

Roberti v Village of New Hyde Park

2009 NY Slip Op 30834(U)

April 3, 2009

Supreme Court, Nassau County

Docket Number: 945-05

Judge: Michele M. Woodard

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X

ANTHONY ROBERTI,

Plaintiff,

-against-

**MICHELE M. WOODARD
J.S.C.**

TRIAL/IAS Part 14

Index No.:945/05

Motion Seq. Nos.: 05 & 06

THE VILLAGE OF NEW HYDE PARK and
NEWBORN CONSTRUCTION, INC., JAMES K.
HANEY, Individually and in his capacity as an
Officer of NEWBORN CONSTRUCTION, INC.,
Defendants.

DECISION AND ORDER

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Papers Read on this Motion:

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Motion [Seq. 005] by Defendants, Newborn Construction, Inc., James K. Haney, individually and in his capacity as an officer of Newborn Construction, Inc. (collectively referred to herein as "Newborn and Haney"), (1) pursuant to CPLR § 2221, for an Order granting it leave to renew and reargue a prior order of this Court dated June 11, 2008; and (2) pursuant to CPLR § 3211(a)(7) and 3212, dismissing the complaint of the Plaintiff, Anthony Roberti, in its entirety on the grounds that it fails to state a cause of action, or in the alternative, for an Order granting summary judgment dismissing Plaintiff's complaint on the ground that there are no triable issues of fact;

Motion [Seq. 006] by Defendant, The Village of New Hyde Park (referred to herein as the "Village"), pursuant to CPLR § 3211 and 3212, dismissing the Plaintiff's complaint and any and all cross claims asserted against it; the motions are determined as follows:

This action for compensatory damages and injunctive relief was commenced in the Supreme Court, Suffolk County, under Index No. 06948/03, by Summons and Verified Complaint dated March 31, 2003, by Plaintiff Anthony Roberti against Defendants The Village of New Hyde Park (hereinafter "Village"), Newborn Construction Inc. (hereinafter "Newborn") and James K. Haney (hereinafter "Haney"). Issue was joined on July 23, 2003 by service of a Verified Answer on Defendants Haney and Newborn. Defendant, Village served an Amended Verified Answer with Cross-Claim on April 15, 2004. Plaintiff then served Defendants with a Verified Bill of Particulars, dated September 22, 2004 and a Supplemental Verified Bill of Particulars dated December 15, 2004. On August 26, 2004, this matter was transferred from the Supreme Court in Suffolk to Nassau, new Index No. 945/05.

Plaintiff is the owner of a residential home located at 812 North Ninth Place in New Hyde Park, on the corner intersection of North Ninth Place and Whittier Avenue. Plaintiff alleges that on or about October 2001, Defendant Village entered into an agreement with the Defendant Newborn to do repair work on the corner of Whittier Avenue and North Ninth Place as part of a public works project that included adding a handicap ramp to the curb. Plaintiff alleges that on or about October 31, 2001 to March 2002, Newborn Construction Inc. performed said repair work "in such an unreasonable manner that it substantially interfered with Plaintiffs right to use and enjoyment of Plaintiff's land."

Plaintiff's first cause of action alleges that the work has resulted in a substantial nuisance by the continual pooling of water in the Plaintiff's driveway when it rains. Plaintiff's second cause of action alleges that "negligent performance of the repair/construction work has resulted in the creation of a tripping hazard in the sidewalk at the Plaintiff's premises together with the health and safety hazard arising from the pools of stagnant water." Plaintiff testified that the work done on the curb had lowered the price of the value of his property, but conceded that he had not conducted an appraisal on his property.

As a result, Plaintiff seeks a judgment against Defendants in the sum of \$100,000.00 in damages for the first cause of action, an additional \$100,000.00 in damages for the second cause of action and an injunction against Defendants from leaving the nuisance condition unabated.

In an Order dated June 11, 2008, this Court denied Defendants', Haney and Newborn, as well as Defendant, Village's motions for summary judgment dismissal of Plaintiff's complaint on the grounds that it was premature. Specifically, this Court held:

In the instant case, the Court finds that summary judgment against the Plaintiff at this juncture is premature as there have been specific discovery demands made on the Defendants that remain unanswered after several appearances before this Court where Defendants agreed to produce the same. Further, the Court agrees with the Plaintiff that they are entitled to know the parameters of the construction job requirements in order to determine compliance with such requirements and to determine the issue of liability, if any, as between all Defendants.

This Order was entered on June 16, 2008.

Upon the instant application, Defendants, Haney and Newborn, make a combined motion for, *inter alia*, an Order seeking leave to renew and reargue the prior Order of this Court (CPLR § 2221[f]). Defendants, Haney and Newborn, claim that the prior order denying summary judgment was entered without prejudice to remake the motion; the Defendants submit, however, that as the form in which the motion could be remade was not specified, they make the instant combined motion for, *inter alia*, leave to reargue and renew this Court's prior Order pursuant to CPLR § 2221, so as "to cover all bases." Defendants failure to specify the relief sought however is not fatal; pursuant to CPLR § 2221(f), this Court will determine each part of the combined motion as if it were separately made. It is noted at the outset that Defendants, Haney and Newborn, in their reply to Plaintiff's opposition to their motion, concede that their motion for leave to reargue the prior Order is untimely made (CPLR § 2221[d][3]). For these reasons, such relief is denied.

Defendants' motion for leave to renew this Court's prior Order is also **denied**. Defendants, Haney and Newborn, not only fail to specify "new facts not offered on the prior motion that would [arguably] change the prior determination" of this Court, but they also fail to "demonstrate that there has been a change in the law that would change the prior determination" (CPLR § 2221[e]). Thus, Defendants' motion for leave to renew this Court's June 11, 2008 Order is denied.

Defendants, Haney and Newborn, also move, pursuant to CPLR § 3211(a)(7) and 3212, for an Order dismissing Plaintiff's complaint on the grounds that it fails to state a cause of action, or in the alternative, granting summary judgment dismissal of the Plaintiff's complaint and any and all cross claims asserted against it. Notably, the arguments advanced in support of their motion are identical to those they previously advanced in support of their prior motion seeking identical relief.

Plaintiff's complaint as against Defendant, James K. Haney, both in his individual capacity and in his capacity as an officer of Newborn Construction, Inc., is **dismissed**. Corporations are formed to protect individual shareholders, directors and officers from liability (*Bartle v Homeowners*

Cooperative, Inc., 309 NY 103, 106 [1955]; *Goldman v Chapman*, 44 AD3d 938 [2d Dept 2007]; *Damianos Realty Grp. LLC v Fracchia*, 35 AD3d 344 [2d Dept 2006]). Certainly, corporate officers acting in their corporate capacity are protected from personal liability (*Kramer v Twin County Grocers*, 151 AD2d 722, 724 [2d Dept 1989]). Plaintiff has failed to carry his burden of implicating Defendant, Haney personally and in his capacity as an officer of Newborn. Plaintiff's bald and conclusory argument that "if [Haney] had the requisite control of operations and management then he would be a responsible party" does not suffice in opposition to Defendants' prima facie entitlement to judgment as a matter of law (*Lorenz Diversified Corp. v Falk*, 44 AD3d 910 [2d Dept 2007]; *Takeuchi v Silberman*, 41 AD3d 336 [1st Dept 2007]). Based upon the papers submitted for this Court's consideration, this Court finds that the public works contract was not entered into with Haney, either in his individual or in his corporate capacity. Furthermore, as there is no evidence whatsoever of Haney's direct involvement with the public works project at issue, there is no need to pierce the corporate veil. No basis for individual liability, or piercing the corporate veil, has been demonstrated or sufficiently alleged in this case (*Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]).

Plaintiff's complaint against Defendant, Newborn, is also summarily dismissed. Plaintiff asserts two causes of action in his complaint: first sounds in common law nuisance based upon allegations of "substantial[] interfer[ance] with Plaintiff's right to the use and enjoyment of Plaintiff's land" and the "creat[ion of] a substantial nuisance by the continual pooling of water in the Plaintiff's driveway whenever it rains" (*Complaint*, ¶¶14-15); and the second cause of action sounds in common law negligence based upon allegations that "Defendant's negligent performance of the repair/construction work has resulted in the creation of a tripping hazard in the sidewalk at the Plaintiff's premises together with the health and safety hazard arising from the pools of stagnant water (*Id.* At ¶22).

"[T]oday it is recognized that one is subject to liability for private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under rules governing liability for abnormally dangerous conditions or activities (citations omitted)" (*Copart Industries, Inc. v Consolidated Edison Co. of New York, Inc.*, 41 NY2d 564, 569 [1977]). In other words, the elements of a cause of action for private nuisance are: "... (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's right to use and enjoy land, (5) caused by

another's conduct" (*Id.* at 570; *see also, Mangusi v. Town of Mount Pleasant*, 19 AD3d 656 [2d Dept 2005]; *Zimmerman v Carmack*, 292 AD2d 601 [2d Dept 2002]). In this case, Plaintiff has failed to establish the elements of this cause of action. Plaintiff, Roberti, has not placed before the court any evidence to establish that the Defendants invaded his interest in the property or their conduct was unreasonable in nature or actionable under the rules governing liability for abnormally dangerous conditions and activities. Plaintiff's claim is that as a result of the public works project performed on the public property abutting his home, there is a continual pooling of water in his driveway when it rains. While Plaintiff testified at his 50-H hearing that the work done on the curb had lowered the price of the value of his property, he conceded that he had not conducted an appraisal on his property. Thus, Plaintiff's claim of damage to his property is meritless. Further, Plaintiff does not claim that he was denied access to his property and there is no claim that the water was artificially diverted onto his property. Thus Plaintiff has failed to demonstrate the facts give rise to a cause of action for private nuisance. Therefore, the cause of action for nuisance must be dismissed.

As to negligent performance of the construction/repair work by Newborn in accordance with the terms of the public works contract with the Village, the crux of Plaintiff's complaint is simply that he is not pleased with the quality of the work in the road construction project, nor is he pleased with the nature of the work itself. Yet, Plaintiff has failed to establish his standing to assert this cause of action.

Standing involves a determination of whether "the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution" (*Graziano v County of Albany*, 3 NY3d 475, 479 [2004], *quoting Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 [1994]). "Injury-in-fact has become the touchstone" and requires "an actual legal stake in the matter being adjudicated" (*Society of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 772 [1991]). A Plaintiff generally has standing only to assert claims on his or her own behalf (*Caprer v Nussbaum*, 36 AD3d 176, 182 [2d Dept 2006]). In order to have standing to challenge or enforce a contract, an entity must be a party thereto or a third-party beneficiary thereof (*VAC Service Corp. v Technology Ins. Co., Inc.*, 49 AD3d 524 [2d Dept 2008]; *DeRaffele v. 210-220-230 Owners Corp.*, 33 AD3d 752 [2nd Dept. 2006], *lv. app. den.*, 8 NY3d 814 [2007]). To bring an action to recover as the third-party beneficiary of a contract, the third-party must establish that it was the specific intent of the contracting parties to benefit that third-party (*Port Chester Electric Construction Corp. v Atlas*, 40 NY2d 652 [1976]; *Crown Wisteria, Inc. v F.G.F.*

Enterprises Corp., 168 AD2d 568 [1st Dept 1990]). A third-party who is only an incidental beneficiary to the contract may not sue to enforce the contract (*Amin Realty, LLC v K & R Construction Corp.*, 306 AD2d 230 [2d Dept 2003]; *Board of Managers of the Riverview at College Point Condominium III v Schorr Brothers Development Corp.*, 182 AD2d 664 [2d Dept 1992]).

In this case, Plaintiff, as a third party to the public works contract between the Village and the corporate Defendant, Newborn, has failed to establish that it was the specific intent of the Village and Newborn to benefit him specifically (*Port Chester Electric Construction Corp. v Atlas*, supra). It is clear that neither the Village nor Newborn intended to make the Plaintiff a beneficiary of their public works project. In fact, the evidence shows that the public works project was not performed on his private property. As Plaintiff has failed to establish that his private property was damaged in any way, Plaintiff has failed to establish an injury in fact. Thus, having failed to establish his standing to challenge the public works contract in the first place, Plaintiff's second cause of action sounding in common law negligence in the negligent performance of repair/construction work must also be **dismissed**. Plaintiff has not raised a legally cognizable claim against the Defendant, Newborn. Accordingly, Defendants, Haney and Newborn's motion for summary dismissal of Plaintiff's complaint is **granted** and the complaint is **dismissed**.

The Village's motion for summary judgment dismissing Roberti's complaint is also **granted**.

The Village Defendant makes an almost identical argument for summary judgment on the grounds that the Plaintiff's complaint as against it is not compensable under the law. The Village argues that the areas complained of including the curb, sidewalk, the utility/curb strip of grass located between the sidewalk and the curb line, and a tree located in the grassy utility strip, are all public property.


The Plaintiff homeowner's negligence action against the Village of New Hyde Park is **dismissed** on the grounds that Plaintiff has failed to demonstrate that the Village had a duty to maintain the sidewalk in a condition acceptable to him specifically. Plaintiff has failed to advance allegations that the Village breached its duty to maintain the public sidewalk in a reasonably safe condition (*see Hausser v. Giuntam*, 88 NY2d 449 [1996]; *Massa v. City of New York*, 201 Misc. 259 [Sup. Ct. Bronx 1951]), Thus, in totality, where there is no claim of damage to the Plaintiff's property, no claim that

the Plaintiff was denied access to his property and no claim that the water was artificially diverted onto the Plaintiff's property, Plaintiff's complaint as against the Village must also be **dismissed**.

Settle judgment on notice.

This constitutes the Decision and Order of the Court.

DATED: April 3, 2009
Mineola, N.Y. 11501

ENTER: 
HON. MICHELE M. WOODARD
J.S.C.

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