

Howard v City of New York

2025 NY Slip Op 32512(U)

July 14, 2025

Supreme Court, New York County

Docket Number: Index No. 157741/2024

Judge: Carol Sharpe

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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. CAROL SHARPE PART 52M

Justice

-----X

JENNIFER HOWARD,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION, NEW
YORK CITY DEPARTMENT OF SANITATION, CARL
SCHURZ PARK CONSERVENCY, INC.

Defendant.

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INDEX NO. 157741/2024
MOTION DATE 11/08/2024
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and following oral arguments, Defendant Carl Schurz Park Conservancy, Inc.'s motion to dismiss pursuant to CPLR 3211(a)(1) is denied and its motion to convert its motion to dismiss pursuant to CPLR 3211(c) into a motion for summary judgment pursuant to CPLR 3212 is denied as moot.

Defendant Carl Schurz Park Conservancy, Inc. i/s/h/a Carl Schurz Park Conservancy, Inc., (the "Conservancy") filed this pre-answer motion seeking dismissal of plaintiff's claims against them with prejudice pursuant to CPLR 3211(a)(1) or, alternatively, pursuant to CPLR 3211(c) converting this pre-answer motion into one for summary judgment and in turn dismissing plaintiff's complaint against them pursuant to CPLR 3212 on the grounds that the documentary evidence established that they did not own, were not a lessee or lessor, and did not maintain, operate, manage, control, supervise, repair, inspect, construct, design, or perform work at Carl Schurz Park. Plaintiff filed opposition.

Plaintiff commenced this action by filing a summons and complaint on August 22, 2024, alleging that on June 19, 2023, at approximately 5:45pm, she was directed to walk around a New York City Department of Sanitation (“DSNY”) truck that was exiting the Carl Schurz Park located at East End Avenue and East 84th Street in New York County, when she tripped and fell as a result of a missing traffic barricade from the sidewalk. Issue was joined upon the filing of an Answer on behalf of defendants The City of New York (“The City”), New York City Department of Parks and Recreation (“Parks Dept.”), and DSNY (collectively “Municipal Defendants”) on November 8, 2024.

In support of its motion to dismiss, the Conservancy submitted, among other documents, hyperlinks to the Parks Dept. website; an affidavit of Patrick K. McCluskey, Executive Director of the Conservancy; an email from Steve Simon, Chief of Staff-Manhattan for the Parks Dept. to Judy Howard and Patrick K. McCluskey of the Conservancy; Parks Dept. PowerPoint presentations dated October 22, 2019, and November 7, 2019, regarding Carl Schurz Park Security Measures Construction; Minutes from The City of New York Community Board 8 Manhattan Parks and Waterfront Committee meeting held on November 7, 2019; Public Design Commission of The City Meeting Agenda and resolution for its meeting held on March 30, 2020; The New York City Landmarks Preservation Commission Advisory Report; and photographs of the plaintiff, the subject defect, and the surrounding area including an erected traffic barricade.

CPLR 3211(a) provides in pertinent parts that, “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1) a defense is founded upon documentary evidence;...”

Pleadings which are the subject of a CPLR 3211 motion to dismiss are liberally construed, the court is to accept the facts as alleged in the complaint to be true, accord plaintiff “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 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994). “However, on a motion to dismiss pursuant to CPLR §3211 (a)(1), where allegations are contradicted by documentary evidence, they are not presumed to be true.” *Sterling Fifth Assocs. v. Carpentille Corp.*, 9 A.D.3d 261, 779 N.Y.S.2d 485 (1st Dept. 2004).

“Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law...” *Leon v. Martinez*, 84 N.Y.2d at 88, and “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002). “Email correspondence can, in a proper case, suffice as documentary evidence for purposes of CPLR 3211(a)(1).” *Art & Fashion Grp. Corp. v. Cyclops Prod., Inc.*, 120 A.D.3d 436, 438, 992 N.Y.S.2d 7 (1st Dept. 2014). “In our electronic age, emails can qualify as documentary evidence if they meet the “essentially undeniable” test [citing *Art & Fashion Grp. Corp.*].” *Amsterdam Hosp. Grp., LLC v. Marshall-Alan Assocs., Inc.*, 120 A.D.3d 431, 433, 992 N.Y.S.2d 2 (1st Dept. 2014). “The motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted.” (*Blackgold Realty Corp. v. Milne*, 119 AD2d 512, 513, *affd* 69 NY2d 719.)” *Biondi v. Beekman Hill House Apartment, Corp.*, 257 A.D.2d 76, 81, 692 N.Y.S.2d 304 (1st Dept. 1999).

Here, taking the facts alleged to be true and giving plaintiff every possible favorable inference, the email from the Parks Dept. to the Conservancy fails the “essentially undeniable” test as it does not utterly refute plaintiff’s factual allegations, and it raises a question of fact. Accordingly, the Conservancy’s motion to dismiss is denied pursuant to CPLR 3211(a)(1) and

their motion to convert its motion to dismiss pursuant to CPLR 3211(c) into a motion for summary judgment pursuant to CPLR 3212 is denied as moot. It is hereby:

ORDERED, that defendant the Carl Schurz Park Conservancy, Inc.’s motion to dismiss pursuant to CPLR 3211(a)(1) is denied; it is further

ORDERED, that defendant the Carl Schurz Park Conservancy, Inc.’s motion to convert its motion to dismiss pursuant to CPLR 3211(c) into a motion for summary judgment pursuant to CPLR 3212 is denied as moot; it is further

ORDERED, that defendant the Carl Schurz Park Conservancy, Inc. shall file its Answer within thirty (30) days of the date of this Order; it is further

ORDERED, that counsel for plaintiff shall serve a copy of this order with notice of entry upon all parties and the Clerk of the Court within twenty (20) days of the date of this Order, and shall file proof of said service, and the Clerk of the Court is 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).

This constitutes the Decision and Order of the Court.

ENTER:

July 14, 2025
DATE


HON. CAROL SHARPE, J.S.C.
HON. CAROL SHARPE
J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	