

**Gottschak v County of Suffolk**

2007 NY Slip Op 31910(U)

June 27, 2007

Supreme Court, Suffolk County

Docket Number: 0004248/2004

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. EMILY PINES  
Justice of the Supreme Court

MOTION DATE 1-10-07 (004)  
2-8-07 (005, 006)  
ADJ. DATE 3-15-07  
Mot. Seq. # 004 - MG  
005 - MG  
006 - XMD

-----X		
GEORGE JOHN GOTTSCHAK, JR., an infant	:	MALLILO & GROSSMAN
under the age of 18 years old by his mother and	:	Attorneys for Plaintiffs
natural guardian, IRENE GOTTSCHAK,	:	163-09 Northern Boulevard
	:	Flushing, New York 11358
	:	
Plaintiffs,	:	CHRISTINE MALAFI, Suffolk Cty Attorney
	:	By: T. Michael Conlon, Esq.
- against -	:	Attys for Defts Cty of Suffolk & Real Estate
	:	100 Veterans Memorial Hwy, P.O. Box 6100
	:	Hauppauge, New York 11788-0099
	:	
COUNTY OF SUFFOLK, SUFFOLK COUNTY	:	LEWIS JOHS AVALLONE AVILES, et al.
DEPT. OF REAL ESTATE, TOWN OF	:	Attorneys for Deft Town of Brookhaven
BROOKHAVEN and TED SMITH	:	425 Broad Hollow Road
EXCAVATING, INC.,	:	Melville, New York 11747
	:	
Defendants.	:	MORENUS, CONWAY, GOREN, et al.
	:	Attorneys for Deft Ted Smith Excavating
	:	58 South Service Road, Suite 350
	:	Melville, New York 11747
-----X		

Upon the following papers numbered 1 to 42 read on these motions and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; 20 - 30 ; Notice of Cross Motion and supporting papers 31 - 36; Answering Affidavits and supporting papers 37 - 38 ; Replying Affidavits and supporting papers 39 - 40; 41 - 42 ; Other County of Suffolk's memorandum of law page 19 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (#004) by defendants County of Suffolk and Suffolk County Department of Real Estate for summary judgment, the motion (#005) by defendant Ted Smith Excavating, Inc. for summary judgment and the cross motion (#006) by defendant Town of Brookhaven for summary judgment are hereby consolidated for the purposes of this determination and it is further;

**ORDERED** that this motion by defendants, County of Suffolk and Suffolk County Department of Real Estate ("County"), for an order pursuant to CLR 3212, granting them summary judgment dismissing plaintiffs' complaint and all cross claims against it is granted and it is further;

**ORDERED** that this motion by defendant Ted Smith Excavating, Inc. ("TSE") for an order pursuant to CLR 3212, granting it summary judgment dismissing plaintiffs' complaint and all cross claims against it is granted; and it is further

**ORDERED** that this cross motion by defendant Town of Brookhaven ("Town") for an order pursuant to CLR 3212, granting it summary judgment dismissing plaintiffs' complaint and all cross claims against it is denied.

Plaintiff Irene Gottschak commenced this action to recover damages for personal injuries allegedly sustained by her twelve-year-old son, infant plaintiff George John Gottschak, Jr. ("George"), on February 7, 2003, when he fell on a metal fence which was partially buried in the ground of a vacant, unimproved lot, located on Mill Drive, Town of Brookhaven, County of Suffolk, New York. Defendant County held ownership of the property by tax title.

Defendant County now moves for summary judgment on the basis that it did not have notice of the defective condition existing on the property because it did not install or bury the fence. Defendant also contends that the plaintiffs are unable to demonstrate any negligence on their behalf or a breach of a duty as the proximate cause of the infant plaintiff's injuries. Defendant further asserts that it did not have actual physical possession, control or operation of the property, nor did it derive any income from the property. In the alternative, defendant contends that County Law § 53(2) provides the defendant with immunity from negligence claims based upon allegations stemming from a defective, unsafe or dangerous condition on property when the property is held by tax title. Defendant submits the pleadings; copies of the transcripts of the GML § 50-H hearing testimony given by plaintiffs; copies of the transcripts of the deposition testimony given by plaintiffs and on behalf of defendants County, Department and Ted Smith; and the affidavit of Gerard Goehring.

Defendant TSE also moves for summary judgment on the basis that it did not have a contractual relationship with the plaintiffs. Defendant TSE asserts that it did not assume a duty to the plaintiffs. Defendant TSE further contends that it did not create the condition that resulted in the infant plaintiff's injuries. Defendant submits the pleadings and copies of the deposition testimony of Theodore Smith and Mrs. Irene Gottschak.

Defendant Town cross-moves for summary judgment on the basis that the Town did not own or maintain the subject property. Defendant Town also contends that it is not liable for the infant plaintiff's injuries because it did not create the defective condition in existence on the premises. Defendant submits the affidavit of Louis Pulsonetti.

Plaintiffs oppose defendant County's motion on the grounds that the County, as owner of the property, owed a duty to maintain the property in a reasonably safe condition and is therefore liable for infant plaintiff's injuries for its failure to do so. Plaintiffs also oppose the motion by defendant TSE on the grounds that defendant TSE breached its duty when it failed to ascertain why the excavation site was being disturbed. Plaintiffs further oppose defendant Town's motion on basis that the deposition of TSE employee, Neil Damara, remains to be taken and that a question of fact exists as to whether the payload that filled in the excavation site and buried the fence belonged to the Town. Plaintiff also contends that a question of fact exists as to whether defendant Town ordered the installation of the safety fence.

The testimony given by the infant plaintiff at the 50-H hearing and at his deposition is consistent. George testified to the effect that on the day of his accident he and two friends were having a snowball fight at an open lot located at the end of Mill Drive. He had played there four or five times before and the lot on those occasions had contained an excavation hole with a fence around it. He stated that was running away from his friends who were chasing him with snowballs when he hit ice hidden below the snow and did a "baseball-like" slide before recovering. After taking a few more steps he saw that his snowsuit pants had been slit open and his right leg was bleeding. He realized that he had cut himself on a "big metal fence" that had fallen down and was partially covered with snow. He described the fence as being made of orange mesh held together by green poles. He stated that the lot was completely empty and there was no construction occurring at the time of his accident. He had previously seen the fence when it was standing erect around the excavation hole but on the day he was hurt the excavation hole had been filled in and the fence was also "plowed in" and buried. George further testified that he knew the neighbor across the street from the vacant lot had called the Town to complain about the excavation site.

Mrs. Gottschak testified at her 50-H hearing that she was informed of her son's injury by his two playmates. Mrs. Gottschak stated that when she arrived at the empty lot she saw her son sitting on the snow with a cut through his snowsuit and his right leg bleeding. Mrs. Gottschak testified that her son informed her that he fell. Mrs. Gottschak stated that her son fell on "a metal fence, barb wire type of fence, half in the snow and half out of snow." She stated there were no signs warning anyone to stay off the vacant lot. Mrs. Gottschak testified that she never gave her son permission to play in the vacant lot and was unaware that he had previously played on the lot. She also testified that there had been a hole in the empty lot with a fence around it prior to September 2002 when the hole was filled in and the fence was buried. Mrs. Gottschak also stated that TSE had excavated the site. Mrs. Gottschak further testified that she was informed by the Town that the County owned the empty parcel of land.

Mrs. Gottschak testified at her examination before trial to virtually the same set of facts as she did at her 50-H hearing. Mrs. Gottschak stated that the trucks that cleared the empty lot at the end of her block bore the name of "Ted Excavating". She stated that approximately one month after the hole was excavated an orange mesh fence was placed around the site. Mrs. Gottschak testified that she never complained to the County about the empty lot or the hole in the empty lot, but one of her neighbors, Mara Winters, called the Town about the vacant lot. Mrs. Gottschak further testified that the vacant parcel of land had been cleared by accident. Mrs. Gottschak stated that the Town informed her that New York State Real Estate owned the property.

Gerard Goehringer testified on behalf of the County at its examination before trial. Mr. Goehringer testified that he has been employed by the Suffolk County, Department of Planning, Division of Real Estate as an inventory supervisor since 1997. He stated that he conducted a search, including the original tax deeds and minor correspondence between the field representatives and the prior owner, about the lot, known to the County as § 969, Block 7, Lot 029, located on Mill Drive in the Town of Brookhaven, and discovered that the lot was owned by the County at the time of the infant plaintiff's injury. He stated the property consisted of dense woods until it was accidentally excavated. Mr. Goehringer stated the County came into possession of the lot in 1992 due to the nonpayment of taxes by its prior owner and disposed of the land after the subject accident in 2003 by land swap. Mr. Goehringer testified that on August 12, 2002, a complaint was received from a neighbor regarding an excavation that was occurring on the lot and a field representative was sent to investigate. Mr. Goehringer stated the field

representative found that the property had been partially excavated and a piece of machinery left behind. It was later discovered that the equipment belonged to TSE. Mr. Goehringer testified that the County never discovered who hired TSE or authorized the excavation. Mr. Goehringer testified that the County never had physical possession of the property, nor did it receive any direct income from the property. Mr. Goehringer further testified that the Town had no ownership interest in the subject parcel of land.

Suzanne Mauro testified on behalf of the Town at its examination before trial. Ms. Mauro testified that she has been employed by the Town, Highway Department, as a senior clerk typist for 6 years and handles all claims and litigation for the Highway Department. She stated that after placing a request with the Engineering Department to determine if the vacant lot was maintained by the Highway Department, she was informed that the Highway Department did not have any jurisdiction over the subject parcel of property. Ms. Mauro further testified that the Town does not maintain records for parcels of land that it does not have authority over and that according to the papers produced by the assessor, the County owned the land.

By his personal affidavit, Mr. Louis Pulsonetti states that he is and has been a general supervisor for the Town of Brookhaven Highway Department since 2001. Mr. Pulsonetti asserts that the Town did not perform any work on the lot in question.

Theodore A. Smith testified on behalf of TSE at its examination before trial. Mr. Smith testified that he is the owner of TSE, which is an excavation and drainage company. Mr. Smith testified that in July of 2002, he was hired by Mr. Cristolo, doing business as Paramount Homes, pursuant to an oral agreement, to perform a "clear and dig" on the lot, which included clearing the trees from the lot and then excavating it for the pouring of a house's foundation. Mr. Smith stated he did not sign any agreements with either the County or the Town and had no knowledge of any agreement between the County or Town with Paramount Homes for the job's performance. He stated the trees were cleared from the lot and the foundation dug in one day, but he returned to the site, approximately one month later, at Mr. Cristolo's request to install a safety fence. He stated he installed a four foot orange plastic safety fence around the perimeter of the excavation foundation, which was located in the center of the vacant lot. Mr. Smith stated that the fence was erected because the Town advised Mr. Cristolo that the neighbors were complaining about the excavation site. Mr. Smith testified that he did not fill the excavation hole, but one of his employees, Neil Damara, informed him that he saw a payloader owned by the Town filling the hole. He stated Mr. Damara saw the Town's emblem on the machinery that was being used to fill the hole. Mr. Smith further testified that the project was never completed and that the safety fence was buried when the Town filled the excavation hole.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see, Alvarez v Prospect Hospital*, 68 NY2d 320 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]).

Fundamental to a plaintiff's recovery in a negligence action, plaintiff must establish that defendant owed plaintiff a duty to use reasonable care, that defendant breached that duty, and the resulting injury was proximately caused by defendant's breach (*see, Turcotte v Fell*, 68 NY2d 432, 510 NYS2d 49 [1986]). In absence of a statute imposing liability upon the owner of real property, liability is an incident to occupation and control (*Gilbert Prop., Inc. v City of New York*, 33 AD2d 175, 305 NYS2d 650 [1969]). Since, the duty of reasonable care to those who enter upon the land is derived from the control of the land, a municipality will not be held liable for the defective condition of a piece of property over which it does not maintain control (*see, Rochette v Town of Newburgh*, 88 AD2d 614, 449 NYS2d 1013 [1982]). While a municipality has a nondelegable duty to maintain land under its authority and control in a reasonably safe manner, liability will not attach unless it is shown that the ascribed negligence of the municipality is the proximate cause of the plaintiff's injuries (*Stiuso v City of New York*, 87 NY2d 889, 639 NYS2d 1009 [1995]; *Sherman v County of Cortland*, 18 AD3d 908, 795 NYS2d 121 [2005]).

Based upon the foregoing, defendant County has established its entitlement to judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr., supra; Zuckerman v City of New York, supra*). Although defendant County was the owner of the subject property on the day of the infant plaintiff's accident, it held ownership to the premises via tax title. Under County Law § 53, subdivision 2, defendant County is not liable for the defective, unsafe or dangerous condition of property that is owned by tax title where the County is not in actual physical possession, control and operation of the property as owner, or deriving a direct income from the parcel of land. Consequently, since defendant County was not under a duty to reasonably maintain property that it held by tax title, such as the property in question, then defendant County cannot be held to have breached a duty to the plaintiff, and absent such a duty, there can be no breach for which the defendant is liable (*Kimbar v Estis*, 1 NY2d 399, 153 NYS2d 197 [1956]; *Ossmer v Bates*, 97 AD2d 871, 469 NYS2d 273 [1983]). Therefore, defendant County had no duty to warn users of the dangerous or defective state of the subject vacant lot and cannot be held accountable for the injuries sustained by the infant plaintiff. Furthermore, no proof has been submitted to demonstrate that defendant County authorized defendant TSE or defendant Town to act on its behalf; instead the evidence shows that it did not authorize anyone's actions and that the subject parcel of land was excavated and filled without prior authorization from defendant County (*see, Harrington v 615 West Corp.*, 2 NY2d 476, 161 NYS2d 106 [1956]; *Hyman v Barrett*, 224 NY 436 [1918]). Nor has any evidence been presented to establish that defendant County exerted control over the vacant parcel of land or participated in creating the risk that caused the infant plaintiff's injuries (*see, Muszynski v Buffalo*, 29 NY2d 810, 327 NYS2d 368 [1971]; *Bonesteel v Fitzgerald Bros. Constr. Co.*, 86 AD2d 715, 446 NYS2d 564 [1982]; *Siddon v Fishman*, 65 AD2d 832, 409 NYS2d 830 [1978]). Defendant County's motion for summary judgment is, therefore, granted.

Regarding, defendant TSE's motion for summary judgment, defendant TSE has established that it did not owe an independent duty of reasonable care to the infant plaintiff beyond its oral contractual agreement with Mr. Cristolo of Paramount Homes (*Phillips v Young Men's Christian Association*, 215 AD2d 825, 625 NYS2d 752 [1995]; *Nassau Roofing & Sheet Metal Company v Facilities Development Corporation*, 125 AD2d 754, 509 NYS2d 177 [1986]). Moreover, defendant TSE's contractual obligation to the non-party Paramount Homes cannot stand as a basis to impose liability upon it since it did not assume a duty of care to the plaintiffs (*Espinal v Melville Snow Contr.*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 Ny2d 220, 557 NYS2d 286 [1990]). Additionally, there has not been any evidence presented to show that the "clear and dig" job as

well as the installation of the orange safety mesh fence by Mr. Smith's company, defendant TSE, was performed in a negligent manner or that it created the hazardous condition that resulted in the infant plaintiff's injuries (*Segretti v Shorestein Co., East, L.P.*, 256 AD2d 234, 682 NYS2d 176 [1998]; *O'Connor-Miele v Barhite & Holzinger Inc.*, 234 AD2d 106, 650 NYS2d 717 [1991]; *Dunlop Tire & Rubber Corp. v FMC Corp.*, 53 AD2d 150, 385 NYS2d 971 [1976]). Defendant TSE's motion for summary judgment is, therefore, granted.

With regard to the cross motion submitted by defendant Town, there are issues of fact regarding whether the Town actually created the defective condition that resulted in the infant plaintiff's injuries (*Robinson v Lupo*, 261 AD2d 525, 690 NYS2d 640 [1999]; *Kuchman v Olympia & York, USA, Inc.*, 238 AD2d 381, 656 NYS2d 323 [1997]). Although the Town has submitted evidence stating that it did not maintain or have any jurisdiction over the subject property, testimony has been provided stating that it was defendant Town that filled in the excavation site that resulted in the partial burying of the orange mesh safety fence that injured the infant plaintiff. Additionally, evidence has been presented of complaints proffered to the Town by the neighbors concerning the hazardous condition in existence on the vacant property, as well as the fact that Mr. Smith's testimony that he installed the safety fence because of the Town's request to Paramount Builders. Therefore, it cannot be said that the plaintiffs have failed to raise a triable issue of fact regarding the defendant Town's creation of the dangerous condition that existed on the vacant parcel of land, which resulted in the infant plaintiff's injury (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; *Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]). Defendant Town's cross motion for summary judgment is, therefore, denied.

Accordingly, the motions by defendants County and TSE for summary judgment are granted and the cross motion by defendant Town for summary judgment is denied. The action is severed and shall continue as against defendant Town.

Dated: 6/27/07

Emily Pines  
J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION