

Liss v City of New York
2023 NY Slip Op 34237(U)
December 6, 2023
Supreme Court, New York County
Docket Number: Index No. 154896/2023
Judge: Nicholas W. Moyne
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
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

ROCHELLE LISS,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, ROOSEVELT ISLAND
OPERATING CORPORATION, AND GRENADIER REALTY
CORP.

Defendant.

INDEX NO. 154896/2023
MOTION DATE 07/26/2023
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for

DISMISS

Upon the foregoing documents, it is

This is an action by plaintiff, Rochelle Liss, to recover for personal injuries allegedly sustained on October 28, 2022, when she was walking on the sidewalk located between 2 River Road and Public School/Intermediate School 217 on Roosevelt Island and was caused to trip and fall as a result of an uneven, broken, missing, unleveled and/or raised dangerous and defective condition on the sidewalk and/or cobblestones.

Defendant Grenadier Realty Corp. ("Grenadier"), in lieu of an answer, moves for an order pursuant to CPLR §§ 3211 (a)(1) and (7) dismissing the complaint and all cross-claims on the grounds that it did not own, manage, maintain, or have any involvement with the premises where the alleged accident occurred. Grenadier, pursuant to CPLR § 8303-a and Uniform Rules of Court § 130-1.1, is seeking costs, fees, and sanctions against plaintiff's counsel for the

commencement of a frivolous action. Alternatively, if the subject motion is denied, Grenadier is requesting to interpose an answer within 30 days of the date of this decision.

Defendant Roosevelt Island Operating Corporation (“RIO”) and the plaintiff oppose the motion as pre-mature, contending there are questions of fact as to whether Grenadier owed a duty that precludes dismissal.

CPLR 3211 § § (a)(1) and (a)(7):

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]).

Discussion:

Plaintiff is asserting claims of negligence based on the alleged dangerous or defective condition of the sidewalk and/or cobblestones located between 2 River Road and Public School/Intermediate School 217 (complaint at 24). A defendant may only be liable in negligence for the breach of a duty of care owed to the plaintiff; if the defendant owes no duty, the action must fail (*Darby v Compagnie Natl. Air France*, 96 NY2d 343, 347 [2001]). Therefore, a threshold question in torts cases is whether the alleged tortfeasor owed a duty of care to the injured party (*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], quoting *Gibbs v Port Auth. of New York*, 17 AD3d 252, 254 [1st Dept 2005]).

Grenadier contends that as it did not own, manage, maintain, or have any involvement with the alleged accident premises, it did not owe the plaintiff a duty and cannot be held liable. To demonstrate that it has no relationship to the premises or accident location, Grenadier submits the following items as “documentary evidence”: (1) Google Street Image of the area between 2 River Road and Public School/Intermediate School 217, 645 Main Street (exhibit B); (2) an affidavit by Grenadier’s property manager, Brian Weisberg, submitted in response to plaintiff’s application for pre-action discovery, commenced under a separate Index No. 160779/2022 (exhibit G) and; (3) additional Google Maps images depicting 2 River Road and 645 Main Street (exhibit H).

The evidence submitted in support of the motion must be documentary or the motion must be denied (*Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012], relying on *Fontanetta v Doe*, 73 AD3d 78, 84 [2d Dept 2010]). For evidence to qualify as documentary, it must be unambiguous, authentic, and undeniable (*Attias v Costiera*, 120 AD3d 1281, 1282 [2d Dept 2014]). Judicial records, as well as documents such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case (*Fontanetta v Doe*, 73 AD3d 78, 84-85 [2d Dept 2010]).

Grenadier contends that “the well-documented public record Google Street views, which are admissible pursuant to the CPLR and affidavit of Brian Weisberg, show that defendant

Grenadier did not own the sidewalk/driveway adjacent to the subject property on the date of the accident, warrants dismissal” (Grenadier memo of law at 4). An image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, is admissible in evidence if it indicates the date the material was created and subject to a challenge that it does not fairly and accurately portray that which it is being offered to prove (CPLR 4532-b)¹. However, the Google Maps and/or Street View image cannot be said to be unambiguous, of undisputed authenticity, or essentially unassailable so as to constitute documentary evidence (*see Norment v Interfaith Ctr. of New York*, 98 AD3d 955, 955 [2d Dept 2012]). Exhibit B is a Google Street View image that Grenadier claims depicts the cobblestone area between 2 River Road and Public School/Intermediate School 217, which is located at 645 Main Street, as a private driveway belonging to the school (affirmation of defendant Grenadier’s counsel ¶ 7). However, the location on the Google Street View image is labeled as “676 Main St”, not 645 Main Street, and there is nothing in the image to indicate the location is that which Grenadier claims it is (NYSCEF Doc. No. 14). Additionally, the Google Maps and images, annexed as Exhibit H, do not comply with statutory requirements as they fail to include the date the materials were created and the contents of these “maps” are ambiguous and/or subject to denial or challenge (NYSCEF Doc. No. 20).

Additionally, factual affidavits and deposition testimony do not constitute the type of documentary evidence that may be considered on a motion pursuant to CPLR 3211(a) (1) (*Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651 [1st Dept 2011]). Therefore, the affidavit of

¹ CPLR 4532-b has additional notice and exchange requirements and absent an objection, the statute permits that a court may take judicial notice and admit the map, image, or information into evidence (CPLR 4532-b; *see Rodriguez v The City of New York* [NY Sup Ct, Bronx County 2021]). It is unclear if these statutory requirements were complied with in this instance.

Grenadier's property manager Brian Weisberg is not documentary evidence for purposes of CPLR 3211(a)(1) (*see Manglani v City of New York*, 209 AD3d 563 [1st Dept 2022] [affidavit of defendant's managing agent was insufficient to establish a defense as a matter of law because it was not conclusive documentary evidence]). However, "an affidavit from an individual, even if the person has no personal knowledge of the facts, may properly serve as the vehicle for the submission of acceptable attachments which provide evidentiary proof in admissible form; like documentary evidence. In such situations, the affidavit itself is not considered evidence; it merely serves as a vehicle to introduce documentary evidence to the court" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 n 4 [1st Dept 2014]). "[T]he affidavit must nevertheless 'constitute a proper foundation for the admission of the records'" (*Doe v Intercontinental Hotels Group, PLC*, 193 AD3d 410 [1st Dept 2021] quoting *HSBC Bank USA, N.A. v. Greene*, 190 AD3d 417, 418, 139 N.Y.S.3d 188 [1st Dept. 2021]). The affidavit of Brian Weisberg, prepared in opposition to the plaintiff's request for pre-action discovery and made under a separate Index Number, is insufficient as a means to introduce the Google Maps and/or Street View image. The Google Maps and/or Google Street View "documents" were not annexed to Weisberg's affidavit (*see Doe v Intercontinental Hotels Group, PLC*, 193 AD3d 410 [1st Dept 2021]). Notwithstanding, Weisberg's affidavit fails to demonstrate sufficient knowledge of the contents of the Maps and/or Street View image, fails to authenticate them, nor explain any significance thereof (*see Bou v Llamaza*, 173 AD3d 575, 576 [1st Dept 2019]). In fact, this affidavit contains no mention or reference to proffered Google Maps and/or Street View image at all. As such, Grenadier has failed to provide documentary evidence of a type that may be considered on a CPLR 3211(a)(1) motion (*see Fontanetta v Doe*, 73 AD3d 78, 84 [2d Dept 2010]).

In any event, these submissions fail to conclusively establish a defense as the vague contents do not irrefutably establish that Grenadier did not occupy, own, operate, or use, the premises in which the plaintiff allegedly fell (*Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651 [1st Dept 2011]). Nor does any of the conclusory information provided within the affidavit, Google Maps and/or Street View image, demonstrate as a matter of law that the sidewalk and/or cobblestones where the accident allegedly occurred belonged to co-defendants the City of New York and RIOG. Considering that, “[t]he documents relied upon must “definitively dispose of [the] plaintiff’s claim” (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] quoting *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]), dismissal at this stage is unwarranted.

Similarly, under the CPLR 3211(a)(7) standard, dismissal at this stage is unwarranted as plaintiff has a viable cause of action for negligence against Grenadier. Even when considering the evidentiary material, Grenadier has failed to demonstrate that there are no questions of fact regarding a duty through its ownership and control of the accident location (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Grenadier’s evidentiary submissions demonstrate that there are outstanding issues of fact. The affidavit of Brian Weisberg includes that “[d]efendant Grenadier is the managing agent for Roosevelt Island Associates, which owns the property at 2 River Road” (exhibit G ¶ 3). Additionally, by Grenadier’s own admission, “the location of plaintiff’s alleged accident is unclear” (affirmation of defendant Grenadier’s counsel ¶ 17). As the location of the accident is unclear, absent any discovery on the issue, and plaintiff alleged that the accident occurred on the sidewalk located between 2 River Road and Public School/Intermediate School 217, it cannot be said as a matter of law that Grenadier did not owe the plaintiff a duty. Therefore, Grenadier’s motion to dismiss is denied.

Conclusion:

For the reasons set forth herein above, it is hereby

ORDERED that the motion to dismiss the complaint and all cross-claims is denied; and it is further

ORDERED that the portion of the motion seeking to impose legal fees, costs and sanctions for commencing a frivolous action is denied; and it is further

ORDERED that the portion of the motion seeking thirty days to interpose an answer is granted and defendant is directed to serve an answer to the complaint within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 103, 80 Centre Street, New York, New York, on February 28, 2024, at 2:00 PM.

This constitutes the decision and order of the court.

12/6/2023

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

☐
☐
☐
☐

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

☐

DENIED

☒
☒
☐
☐

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE



NICHOLAS W. MOYNE, J.S.C.