

Geist v Town of Islip

2008 NY Slip Op 32645(U)

September 24, 2008

Supreme Court, Suffolk County

Docket Number: 05-7325

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 7-10-08 (007)
MOTION DATE 7-17-08 (008)
MOTION DATE 7-31-08 (009)
MOTION DATE 8-13-08 (010)
ADJ. DATE 8-13-08
Mot. Seq. # 007 - MG # 008 - MG
009 - MG # 010 - MD

-----X
SUSAN GEIST, as Administratrix of the Goods, :
Chattels, and Credits of GERALD J. GEIST, :
RAYMOND MESSINA, TIMOTHY NOONAN, :
JOHN J. CUNDARI, KATHLEEN MESSINA, :
GIA NOONAN, JOAN KRESOFSKY, as :
Administratrix of the Estate of DAVID A. :
KRESOFSKY, deceased, JOAN KRESOFSKY, :
individually, ASHLEY KRESOFSKY, an infant :
and KEVIN KRESOFSKY, an infant by their :
mother and natural guardian, JOAN KRESOFSKY, :
STATE FARM MUTUAL AUTOMOBILE :
INSURANCE CO. a/s/o JOHN CASCIO, :
:
Plaintiffs, :
:
- against - :
:
TOWN OF ISLIP, THE COUNTY OF SUFFOLK, :
P.C. RICHARD & SON, INC., EMPIRE STATE :
REGIONAL COUNCIL OF CARPENTERS :
BUILDING CORP., EMPIRE STATE REGIONAL :
COUNCIL OF CARPENTERS LOCAL 7 a/k/a :
LOCAL UNION 7 UNITED BROTHERHOOD OF :
CARPENTERS, JAMES P. BARRETT and :
ANTHONY PERSON, :
:
Defendants. :
-----X

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Upon the following papers numbered 1 to 34 read on these motions for summary judgment and motion to consolidate; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4; 5 - 8; 9 - 11; 12 - 15 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 16 - 17; 18 - 19; 20 - 22; 23 - 24; 25 - 26 ; Replying Affidavits and supporting papers 27 - 28; 29 - 30; 31 - 32; 33 - 34 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (007) by defendant, County of Suffolk, for summary judgment dismissing the action as against them pursuant to CPLR 3212 is granted; and it is further

ORDERED that the motion (008) by defendant, P.C. Richard & Son, for summary judgment dismissing the action as against them pursuant to CPLR 3212 is granted; and it is further

ORDERED that the motion (009) by defendants, Empire State Regional Council of Carpenters Building Corp. and Empire State Regional Council of Carpenters Local 7 , for summary judgment dismissing the action as against them pursuant to CPLR 3212 is granted; and it is further

ORDERED that the motion (010) by defendants, James Barrett and Anthony Person, to consolidate a related action, captioned, Randal Haynal v Anthony Person and James P. Barrett, under Index Number 18320/07 with the instant action pursuant to CPLR 602 is denied without prejudice.

In this negligence action, plaintiffs seek damages for injuries allegedly sustained on July 20, 2004 while attending a public awareness event on the sidewalk in front of a construction site owned by defendant, P.C. Richard & Son (hereinafter referred to as "P.C. Richard"), located on the North Service Road of the Sunrise Highway in the Town of Islip, New York. The awareness event was organized by defendants, Empire State Regional Council of Carpenters Building Corp. and Empire State Regional Council of Carpenters Local 7 (hereinafter referred to as "the Empire defendants"). The record reveals that at approximately 8:40 a.m., a pick-up truck operated by defendant, Anthony Person, and owned by defendant, James Barrett, drove onto the sidewalk, pushing the plaintiffs into a fence that surrounded the P.C. Richard construction site, allegedly causing injuries and death. The record reveals that defendant Person pled guilty to several criminal charges related to driving while impaired and was incarcerated. Plaintiffs allege that the Empire State defendants and defendants, County of Suffolk (hereinafter "the County") and P.C. Richard, proximately caused the injuries by their failure to safeguard plaintiffs on the sidewalk and in negligently placing a fence that encroached onto the sidewalk. Before the Court are motions for summary judgment by the Empire State defendants, the County of Suffolk and P.C. Richard. Defendants Barrett and Person also move to consolidate a related action commenced by plaintiff, Randal Haynal, with the main action.

Initially, the motion to consolidate the related action, Action #2, under Index Number 18320/07 with the instant action, Action #1, is denied. Defendants improperly requested relief in Action #1 and must move for separate relief under the Index Number of Action #2. Since the instant motion was submitted under Index Number 7325/05, Action #1, the court shall consider the relief requested only as to Action #1 and denies without prejudice all relief requested as to Action #2.

Plaintiff Raymond Messina testified in his examination before trial that he was a member of the Carpenters' union since 1999. He had participated in protests in the past on sidewalks in front of

businesses who were not employing union workers. No barricades were ever used at the picketing sites in the past. When he arrived at the site on July 20, he was told where to stand by the organizer. The men were holding a banner and did not engage vehicle operators in conversation. He stated that there was no indication that an accident was about to happen. The men were standing in front of a chain link fence which was erected by P.C. Richard employees along the sidewalk. Plaintiff was standing in front of the fence and facing P.C. Richard when the accident occurred. There was no warning and he heard no horn.

At his examination before trial, plaintiff Timothy Noonan testified to the effect that he was employed by the union and was instructed to appear at the P.C. Richard site on July 20. He was holding one end of the banner prior to the accident. He first saw the vehicle coming up onto the curb and turned to his side. He observed the truck strike some of the men. He observed a police car driving by the site prior to the accident, but had no contact with the officer.

At his examination before trial, plaintiff John Cundari testified to the effect that he was also present at the P.C. Richard site to participate in the public awareness event. He was a member of the Union for approximately eight years and was holding one end of the banner when the accident occurred. He had no contact with the County or Town regarding union activity and no representations were made to him that he would be protected at the site. He stated that all the men were standing on the sidewalk prior to the accident and did not see the truck before the accident. After the impact, he found himself wedged under the fence.

At his examination before trial, Michael L. Conroy testified to the effect that he was employed as director of organizing for the Empire defendants. He was aware of the incident of July 20, 2004 but was not present at the time of the impact. He verbally told the men to act in an orderly manner, hold the banner and not to interfere with the traffic. He organized the event which began on June 29, 2004 and continued daily to inform the public that P.C. Richard was hiring a general contractor who did not employ union workers or provide benefits. He stated that he was aware that a fence surrounded the site but the fence did not encroach upon the sidewalk.

Rosario Pellegrino testified at his examination before trial to the effect that he was a Council representative for the Empire defendants. He initiated the demonstration at P.C. Richard. He stated that he spoke with county police officers but was not told to move from the site by them. He stated that there was no written policy regarding safety and no one was specifically responsible for the men's safety. The men were aware that they should not stand in the road. He viewed the area prior to organizing the event and noticed that there was a sidewalk where the men could stand safely. Before the start of the campaign, he told the men not to block the sidewalk, not to talk to people on the job site, not to confront anyone, to follow the directions of the police and to call him immediately with their instructions. He stated that whenever he saw the police, they never stated that they would stay at the site and protect the members and he never requested protection for his members from the police.

Defendant, Anthony Person, testified at his examination before trial to the effect that he was under the influence of Valium, cocaine and Xanax at the time he borrowed defendant Barrett's vehicle to perform errands on the morning of July 20, 2004. He conceded that he was not wearing corrective lenses which were required on his license. He was returning to the Bay Shore Inn when he encountered a pot

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hole near the sidewalk on the North Service Road where plaintiffs were standing and lost control of the vehicle. He was not aware that he struck anyone and drove back to the Inn. He conceded that he caused the injuries to plaintiffs and plaintiffs' decedents.

John Pietsch testified at his examination before trial to the effect that he was employed by P.C. Richard & Son as director of property management and construction. He was aware of a fence that was erected around the property line several inches north of the sidewalk by the general contractor according to a survey. He stated that a second entrance was made in the fence to the side of the site, where he hoped the union members would congregate instead of on the sidewalk fronting the North Service Road. Although meetings were being held between P.C. Richard and the Empire defendants regarding hiring union carpenters in the future, he stated that the union members continued to congregate in front of the construction site.

Defendant County moves for summary judgment and contends that it had no prior written notice of a defect or dangerous condition on the North Service Road near plaintiffs' accident at any time prior to the alleged accident and that there was no special relationship created with the county police department to provide safety for the union members. In support, the County submits, among other things, the pleadings, bill of particulars, a personal affidavit of Richard Bloch, and the examination before trial testimonies of Joann Kresofsky and Peter Quinn. Mr. Bloch avers in his affidavit that he is an investigator with the County of Suffolk in the office of the Suffolk County Attorney. He stated that he searched the records of the County for any complaints made with regard to a defective condition or pothole on the North Service Road of Sunrise Highway and found none prior to the subject accident.

Plaintiff Joann Kresofsky testified at her examination before trial to the effect that no calls were made by her or her decedent, David, to request protection while at the P.C. Richard construction site. Police Officer Peter Quinn testified to the effect that he was the commanding officer of the 3rd Precinct in Patchogue on the date of the accident and had no prior knowledge of the demonstration. In addition, he was not aware of any officers being sent to the location prior to the accident.

Actual written notice is a condition precedent to maintenance of a cause of action pursuant to the County Charter of the County of Suffolk, Article 8, Section 2. The written notice must specify the particular place and nature of such defect or unsafe condition. Defendant County has demonstrated its prima facie entitlement to judgment as a matter of law by establishing that there was no prior notice of the defective condition in the roadway which caused defendant Person to leave the road and drive into the sidewalk. In addition, the County has established that there was no special relationship with the union members by establishing that there was no justifiable reliance by the union members that they would be afforded protection by the County police (*see, Kovit v Estate of Hallums*, 4 NY3d 499, 797 NYS2d 20 [2005], *rearg denied* 5 NY3d 783 [2005]). Plaintiff submits no opposition to this motion. Accordingly, the County's motion for summary judgment is granted.

Turning to the motion for summary judgment by defendant, P.C. Richard, it is well settled that the owner or lessee of land abutting a public sidewalk owes no duty to the public to keep the sidewalk in a safe condition unless the landowner or lessee creates a defective condition in the sidewalk or uses it for a

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special purpose" (*Otero v City of New York*, 213 AD2d 339, 339-340, 624 NYS2d 157 [1st Dept., 1995]; *Angulo v City of New York*, 5 AD3d 707, 773 NYS2d 573 [2d Dept., 2004]). Here, P.C. Richard has demonstrated, prima facie, that it was not negligent by establishing that it did not create a defective condition inasmuch as the fence was erected adjacent to the sidewalk according to its survey, and did not encroach upon the sidewalk. P.C. Richard erected the fence to enclose the construction site, and made no special purpose of the sidewalk. In addition, there were no complaints regarding the condition of the sidewalk. Mr. Pietsch's testimony established that the fence was placed several inches north of the sidewalk due to the location of the property line. This placement actually allowed for more space to pedestrians. Thus, defendant, P.C. Richard, has demonstrated, prima facie, its entitlement to judgment as a matter of law by establishing that it had no duty to the plaintiffs and was not negligent. In opposition, plaintiffs failed to raise an issue of fact and provided no evidence to prove that the fence encroached upon the sidewalk, or that defendant breached a duty. Accordingly, the motion for summary judgment by P.C. Richard is granted.

The court turns to the motion for summary judgment by the Empire defendants, wherein they contend that they were not negligent in the organization and control of a union demonstration; they did not fail to safeguard the demonstrators; and were not negligent in failing to place barricades or protective devices around the demonstrators and take other preventive measures. To establish a prima facie case with respect to the issue of causation, the plaintiff must necessarily demonstrate that the acts of the defendant were "a substantial cause of the events which produced the injury" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]). Moreover, where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, liability depends upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence (*see, Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, *supra*). Here, Mr. Pellegrino took the precautions of viewing the site prior to organizing the awareness event to be sure the site had a sidewalk.

In addition, the union members' testimonies established that they were instructed to stay on the sidewalk, avoid entering the road and refrain from confrontations with passing vehicle operators. In addition, the members testified that they had participated in other similar union activities and did not expect barricades to be placed for their protection. Moreover, the Empire defendants were not bound to foresee the possibility that defendant Person would lose control of his vehicle and drive off the service road and into the members who were safely standing on the sidewalk (*see, Maida v Vellella*, 124 AD2d 561, 507 NYS2d 706 [2d Dept., 1986], *modified* 69 NY2d 1026 [1987]). Thus, the Empire defendants demonstrated, prima facie, their entitlement to judgment as a matter of law by establishing that their conduct in organizing the event, on July 20, 2004, was reasonable under the circumstances and that they were not negligent.

In opposition, plaintiffs claim that the Empire defendants' refusal to move the awareness event to the side street of the P.C. Richard site was negligent in that the placement of the union members on a narrow strip of sidewalk exposed them to a more heavily trafficked service road, putting the members at obvious peril. However, the court finds that even assuming arguendo, that the Empire defendants were negligent in instructing the members to remain on the sidewalk of the service road on a daily basis for three weeks, their conduct was not the proximate cause for plaintiffs' injuries, but merely furnished the

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occasion for the subsequent intervening action by the defendant Person when he lost control of the vehicle at the same place where plaintiffs were safely standing (*see, Ventricelli v Kinney System Rent A Car, Inc.*, 45 NY2d 950, 411 NYS2d 555 [1978], *remititur amended* 46 NY2d 770 [1987]); *Torres v Hallen Constr. Corp.*, 226 AD2d 364, 640 NYS2d 244 [2d Dept., 1996]). Defendant Person was under a duty to operate the vehicle with reasonable care and his conduct was the sole proximate cause of the accident. Accordingly, the motion by the Empire defendants is granted.

Accordingly, summary judgment is granted to defendants, the County of Suffolk, P.C. Richard & Son and the Empire defendants. The motion to consolidate by defendants, Barrett and Person, is denied.

Dated: Sept. 24, 2008


 J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION

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