

Carrington v McDonald

2025 NY Slip Op 30647(U)

February 24, 2025

Supreme Court, Kings County

Docket Number: Index No. 535144/2023

Judge: Richard J. Montelione

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At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the 24th day of February 2025.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

**DECISION
and
ORDER**

-----X
ARLENE CARRINGTON,

Plaintiff,
-against-

Index No.: 535144/2023
Mot. Seq. No.: 1-2

GORDON J. MCDONALD, EARMIN A. MCDONALD, and
LAMB OF GOD SPIRITUAL BAPTIST CHURCH INC.,

Defendants.
-----X

After oral argument, the following papers were read on this motion pursuant to CPLR 2219(a):

Papers	NYSCEF DOC. #
Defendant Lamb of God Spiritual Baptist Church, Inc. motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)7 and supporting papers (MS#1).....	18-20
Plaintiff's opposition (MS#1).....	34
Plaintiff's cross motion for a protective order pursuant to CPLR 3103 quashing defendant Lamb of God Spiritual Baptist Church, Inc.'s request for admission dated July 22, 2024 and supporting papers(MS#2).....	31-33
Defendant Lamb of God Spiritual Baptist Church, Inc.'s opposition (MS#2).....	34
Plaintiff's Reply Affirmation (MS#2).....	36
Other.....	

MONTELLIONE, RICHARD J., J.

This action was commenced by filing the summons and complaint on December 1, 2023, alleging personal injuries sustained by the plaintiff while on the premises of 873 Hancock Street, Brooklyn, NY, on July 22, 2023, due to the negligence of the defendants/licensees of the premises. Issue was joined by defendants Godon J. McDonald and Earmin A. McDonald by filing of their answer with cross-claims on January 11, 2024. Defendants Godon J. McDonald and Earmin A. McDonald amended their verified answer on March 31, 2024. Issue was joined by defendant Lamb of God Spiritual Baptist Church, Inc. on April 12, 2024.

Defendant Lamb of God Spiritual Baptist Church, Inc. (defendant) moves to dismiss pursuant to CPLR 3211[a][7] for failure to state a cause of action and because there is a complete defense to the action pursuant to the Volunteer Protection Act of 1977 (Mot. Seq. No.1).

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Plaintiff opposes the motion because there is no supporting affidavit or attorney affirmation which it argues is required under CPLR 2214(b) and only a memorandum of law. Moreover, plaintiff argues that the memorandum does not contain an acknowledgment that it was prepared “under the penalties of perjury.” The plaintiff has not provided the court with any case law that supports the proposition that a motion based purely on a legal issue requires anything more than a memorandum of law. Regarding the motion to dismiss, an attorney affirmation which is not based on personal knowledge would be treated as a nullity (*Zuckerman v City of New York*, 49 NY2d 557, 404 NE2d 718 [1980]) and do no more than parrot what is already in the defendant’s memorandum of law. The court notes that neither party provided the court with an affidavit from a party with personal knowledge and therefore its decision will be based solely on the law regarding the sufficiency of the pleading.

The standard to apply when considering a motion to dismiss is found in *Doe v Educ. Inst. Oholei Torah*, 2025 NY Slip Op 00948, 2025 WL 542053, at *1 [2d Dept Feb. 19, 2025]:

On a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint for failure to state a cause of action, a court must ‘accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ (*Leon v Martinez*, 84 NY2d 83, 87–88, 614 NYS2d 972, 638 NE2d 511; see *Rubin v Poly Prep Country Day Sch.*, 227 AD3d 741, 742, 211 NYS3d 177). However, ‘allegations consisting of bare legal conclusions ... are not entitled to any such consideration’ (*Simkin v Blank*, 19 NY3d 46, 52, 945 NYS2d 222, 968 NE2d 459 [internal quotation marks omitted]; see *Doe v Hauppauge Union Free Sch. Dist.*, 213 AD3d 809, 810, 184 NYS3d 150).

Whether a plaintiff can ultimately establish the allegations within the complaint is of no consequence to whether a potential cause of action is stated. (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Although plaintiff argues that the allegations within the complaint are not vague or conclusory and comport with the liberal pleading requirements permitted by CPLR 3013, there are absolutely *no facts that support even an inference of negligence*. Such a deficiency could easily have been resolved by providing an affidavit of plaintiff which would otherwise rescue a defective pleading. (“Moreover, the court may consider affidavits submitted by the pleading party to remedy any defects in the pleading, and upon considering such an affidavit, the facts alleged therein must also be assumed to be true” (*Island Ordnance Sys., LLC v Amerimax, Inc.*, 224 AD3d at 822, 205 NYS3d 456; see *Mera v New York City Health & Hosps. Corp.*, 220 AD3d 668, 669, 197 NYS3d 278),” see *Mikoma Electric, LLC v Otek Builders, LLC*, 233 AD3d 856, 858 [2d Dept 2024]). The plaintiff also argues that the facts sought by defendant are “evidentiary” in nature, but you need some facts to support a negligence claim and bare legal conclusions are not entitled to any such consideration. See *Doe v Educ. Inst. Oholei Torah*, 2025 NY Slip Op 00948, 2025 WL 542053, at *1 [2d Dept Feb. 19, 2025]. Plaintiff argues that plaintiff “was caused to be burned due to the negligence and indifference of defendants.” The

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court specifically looks at the following provisions of the complaint:

41. That on July 22, 2023, the plaintiff ARLENE CARRINGTON was caused to be burned while at said premises, as a result of which the plaintiff ARLENE CARRINGTON was caused to sustain injuries.

There are no facts as to how plaintiff was caused to be burned.

42. That Plaintiff, ARLENE CARRINGTON, was seriously injured.

This meets the requirements of showing damages.

43. That the aforesaid accident and the injuries resulting therefrom were due solely and wholly as a result of the carelessness, negligence and recklessness of the defendants, their employees, servants, and/or agents, in the ownership, operation, maintenance, control, supervision or about and/or management the aforesaid premises, without the plaintiff in any way contributing thereto.

This is a conclusory statement as there is no indication of the conduct which is alleged to be negligent or reckless or that supervision or management had anything to do with the accident.

46. That the defendants herein were negligent, reckless and careless in that defendants violated their duties to persons on the aforesaid premises and to this plaintiff in particular, in failing to correct the defective, unsafe and dangerous condition on the aforesaid premises.

There is no indication of the "defective, unsafe and dangerous condition." The court should not have to speculate.

47. That by reason of the foregoing and the negligence of the defendants, the plaintiff, ARLENE CARRINGTON, was severely injured, burned and wounded, suffered, still suffers and will continue to suffer for some time physical pain and bodily injuries and became sick, sore, lame and disabled and so remained for a considerable length of time.

Both parties make reference in their respective memorandum of law or attorney affirmation that a "candle" was involved in this accident, but this word is not mentioned even once in the complaint (or in any response to a demand for a bill of particulars although there are unexplained photos of candles without any persons in the photo) and plaintiff's counsel does not have personal knowledge as to the circumstances of this accident. There is no indication in the complaint of what the defendant did or failed to do which constituted negligence and the court

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should not have to speculate. In short, the minimum pleading requirements have not been met. The court will grant defendant Lamb of God Spiritual Baptist Church Inc.'s motion to dismiss.

There is an abundance of case law that allows a court to grant summary judgment to a nonmoving party (CPLR. 3212[b]; *Maheshwari v City of New York*, 2 NY3d 288, 810 NE2d 894, 778 NYS2d 442 [2004]), but no cases can be found that allows or disallows granting dismissal as to nonmoving defendants when the basis is that the complaint fails to state a cause of action. Notwithstanding, the nonmoving co-defendants have cross claims for indemnification against the moving defendant and it appears that full relief cannot be granted *without* dismissal of the complaint against all defendants. Therefore, the complaint is dismissed along with all crossclaims of defendants Gordon J. McDonald and Earmin A. McDonald for indemnification which must also be dismissed.

Based on the foregoing, it is

ORDERED that defendant Lamb of God Spiritual Baptist Church's motion to dismiss because of a failure to state a claim is GRANTED and the complaint and all crossclaims are DISMISSED (MS#1); and it is further

ORDERED that plaintiff Arlene Carrington's motion for a protective order is DENIED as moot (MS#2); and it is further

ORDERED that all other requests for relief are DENIED.

This constitutes the decision and order of the Court.


Hon. Richard J. Montelione

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