

**Soler v City of New York**

2023 NY Slip Op 33347(U)

September 28, 2023

Supreme Court, New York County

Docket Number: Index No. 150749/2023

Judge: Nicholas W. Moyne

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. NICHOLAS W. MOYNE PART 52**

*Justice*

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RAFAEL SOLER,

Plaintiff,

INDEX NO. 150749/2023

MOTION DATE 08/11/2023

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY  
DEPARTMENT OF HOMELESS SERVICES, THE  
DEPARTMENT OF SOCIAL SERVICES, NEW YORK CITY  
HOUSING AUTHORITY, MILTON BORON 2027  
LLC, BOWERY RESIDENTS' COMMITTEE, INC.

Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for

DISMISS

Upon the foregoing documents, it is

This is an action by plaintiff, Rafael Soler, to recover for personal injuries allegedly sustained on March 15, 2022, in the homeless shelter located at 2027 Lexington Avenue, New York, New York 10035, when he fell asleep leaning on a hot pipe, unaware of the massive heat running through it. Plaintiff is asserting claims of negligence, contending that he was injured as a result of a dangerous, defective, and unsafe condition located on the property.

Defendant, New York City Housing Authority ("NYCHA"), in lieu of an answer, has moved pursuant to CPLR §§ 3211(a)(1) and (7) to dismiss the complaint in its entirety. This motion is unopposed.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, accord plaintiffs the benefit of every favorable inference, and determine whether the facts alleged fit within any cognizable

legal theory (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). To prevail on a motion to dismiss pursuant to CPLR § 3211(a)(1), the defendant must show that the documentary evidence conclusively refutes the plaintiff's allegations, establishing a defense as a matter of law (*AG Capital Funding Partners, L.P. v State St. Bank and Tr. Co.*, 5 NY3d 582, 591 [2005]).

Plaintiff's negligence claims are based on a dangerous, defective, or unsafe condition on the premises, allegedly arising out of the defendants' ownership, supervision, management, maintenance, operation and control of the property and the conditions therein. Considering that a defendant may only be liable in negligence for a breach of duty of care owed to a plaintiff, the existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court (*Sanchez v State of New York*, 99 NY2d 247, 252 [2002]; *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]). Accordingly, "[l]iability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" (*Jackson v Bd. of Educ. of City of New York*, 30 AD3d 57, 60 [1st Dept 2006]).

NYCHA has produced an affidavit by Miguel Angel Ballena, Assistant Director of the Department of Performance Tracking & Analytics, attesting to his search of NYCHA's computerized records and public property records; including the New York City Department of Finance's ACRIS system, which uncovered documentary evidence. The documentation includes the results of the database searches, including the deed and real property transfer report for the property located at 2027 Lexington Avenue, as well as Department of Environmental Protection registration for water and sewer billing, and other documentation (NYSCEF Doc. No. 21).

Documentary evidence, such as a deed or lease for a property, that unambiguously demonstrates that the defendant lacked any role in the ownership, control, or maintenance of that premises warrants dismissal (*see Philanthrope v Pizza*, 191 AD3d 563 [1st Dept 2021]; *see also Igarashi v Higashi*, 289 AD2d 128 [1st Dept 2001]). Through this documentary evidence, NYCHA has conclusively established that as it did not own, operate, or control the premises located at 2027 Lexington Avenue (*see Igarashi v Higashi*, 289 AD2d 128 [1st Dept 2001] [while pleadings should be liberally construed on a motion to dismiss, claims “flatly contradicted by documentary evidence” must be rejected]). Therefore, as NYCHA did not owe a duty to the plaintiff, dismissal of the complaint is warranted as against them.

Accordingly, it is hereby

ORDERED that the motion of defendant New York City Housing Authority to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

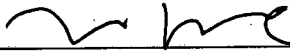
ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk’s Office, who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on*

*Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website)].

<u>9/28/2023</u> DATE			 NICHOLAS W. MOYNE, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE