

Kempski v Town of Oyster Bay
2025 NY Slip Op 35592(U)
January 21, 2025
Supreme Court, Nassau County
Docket Number: Index No. 001149/2018
Judge: R. Bruce Cozzens
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: HON. R. BRUCE COZZENS - SUPREME COURT JUSTICE

JOHN KEMPSKI,

Plaintiff,

-against-

TOWN OF OYSTER BAY,

Defendants.

TRIAL/ IAS PART 1

NASSAU COUNTY

INDEX NO. 001149/2018

MOT. SEQ. #006

The following papers read on this Motion for Summary Judgment pursuant to CPLR §3212:

Notice of Motion/Affidavits/Affirmations/Exhibits.....X
 Statement of Material Facts.....X
 Memorandum of Law.....X
 Affidavits/Affirmations/Exhibits in Opposition.....X
 Memorandum of Law in Opposition.....X
 Response to Material Facts.....X

Motion by the Defendant, TOWN OF OYSTER BAY for an Order of this Court pursuant to CPLR §3212 granting to the Defendant TOWN OF OYSTER BAY, Summary Judgment dismissing the Plaintiff's Complaint and all Cross-Claims against it is determined as follows:

This action involves the Plaintiff's claims related to demolition, pursuant to Chapter 96 of the Code of the Town of Oyster Bay, on April 13, 2019 of a structure determined to be dangerous and abandoned on the Plaintiff's property. Plaintiff commenced the instant litigation by the filing of a Verified Complaint on October 2, 2018 and an Order to Show Cause on October 3, 2018 seeking a Temporary Restraining Order. The Motion seeks Summary Judgment on the claims set forth in the Plaintiff's Amended Complaint which were added after the Court denied the Plaintiff's request for a Preliminary Injunction to stop the demolition.

Plaintiff states that he built the single family house in the 1970's and lived there with his family as their primary residence until 2012 when Super Storm Sandy occurred and they vacated. A review of the Plaintiff's deposition testimony reveals that the Plaintiff admitted that the dwelling was in a dangerous condition. The dwelling had a compromised roof and the Plaintiff stated that at no time since Super Storm Sandy in 2012 was the roof fixed. There was no

electrical power to the house nor was there any heat. Walls had fallen due to the water damage. Trespassers were in the premises and they damaged the garage and front door. Children were walking on the dangerous property. Supports for the porch had rotted due to water damage requiring a jack to support it. The roof rafters were compromised and the structure was at imminent risk of additional collapse which created a risk to the community.

Deputy Commissioner Zike outlined his findings and issued a report to the Commissioner for Planning and Development recommending that the dwelling be demolished pursuant to the Oyster Bay Town Code Section 96-20. The Commissioner adopted the rulings and issued an Order of Demolition. This action was commenced through the filing of a Summons and Complaint on October 2, 2018. The Plaintiff filed an Order to Show Cause and the matter was set down for a Hearing. Through Short Form Order dated March 7, 2019 the Court denied Plaintiff's application for an Order staying Defendant from the demolition of the subject property. The Court extended the stay of demolition to permit the Plaintiff to remove two motor vehicles from the property. On April 13, 2019 the dangerous building was demolished. Although the Plaintiff claims to have had valuables in the home there apparently was no effort to remove them from the time when he and his family vacated the premises in 2012 right up and through the time the premises was demolished on April 13, 2019. When the Court Order was signed the Plaintiff was given two extra weeks to remove two vehicles from the premises which he did but apparently left the other items behind.

Defendant states that each of the Plaintiff's causes of action must fail based on the law and the undisputed facts of the case. This Court agrees. Firstly, the 2018 Affidavit of Deputy Commissioner Timothy Zike established the lengthy history of violations to the premises which resulted in the determination in August of 2018 that there an imminent danger to the life, health, safety and welfare of any and all persons. The Town record is replete with complaints, inspections, violations and notices as well as invoices for the costs of demolition. The Town properly exercised its Police powers to protect the public. The testimony of the Plaintiff at his deposition confirms this. Plaintiff states that "the state of disrepair" was not an emergency.

This action seeks a Judgment that the "Defendants were not entitled to demolish the Property." Clearly such a claim was required to have been brought as a proceeding under Article 78 of the CPLR which is the vehicle to challenge the actions and determinations of a governmental official or body. An Article 78 Proceeding has a four month Statute of Limitations. *Save the View Now v. Brooklyn Bridge Park Corp.*, 156 A.D.3d 928 (2d Dep't. 2017). This four month period of limitations applies, *Lenihan v. New York*, 58 N.Y.2d 679 (1982); (CPLR 217). Therefore the action must be dismissed as time-barred.

Plaintiff asserts a Cause of Action for Trespass in the Complaint. Trespass is intentional entry without justification or permission. The Plaintiff failed to plead that Defendant lacked justification to enter and in any event the Defendant had justification after the Court Order denying the Preliminary Injunction. The evidence is clear as to the dangerous condition of the property. Pursuant to the Town Code 96-20 the Town is clearly authorized. The First Cause of Action must be dismissed.

The Second Cause of Action for Inverse Condemnation must be dismissed. Inverse condemnation occurs when a government takes a property for public use that greatly damages the value of the Plaintiff's property. The Plaintiff is required to prove that the government intruded onto the property and interfered with the owner's rights amounting to a constitutional taking. Clearly a municipality may demolish a dangerous building in the exercise of its Police powers. Where the government's discretion is neither arbitrary nor capricious there is no constitutional violation. Here the actions were sanctioned by the Court.

The Cause of Action for Negligence must be dismissed. There was no Special Duty owing to the Plaintiff. Plaintiff did not belong to a special class; the Town did not assume a duty to the Plaintiff beyond what was owed to the Public generally. Such provision would arise where the municipality took positive control of a known and dangerous safety condition having knowledge of a blatant violation of safety laws and provides assurances of safety to a person or entity.

The Tort Causes of Action must be dismissed as the Plaintiff fails to establish the elements of the Cause of Action. To state a cognizable claim a Plaintiff must allege intentional infliction of harm resulting in special damages without any excuse or justification by a series of acts which would otherwise be lawful and the defendant acted with disinterested malevolence.

The Fourth Cause of Action for Willful Misconduct and Gross negligence must be dismissed. To make a finding of negligence a party must fail to exercise the degree of care a reasonably prudent person would have used. A claimant must prove a duty of care, breach of that duty, causation and damages. Gross negligence and willful misconduct require recklessness and intentional misconduct, a complete disregard for the rights and safety of others which is clearly not the case here.

The Cause of Action for Private Nuisance must be dismissed. Such claim requires interference substantial in nature, intentional in origin, unreasonable in character, with a person's property right to use and enjoy the land, caused by another's misconduct in acting or failure to act.

The Sixth Cause of Action for Violation of Due Process is properly dismissed. The Plaintiff was give more than ample notice which is proven by the documentary evidence. The Plaintiff had the opportunity to establish that the property was not dangerous which he failed to do before this Court on multiple occasions when the application for a preliminary injunction was being considered.

The defense to the second, fifth and seventh causes of action in the amended complaint are founded on documentary evidence and therefore those causes of action must also be dismissed.

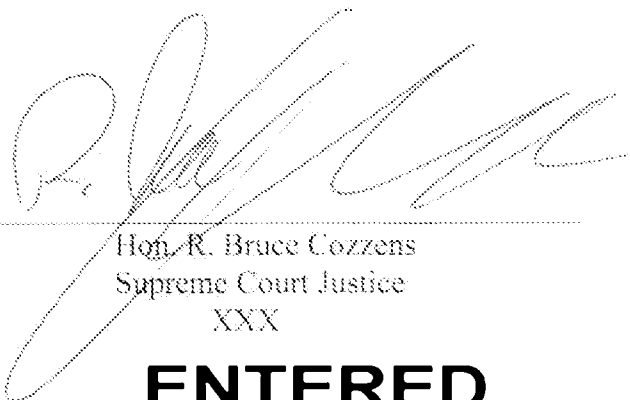
It is well established that a Defendant is entitled to summary judgment where there are no material facts to be resolved at trial. The Defendant has made a *prima facie* showing of their entitlement to judgment as a matter of law by tendering the admissible evidence. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Conclusions, expressions of hope and unsubstantiated

allegations are insufficient to defeat the motion. The Documentary evidence including the Exhibits annexed to the Motion establish the factual history which has not been successfully refuted by the Plaintiff. This clearly was not a hasty determination on the part of the Defendants. The Defendants acted reasonably and properly in enforcing the provisions set forth in the Code of the Town of Oyster Bay to protect the Public.

Motion (Seq. #006) by the Defendant TOWN OF OYSTER BAY for Summary Judgment dismissing the Plaintiff's Complaint and all Cross-Claims is granted in its entirety.

Dated:

JAN 21 2025



Hon. R. Bruce Cozzens
Supreme Court Justice
XXX

ENTERED

Jan 23 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE