did not owe DeMatteo a duty, and that it is not a legal entity.

It is well settled that 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 (*see 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 (*see Winegard 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 (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980], *supra*).

One cannot be held liable for a dangerous or defective condition on property unless ownership, occupancy, control or special use of the property has been established.

(*Ruggiero v. City School District of New Rochelle*, 109 A.D.3d 894 [2nd Dept 2013]; *Soto v. City of New York*, 244 A.D.2d 544 [2nd Dept. 1997]; *James v. Stark*, 183 A.D.2d 873 [2nd Dept. 1982]).

In support of the motion, NICE submits the affidavit of Pedrito Morales, Service Quality Manager for Transdev Services, Inc. (Transdev). Mr. Morales states that Transdev is a corporation that operates buses for the County of Nassau. NICE is a brand name for the bus system and is not a legal entity. It is not a corporation or a subdivision of a municipality. He further states that Nice and/or Transdev do not “...own, occupy, control, possess, inspect, maintain, repair or perform any work on the public sidewalk...” in the location where DeMatteo claims she fell. NICE/Transdev have no connection to that location or sidewalk. While there is no bus stop at that location, even if there was, NICE/Transdev are not responsible for maintaining bus stops, bus sheds or the sidewalk around bus stops. Finally, NICE/Transdev received no notice of any alleged defect at the location where DeMatteo claims she fell.

Based upon Mr. Morales’ affidavit, the court finds that NICE has established entitlement to summary judgment as a matter of law. NICE had no connection to the sidewalk where DeMatteo fell, and NICE is not a legal entity. The burden shifts to DeMatteo to raise a material issue of fact requiring a trial of the action.

In opposition, DeMatteo only offers the affirmation of counsel. Counsel refers to the affidavit of Mr. Morales as “self serving”, but the court finds it contained the relevant information, which was stated by a person with firsthand knowledge. Counsel also

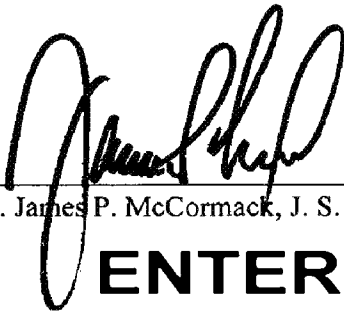
claims the motion should be denied because DeMatteo has not yet had the opportunity to complete discovery. Said discovery “may reveal evidence to support a claim...” against NICE. However, DeMatteo has neglected to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. “The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion” (*Hanover Ins. Co. v. Prakin*, 81 AD3d 778 [2d Dept. 2011]; *see also Essex Ins. Co. v. Michael Cunningham Carpentry*, 74 AD3d 733 [2d Dept. 2010]; *Peerless Ins. Co. v. Micro Fibertek, Inc.*, 67 AD3d 978 [2d Dept. 2009]; *Gross v. Marc*, 2 AD3d 681 [2d Dept. 2003]). Finally, DeMatteo makes no argument to refute NICE’s claim it is not a legal entity. As a result the court finds DeMatteo is unable to raise an issue of fact.

Accordingly, it is hereby

ORDERED, that the moving Defendants’ motion for summary judgment is **GRANTED**. The complaint and all cross claims are dismissed against NICE. As the court finds NICE cannot be found liable, its cross claims are dismissed as moot.

This foregoing constitutes the Decision and Order of the Court.

Dated: June 1, 2021
Mineola, N.Y.


Hon. James P. McCormack, J. S. C.

ENTERED

Jun 03 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE