

Echegaray v City of New York

2021 NY Slip Op 34161(U)

February 26, 2021

Supreme Court, Queens County

Docket Number: Index No. 702296/2018

Judge: Tracy Catapano-Fox

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
ROBERTO ECHEGARAY,

Plaintiff,

-against-

THE CITY OF NEW YORK, HUNG THAI PHAN,
NHUNG THI TRAN, ANTONIO BRUCCULERI and
ANNEMARIE BRUCCULERI,

Defendants.
-----X

HUNG THAI PHAN and NHUNG THI TRAN,

Third-Party Plaintiffs,

-against-

HELENE WOJCICKI, MIRSAJ JAKUPOVIC,
FIKRE A. JAKUPOVIC, NICK KALAVANOS, PAT
KALAVANOS, ANTHONY MASSALIN,
MARCELLINA MASSALIN, CARLOS GAMA,
MARIA GAMA, ARASH VAKIL, AS TRUSTEE OF
THE VAKIL AND SAIRI TRUST, ERICA ROSEANN
MILLER, MICHAEL ANGELO DIANGELO, VITO
DONATO ALVAREZ, ARISTEA KRIBAS TRUST
AND ARISTEA KRIBAS TRUSTEE C/O GEORGE
VLACHOS, TENZING LEGDHEN, TENZIN
LHAMO, SONAM WANGCHUK, FLIPPO
BADALAMENTI, SALVATORE PRESTIGIACOMO,
ANGELA PRESTIGIACOMO, ROSALIA ANNIBALE,
AS TRUSTEE OF V&F LAGUMIA REVOCABLE
TRUST, VIRGINIA FADIS, AS TRUSTEE OF V&F
LAGUMIA REVOCABLE TRUST, JOHN J.
PADOVAN, JOHN PADOVAN, ELIAS KOUTROS,
AS TRUSTEE OF KOUTROS FAMILY TRUST,
KONSTANTINOS EFKARPIDIS, PLOUMI
EFKARPIDIS, CALOGERO PEDALINO, ISABELLA
PEDALINO, NICHOLAS FADIS, VIRGINIA FADIS,

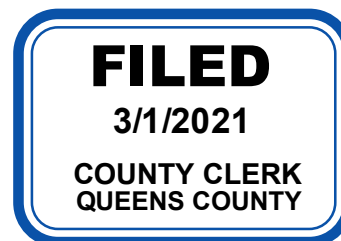
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Part 6

Motion Date: January 11, 2021

Calendar No. 20

Sequence No. 1



MICHAEL LITSCHER, REGINE LITSCHER,
ASIMENI SARRIS, NICHOLAS SARRIS,
ASIMENI SARRIS, MICHAEL MERSLICH,
MICHELLE E. RAPUANAO, MIRA RUNKO,
DOMENICO PEDALINO AND CARMENA
PEDALINO,

Third-Party Defendants.

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The following papers numbered 1 to 106 read on this motion by third-party defendant ASIMENI SARRIS to dismiss third-party plaintiffs' Complaint pursuant to CPLR §3211(a)(1), (a)(2), (a)(3) and (a)(7), and this cross-motion by third-party defendant REGINA LITSCHER to dismiss third-party plaintiffs' Complaint pursuant to CPLR §3211(a)(1), (a)(2), (a)(3) and (a)(7), and this cross-motion by third-party defendant MIRA RUNKO to dismiss third-party plaintiffs' Complaint pursuant to CPLR §3211(a)(1), (a)(2), (a)(3) and (a)(7), and this cross-motion by third-party defendants NICK KALAVANOS and PAT KALAVANOS for summary judgment and dismissal of third-party plaintiffs' Complaint pursuant to CPLR §3212, and this cross-motion by third-party defendants ROSALIA ANNIBALE, AS TRUSTEE OF V&F LAGUMIA REVOCABLE TRUST, AND VIRGINIA FADIS, AS TRUSTEE OF V&F LAGUMIA REVOCABLE TRUST to dismiss third-party plaintiffs' Complaint pursuant to CPLR §3211(a)(1), (a)(2), (a)(3) and (a)(7), and this cross-motion by third-party defendants TENZING LEGDHEN, TENZIN LHAMO and SONAM WANGCHUK for summary judgment and dismissal of third-party plaintiffs' Complaint pursuant to CPLR §3212, and this cross-motion by third-party defendants JOHN PADOVAN and JOHN J. PADOVAN to dismiss third-party plaintiffs' Complaint pursuant to CPLR §3211(a)(1), (a)(2), (a)(3) and (a)(7), and this cross-motion by third-party defendants MICHELLE E. RAPUANAO AND MICHAEL MERSLICH for summary judgment and dismissal of third-party plaintiffs' Complaint pursuant to CPLR §3212, and this cross-motion by third-party defendant ARISTEA KRIBAS TRUSTEE C/O GEORGE VLACHOS to dismiss third-party plaintiffs' Complaint pursuant to CPLR §3211(a)(1), (a)(2), (a)(3) and (a)(7), and this cross-motion by third-party defendants SALVATORE PRESTIGIACOMO and ANGELA PRESTIGIACOMO to dismiss third-party plaintiffs' Complaint pursuant to CPLR §3211(a)(1), (a)(2), (a)(3) and (a)(7), and this cross-motion by third-party defendants HELENE WOJCICKI, ARASH VAKIL, AS TRUSTEE OF THE VAKIL AND SAIRI TRUST, MICHAEL ANGELO DI ANGELO, FILIPPO BADALAMENTI, CARLOS GAMA & MARIA GAMA to dismiss third-party plaintiffs' Complaint pursuant to CPLR §3211(a)(1), (a)(2), (a)(3) and (a)(7), and this cross-motion by defendant/third-party plaintiff NHUNG THI TRAN to omit defendant/third-party plaintiff Thi Hung Phan from the caption, omit Elias Koutros, as Trustee of Koutros Family Trust and Efstathia Michaelides, as Trustee of Koutros Family Trust as third-party defendants and add Christos Koutros as a third-party defendant, amend his Third-Party Complaint to reflect the above and to clarify allegations against third-party defendants, to deem the Amended Third-Party Summons and Amended Third-Party Complaint served nunc pro tunc, and direct the

Amended Third-Party Summon and Amended Third-Party Complaint be served upon the non-answering third-party defendants and additional defendant Christos Koutros pursuant to the CPLR.

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Upon the foregoing papers, and after conference, it is ordered that these motions are determined as follows:

Third-Party Defendant Sarris’ motion, and third-party defendants Litschel, Runko, Kalavanos, Annibale, Legdhen, Padovan, Rapuanoa, Kribas, Prestigiacommo and Wojcicko’s cross-motions for summary judgment and dismissal of third-party plaintiffs’ Complaint pursuant to CPLR §3212 and/or §3211(a)(1), (a)(2), (a)(3) and (a)(7) are granted. Defendant/Third-Party Plaintiff Nhung Thi Tran’s cross-motion to amend his third-party Complaint is granted, solely to the extent that he may amend the claims against the remaining third-party defendants and denied in all other respects. Plaintiff Echevary commenced this action on February 14, 2018, against defendants to recover for personal injuries sustained on February 14, 2017, when he slipped and fell on snow and ice on the driveway located between 30-33 43rd Street and 30-37 43rd Street, Queens, New York. Issue was joined by all defendants except defendant Hung Thai Phan, and defendants Hung Thai Phan and Nhung Thi Tran commenced a third-party action against third-party defendants on August 14, 2019.

Third-Party Defendant Sarris moved to dismiss pursuant to CPLR §3211, arguing that she cannot be liable for plaintiff’s injuries. Sarris presented the pleadings, as well as the deed to her property, and a 1921 easement and 1923 agreement in support of her motion. Sarris argues that the easement provided for shared common driveways and alleyways, but only held the property owners liable for snow removal of the alleyway, driveway, and passageway within and abutting their respective properties. As defendant Sarris does not own the property where plaintiff fell, defendant Sarris cannot be liable under the terms of the express easement. Further, third-party plaintiffs’ claim that defendant could be liable under the common law is without merit, as defendant Sarris argues she did not control, repair, or use the sidewalk or driveway for a special purpose. Therefore, defendant Sarris argues that under Administrative Code 7-210, she cannot be liable for plaintiff’s injuries. Finally, defendant Sarris argues that defendant/third-party plaintiff Phan did not appear in the main action, and therefore has no standing to commence a third-party Complaint. Defendant Sarris also argues that third-party/defendant Tran admitted ownership of the property located at 30-33 or 30-37 43rd Street, and therefore defendant Sarris cannot be liable for plaintiff’s injuries under a theory of indemnification or contribution.

Third-Party Defendant Runko joined in the above application and relied on third-party defendant Sarris' arguments and evidence. Third-Party Defendants Nick Kalavanos and Pat Kalavanos joined in the above application, relying upon the above evidence, and also arguing that as they owned the property at 30-81 43rd Street, they cannot be liable for plaintiff's injuries. Third-Party Defendants Rosalia Annibale, as Trustee of V&F Lagumia Revocable Trust, and Virginia Faid, as Trustee of V&F Lagumia Revocable Trust joined in the above application, relying upon the above arguments and evidence. Third-Party Defendants Tenzing Legdhen, Tenzin Lhamo and Sonam Wangchuk joined in the above application, relying upon the above evidence, and also arguing that as owners of the property located at 30-69 43rd Street, they cannot be liable for plaintiff's injuries. Third-Party Defendants John Padovan and John J. Padovan joined in the above application, relying upon the above evidence, and also arguing that as owners of the property located at 30-59 43rd Street and 30-61 43rd Street, they cannot be liable for plaintiff's injuries. Third-Party Defendants Michael Merslich and Michelle E. Rapuanao joined in the above application, relying upon the above evidence and arguments. Third-Party Defendant Rapuanao also argues that she cannot be liable, as she transferred her ownership of the property located at 30-43 43rd Street to third-party defendant Merslich prior to plaintiff's accident. Third-Party Defendant Merslich also argues that as owner of the property located at 30-43 43rd Street, under the express easement, he cannot be liable for plaintiff's injuries. Third-Party Defendant Aristeia Kribas Trustee c/o George Vlachos joined in the above application, relying upon the above evidence and arguments. Third-Party Defendants Salvatore Prestigiacommo and Angela Prestigiacommo joined in the above application, relying upon the above evidence, and arguing that as the owners of the property located at 30-65 43rd Street, they cannot be liable for plaintiff's injuries. Third-Party Defendant Helene Wojcicki joined in the above application, replying upon the above evidence, and arguing that as the owner of the property located at 30-87 43rd Street, she cannot be liable for plaintiff's injuries. Third-Party Defendant Arash Vakil, as Trustee of the Vakil and Sairi Trust joined in the above application, replying upon the above evidence, and arguing that as the owner of the property located at 30-75 43rd Street, he cannot be liable for plaintiff's injuries. Third-Party Defendant Michael Angelo Di Angelo joined in the above application, replying upon the above evidence, and arguing that as the owner of the property located at 30-73 43rd Street, he cannot be liable for plaintiff's injuries. Third-Party Defendant Filippo Badalamenti joined in the above application, replying upon the above evidence, and arguing that as the owner of the property located at 30-67 43rd Street, he cannot be liable for plaintiff's injuries. Third-Party Defendants Carlos Gama and Maria Gama joined in the above application, replying upon the above evidence, and arguing that as the owners of the property located at 30-77 43rd Street, they cannot be liable for plaintiff's injuries.

Defendant/Third-Party Plaintiff Nhung Thi Tran opposed third-party defendants' motion and cross-motions, and cross-moves to amend his third-party Complaint. Tran opposes the above motion and cross-motions, arguing that the easement agreement is not applicable to plaintiff's accident as it occurred on the sidewalk, and not on private property. As the sidewalk exists for the benefit and special use of third-party defendants, who access it to gain entry to their rear garages, there is an issue of fact as to whether they are liable for plaintiff's injuries.

Defendant/Third-Party Plaintiff Tran also cross-moves to remove defendant/Third-Party Plaintiff Phan from the caption, as Phan had conveyed the property to Tran on November 30, 2015, and Phan is deceased. As Phan was not a proper party to the action, Tran seeks to amend the caption to remove Phan as a party. Tran also seeks to amend the caption to remove third-party defendant Koutros Family, who did not own the property until July 7, 2017, after plaintiff's accident. Instead, Tran seeks to add proposed third-party defendant Christos Koutros to the action, as the owner of the property located at 30-57 43rd Street.

Defendant/Third-Party Plaintiff Tran also seeks to amend his third-party Complaint to clarify his claims against third-party defendants, for negligence in use, maintenance and repair of the common sidewalk, roadway and driveway area abutting same premises. Tran argues that this clarification is not a new claim, is not patently devoid of merit, and does not prejudice third-party defendants. Based upon the above, Tran seeks to amend his third-party Complaint to remove defendant/third-party plaintiff Phan, remove third-party defendant Koutros Family, and add Christos Koutros, amend his claim to clarify the Complaint, and deem appearing parties as served.

Plaintiff Echegary opposes third-party defendants' motion and cross-motions, arguing that the easement document is illegible, and gives rise to special use of the sidewalk to access the common driveways and alleyways. Plaintiff also argues that third-party defendants had a common law obligation to maintain the common driveway in a safe manner and can be held liable for plaintiff's injuries. Alternatively, plaintiff argues that third-party defendants failed to meet the high burden of dismissal under CPLR §3211, and there are issues of fact that preclude summary judgment under CPLR §3212.

Defendants Antonio Brucculeri and Annemarie Brucculeri oppose third-party defendants' motion and cross-motions, arguing that the motions are premature and discovery should be completed before a determination is made.

On a motion to dismiss pursuant to CPLR §3211, the Court is required to afford the

pleadings a liberal construction, accept the facts alleged in the complaint as true, provide plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. (*Leon v. Martinez*, 84 NY2d 83 [1994][citing CPLR § 3026][internal citations omitted].) Furthermore, whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss, rather, the Court merely examines the adequacy of the pleadings. (*EBC Inc. v. Goldman Sachs & Co.*, 5 NY3d 11 [2005][internal quotation marks omitted]; see also *Cortlandt Street Recovery Corp. v. Bonderman*, 31 NY3d 30 [2018].)

Under CPLR §3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively established a defense to the claims asserted as a matter of law. (*Shofel v. DaGrossa*, 133 AD3d 649 [2nd Dept. 2015].) To be considered documentary, evidence must be unambiguous and of undisputed authenticity. On a motion to dismiss based upon documentary evidence, the evidence must be unambiguous and of undisputed authenticity. (CPLR § 3211 [a][1]; *Hohwald v. Farm Family Casualty Insurance Company*, 155 AD3d 1009, 66 [2nd Dept 2017].)

In 2003, Administrative Code §7-210 was enacted to shift tort liability for defective sidewalks from the City of New York to abutting property owners but created an exception for one-to-three family residential properties that are owner occupied. (*Brown v. City of New York*, 162 AD3d 733, 734 [2nd Dept. 2018].) The exception was created to relieve small property owners with limited resources from the sole burden of liability for sidewalk repairs and defects. (*Id. at 734-735.*) However, it also allowed for liability against residential property owners who negligently perform repairs, created the defective condition, or caused the condition to occur because of a special use of the sidewalk. (*Leitch-Henry v. Doe Fund, Inc.*, 179 AD3d 655 [2nd Dept. 2020].)

Third-Party Defendants established that under the easement agreement, their duties extend only toward maintaining the portion of the driveway, alleyway and passageway directly abutting their respective properties. Express easements are construed to give effect to the parties' intent, as shown by the language of the grant. (*Hoffman v. Delbeau*, 139 AD3d 803 [2nd Dept. 2016].) Here, the plain language of the easement demonstrates that the common owners were only responsible to maintain the portion of the driveway, passageway or sidewalk abutting their respective properties. Plaintiff's 50-h testimony indicated he fell on the driveway between 30-33 43rd Street or 30-37 43rd Street, due to snow or ice in the driveway area. As the express easement only gives rise to an obligation for the area abutting the owners' property, and third-party defendants have demonstrated that they are not the owners of the property abutting the driveway where plaintiff fell, their motion to dismiss pursuant to CPLR §3211 is granted.

It is further noted that their motions for summary judgment under CPLR §3212 is also granted, as there is no evidence that third-party defendants had an obligation to remove snow on the portion of the driveway where plaintiff fell. (*Compare McClenan v. Brancato Iron & Fire Works*, 282 AD2d 722 [2nd Dept. 2001].) Third-Party Defendants established a prima facie entitlement to summary judgment, by demonstrating that plaintiff's injuries were caused by snow on the driveway between 30-33 43rd Street and 30-37 43rd Street, which third-party defendants did not cause or create, nor have an obligation to remove. (*See Missirlakis v. McCarthy*, 145 AD3d 772 [2nd Dept. 2016].)

Plaintiff, defendants Brucculeri, and defendant/third-party plaintiff Tran failed to raise a triable issue of fact or demonstrate why further discovery would establish liability against third-party defendants. "The mere hope or speculation that evidence sufficient to defeat the summary judgment motion may be uncovered during the discovery process is insufficient to deny the motion." (*Castro v. Rodriguez*, 176 AD3d 1031, 1033 [2nd Dept. 2019].) As plaintiff, defendants Brucculeri and defendant/third-party plaintiff Tran failed to demonstrate that further discovery would result in relevant admissible evidence against third-party defendants, plaintiff and they failed to rebut third-party defendants' prima facie case. Further, plaintiff and defendant/third-party plaintiff's argument that the common driveway created a special use of the sidewalk is without merit, as they present no case law or authority to support this conclusion.

Defendant/Third-Party Plaintiff Tran's cross-motion to amend his third-party Complaint and remove defendant/third-party plaintiff Phan is denied, as Tran cannot merely remove the deceased Phan from the caption. Rather, counsel must discontinue the matter as to defendant/third-party plaintiff Phan and once Phan's action is discontinued, he can be removed from the caption. Tran's cross-motion to amend the Complaint to discontinue the action against third-party defendant Koutros Family and add Christos Koutros as a third-party defendant is also denied. CPLR 3025(b) permits amendment to pleadings absent prejudice or surprise to the opposing party, or unless the amendment is palpably insufficient or meritless. (*Ciminello v. Sullivan*, 120 AD3d 1176 [2nd Dept. 2014].) While amendments are generally permitted, Tran failed to present a meritorious claim against Koutros, who was the owner of the property located at 30-57 43rd Street, and not the property at which plaintiff alleges he fell. Therefore, and for the reasons stated above, Tran's cross-motion to amend to include Koutros is denied, but Tran may discontinue the action as against third-party defendant Koutros Family. Tran's cross-motion to amend the Complaint to clarify his claims is granted, solely as to the remaining third-party defendants in the action, and denied as to the above third-party defendants, whose motions to

dismiss have been granted.

Accordingly, third-party defendants' motion and cross-motions to dismiss and for summary judgment pursuant to CPLR §3211 and §3212 are granted, and third-party Complaint is dismissed as to the moving third-party defendants. Defendant/Third-Party Plaintiff Tran's cross-motion to amend his third-party Complaint is granted, solely to the extent that he may amend his Complaint to clarify his claims and discontinue the action against third-party defendant Koutros Family. Defendant/Third-Party Plaintiff Tran is directed to serve his amended Third-Party Complaint upon all remaining third-party defendants within thirty (30) days from the date of this Order with Notice of Entry.

This constitutes the decision and Order of the Court.

Dated: February 26, 2021



Hon. Tracy Catapano-Fox, J.C.C.

