SHORT FORM ORDER

INDEX No. 610692/2024
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 06/11/2024
SUBMIT DATE 07/18/2024
Mot. Seq. # 01 - MG

----------X

JOSEPH MUTONE,

Plaintiff,

-against-

TOWN OF ISLIP,

Defendants.

----------X

PATRICIA BYRNE BLAIR, ESQ.
Attorney for Plaintiffs
9b Montauk Highway
Blue Point, NY 11715

WILLIAM D. WEXLER
Attorney for Defendant
816 Deer Park Avenue
North Babylon, NY 11703

Upon the following papers read on this motion to dismiss; Notice of Motion and supporting papers 4 - 7; Answering Affidavits and supporting papers 8 - 13; Replying Affidavits and supporting papers 14; it is

This motion by the defendant seeks an order dismissing the plaintiffs complaint pursuant to CPLR 3211 (a)(7) for failure to state a claim. The plaintiff opposes the motion in all respects.

The plaintiff commenced this action against the Town of Islip alleging failure to take legal action to shut down a bed and breakfast located next to plaintiff's home resulting in loss of quiet enjoyment in the use of his home, loss in the value of plaintiff's real property, and a strain on municipal resources . The plaintiff claims that the Town owed him a duty to enforce its codes and rules by shutting down "the illegal operation of the Bed and Breakfast." The defendant claims that it owed no municipal duty to plaintiff nor a special duty under New York law and the complaint must be dismissed.

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 plaintiff every favorable inference which may be drawn from the pleading, plaintiff 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).

In ***Worth Distribs. v Latham***, 59 NY2d 231, 237 [1983], the Court held that

> The city should not have been held liable. As this court recently reaffirmed, "it has long been the rule in this State that, in the absence of some special relationship creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for failure to enforce a statute or regulation" (***O'Connor v City of New York***, 58 NY2d 184, 192). Here the city building department failed to enforce provisions of the city's Administrative Code relating to building safety, even though its employees knew of the dangerous structural conditions in the building. These regulations were designed to protect the general public, however, and no special relationship has been shown that would establish a municipal duty to the instant plaintiffs in particular. Thus, the complaints should be dismissed as against the City of New York, and apportionment of liability among the remaining defendants redetermined accordingly.

In ***Garrett v Holiday Inns, Inc.***, 58 NY2d 253, 257-258 [1983], the Court held

> The theory of negligence pleaded against the town was predicated on its failure to require the motel owners to comply with applicable fire and safety laws and its failure to inspect the construction of the motel adequately. Because plaintiffs had, in this regard, alleged no more than a violation of a general duty owed by the town to the public at large, the complaints against the town were held insufficient to state a cause of action and were

> therefore dismissed (***Garrett v Town of Greece***, 78 AD2d 773, affd on opn below 55 NY2d 774)...
>
> The town's liability is based on an alleged breach of a special duty owing third-party plaintiffs in that it: (1) permitted alterations in the originally approved building plans which did not comply with applicable fire and safety laws, codes and regulations; (2) issued a certificate of occupancy representing that the building was safe and in compliance with fire and safety laws, notwithstanding the existing, obvious violations of those laws; and (3) thereafter negligently failed to uncover the violations upon inspection.

"In any common-law negligence case brought pursuant to New York law, 'a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom'" (***Ferreira v City of Binghamton***, ___ NY3d ___, 2022 NY Slip Op. 01953 [2022], citing ***Solomon v City of New York***, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]). "When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose" (***Applewhite v Accuhealth, Inc.***, 21 NY3d 420, 425, 972 NYS2d 169 [2013]; *see also* ***Tara N.P. v West Suffolk Bd. of Coop. Educ. Servs.***, 28 NY3d 709, 713, 49 NYS3d 362 [2017]). "If the municipality's actions fall in the proprietary realm, it is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties" (***Applewhite v Accuhealth, Inc.***, 21 NY3d at 425, 972 NYS2d 169 [internal citations omitted]). "A government entity performs a purely proprietary role when its 'activities essentially substitute for or supplement traditionally private enterprises'" (*id.*, citing ***Sebastian v State of New York***, 93 NY2d 790, 793, 698 NYS2d 601 [1999]). "Conversely, a municipality will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers" (***Ferreira v City of Binghamton***, *supra* at 4 [internal quotation marks and citation omitted]). "Police and fire protection are examples of long-recognized, quintessential governmental functions" (***Applewhite v Accuhealth, Inc.***, 21 NY3d at 425, 972 NYS2d 169).

Where a municipality is exercising a governmental function, "the next inquiry focuses on the extent to which the municipality owed a 'special duty' to the injured party" (***Applewhite v Accuhealth, Inc.***, 21 NY3d at 426, 972 NYS2d 169). Such a duty is "born of a special relationship between the claimant and the public entity" (***Gonzalez v State of New York***, 156 AD3d 764, 764, 65 NYS3d 719 [2d Dept 2017]). "The core principle is that to sustain liability against a municipality [engaged in a governmental function], the duty breached must be more than that owed the public generally" (***Ferreira v City of Binghamton***, *supra* at 4 [internal quotation marks and citation omitted]). "[W]here there is no special duty, courts will not examine the reasonableness of the municipality's actions" (***Ferreira v City of Binghamton***, *supra* at 4 [internal quotation marks and citation omitted]).

"[A] special duty can arise in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition" (***Ferreira v City of Binghamton***, *supra* at 5, citing ***Applewhite v Accuhealth, Inc.***, 21 NY3d at 426, 972 NYS2d 169). In order for a plaintiff to prove that a special relationship arose through the municipality's voluntary assumption of a duty to him or her, four elements must be shown: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking (*see* ***Applewhite v Accuhealth, Inc.***, 21 NY3d 420, 972 NYS2d 169; ***Laratro v City of NewYork***, 8 NY3d 79, 828 NYS2d 280 [2006]; ***Cuffy v City of New York***, 69 NY2d 255, 513 NYS2d 372 [1987]).

Here, the evidence submitted establishes a lack of any special duty owed by the Town defendants to the plaintiff (see ***Ferreira v City of Binghamton***, *supra;* ***Applewhite v. Accuhealth, Inc.***, *supra*; ***Laratro v City of New York***, *supra*).

The Court concludes that, accepting as true the factual averments of the complaint and granting the plaintiff every favorable inference which may be drawn from the pleadings, the plaintiff has not pled a cause of action cognizable at law as against the Town defendant. Therefore the defendants motion to dismiss is granted.

The foregoing constitutes the Decision and Order of this Court.

Dated: July 19, 2024

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

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION