

Klausner v Incorporated Vil. of Ocean Beach
2025 NY Slip Op 35488(U)
February 26, 2025
Supreme Court, Suffolk County
Docket Number: Index No. 618164/2024
Judge: James F. Quinn
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Index No. 618164/2024SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 41 - SUFFOLK COUNTY**PRESENT:**HON. JAMES F. QUINN
Acting Justice of the Supreme CourtMOTION DATE 08/26/2024
ADJ. DATE 01/21/2025
Mot. Seq. #001 - MDJARED KLAUSNER and ELIZABETH
KLAUSNER,

Plaintiffs,

- against -

INCORPORATED VILLAGE OF OCEAN
BEACH,

Defendant.

DECISION AND ORDERLEVINE & GROSSMAN
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Upon the E-file document list numbered 4-24 and 27-28 read on motion by Defendant Incorporated Village of Ocean Beach seeking an order pursuant to CPLR §3211(a)(1) and (a)(7) to dismiss the complaint as against the moving Defendant, it is hereby

ORDERED, that the application by Defendant Incorporated Village of Ocean Beach seeking an order pursuant to CPLR §3211(a)(1) and (a)(7) to dismiss the complaint as against the moving Defendant is **denied with leave to renew upon completion of all discovery**.

Plaintiff commenced this action on or about July 24, 2024 by filing and then serving on August 5, 2024 the complaint against the Defendant. The complaint alleges that on July 1, 2023, while Plaintiff was walking on the sidewalk of Cottage Walk, Ocean Beach, Fire Island, Plaintiff tripped on an alleged defective sidewalk where it merged with another walkway. Plaintiffs' complaint sounds in negligence alleging the Village caused or created a defective walkway or failed to maintain same.

The Defendant alleges that it is not liable as a municipality because there is no notice of the defective condition on file with its offices after a search of the Clerk's Office and also according to the sworn affidavit of the Department of Public Works, for the past twenty (20) years.

Defendant's first challenge as per CPLR §3211(a)(7) is of the sufficiency of the pleading.

In determining a motion to dismiss a complaint pursuant to CPLR §3211(a)(7), the 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" (*Matneja v Zito*, 163 AD3d 800, 801, 81 NYS3d 174 [2d Dept 2018]; see also *Rosenblum v Island Custom Stairs, Inc.*, 130 AD3d 803, 803, 14 NYS3d 82 [2d Dept 2015]; *Country Pointe at Dix Hills Home Owners Assn., Inc. v*

Beechwood Organization, 80 AD3d 643, 649, 915 NYS2d 117 [2d Dept 2011], quoting *Schneider v Hand*, 296 AD2d 454, 744 NYS2d 899 [2002]). The test of the sufficiency of a pleading is “whether it gives sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments” (*Hampshire Prop. v BTA Bldg. & Developing, Inc.*, 122 AD3d 573, 573, 996 NYS2d 129 [2d Dept 2014], quoting *Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]; see also *JPMorgan Chase v J.H. Electric of N.Y., Inc.*, 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010], quoting *Moore v Johnson*, 147 AD2d 621, 621, 538 NYS2d 28 [1989]). Thus, the inquiry is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170 [2005]).

A review of the complaint shows that a Notice of Claim was duly served within the time frame required by law and that the action was timely commenced. It alleges that the Defendant controlled the sidewalk at issue and alleges a defective condition and that the defective condition was the proximate cause of the Plaintiff’s fall and subsequent injury.

This cause of action is one in negligence.

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 Binghamton*, 38 NY3d 298, 173 NYS3d 484, 194 NE3d 239 (2022); *Pasternack v Laboratory Corp. of America Holdings*, 27 NY3d 817, 37 NYS3d 750, 59 NE3d 485 (2016); *Solomon by Solomon v. New York*, 66 NY2d 1026, 499 NYS2d 392, 489 NE2d 1294 (1985); *Shepard v Power*, 219 AD3d 769, 195 NYS3d 94 (2d Dept 2023); *Colucci v Stuyvesant Plaza, Inc.*, 157 AD3d 1095, 69 NYS3d 410 (3d Dept 2018).

This Court has reviewed the complaint, and all of the elements of negligence are sufficiently pled. Whether or not the Plaintiffs can prove the allegations is not the test used by the Court for a dismissal.

The Defendant argues that the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law.

However, the Plaintiffs argue that the exemption to the prior written notice statute is when the municipality has created the defect or hazard through an affirmative act of negligence.

Plaintiffs have produced an expert witness’ affidavit which refutes the Defendant’s support affidavit and alleges that construction work was in fact performed in the area within the last twenty (20) years.

This raises a question of fact for a judge or jury to determine and reading the complaint in a light most favorable to Plaintiffs, Defendant’s request to dismiss pursuant to CPLR §3211(a)(7) is **denied with leave to renew once discovery is completed**.

Defendant’s second motion is to dismiss the complaint pursuant to CPLR §3211(a)(1) that a defense is founded upon documentary evidence.

Defendant argues that it is entitled to dismissal not only because it received no prior notice of the alleged defective condition but even if the Court were to accept Plaintiffs’ contention that the Defendant created the alleged defective condition, that said condition, as alluded to in Defendant’s expert affidavit, was not and does not fit into the creation of a defective condition which immediately resulted in the existence of

a dangerous condition, which is the exception to the Prior Notice Rule. See *Oboler v City of New York*, 8 NY3d 888, 32 NYS 2d 71, 2007.

“(1), (2) We have recognized only two exceptions to prior written notice laws—“where the locality created the defect or hazard through an affirmative act of negligence and where a ‘special use’ confers a special benefit upon the locality” (*Amabile v City of Buffalo*, 93 NY2d 471, 474 (1999) [citations omitted]). Further, “the affirmative negligence exception... [is] limited to work by the City that *immediately* results in the existence of a dangerous condition” (*Bielecki v City of New York*, 14 ADd 301 *890 [1st Dept 2005] [emphasis added]). Here, plaintiff presented no evidence of who last repaved this section of the roadway before the accident, when any such work may have been carried out, or the condition of the asphalt abutting the manhole cover immediately after any such resurfacing. Next, even assuming that the special use doctrine applies to a manhole situated in a city public street, plaintiffs presented no proof of any special benefit conferred on the City. Finally, we note that the expert’s opinion was not inadmissible merely because nearly four years elapsed between the accident and the expert’s inspection of the site. Because the expert could not supply any reliable evidence as to the elements of the exceptions to the prior written notice law, however, whether the trial court erred in precluding the expert’s testimony is a question that does not affect the outcome of this case.”

Plaintiffs argue that this case fits into the Notice exception when the municipality actually created the defective condition. In support, they provide an affidavit of an alleged expert witness, John J. Natoli, P.E., a construction engineer who previously worked for the City of New York Department of Parks and Recreation as Chief Engineer, Chief of Construction. He reviewed the surveys, 50-h Hearing transcripts, affidavits of the Defendant, Google Earth Pro images of the accident location, photographs and videos of the accident area. In his affidavit, he stated that the ramp installation existed on June 19, 2014 and the ramp was installed no later than December 16, 2024. He also testified that the design and construction work where the wooden ramp meets the sidewalk was not done in accord with generally accepted construction and engineering practices, and in fact it was constructed improperly and presented a tripping hazard. In particular, Mr. Natoli alleges that the gap was made in the concrete with a “saw cut” edge of the cement and the edge of the ramp, that this gap constituted a tripping hazard which is unacceptable, and that the gap should have been filled in at the end of the construction project. Also, he complains that no safety rail has been installed at the last two (2) feet of the ramp.

Nowhere in the affidavit does Mr. Natoli allude as to when the construction was completed. However, he does note the two (2) different types of concrete used indicating that the sidewalk and the concrete slab were constructed at two (2) different times.

Again, Defendant relies upon the affidavits of the Superintendent of the Department of Public Works as conclusive proof that the Village performed no work in the area of the Plaintiff’s accident.

However, the Plaintiffs have yet to complete discovery and have an opportunity to cross-examine this witness.

Usually, motions contemplated under CPLR §3211(a)(1) state that the defense can be established by “documentary evidence” alone. Affidavits alone do not “utterly refute” Plaintiffs’ actual allegations

conclusively establishing a defense as a matter of law and it is incumbent upon the Court to permit Plaintiffs full and fair opportunity to explore Plaintiffs' claim before entertaining a motion to dismiss.

Accordingly, the Defendant's motion is *denied with leave to renew at the conclusion of discovery*. See *Thomas A. Sbarra Real Estate, Inc. v. Lovelle-Tomko*, 84 AD3d 1570, 921 NYS2d 919 (3rd Dept 2011); *Vaughns v. Kirkland*, 85 AD3d 770, 924 NYS2d 845 (2nd Dept 2011).

The foregoing constitutes the *Decision and Order* of the Court.

Dated: February 26, 2025
Riverhead, New York


HON. JAMES F. QUINN, A.J.S.C.

___ FINAL DISPOSITION XX NON-FINAL DISPOSITION