

Schneckenburger v Maynard

2009 NY Slip Op 31306(U)

June 5, 2009

Supreme Court, Nassau County

Docket Number: 10449-07

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**WILLIAM SCHNECKENBURGER,
Plaintiff,**

**Motion Sequence #2, #3, #4
Submitted March 17, 2009**

-against-

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**ROBIN S. MAYNARD, PAUL MACHESE,
ROBERT LANDRY HENDRICKSON and
THE MANHASSET-LAKEVILLE WATER DISTRICT,**

Defendants.

The following papers were read on these motions:

MAYNARD and MACHESE Notice of Motion.....	1
DISTRICT Notice of Motion.....	2
HENDRICKSON Notice of Cross-Motion.....	3
Plaintiff's Affirmation in Opposition to all Motions.....	4
MAYNARD and MACHESE Affirmation in Opposition to DISTRICT Motion.....	5
HENDRICKSON Affirmation in Opposition to DISTRICT Motion.....	6
MAYNARD and MACHESE Reply Affirmation.....	7

Defendants, ROBIN MAYNARD and PAUL MACHESE, move for an order, pursuant to CPLR §3212, for summary judgment dismissing the complaint and all cross claims. Subsequently, defendant, THE MANHASSET-LAKEVILLE WATER DISTRICT (hereinafter referred to as the "DISTRICT"), and defendant, ROBERT LANDRY

HENDRICKSON (hereinafter referred to as "HENDRICKSON"), move for the same relief.

The motion is determined as follows:

This is an action for personal injury arising from a trip and fall accident. Defendants, ROBIN MAYNARD and PAUL MACHESE, jointly own a building located at 47 Plandome Road in Manhasset, New York, where they operate a law office. Defendant HENDRICKSON owns the adjoining property located at 41 Plandome Road, where he conducts a veterinary practice.¹ The two properties share a common driveway. The boundary line between the properties runs down the middle of the driveway, and each owner holds an easement over the portion of the driveway lying on the other's property. The cost of maintaining the driveway is shared by the adjoining property owners.

Along the section of Plandome Road where the properties are located, there is a decorative brick sidewalk which crosses the common driveway. On the section of the sidewalk which crosses the driveway, there is a "curb box cover," covering the emergency shut off valve which controls the water service provided by the DISTRICT. The cover is about six (6) inches in diameter and about one and one half (1 ½) inches high. Although identified by the DISTRICT's representative as a "curb box cover," it is actually located on the side of the sidewalk away from the curb and "closer to the animal hospital."

On January 2, 2007, plaintiff, WILLIAM SCHECKENBURGER, an elderly man, was assisting his daughter-in-law in picking up two (2) dogs from the veterinary office. After exiting the animal hospital with one of the dogs, plaintiff tripped on the curb box cover and sustained injury.

¹Although it is alleged in the complaint that the address of the veterinary clinic is 37 Plandome Road, there is no dispute that it is the same premises.

Defendants MAYNARD and MACHESE move for summary judgment dismissing the complaint and all cross claims on the grounds that the curb box cover did not constitute a dangerous condition and based upon "lack of notice." Defendant HENDRICKSON moves for similar relief, asserting that the condition was not dangerous but arguing, in the alternative, that if the condition was dangerous, defendants MAYNARD and MACHESE are partially responsible. The DISTRICT moves for summary judgment dismissing the complaint and all cross claims on the ground that, pursuant to Town Law § 198(3)[a], maintenance of the curb box cover was the responsibility of the adjoining property owners. Defendants MAYNARD and MACHESE and HENDRICKSON assert that the DISTRICT also has an obligation to maintain the curb cover.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [C.A. 1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626, 620 NYS2d 500 [2nd Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*; *Alvarez*

v Prospect Hosp., supra). However, once this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve (*Id*). Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]).

Landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition (*Tagle v Jakob*, 97 NY2d 165, 737 NYS2d 331, 763 NE2d 107 [C.A.2001]). While plaintiff's status as a trespasser, licensee, or invitee is not determinative, plaintiff's purpose in being upon the land is relevant to the question of reasonable care (*Basso v Miller*, 40 NY2d 233, 386 NYS2d 564, 352 NE2d 868 [C.A.1976]). Whether a dangerous or defective condition exists on the property of another so as to create liability depends upon the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*Trincere v Suffolk*, 90 NY2d 976, 665 NYS2d 615, 688 NE2d 489 [C.A.1997]).

From plaintiff's deposition testimony, that the curb cover was closer to the veterinary office, the court infers that it is actually located on defendant HENDRICKSON's property. While plaintiff's status as a business visitor is not determinative, it was foreseeable that the driveway would be used by veterinary customers, attempting to control their animals. Depending upon the size and physical condition of the dog, a pet owner might be sufficiently distracted so as not to observe an object protruding even slightly from the sidewalk. Thus, the duty of reasonable care may have required the owner of the property to post a warning or perhaps relocate the curb cover. Since defendant HENDRICKSON

has not carried his burden of establishing *prima facie* that he was not negligent, his motion for summary judgment dismissing the complaint and all cross claims is denied.

As a general matter, a landowner owes no duty to warn or to protect others from a defective or dangerous condition on neighboring premises, unless the landowner has created or contributed to it (*Clementoni v Conrail*, 8 NY3d 963, 836 NYS2d 507, 868 NE2d 187 [C.A.2007]). However, absent agreement to the contrary, the burden to maintain an easement falls upon the owner of the dominant estate (*Cypress Hills Cemetery v New York*, 35 AD3d 788, 826 NYS2d 736 [2d Dept 2006]). Although it appears that the curb cover was located on defendant HENDRICKSON's property, MAYNARD and MACHESE, as the owners of the dominant estate, had a duty to maintain it. The parties' agreement with respect to maintenance did not abrogate MAYNARD and MACHESE's common law obligation. Since defendants MAYNARD and MACHESE have not carried their *prima facie* burden that they were not negligent with respect to the curb cover, defendants' motion for summary judgment dismissing the complaint and all cross claims is denied.

With respect to the DISTRICT's motion for summary judgment, the Court notes that although a water district is not a municipality, it has the capacity to sue and apparently to be sued (See, *Jericho Water District v One Call Users Council*, 10 NY3d 385, 858 NYS2d 84, 887 NE2d 1142 [C.A. 2008]). Town Law § 198(3)(a) in part provides, "Supply pipes connecting with district mains shall be installed and repaired at the property owner's expense under the direction of an employee of the town or the district after a permit therefor has been granted....". The requirement that supply pipes be installed under the direction of a town or district employee does not imply that a water district may not be held

liable for negligent installation of a supply pipe or shut off valve cover.

In support of its motion for summary judgment, the DISTRICT submits the affidavit of its Superintendent, Paul Schrader, who states that the DISTRICT did not install, maintain, or repair the curb cover. Nevertheless, pursuant to Town Law § 198(3)(a), the curb cover was presumably installed under the supervision of a district employee, who would have been responsible for its location. The court further notes that the curb cover, which is made of metal, contains raised lettering which reads, "Water DWP." According to Mr. Schrader, the wording indicates that the cover is a "curb valve cover as opposed to a gas valve cover." The Superintendent's familiarity with the legend on the curb cover suggests that it was supplied by the DISTRICT and the DISTRICT may have been responsible for its specifications. In these circumstances, defendant has not carried its burden of establishing *prima facie* that it was not negligent with respect to the placement and design of the curb cover. (See, *D'Ambrosio v New York*, 55 NY2d 454, 450 NYS2d 149, 435 NE2d 366 [C.A.1982][municipality under duty to maintain curb cover flush with the surrounding sidewalk]). Therefore, the DISTRICT's motion for summary dismissing the complaint and all cross claims is denied.

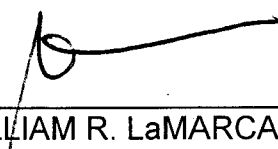
Based on the foregoing, it is hereby

ORDERED, that all defendants' motions for summary judgment dismissing the complaint and all cross-claims are denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: June 5, 2009



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ENTERED
JUN 10 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE