

Melby v Duffy

2001 NY Slip Op 30022(U)

September 7, 2001

Supreme Court, Suffolk County

Docket Number: 0025518/5518

Judge: Robert W. Doyle

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Short Form Order

Index No. 1997-25518

SUPREME COURT-STATE OF NEW YORK
TRIAL SPECIAL TERM, PART 5 SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
JUSTICE

MOTION DATE: 3-10-1999
MOT. Seq. #004-DISM
Seq. #005-X-SJ
Seq.#006-X-Amend

STEEN MELBY,
Plaintiff(s),

- against -

TOM DUFFY,
THE TOWN OF BROOKHAVEN and
THE COUNTY OF SUFFOLK,

Defendant(s)

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Upon the following papers numbered 1 to 5 read on this motion and cross motion for summary judgment and this cross motion to amend: Notice of Motion/Order to Show Cause and supporting papers 1 ; Notice of Cross Motion and supporting papers 2,3; Answering Affidavits and supporting papers 4; Replying Affidavits 5 and supporting papers ; Other ;(and after hearing counsel in support and opposed to the motion); it is,

ORDERED that this motion **by** defendant County of Suffolk and cross motion **by** defendant Town of Brookhaven, each of which seek summary judgment dismissing the complaint and all cross claims and this cross motion **by** plaintiff seeking leave to serve an amended complaint are considered **by** the Court and are decided as follows:

This is an action commenced by plaintiff seeking to recover for personal injuries sustained by him on May 27, 1997 when while operating his boat on the waters of the Great South Bay near Blue Point Cove, he struck fishing nets owned by defendant Tom Duffy. According to his testimony at a hearing held pursuant to General Municipal Law section 50-h, plaintiff is a licensed boat captain and is self-employed as a restorer of antique boats with a shop on the Patchogue River. On May 27, 1997, he and a friend went in plaintiff's boat to a restaurant across the Patchogue River for dinner. After dinner they went for a ride, heading south on the Patchogue River. It was about 9:30 p.m., night had fallen, and there was little illumination from either the moon or an artificial lighting source. Upon reaching the Great South Bay, plaintiff turned his boat to the west and traveled along the coast for about one mile. When he reached a curved cove area, he began to turn his boat to the left in order to begin the return trip. According to plaintiff, after he completed the turn and while moving at approximately 15 miles per hour, he was struck in the face by a rope or netting. Plaintiff testified at the 50-h hearing that he was familiar with the waters in that area and had operated boats in that portion of the Great South Bay for years.

Initially, it should be noted that the rope that struck plaintiff in the face was part of a fishing system employed by defendant Tom Duffy. At his deposition, defendant Duffy testified that he has been a commercial fisherman for about 37 years and for the last 30 years, he has fished the waters of the Great South Bay using pound traps. According to defendant, pound traps consist of a series of poles that are imbedded in the bay bottom and which extend above the water line. There is a series of nets attached to these poles. There is also a rope line that runs along the tops of the poles which acts like a clothesline, permitting the nets to be pulled out of the water and hung over the lines to dry and be cleaned. Defendant testified that he has maintained pound net traps near this location as well as in other locations in the Great South Bay on and off for over 25 years. He had placed the traps-in question in the water sometime in March of 1997.

In support of its motion for summary judgment, the defendant County of Suffolk (hereinafter the County) alleges that it has no duty to prevent the placing of fish nets or traps in the Patchogue Bay area of the Great South Bay. Defendant points to the deposition testimony of its own witness, an engineer with the County's Department of Public Works, in which he clearly states that the County does not maintain or control the bay bottom or the water where the accident occurred. In fact, in their papers in support of their cross motion, the Town of Brookhaven concedes that it owns the area in question. Defendant argues that liability in tort is an incident of occupation and control giving rise to a duty of care. According to defendant, in the absence of occupation of the bay area in question, there can be no duty of care on the part of the County and no liability on its part for any injuries sustained by plaintiff.

"In order to establish a prima facie case of negligence, a plaintiff must first demonstrate the existence of a duty owed by the defendant to the plaintiff" (Schulman v City of New York, 190 AD2d 663; see also, Solomon v City of New York, 66 NY2d 1026, 1027; Bauer v Town of

Hempstead, 143 AD2d 793, 794). In the case at bar, the plaintiff has not demonstrated any duty which was owed by the County to the plaintiff.

It is clear from the evidence that the accident occurred in waters owned by defendant Town of Brookhaven. Thus, the duty to maintain the area in question, if any, would fall upon the owner thereof. Plaintiff argues that the County may be held liable to plaintiff based on the theory that it controls the waterways in question by virtue of the fact that its agents, County police marine bureau personnel, patrol these waters for the purpose of enforcing state and local regulations. A similar argument pertaining to the patrolling of state highways by county police was made and rejected by the Court in Estate of Konstantatos v. County of Suffolk (208 AD 2d 889, 618 NYS 2d 90). In that case, the Court reasoned that taken to its logical conclusion, plaintiff's argument would render a municipality responsible in tort for the consequences of any condition existing on a roadway which it neither owns, designs, maintains, controls or repairs, simply because it enforces traffic regulations there. The Court concluded that since the County did not own the roadways or maintain the traffic signal, it owed no duty to the plaintiffs decedent to warn him of any dangerous condition existing on the roadway (see also, Schulman v. City of New York, 190 AD 2d 663, 593 NYS 2d 286; Ossmer v. Bates, 97 AD 2d 871, 469 NYS 2d 273; Cuddy v. Murdock, 84 AD 2d 744, 443 NYS 2d 744).

Applying that same line of reasoning to the facts in the case at bar, the Court finds that there can be no liability imposed upon the County of Suffolk based only on the fact that it patrols the waters where the accident occurred. Absent some other basis for the imposition of liability, whether it be ownership of the area where the accident occurred or a statutory obligation to maintain the public waterways, there is no claim that can be made by plaintiff against the defendant County of Suffolk for the injuries sustained by him. Accordingly, the motion by the defendant County for an order granting it summary judgment dismissing the complaint and any and all cross claims against it is granted.

Defendant Town of Brookhaven has also moved for summary judgment dismissing the complaint. In support of its motion, the Town raises several arguments. Initially, the Town contends that the statutory immunity granted to landowners who permit the public access to their property for the purpose of certain recreational activities prevents the plaintiff herein from pursuing a claim against the Town.

General Obligations Law § 9-103 " 'grants immunity for ordinary negligence to landowners who permit members of the public to come on their property to engage in several enumerated recreational activities' " (Albright v. Metz, 88 N.Y.2d 656, 661-662, 649 N.Y.S.2d 359, 672 N.E.2d 584 quoting Bragg v. Genesee County Agric. Socy., 84 N.Y.2d 544, 546-547, 620 N.Y.S.2d 322, 644 N.E.2d 1013), including "boating." The statute was promulgated to encourage property owners to permit persons to come on their property to engage in specified recreational activities, without fear of liability for injuries suffered by

recreationists (see, Farnham v. Kittinger, 83 N.Y.2d 520,523, 611 N.Y.S.2d 790,634 N.E.2d 162; Ferres v. City of New Rochelle, supra, 68 N.Y.2d, at 451, 510 N.Y.S.2d 57,502 N.E.2d 972). Thus the Legislature, in drafting the statute, intended a quid pro quo, whereby property owners would be granted statutory immunity in return for permitting the public access to their undeveloped land (see, Farnham v. Kittinger, supra, 83 N.Y.2d, at 523,611 N.Y.S.2d 790,634 N.E.2d 162; Ferres v. City of New Rochelle, supra, 68 N.Y.2d, at 454, 510 N.Y.S.2d 57,502 N.E.2d 972).

The statute does not apply, however, to immunize a municipality from liability for its failure to fulfill its duty of reasonable care in the operation and maintenance of a supervised public park or recreational facility (Ferres v. City of New Rochelle, 68 N.Y.2d 446, 510 N.Y.S.2d 57, 502 N.E.2d 972, supra). Where a municipality has already opened land for supervised recreational use, the statute's intended purpose of encouraging the landowner to make its property available for public use would not be served (see, Ferres v. City of New Rochelle, supra at 454; see also Bennett v. Town of Brookhaven, 233 AD 2d 356.650 NYS 2d 752). In such a case, the municipality has already assumed a duty to act reasonably in maintaining the facility in a safe condition in view of all the circumstances (see, Preston v. State of New York, 59 N.Y.2d 997,998,466 N.Y.S.2d 952, 453 N.E.2d 1241), and to extend it immunity under section 9-103 in its recreational facility would lead to the anomalous result of defendant's liability for injuries suffered there by recreationists depending upon whether the recreationist was engaged in one of the activities which happens to be enumerated in the statute (see, Ferres v. City of New Rochelle, supra, 68 N.Y.2d, at 454, 510 N.Y.S.2d 57,502 N.E.2d 972).

In this case, plaintiff was injured while boating on a public waterway that was already open to the public. In this regard it should be noted courts have long recognized the right of the public to travel over navigable waterways such as this for use as a "public highway" (see, Smith v. Odell, 234 NY 267; Chenango Bridge Co. v. Paige, 83 NY 178). Thus, while the waterway was not part of a supervised public park, it was already accessible to the public. General Obligations Law section 9-103 provided no inducement to defendant Town to open to the public what was already considered part of the "public highway" and therefore, defendant may not take advantage of the immunity afforded by that statute.

However, defendant also seeks dismissal of the complaint upon the ground that it could not be held liable for the existence of the pound traps in the bay since it did not have the right to regulate or remove those nets. Defendant argues that a prior attempt by it to pass legislation that prohibits the use of pound nets was struck down as unconstitutional.

"The legislative power to regulate fishing in public waters has been exercised from the earliest period of common law and it has become a settled principle of public law that power resides in the several states to regulate and control the right of fishing in public" (see, Sloup v. Town of Islip, 78 Misc. 2d 366, 356 NYS 2d 742 and the cases cited therein). Without a specific grant of power, a town has no authority to restrict by local law or ordinance the catching of migratory fish in navigable waters within its jurisdiction (36A C.J.S. Fish s 26;

Lawton v. Steele, 119 N.Y. 226, 23 N.E. 878). Migratory marine fish are considered to be *ferae naturae* (see McKee v. Gratz, 260 U.S. 127, 43 S.Ct. 16, 67 L.Ed. 167; People v. Johnson, 7 Misc.2d 385, 166 N.Y.S.2d 732) and are thus held to be the property of the state (People v. Miller, 235 App.Div. 226, 257 N.Y.S. 300, *aff'd*, 260 N.Y. 585, 184 N.E. 103). In the Sloup case, the court found that a local ordinance which sought to regulate the times and locations for fishing by the public ran afoul of the Environmental Control Law by which the State reserved to exclusive right to regulate such matters.

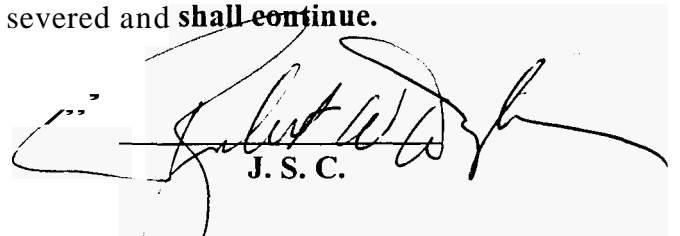
Thus, in this case, the defendant Town would have had no authority to regulate the placement of nets in the navigable waters of the bay, regardless of the fact that it owned the land underneath the bay. In fact, in 1997, the Town enacted Local Law 11, section 32-7-B which provided that no pound net was to be placed in or on lands owned by the Town of Brookhaven. Co-defendant Duffy, in a separate action, challenged the enactment of the law as being *ultra vires* and this Court (Henry, J.), agreed. In that case, Duffv v. Town of Brookhaven (decided 9/24/98), Justice Henry struck down the local law as an unconstitutional usurpation of the rights of the state to regulate the public waterways and the right of the public to fish in those waterways. Under these circumstances, it cannot be said that defendant may be held liable for a condition that it had no ability to either control or regulate. To the extent that the pound traps could be considered a dangerous condition or hazard, defendant Town of Brookhaven may not be held liable to plaintiff for any injuries sustained as a result thereof.

Accordingly, the cross motion by defendant Town of Brookhaven for an order granting it summary judgment dismissing the complaint and any and all cross claims against it is granted.

In light of the disposition of the cross motion by defendant Town of Brookhaven, the cross motion by plaintiff for leave to amend his complaint to allege that the defendant Town acted willfully or maliciously is denied.

The action against the remaining defendant is severed and **shall continue.**

Dated: September 7, 2001



J. S. C.