

Williams v Faltz

2007 NY Slip Op 33976(U)

November 27, 2007

Supreme Court, Suffolk County

Docket Number: 0023167/2005

Judge: Peter Fox Cohalan

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This opinion is uncorrected and not selected for official publication.

ORDERED that the motion for summary judgment by the defendant REP C. LLC is granted and the complaint of Alan Williams and all cross-claims asserted against this defendant are hereby severed and dismissed; and it is further

ORDERED that the unopposed motion by Darryl Williams to consolidate the action entitled *Williams v Rep C. LLC* filed under Suffolk County Index No. 06-23709 with the instant action is granted and Index No. 06-23709 is disposed; and it is further

ORDERED that the unopposed cross-motion by Traneigha Walker on behalf of Michael A. Allen, deceased, to consolidate the action entitled *Traneigha Walker as Administratrix of the goods, chattels and credits which were of MICHAEL A. ALLEN, Deceased (hereinafter Walker as Administratrix) v. REP C LLC*, under Suffolk County Index No. 06-04645 with the instant action is also granted and Index No. 06-04645 is disposed; and it is further

ORDERED that upon a search of the record pursuant to CPLR 3212(b), summary judgment is granted in favor of the defendant REP C. LLC and the complaint of Darryl Williams, under index #23709/06 and Walker as Administratrix under index #04645/06 are hereby severed and dismissed as asserted against this defendant.

This action arises out of a three-vehicle accident which occurred on February 20, 2004, at approximately 10:00 AM on Motor Parkway near the driveway to the parking lot of 1516 Motor Parkway in the hamlet of Hauppauge, in Suffolk County, New York ("the "property"). The property is owned by the defendant REP C. LLC ("REP C") and leased to non-party Whitman Packaging, a subsidiary of Estee Lauder ("Whitman"). The driveway to the parking lot on the property pitches upward upon exiting onto Motor Parkway, a four-lane roadway with two eastbound and two westbound traffic lanes. Adjacent to the parking lot ramp to the left (i.e., west) and parallel to Motor Parkway is a concrete retaining wall on top of which sits a six feet cyclone fence. A few feet in front of the retaining wall is a guardrail which runs along Motor Parkway.

On the day of the accident, the defendant Bernetta Faltz ("Faltz") had driven Michael Allen, Allan Williams and Darryl Williams, all employees of Whitman, to the property to pick up their paychecks. As Faltz's vehicle, with its three passengers and driver, exited the driveway of the parking lot to proceed westbound on Motor Parkway and started crossing the two eastbound lanes, the vehicle was struck by the vehicle owned by the defendant Rosa Moreno and operated by the defendant Edilberto Moreno, ("Moreno"), which was traveling in the left eastbound lane of Motor Parkway. The impact caused the Faltz vehicle to spin around into the right eastbound lane on Motor Parkway where it was struck a second time by the vehicle owned by the defendant Victoria Trujillo and operated by the defendant Clarke Torres ("Torres"). It is undisputed that the defendants Moreno and Torres were speeding on Motor Parkway when the impact occurred; indeed, in his police statement, Edilberto Moreno conveyed that his vehicle was racing with the Torres vehicle on Motor Parkway.

In their complaints by Allan Williams and Traneigha Walker and as amplified by his bill of particulars, the plaintiff Alan Williams and Walker as Administratrix allege, *inter alia*, that REP C was negligent in the ownership, operation, design, maintenance, inspection, repair and control of its property in creating and allowing a hazardous and defective condition to exist which limited and obstructed the sight distance for drivers emerging from the parking lot onto Motor Parkway in violation of the national and New York State standards, failing to implement traffic control measures to prohibit a left turn or to post warnings to motorists emerging from the driveway, failing to modify an improperly sloped driveway, failing to eliminate the visual obstruction of the fence and guardrail and failing to provide an alternative safe method of egress. In support of its motion for summary judgment, REP C argues that it owed no duty to the plaintiffs, and that any alleged defect in the design of the parking lot driveway or alleged hazardous condition created by the placement of the fence and guardrail were not the proximate cause of the accident.

A landowner is not an insurer of the safety of those coming on its premises, but has a duty to keep its "property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]; ***Jang Hee Lee v Sung Whun Oh***, 3 AD3d 473, 473-474, 771 NYS2d 134 [2004]). In order for a property owner to be held liable for injuries sustained as a result of an allegedly dangerous or defective condition on its property, the plaintiff must establish that such a condition existed, and that the owner either affirmatively created the condition or had actual or constructive notice of it (see, ***Basso v Miller***, *supra*; ***Pena v Women's Outreach Network, Inc.***, 35 AD3d 104, 824 NYS2d 3 [2006]; ***Kuchman v Olympia & York***, 238 AD2d 381, 656 NYS2d 323 [1997]). Nevertheless, a property owner has no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous (***Jang Hee Lee v Sung Whun Oh***, *supra*), or to warn or protect others from a dangerous or defective condition on a neighboring premises (***Clementoni v Consolidated Rail Corp.***, 8 NY3d 963, 836 NYS2d 507 [2007]; ***Galindo v Town of Clarkstown***, 2 NY3d 633, 781 NYS2d 249 [2004]).

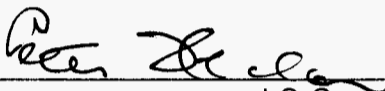
In the case at bar, REP C has no duty to control the location of the fence and guardrail which it established is on the adjacent premises. Additionally, REP C has no legal duty to evaluate and warn others about a danger caused by the condition existing on the neighboring land, especially, where, as here, the condition is open and obvious. Further, there is no indication in the factual record before the Court to establish that the location of the fence and guardrail obstructed Faltz's view of Motor Parkway, or to establish that the slope of the driveway in any way contributed to the happening of the accident.

During her deposition, Faltz testified that she stopped on the top of the driveway, looked both ways before proceeding onto Motor Parkway and did not see any vehicles. Indeed, Faltz testified that when she looked left from the place where she had stopped her vehicle in the driveway, she clearly could see the traffic light on Motor Parkway which was approximately 500 feet away. Even assuming, *arguendo*, that Faltz's view was obstructed, she was obligated to

yield the right-of-way to oncoming vehicles before proceeding on to Motor Parkway until it was reasonably safe to do so (**Gondolfo v DeMasi**, 28 AD3d 606, 813 NYS2d 527 [2006]; see also, **Olsen v Baker**, 112 AD2d 510, 490 NYS2d 916 [1985], *appeal denied* 66 NY2d 604, 498 NYS2d 1024 [1985]). Thus, there is no evidence to establish that REP C created a risk that it had a duty to prevent or warn against (see, **Daversa v Harris**, 167 AD2d 810, 563 NYS2d 372 [1990]). As to the posting of signs to prohibit a left turn, REP C has no authority to regulate the turning of vehicles exiting its property (see, Vehicle & Traffic Law § 1640[a][2], [11]; **Daversa v Harris**, *supra*). Thus, no basis exists to hold REP C liable for the subject accident and the resulting injuries.

In light of the determination herein, the Court will exercise its discretion to search the record (CPLR 3212[b]) and award summary judgment to REP C on the complaint of Alan Williams and also dismiss the complaints of Darryl Williams and Walker as Administratrix.

Dated: November 27, 2007



J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION