

Rabenou v Village of Great Neck Plaza, Inc.
2007 NY Slip Op 32969(U)
September 12, 2007
Supreme Court, Nassau County
Docket Number: 9900-05/
Judge: Daniel Martin
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SHORT FORM ORDER**SUPREME COURT OF THE STATE OF NEW YORK**

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

FARAZANEH RABENOU.
Plaintiff.

- against -

VILLAGE OF GREAT NECK PLAZA, INC., D.
ARBUSMAN MANAGEMENT, LLC, LEBLAVI
ASSOCIATES L.P. and CLE BLAVI ASSOCIATES.

Defendants.

LEBLAVI ASSOCIATES L.P.

Third-Party Plaintiff.

- against -

WATER AUTHORITY OF GREAT NECK
NORTH, AEROPI, INC. And IRA BENLAVI.

Third-Party Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motion and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Defendants D. Arbusman Management, LLC (hereinafter "Arbusman") moves and defendant/third-party plaintiff Leblavi Associates, L.P. (herein "Leblavi") cross-move for summary judgment dismissing the complaint and all cross-claims and counterclaims asserted against these defendants. Third-party defendant Water Authority of Great Neck North (hereinafter "Water Authority") cross-moves for summary judgment dismissing the complaint and third-party complaint.

The following facts are undisputed. On or around January 15, 2005 at 1:30 p.m. plaintiff

tripped on the sidewalk between the property owned by defendant Leblavi, 63 Middle Neck Road, Village of Great Neck Plaza, and 65 Middle neck Road which is owned by defendant Arbusman. A water shut-off valve owned and maintained by the Water Authority is located in the area in which plaintiff tripped.

Plaintiff alleges in his bill of particulars that he tripped on a dangerous condition, i.e., a square cut in the brick sidewalk approximately 2-3 inches by 2-3 inches and two inches deep and that there were blue markings in the area of the hole indicating that same was to be repaired. Plaintiff also contends that the hole was the result of a missing water shut-off valve cover owned and maintained by the Water Authority.

Plaintiff commenced the instant action against the above referenced defendants as well as the Village of Great Neck Plaza, asserting causes of action based upon the defendants' negligent ownership, maintenance, operation, management and control over the area where plaintiff tripped and fell. Defendants have all answered asserting cross-claims against each other. Leblavi commenced a third-party action against the Water Authority as the owner of the shut-off valve in the area where plaintiff fell and against Aeropi, Inc. and Ira Benlavi as the tenants at 65 Middle Neck Road.

Defendants Arbusman and Leblavi respectively move for summary judgment on the grounds that 1) they had no tort liability in the event they failed to repair the sidewalk as required by the applicable local statute; 2) they did not create the defective condition which caused plaintiff to trip; and 3) they did not enjoy a special use of the area in the sidewalk where plaintiff fell so as to require the abutting property owner defendants to maintain the area where plaintiff fell. Third-party defendant Water authority moves for summary judgment dismissing the complaint and third-party complaint upon the basis that plaintiff is unable to identify the hole upon which she tripped and whether or not that area is under the control of this third-party defendant.

A party moving for summary judgment must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party opposing a motion for summary judgment must demonstrate that there are no triable issues of fact through admissible evidence. Zuckerman v. City of New York, *supra*.

Motions of Landowners

Both abutting landowner defendants, Arbusman and Leblavi assert that they although Code of the Village of Great Neck §185-1 imposes a duty on property owners who abut a public sidewalk to maintain the sidewalk in good and safe repair, said statute does not impose tort liability upon abutting land owners where they fail to comply with this requirement. Where, as here, such a statute does not expressly impose tort liability upon the abutting land owner it will not be held liable based upon a mere violation of the statute. See, Brandes v. Incorporated Village of Lindenhurst, 8 A.D.3d 315.

Defendant Arbusman relies upon the deposition testimony of Danny Arbusman, defendant Arbusman's "owner." At his deposition Mr. Arbusman testified that :

- 1) in addition to being Arbusman's owner he owns the tenant jewelry store at 65 Middle Neck Road;
 - 2) he was unaware of any missing brick or cut out in the sidewalk;
 - 3) he received no complaints about the sidewalk;
 - 4) the tenant which operated out of 65 Middle neck Road did not perform any construction or maintenance of the sidewalk area.
- (See, deposition transcript of Danny Arbusman, pp. 5, 7, 19-23, 29).

In support of its motion Leblavi points to the deposition testimony of Loretta Mastrocinque, Leblavi's managing agent's property manager wherein she testified that she did not observe any brick cuts or missing bricks and that there are no records of maintenance or complaints about the sidewalk in front of this defendant's property. (See, deposition transcript of Loretta Mastrocinque, pp. 20-23). In an affidavit Ms. Mastrocinque also avers that no one associated with Leblavi removed any cap or paving stone covering a water shut-off valve "nor did we create any other condition on that stretch of sidewalk."

Both defendants assert that the area in which the alleged defect is located does not constitute a special use which could result in liability to the defendants. Where a landowner abutting public property puts part of that public property to a special use for his own benefit that is under the abutting owner's control, said landowner has a duty to safely maintain the area in order to avoid injury to others. See, Balsam v. Delma Engineering Corp., 139 A.D.2d 292 (1st Dep't 1988). Where the benefit of the area of the sidewalk where the accident occurred is enjoyed by the abutting landowner as it would be by the rest of the general populace and not solely to the landowner's benefit, the court will find that there is no special use imposing a duty on the abutting owner defendants. Balsam v. Delma Engineering Corp., supra.

At his deposition Robert J. Graziano, the Water Authority's Superintendent testified that the Water Authority owned and maintained the water shut-off valve in the area of the accident and that same serviced both 63 and 65 Middle Neck Road as well as possibly other addresses. (See, deposition transcript of Robert J. Graziano, pp. 10-11, 20).

A landowner is not liable to a plaintiff who suffers personal injuries due to a defect in a sidewalk abutting the landowner's property unless the landowner 1) affirmatively creates the defective condition; 2) negligently made repairs to the area; 3) created the defect through a special use; or 4) violated a statute which expressly imposes liability on the landowner for his failure to maintain and repair the sidewalk. See, Brandes v. Incorporated Village of Lindenhurst, supra.

As set forth above, there is no local statute that expressly places tort liability on the landowners who fail to maintain the sidewalk abutting their property. Further, the deposition testimony and affidavit of the representatives of these defendants adequately demonstrate that they did not undertake maintenance and/or repairs such that they may have created a defect. The

owners have also demonstrated that they did not enjoy a special use which would impose liability. The valve was owned and maintained by the water district, the defendants both testified that they did nothing themselves to create the defect and they *prima facie* demonstrated that any benefit realized as a result of the presence of the valve is not exclusive to these defendants.

Where, as here, defendants Arbusman and Leblavi have made *prima facie* demonstrations of entitlement to summary judgment, the burden shifts to any party opposing the motions to demonstrate a triable issue of fact. Zuckerman v. City of New York, *supra*.

In opposition plaintiff argues that 1) there is a special use by virtue of the fact that the valve in question serviced the premises owned by the two abutting landowner-defendants herein and that as a result they enjoyed the exclusive special use; and 2) the local ordinance requires maintenance and repair on the part of the abutting landowners.

First, the court disagrees with plaintiffs' position that the valve serviced only these two pieces of property and should therefore be viewed as a special use to these two owners. While Mr. Graziano only testified that the valve may have serviced other addresses in addition to the two landowner-defendants herein, he also testified as to the extensive use of the valve by the Water Authority itself. At a second deposition conducted on April 23, 2007 Mr. Graziano testified that the Water Authority owns the valve and can use it to shut off the water supply in order to service 1) the meter on the building; 2) a break in the service connection; and 3) the underground pipes owned by the authority. Further, the Authority uses the valve to shut off the water when it replaces the water meter. (See, deposition transcript of Robert J. Graziano, pp. 66-70). The court concludes that it was not the property owners who enjoyed the exclusive benefits of the use of the shut-off valve, but that the Water Authority at the very least shared said benefits in its providing water services.

Even accepting plaintiff's position that the valve could exclusively cut-off water supplied to the two abutting landowners, in order for the special use doctrine to apply, "access and ability to control the special use are essential to the existence of a duty to repair and maintain." Kaufman v. Silver, 90 N.Y.2d 204, 208. As set forth above, Mr. Graziano testified that the Water Authority owned and maintained the valve. There has been no evidence to suggest that the landowners had access to the valve under the sidewalk other than turn-off switches at the meters which are located in their building.

Plaintiff's position that the motion should be denied due to the landowners' failure to comply with the statutory requirement to maintain the sidewalk is also unavailing. As set forth above, liability for such a violation may only be imposed where the statute expressly provides for same. See, e.g., Norcott v. Central Iron Metal Scraps, 214 A.D.2d 660 (2nd Dep't 1995). The court therefore finds that plaintiff has failed to meet his burden of demonstrating a triable issue of fact which precludes these motions for summary judgment. The complaint and all cross-claims as asserted against defendants Arbusman and Leblavi are dismissed. As Leblavi's third-party complaint is based upon contribution and indemnification, the court likewise dismisses the third-party complaint in its entirety.

Third-Party Defendant Water Authority's Motion

The court having directed that the third-party complaint be dismissed in its entirety, the court denies the Water Authority's motion to the extent it seeks dismissal of the complaint as moot.

So Ordered.

Dated: September 12, 2007

Alvin Martin
A.J.S.C.
ENTERED
SEP 20 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE