

Puzian v Costello

2022 NY Slip Op 34253(U)

December 13, 2022

Supreme Court, New York County

Docket Number: Index No. 155754/2021

Judge: Leslie A. Stroth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LESLIE A. STROTH PART 52

Justice

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LAMARA PUZIAN,

Plaintiff,

- v -

ADELINA COSTELLO, DRIGIDO COSTELLO, 187 STREET
MAZAL, LLC, THE CITY OF NEW YORK

Defendant.

-----X

INDEX NO. 155754/2021
MOTION DATE 08/24/2022
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51 were read on this motion to/for DISMISSAL

This action arises from plaintiff Lamara Puzian's (plaintiff) alleged trip and fall on a defective sidewalk adjacent to the real property located between 655 West 187th Street and 671 West 187th Street, New York, NY on August 3, 2020. Plaintiff allegedly sustained serious injuries from the incident. Defendants Adelina Costello and Bridigo Costello s/h/a Drigido Costello (together, the Costello defendants) move for dismissal of the complaint pursuant to CPLR 3211 (a) (7) and 3211 (a) (1), respectively, on the ground the complaint fails to state a cause of action against them and that documentary evidence conclusively establishes their defense as a matter of law.

The Costello defendants argue that they are not liable for plaintiff's injuries, because New York City Administrative Code § 7-210 does not impute liability onto them, as they own and reside in the property adjacent to the allegedly defective sidewalk. Furthermore, they maintain that documentary evidence demonstrates that the defective sidewalk on which plaintiff's alleged trip

and fall occurred was not abutting the Costello defendants' property. Plaintiff opposes the motion, and the City of New York takes no position as to the Costello defendants' arguments.

I. Analysis

a. Motion to Dismiss for Failure to State a Claim

Pursuant to CPLR 3211 (a) (7), a party may move to dismiss a claim on the ground that the pleading fails to state a cause of action. Upon such a motion the Court must accept the facts alleged as true and determine simply whether plaintiff's facts fit within any cognizable legal theory. *See* CPLR 3026; *Morone v Morone*, 50 NY2d 481 (1980). In reviewing a motion to dismiss, the complaint shall be liberally construed, and the allegations are given the benefit of every possible favorable inference. *See Leon v Martinez*, 84 NY2d 83, 87 (1994).

Administrative Code § 7-210 (b), provides that “the owner of real property abutting any sidewalk...shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.” However, Administrative Code § 7-210 (b) does “not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.”

The Costello defendants argue that the complaint fails to state a cause of action, because Administrative Code § 7-210 does not apply to them as owners and occupants of a residential two-family home. In support of their position that the residential and owner-occupied exception to Administrative Code § 7-210 applies here, the Costello defendants submit an affidavit of Bridigo Costello (NYSCEF doc. no. 39) and certified records from the New York City Department of Finance, including the deed to the subject property, property records, and tax bills (NYSCEF doc.

no. 44, 45). Plaintiff does not dispute that the subject property is a residential two-family home and that the Costello defendants have established that their property is covered by the exemption.

However, plaintiff argues that the complaint also alleges that the Costello defendants are nonetheless liable for her accident, in that they caused or created the dangerous defective condition that resulted in her trip and fall. According to common-law principles, “[a]bsent the liability imposed by statute or ordinance, an abutting landowner is not liable to a passerby on a public sidewalk for injuries resulting from defects in the sidewalk *unless the landowner either created the defect or caused it to occur by special use.*” *Meyer v City of New York*, 114 AD3d 734 (2d Dept 2014), citing *Zektser v City of New York*, 18 AD 869 (2d Dept 2005) (emphasis added).

Affording the complaint every favorable inference, plaintiff has sufficiently pled that the Costello defendants caused or created the subject defective condition. In her complaint, plaintiff clearly alleges that both Adelina Costello and Bridigo Costello were negligent in “...in actually causing and creating the broken, defective and dangerous condition.” Complaint, NYSCEF doc. no. 2 at ¶¶ 13, 31. As plaintiff’s facts, as plead, fit into a cognizable legal theory, the Costello defendants’ motion to dismiss pursuant to CPLR 3211 (a) (7) is denied.

b. Motion to Dismiss for a Defense Founded on Documentary Evidence

CPLR 3211 (a) (1) prescribes that “a party may move for judgment dismissing one or more causes of action asserted against him on the ground that...a defense is founded on documentary evidence.” A motion pursuant to CPLR 3211 (a) (1) “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002], citing *Leon v Martinez*, 84 NY2d 83, 88 (1994).

At the outset, plaintiff argues that the instant motion should be treated as one for summary judgment, because the Costello defendants have annexed exhibits in support of their motion. CPLR 3211 (c) provides that the Court may treat a motion to dismiss as a motion for summary judgment if either party submits evidence that could properly be considered for summary judgment, but only after adequate notice to the parties.¹ As the defendants move pursuant to CPLR 3211 (a) (1) for dismissal pursuant to its submission of documentary evidence, the motion need not be converted to one for summary judgment simply because the Costello defendants submit exhibits along with their motion. The record does not establish that they “deliberately charted a summary judgment course,” (*Wadiak v Pond Mgt., LLC*, 101 AD3d 474, 475 [1st Dept 2012]), and the Court declines to convert this motion to dismiss to one for summary judgment.

In support of their motion, the Costello defendants provide an affidavit by Bridigo Costello which states that they “have not performed work on the sidewalk abutting [their] premises nor hired anyone to make repairs to the sidewalk at the subject location.” NYSCEF doc. no. 39 at ¶¶ 7 and 10. However, such self-serving affidavit does not “utterly refut[e] plaintiff’s factual allegations” that the Costello defendants caused or created the alleged defect or “conclusively establis[h] a defense as a matter of law.” *Goshen*, 98 NY2d at 326, citing *Leon*, 84 NY2d at 88.

The Costello defendants also submit a photograph taken on the day of the incident that they argue demonstrates that the accident did not actually occur on the sidewalk abutting their premises. Instead, they argue, the photograph depicts plaintiff lying with her head closer to their property and with her feet further up the block by the property next door. Therefore, they maintain that the

¹ While CPLR 3211 does allow for the conversion of a motion to dismiss to a motion for summary judgment, the Court must give notice of its intention to consider the motion as such so that a party is not “deprived of the opportunity to make an appropriate record by any unanticipated award of summary judgment.” *Bacciocchi v Ranch Parachute Club, Ltd.*, 273 AD2d 173 (2nd Dept 2000) (internal citations omitted).

trip and fall and/or the defect which caused the trip and fall was not on a sidewalk abutting their property but rather occurred or was present on their neighbor's property, and their neighbors would thus be liable for plaintiff's injuries. While they assert that the photograph demonstrates the alleged defect did not occur on a sidewalk abutting their property, the photograph is unclear and does not conclusively establish their defense as a matter of law.

Therefore, the Costello defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) is also denied. The Court has considered the parties' remaining contentions and finds them to be unavailing.

II. Conclusion

Accordingly, it is

ORDERED that defendants Adelina Costello's and Bridigo Costello s/h/a Drigido Costello's motion to dismiss the complaint is denied; and it is further

ORDERED that the clerk shall schedule a preliminary conference to be held on the next available date²; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order upon all parties, with notice of entry, and shall file such notice via NYSCEF.

The foregoing constitutes the decision and order of the Court.


12/13/2022
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE


LESLIE A. STROTH, J.S.C.

² The Court notes that prior to a preliminary conference the parties may consent to a case scheduling order, which may be emailed directly to chambers for review.