

Kleinke v Town of Colonie
2024 NY Slip Op 35209(U)
November 13, 2024
Supreme Court, Albany County
Docket Number: Index No. 907835-24
Judge: Peter A. Lynch
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STATE OF NEW YORK
SUPREME COURT COUNTY OF _____

MICHAEL J. KLEINKE, JR., DECEASED,
BY AND THROUGH JESSICA L. KLEINKE AND
MICHAEL J. KLEINKE, RS., AS CO-
ADMINISTRATORS OF THE ESTATE OF
MICHAEL J. KLEINKE, JR.,

Plaintiffs,

v.

TOWN OF COLONIE,

Defendants.

DECISION AND ORDER

Index No.: 907835-24

Mot. Seq. No. 1

(Hon. Lynch, J.)

INTRODUCTION

This is a personal injury action for money damages.¹ The claim arose out of a two-vehicle motor vehicle accident that took place on May 11, 2023, in which plaintiff's decedent, Michael J. Kleinke, Jr., was the operator of a vehicle and was killed, due to the alleged negligence of the driver of the second vehicle, one Thomas McGrath. It is alleged that the Town of Colonie, through its police department, breached its duty of care to plaintiff's decedent, by allowing Thomas McGrath to continue operating a motor vehicle on the highway, despite having been previously interviewed by the police same date.

¹ NYSCEF Doc. No. 1 – Complaint.

CPLR 3211 MOTION TO DISMISS²

Defendant moved to dismiss the Complaint pursuant to CPLR R 3211(a) (7), on the ground that the allegations in the complaint failed to state any cause of action against the moving defendants, due to a lack of any special duty to plaintiff's decedent.

CROSS-MOTION TO DISCONTINUE ACTION

Plaintiff moved to discontinue the action, in accord with CPLR R 3217 (b).³ Defendant did not file any papers in opposition to the cross-motion.

STATEMENT OF LAW

The CPLR R 3211 review standard requires that a Court "must give the pleadings a liberal construction, accept the allegations as true and accord the Petitioners every possible favorable inference" (Chanko v. Am. Broad Companies, Inc., 27 N.Y. 3d 46, 52 [2016]; see also, Conklin v Laxen, 180 A.D.3d 1358, 1362 [4th Dept. 2020]; Piller v Tribeca Dev. Group LLC, 156 A.D.3d 1257, 1261 [3d Dept. 2017]). In Wedgewood Care Ctr. v. Kravitz, 198 A.D.3d 124, 130 [2d Dept. 2021], the court held,

On a motion to dismiss for failure to state a cause of action, the pleading is to be afforded a **liberal construction**. The **facts alleged in the complaint must be accepted as true**, and the plaintiff is entitled to receive the **benefit of every possible favorable inference**. Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, **or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery**.

However, **allegations consisting of bare legal conclusions** as well as factual claims flatly contradicted by documentary evidence are **not entitled to any such consideration**, nor to that arguendo advantage." (Internal quotations and citations omitted; emphasis added).

² NYSCEF Doc. No. 6.

³ NYSCEF Doc. No. 15.

(See also, Easterbrooks v. Schenectady County, 218 A.D.3d 969, 970 [3d Dept. 2023], where the Court held,

"However, **the favorable treatment** accorded to a plaintiff's complaint is **not limitless** and, as such, conclusory allegations — claims consisting of bare legal conclusions with no factual specificity — are insufficient to survive a motion to dismiss. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (Internal quotations and citations are omitted; emphasis added)

The issue distills to whether Plaintiff has alleged sufficient facts to support a special duty claim which provides a right of recovery. Since, plaintiff has moved to discontinue the action, however, the Court need not address the merits of the motion to dismiss.

CPLR R 3217 (b) and (c) provide, inter alia:

(b) By Order of Court. Except as provided in subdivision (a), an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper...

(c) Effect of Discontinuance. Unless otherwise stated in the notice, stipulation or order of discontinuance, the discontinuance is without prejudice....

Here, there is nothing in the record to demonstrate defendant would be prejudiced in any way by the discontinuance of the action, especially where, as here, defendant moved to dismiss the action (See Matter of Wiley v. Wiley, 226 A.D.3d 1035 2d Dept. 2024])

CONCLUSION

For the reasons more fully stated above, Plaintiff's cross-motion to discontinue the action is granted, without prejudice, and Defendant's motion to dismiss the complaint is denied, as moot, without prejudice, and it is further,

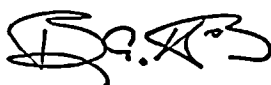
Ordered, that the action be and hereby is discontinued.

This memorandum constitutes the decision and order of the Court.

Dated: Albany, New York
November 13, 2024


PETER A. LYNCH, J.S.C.

PAPERS CONSIDERED:
All e-filed pleadings and exhibits
NYSCEF Doc. Nos. 1 to 21


11/14/2024

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