

Dewey v Town of Colonie

2010 NY Slip Op 31795(U)

July 20, 2010

Sup Ct, Albany County

Docket Number: 3989-08

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

RICHARD DEWEY and MARY DEWEY,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO.: 3989-08
RJI NO.: 01-09-96103

TOWN OF COLONIE, TOWN OF COLONIE
POLICE DEPARTMENT, LOCK AND KEY
PRODUCTIONS, ENDEMOL USA INC.,
ABC, INC., and THE WALT DISNEY COMPANY,

Defendants.

Supreme Court Albany County All Purpose Term, July 9, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

On March 28, 2007 Richard Dewy (hereinafter "Plaintiff") was injured when he fell while traversing a residential front yard's muddy decline. He was walking to the "viewing area" for

Extreme Makeover: Home Edition (hereinafter “Extreme Makeover”), a televised construction project, along the only path available to him. The path was, as alleged by Plaintiff, created by Defendants Town of Colonie and Town of Colonie Police Department (hereinafter collectively “Colonie”) along with Defendants Lock and Key Productions, Endemol USA, Inc. ABC, Inc. and The Walt Disney Company (hereinafter collectively “Lock and Key”). Plaintiff further alleges that both Colonie and Lock and Key directed him to the muddy path where he was injured.

Plaintiff, with his wife derivatively, commenced this action against Defendants seeking damages due to the injuries he sustained in his fall. As is relevant for purposes of this motion, Plaintiff’s complaint’s two causes action against Colonie are set forth in substantially similar terms. However, on this record, Plaintiff further defined his causes of action. Plaintiff first alleges Colonie was negligent by creating or having notice of the hazardous and defective condition that caused his fall. Second, he alleges Colonie negligently organized and conducted crowd and pedestrian control.

Issue was joined by all Defendants, discovery is complete and a trial date certain is set. Colonie now moves for summary judgment dismissing the complaint and Lock and Key’s cross claim. Both Plaintiff and Lock and Key oppose the motion. Because Colonie demonstrated its entitlement to judgment as a matter of law and no issue of fact was raised, its motion is granted.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). On a motion for summary judgment, all evidence must be viewed in the light most favorable to the opponent of the motion. (Kropp v. Corning, Inc., 69 AD3d 1211 [3d Dept. 2010]; Haider v. Zadrozny, 61 AD3d 1077 [3d Dept. 2009]).

It is well established that the proponent of a summary judgment motion bears the

“threshold burden of tendering evidentiary proof in admissible form establishing entitlement to judgment as a matter of law.” (Chiarini ex rel. Chiarini v. County of Ulster, 9 AD3d 769 [3d Dept. 2004], Smalls v. AJI Industries, Inc., 10 NY3d 733 [2008], Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; CPLR §3212). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). In opposing a motion for summary judgment, one must produce “evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (Id. at 562).

First, Colonie demonstrated its entitlement to judgment dismissing Plaintiff’s claim that it created or had notice of a hazardous and defective condition.

It is well recognized that “liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property . . . Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property.” (Battaglia v. Town of Bethlehem, 46 AD3d 1151 [3d Dept. 2007]; Seymour v. David W. Mapes, Inc., 22 AD3d 1012 [3d Dept. 2005]; O’Brien v. Trustees of Troy Annual Conference of United Methodist Church, 257 AD2d 954 [3d Dept. 1999]; St. Andrew v. O’Brien, 45 AD3d 1024 [3d Dept. 2007]).

On this record it is undisputed that Plaintiff fell on privately owned property, not Colonie’s property. Moreover, Colonie demonstrated that it had no occupancy, control or special use of such property. Colonie submits Lock and Key’s written contract with the owner of the property where Plaintiff fell, establishing Lock and Key’s right to enter upon and use such

property for its Extreme Makeover project. Also, the Lock and Key Location Manager testified that he coordinated the property owner's "permission for us [Lock and Key] to use their land or their property." He further acknowledged that the contract for the use of property was "between Lock and Key Productions and the landlords – or the landowners," not with Colonie. Such documentation and testimony demonstrate Colonie's lack of any ownership, occupancy, control or special use of the property where Plaintiff fell. Thus Colonie established its entitlement to judgment as a matter of law dismissing Plaintiff's first cause of action.

In opposition, Plaintiff failed to raise a triable issue of fact. Plaintiff submits no proof demonstrating Colonie's ownership, occupancy, control or special use of the property. Rather, Plaintiff's only showing relative to such issue was based upon Lock and Key's "permission to use... the land where [Plaintiff] fell." Moreover, the proof Plaintiff relies upon to demonstrate Colonie's participation in directing pedestrian traffic to the location of Plaintiff's fall is irrelevant to the issue of ownership, occupancy, control or special use of property. As such proof fails to raise an issue of fact about Colonie's ownership, occupancy, control or special use of the property, Colonie's motion for summary judgment dismissing Plaintiff's claim that it created or had notice of a hazardous and defective condition is granted.

Turning next to Plaintiff's claim that Colonie negligently organized and conducted crowd and pedestrian control in directing him to the area where he fell, again Colonie demonstrated its entitlement to judgment as a matter of law.

"Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general." (McLean v. City of New York, 12 NY3d 194 [2009]; *see also* Dinardo v. City of New York, 13 NY3d 872 [2009]). "[D]iscretionary... acts involve the exercise of reasoned

judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result.” (Lewis v. State, 68 AD3d 1513, 1514 [3d Dept. 2009], quoting Haddock v City of New York, 75 NY2d 478, 484 [1990], quoting Tango v Tulevech, 61 NY2d 34, 41 [1983]).

Here, Colonie demonstrated that its allegedly negligent crowd and pedestrian control constituted non-actionable discretionary acts. Plaintiff’s negligence allegation premises Colonie’s liability on its decision to direct individuals to a muddy and declined residential lawn, for access to the “viewing area.” Even assuming the truth of such negligence allegation, such decision was the product of “reasoned judgments which could typically produce different acceptable results”. (Lewis, supra; St. Andrew v. O'Brien, 45 AD3d 1024 [3d Dept. 2007][special event police coverage discretionary]). Such decision was simply not the result of adherence to a governing rule or standard. As such, Plaintiff’s claim of negligent crowd and pedestrian control is not actionable as a ministerial act.

Moreover, Colonie demonstrated that it was fulfilling a discretionary governmental function and not acting in a proprietary capacity. (Balsam v. Delma Engineering Corp., 90 NY2d 966 [1997]; St. Andrew, supra; Sebastian v. State, 93 NY2d 790 [1999]). Whether a municipalities’ acts are proprietary, and actionable as ordinary negligence, rather than governmental turns on “the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred.” (St. Andrew, supra 1027, quoting Miller v. State, 62 NY2d 506 [1984]).

The specific act of alleged negligence is crowd and pedestrian control. It is undisputed that Colonie was performing such acts in conjunction with a private security company hired by

Lock and Key.¹ While the deposition testimony conflicts about who was in charge of the site's ultimate security decisions, there is no dispute that Colonie was acting in the public's interest. Colonie was acting in its capacity of protecting the public's health and safety by regulating vehicular traffic on public streets and maintaining pedestrian traffic in an area open to the public, traditional governmental roles. Regardless of whether ultimate security determinations were made by Colonie or Lock and Key's private security firm, Colonie was at all times performing its governmental function. Negligent crowd and pedestrian control "[l]ike crime prevention [and] traffic regulation [are] classic example[s] of a governmental function undertaken for the protection and safety of the public pursuant to the general police powers." (Balsam, supra at 968). Moreover, Lock and Key's "pay[ment] of the overtime expenses of [Colonie's] police officers does not transform the governmental purpose to a proprietary purpose for which liability may attach." (St. Andrew, supra 1027). As Plaintiff's claim is fundamentally a challenge to Colonie's provision of governmental "safety and security" measures, it is not actionable as a proprietary function. (Miller, supra at 512).

Due to the foregoing, Colonie demonstrated its entitlement to judgment as a matter of law on Plaintiff's negligent crowd and pedestrian control claim.

Again, Plaintiff failed to raise a triable issue of fact. Plaintiff's opposition amply demonstrates that Colonie participated in directing pedestrian traffic to the location of Plaintiff's fall. However, as set forth above, such showing fails to establish that Colonie's actions were ministerial or proprietary. As such, Plaintiff raised no issue of fact, and Colonie's motion for summary judgment dismissing Plaintiff's negligent crowd and pedestrian control claim is granted.

Turning next to Colonie's motion for summary judgment dismissing Lock and Key's cross

¹ Based upon the deposition testimony of Colonie's two officers and Lock and Key's Location Manager.

claim for contribution, again Colonie demonstrated its entitlement to judgment as a matter of law. Defining a claim for contribution, CPLR §1401 states that “two or more persons who are subject to liability for damages for the same personal injury... may claim contribution among them...” Here, as set forth above, Colonie demonstrated that it is not subject to liability for Plaintiff’s personal injury claims. Nor has Lock and Key set forth any breached duty Colonie owed to it or to Plaintiff. (O’Neill v. Ithaca College, 56 AD3d 869 [3d Dept. 2008], Raquet v. Braun, 90 NY2d 177 [1997]). As such, Lock and Key has no basis for contribution and its cross claim is dismissed.

Accordingly, Colonie’s motion is granted in its entirety. To the extent not specifically addressed above, the parties’ remaining contentions have been examined and found to be lacking in merit or rendered moot.

This Decision and Order is being returned to the attorneys for Colonie. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: July 20, 2010
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated May 26, 2010 with attached Affidavit of Carolyn George, dated May 26, 2010, Affidavit of Michael Maggulli, dated May 19, 2010, with attached Exhibits A-J.
2. Affidavit of Kimberly Furnish, dated June 24, 2010 with attached Exhibits 1-13.
3. Affidavit of Sarah Goldman, dated June 24, 2010 with attached Exhibits 1-4.
4. Affidavit of Carolyn George, dated July 7, 2010
5. Affidavit of Carolyn George, dated July 7, 2010, with attached Exhibits 1-3.