

Behrens v Town of Huntington
2021 NY Slip Op 34334(U)
November 24, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 612168/2021
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

ORIGINALINDEX No. 612168/2021
CAL No. _____SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY**PRESENT:**Hon. JOSEPH A. SANTORELLI
Justice of the Supreme CourtMOTION DATE 8-26-2021
SUBMIT DATE 10-28-2021
Mot. Seq. # 01 - MG-----X
BRIAN BEHRENS and KELLY BEHRENS,

Plaintiffs,

- against -

TOWN OF HUNTINGTON,

Defendant.
-----X**DOUGLAS M. REDA, ESQ.***Attorney for Plaintiffs*180 FROEHLICH FARM BLVD
WOODBURY, NY 11797**NICHOLAS R. CIAPPETTA, ESQ.****TOWN ATTORNEY, TOWN OF HUNTINGTON***Attorneys for Defendant- Town of Huntington*100 MAIN ST- TOWN HALL
HUNTINGTON, NY 11743

Upon the following papers read on this motion to dismiss; e-filed on the NYSCEF system as documents 4 - 16, 19 - 21 & 22.

The plaintiffs commenced this action to recover damages for personal injuries allegedly sustained on July 25, 2020. Defendant, Town of Huntington, hereinafter referred to as "Town", moves for an order, pursuant to CPLR 3211(a)(1) and (7) and General Municipal Law 50-e, dismissing the complaint on the grounds that the Notices of Claim served by the plaintiffs did not identify the accident location nor allege any type of defect or dangerous condition with specificity. The Town also argues that the plaintiffs' claim about the gangways being wet involve "a non-actionable and/or an open and obvious condition which cannot state a cause of action for negligence". The plaintiffs oppose the motion in all respects.

Plaintiff Brian Behrens claims that at approximately 8:30 a.m. "upon the property owned, managed, maintained and controlled" by the defendant he "was caused to fall to the ground as a result of defect and/or water or other substance on the gangway leading down to the floating docks behind the Halesite Fire Department". Plaintiff Kelly Behrens claims that at approximately 9:15 a.m. "while lawfully upon the property owned, managed, maintained and controlled" by the defendant she "was caused to fall to the ground as a result of defect and/or water or other substance on the gangway leading down to the floating docks behind the Halesite Fire Department". The plaintiffs filed Notices of Claim on September 25, 2020. Brian Behrens' Notice of Claim states:

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That the said occurrences took place on July 25, 2020 at approximately 8:30 a.m., while claimant was on the gangway to the docks behind the Halesite Fire Department leading down to the floating docks at separate times. Mr. Behrens was injured when he slipped and fell on the gangway while attempting to go fishing on the docks. Claimant was caused to incur severe personal injuries.

Kelly Behrens' Notice of Claim states:

That the said occurrence took place on July 25, 2020 at approximately 9:15 a.m, respectively, while claimant was on the gangway to the docks behind the Halesite Fire Department leading down to the floating docks at separate times. Ms. Behrens was injured when she slipped and fell on the gangway while attempting to locate an individual that was present when her husband, Brian Behrens, fell earlier on the same day. Claimant was caused to incur severe personal injuries.

The plaintiffs testified at a General Municipal Law 50-H hearing on January 19, 2021. Brian Behrens testified that he slipped on the "gangplank" as he was "getting very close to the bottom" of the ramp. He testified he was four to six feet from the bottom of the "gangway" that went to the right. He also testified that there was another "gangway" that went to the left. When asked about what caused his foot to slip, he indicated that "it seemed as though there was moisture on the -- on the thing, and that, coupled with, um, I -- I don't know how old that particular thing is, but, uh, and I'm -- you know how you have corduroy pants and when you shared them with your brother or sister, they got worn down and the corduroy disappeared? There's not a lot of corduroy on that particular thing." He later clarified that the "thing" was the "gangway" and after he fell the "gangway" was wet. When asked about whether the angle of the ramp contributed to his slipping, Brian Behrens stated "I can't really say whether it did or didn't, but I'm sure it wasn't a -- a positive. I mean, I would think that just the fact there's a steeper incline, you know, you'd be more cautious." Kelly Behrens testified that she fell on the "ramp to the left" and that it was the same "gangway" that her husband had his accident on. She testified that she took about three steps onto the ramp before she slipped and fell. Kelly Behrens stated that she did not notice any moisture on the ramp after she fell. Kelly Behrens was shown a photograph which Brian Behrens' had identified as the "gangway" he fell on and testified that it was not the same one she fell on. She then indicated for the first time that she fell on the ramp facing in the opposite direction.

The plaintiffs filed a summons and verified complaint on June 25, 2021. The allegations in the complaint state

That on the 25th day of July, 2020 at approximately 8:30 a.m. while lawfully upon the property owned, managed, maintained and controlled by Defendants TOWN OF HUNTINGTON, Plaintiff BRIAN BEHRENS was caused to fall to the ground as a result of defect and/or water or other

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substance on the gangway leading down to the floating docks behind the Halesite Fire Department.

That on the 25th day of July, 2020 at approximately 9:15 a.m. while lawfully upon the property owned, managed, maintained and controlled by Defendants TOWN OF HUNTINGTON, Plaintiff KELLY BEHRENS was caused to fall to the ground as a result of defect and/or water or other substance on the gangway leading down to the floating docks behind the Halesite Fire Department.

That said occurrences were caused solely and wholly by reason of the negligence and carelessness of Defendants, their agents, employees, contractors and/or assigns in the ownership, management, maintenance and control of the TOWN OF HUNTINGTON, with an address of 1 New York Avenue, Halesite, New York, Suffolk County, New York and without any negligence or want of care on the part of Plaintiffs.

To succeed on a motion to dismiss pursuant to CPLR 3211 for failure to state a cause of action, the court must determine whether, accepting as true the factual averments of the complaint and granting plaintiffs every favorable inference which may be drawn from the pleading, plaintiffs can succeed upon any reasonable view of the facts stated (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 754 NE2d 184, 729 NYS2d 425 [2001]; *see also Fowler, Rodriguez, Kingsmill, Flint, Gray & Chalos LLP v Island Prop., LLC*, 307 AD2d 953, 763 NYS2d 481 [2d Dept 2003], *Bartlett v Konner*, 228 AD2d 532, 644 NYS2d 550 [2d Dept 1996]). If the pleading states a cause of action and if, from its four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail (*see Wayne S. v County of Nassau Dept. of Social Services*, 83 AD2d 628, 441 NYS2d 536 [2d Dept 1981]). The documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see Estate of Menon v Menon*, 303 AD2d 622, 756 NYS2d 639 [2d Dept 2003], citing *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972, 638 NE2d 511, *Roth v Goldman*, 254 AD2d 405, 406, 679 NYS2d 92).

In the context of a CPLR 3211 motion to dismiss, the Court must take the factual allegations of the complaint as true, consider the affidavits submitted on the motion only for the limited purpose of determining whether the plaintiff has stated a claim, and in the absence of proof that an alleged material fact is untrue or beyond significant dispute, the Court must not dismiss the complaint (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 684 NYS2d 244 [1st Dept 1999], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634-636). In making a determination whether the complaint sets forth a cognizable claim, evidentiary material may be considered to "remedy defects in the complaint" (*see Dana v Shopping Time Corp.*, 76 AD3d 992, 908 NYS2d 114 [2d Dept 2010], quoting *Rovello v Orofino Realty Co.*, *supra* at 40 NY2d at 636).

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The Town argues that the plaintiffs' complaint does not enumerate a cause of action and merely asserts "a conclusory paragraph that plaintiffs fell due to the 'negligence and carelessness' of the Town." The Town states that "Nowhere in either Notice of Claim is there an allegation of a dangerous or defective condition." Both plaintiffs stated that they had never complained to the Town about the "gangway", and did not know whether anyone else had ever complained. The Town filed affidavit of both Diane Esposito and Fred Uvena who both indicated that "the Town had not received any notices of claims, complaints, nor reports of incidents, involving these gangways, from the time of their purchase in August 2016, through the date of plaintiffs' accidents on July 25, 2020."

In opposition, the plaintiffs argue that

Indeed, and as contemplated by the Complaint and set forth in the accompanying Analysis (defined below), the Defendant was also negligent in failing to ensure that the Gangways in this public marina were maintained structurally sound and kept free from defects that might cause slipping. Here, for example, the treads on the Gangways were worn and failed to reduce slipping as they were intended to do. In addition, the Analysis provides that an unsafe condition with respect to the Gangways existed in that the angle in which the Gangways were installed were too steep, and the absence of appropriate handrails at the required height and required outside diameter prevented the Plaintiffs from being able to steady or stop their falls once they began to trip. As set forth in the Complaint at ¶¶ 13-14 the Plaintiffs assert that the actions of the Defendant resulted in the respective injuries suffered by the Plaintiffs and in so doing.

The plaintiffs include in their opposition an analysis that was prepared by Leo J. DeBobes, CSP, CHCM, with Leo DeBNobes Safety Consultants. The analysis outlines several factors that "contributed to the accidents" including that the slope of the gangways was excessively steep. The report states that "the defendants were negligent in failing to ensure that the gangway in this public marina was maintained structurally sound and kept free from defects that might cause slipping". DeBobes opines that

It is clear that there was an unsafe condition in the gangway, and specifically on the defectively installed and maintained gangway slats or treads that caused plaintiff to fall, as well as the absence of appropriate handrails at the required height and required outside diameter that prevented him from being able to steady himself or to stop his fall once he began to trip.

In *Caselli v New York*, 105 AD2d 251, 252-253 [2d Dept 1984], the Court held that

The purpose of the statutory notice of claim requirement (General Municipal Law, § 50-e) is to afford the public corporation "an adequate opportunity to investigate the circumstances surrounding the accident and to explore the

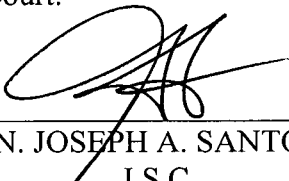
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merits of the claim while information is still readily available" (*Teresta v City of New York*, 304 NY 440, 443; see, also, *O'Brien v City of Syracuse*, 54 NY2d 353, 358; *Salesian Soc. v Village of Ellenville*, 41 NY2d 521, 524). The statute is intended "to protect a public corporation against stale or unwarranted claims and to enable it to investigate claims timely and efficiently" (*Heiman v City of New York*, 85 AD2d 25, 27, quoting *Twenty-First Ann Report of NY Judicial Conference*, 1976, p 286). To that end, the statute requires that the notice set forth "the time when, the place where and the manner in which the claim arose" (General Municipal Law, § 50-e, subd 2). We have held that the statutory requirement regarding the recital of the place of occurrence is met where the notice describes the accident location with sufficient particularity to enable defendant to locate the alleged defect and to conduct a proper investigation of the site and otherwise assess the merits of plaintiff's claim (*Evers v City of New York*, 90 AD2d 786; see, also, *Faubert v City of New York*, 90 AD2d 509; *Campbell v City of New York*, 78 AD2d 631). Moreover, we have recognized that claims involving "pothole" and sidewalk defects require even greater particularity (*Cruz v City of New York*, 95 AD2d 790; *Evers v City of New York*, *supra*; see, also, *Schwartz v City of New York*, 250 NY 332; *Matter of Klobnock v City of New York*, 80 AD2d 854; *Rozell v City of New York*, 271 App Div 832), because of their transitory nature (*McKie v City of New York*, 79 AD2d 901).

The Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiffs every favorable inference which may be drawn from the pleading, the plaintiffs have not pled a cause of action cognizable at law as against the Town. In opposition, the plaintiffs have failed to come forth with any information to counter the proof provided by the Town as to the Town being given the requisite prior written notice of the defect. Additionally, the plaintiffs did not counter the proof provided that the Notices of Claim and complaint did not specifically indicate the location of the accidents alleged by both Brian Behrens and Kelly Behrens to the degree required by law. Therefore the Town's motion to dismiss is granted and the complaint is dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: November 24, 2021


HON. JOSEPH A. SANTORELLI
J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION