Arev v Feigenbaum
2011 NY Slip Op 31069(U)
March 18, 2011
Supreme Court, Queens County
Docket Number: 24706/08
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **Justice** — **IAS PART 6**

----------------------------------	Index No. 24706/08
MORRIS AREV,	
Plaintiff,	Motion Date January 25, 2011
-against-	Motion Cal. No. 1
ESTHER FEIGENBAUM, Defendant.	Motion Sequence No. 1

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits......	1-5
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Upon the foregoing papers it is ordered that this motion by defendant is determined as follows:

This is a personal injury action occurring on February 23, 2007 in which plaintiff, Morris Arev, alleges that he was at the premises of defendant Esther Feigenbaum and was passing thereon when he was caused to slip and fall and be precipitated to the ground by reason of snow and ice which was upon the ground. Plaintiff alleges that the accident occurred at a fence and gate erected, owned and/or maintained by defendant. Plaintiff further maintains that the defendant’s use of the gate constitutes a special use to the defendant. It is additionally alleged that the defendant failed to apply salt, sand or other substances to the area of the accident and otherwise failed to make the area safe.

Defendant moves for an order granting summary judgment dismissing the complaint of plaintiff, Morris Arev and for an order pursuant to CPLR 3025(b) permitting the defendant leave to serve an amended answer so as to include the additional defenses of judicial estoppel and collateral estoppel.

Summary judgment is a drastic remedy and will not be granted

if there is any doubt as to the existence of a triable issue (Andre v. Pomeroy, 32 NY2d 361 [1974]; Kwong On Bank, Ltd. v. Montrose Knitwear Corp., 74 AD2d 768 [2d Dept 1980]; Crowley Milk Co. v. Klein, 24 AD2d 920 [3d Dept 1965]. Even the color of a triable issue forecloses the remedy (Newin Corp. v. Hartford Acc & Indem. Co., 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (Bennicasa v. Garrubo, 141 AD2d 636 [2d Dept 1988]; Weiss v. Gaifield, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (Knepka v. Tallman, 278 AD2d 811 [4th Dept 2000]).

For defendant to be liable, plaintiff must prove that defendant either created or had actual or constructive notice of a dangerous condition (Gordon v. American Museum of Natural History, 67 NY2d 836 [1986]; Ligon v. Waldbaum, Inc., 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendant to discover and remedy it (see, id.).

As a general rule, "[l]iability for a dangerous or defective condition on property is . . predicated upon ownership, occupancy, control or special use of the property . . . Where none is present, [generally] a party cannot be held liable for injuries caused by the dangerous or defective condition of the property." (Ruffino v. New York City Transit Authority, 55 AD3d 819 [2d Dept 2008][internal citations omitted]). "The principle of special use . . . imposes an obligation on the abutting landowner, where he puts part of a public way to a special use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to

avoid injury to others" (Noia v. Maselli, 45 AD3d at 746, quoting Minott v. City of New York, 230 AD2d at 720 [internal quotation marks omitted]).

The concept of "special use" or "special benefit" has long been recognized. As the Court of Appeals observed in Kaufman v. Silver, 90 NY2d 204 (1997) the doctrine was developed to place liability on those who, because they derived a special benefit, should bear the responsibility of maintaining the appurtenance in a reasonably safe condition:

> The doctrine of special use was fashioned in New York in the previous century, to authorize the imposition of liability upon an adjacent occupier of land for injuries arising out of circumstances where "permission [has been] given, by a municipal authority, to interfere with a street solely for private use and convenience in no way connected with the public use" (Clifford v. Dam, 81 NY 52, 56-57). Consequently, where the abutting landowner "derives a special benefit from that [public property] unrelated to the public use," the person obtaining the benefit is "required to maintain" the used property in a reasonably safe condition to avoid injury to others (Poirier v. City of Schenectady, 85 NY2d 310, 315 [emphasis supplied]; D'Ambrosio v. City of New York, 55 NY2d 454, 462-463 [the abutting landowner's obligation to maintain the sidewalk appurtenance, installed for that landowner's private advantage, runs to the public who might otherwise be harmed by his or her negligence]; see also, Trustees of Vil. of Canandaigua v. Foster, 156 NY 354, 359). Inherent in the doctrine of special use is the principle that the duty to repair and maintain the special structure or instrumentality is imposed upon the adjoining landowner or occupier because the appurtenance was installed at their behest or for their benefit (cf., Heacock v. Sherman, 14 Wend 58, 60 ["if a (structure) is built by an individual over a public highway for his own exclusive benefit, he is bound to repair it ... in consideration of private advantage"]).

A special use has been characterized as involving the installation of some object in the sidewalk (Weiskopf v. City of New York, et al., 5 AD3d 202 [2d Dept 2004]). Such special use gives rise to maintenance responsibilities Santorelli v. City of New York, 77 AD2d 825 [1st Dept 1980]). The existence of a "special use" has been found in various circumstances, including

the installation of cellar doors or vault doors in the sidewalk (McCutcheon v. National City Bank, 291 NY 509 [1943]; Fleming v. Fifth Avenue Coach Lines, Inc., 23 AD2d 726 [1st Dept 1965]). Courts have imposed liability on abutting landowners and lessees for raised features on sidewalks such as oil filler caps, tiles, steps, etc., where liability was connected to that feature having been requested by or benefitting the abutting property (McGee v. City of New York, 252 AD2d 483 [2d Dept 1998]).

DISCUSSION

That branch of the motion by defendant Esther Feigenbaum for an order granting summary judgment dismissing the complaint of plaintiff, Morris Arev, is decided as follows:

In support of summary judgment, the defendant submits, inter alia, plaintiff's own examination before trial transcript testimony, a certified copy of the Quality Controlled Local Climatological Data for JFK Airport for February 2007, the affirmation of defendant herself, and a copy of the affidavit of Albert W. Tay, NYS licensed professional surveyor.

Plaintiff testified that on the date of the accident, he was walking home and walked through the yard of the premises located at 619 Elvira Avenue, Far Rockaway, New York, crossing over and behind said premises to a gate located behind said property. The use of the gate provided a short cut to go from Elvira Avenue to Oak Street. At plaintiff's EBT, he identified the location of where he fell by marking several photographs. Plaintiff admitted that he did not have permission to walk across the 619 Elvira Avenue property to reach the gate nor did he have permission to enter upon the defendant's property at 514 Oak Drive.

Defendant submitted the affidavit of Albert W. Tay, NYS licensed professional surveyor. Mr. Tay avers that he performed a survey of the area where plaintiff claims he fell and such area was located 6.75 feet south of the 619 Elvira Avenue property line.

Defendant also submitted an affidavit of plaintiff in which he concedes that the accident occurred on public property.

In plaintiff's verified bill of particulars, he states that the occurrence took place by the gate in the fence which allows

passage between 619 Elvira Avenue and 514 Oak Drive.

Plaintiff concedes that the accident occurred on an undeveloped portion, Annapolis Street, a public thoroughfare of city property that abutted both 619 Elvira Avenue, Far Rockaway, New York and 514 Oak Drive, Nassau County, New York. It is undisputed that defendant erected a wooden fence and gate that was traversed and was located within the boundary lines of the public property. Plaintiff identified the place where he fell was 6 to 7 feet from the gate in the fence. Plaintiff asserts that while walking toward the gate between the properties, he was caused to slip and fall on a dark, dangerous, icy portion of the public thoroughfare. Defendant admits that she used the abutting city property as a means of access between her property at 514 Oak Drive and her daughter's house at 619 Elvira Avenue.

1. Plaintiff has failed to establish the existence of a "special use".

Defendant moved for summary judgment dismissing the complaint contending, inter alia, that she did not own, occupy, control or make special use of the location/place where the plaintiff's accident occurred. Plaintiff opposes the summary judgment by primarily relying on the doctrine of special use to impose liability upon the defendant. The court finds that defendant has demonstrated its entitlement to judgment as a matter of law. It is undisputed that the plaintiff's fall occurred in the public pathway and not on any property owned or maintained by the defendant.

First, since plaintiff concedes that the public pathway where the accident occurred was available to the public in general, the special use doctrine is not applicable. "The special use is a use different from the normal intended use of the public way, and thus '[t]he special use exception is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use'" (Minott v. City of New York, 230 AD2d 719, 720 quoting Poirier v. City of Schenectady, 85 NY2d 310, 315[ ]). There is no evidence that defendant derived a special benefit from the public pathway unrelated to the public use. The public pathway was used by the public as a walkway which is the same use that defendant used it for, i.e. a walkway to her daughter's property at 619 Elvira Avenue. The use by the defendant of the public way merely to travel to visit her

daughter is not a special benefit giving use to a special use (see, Ruffino v. NYCTA, 55 AD3d 819 [2d Dept 2008]).

Second, the mere fact that defendant erected and maintained a wooden fence and gate near the location of the plaintiff's fall does not support the plaintiff's claim that defendant put the public way to some special use which created the allegedly defective condition, i.e., ice (see, Ngayen v. Brentwood School Dist., 239 AD2d 406 [2d Dept 1997]).

While the fence and gate that defendant erected and maintained in the public pathway may constitute a special use such that the abutting landowner may be liable if the landowner's use of the fence and gate created a defect in the public pathway, here the plaintiff concedes that his slip and fall occurred in the public pathway way several feet from defendant's fence and gate.

2. Plaintiff has failed to establish that defendant's negligent use of the wooden fence and gate caused plaintiff's injury.

In order to impose liability on the abutting owner, the special use must be the cause of the defect/dangerous condition in the public pathway which allegedly resulted in injury (see, Santana v. City of New York, 722 NYS2d 545 [1st Dept 2001] [use of the public sidewalk in front of private school as a children's playground constituted a special use of the public sidewalk by school; however, as the special use did not cause the crack on which the infant plaintiff tripped and fell, the school could not be held liable]; Benenati v. City of New York, 282 AD2d 418 [2d Dept 2001] [absent evidence the defect was caused by owner's special use of public sidewalk as a driveway or that driveway in any way contributed to allegedly defective condition, property owner was not liable to pedestrian who allegedly tripped and fell on defect]). Moreover, there is no evidence that the fence and gate contributed in anyway to the creation of the allegedly dangerous condition of ice and snow in the pathway (see, Benenati v. City of New York, 282 AD2d 418 [2d Dept 2001]; Winberry v. City of New York, 257 AD2d 618 [2d Dept 1999]). The mere proximity of a special use to a defect allegedly causing injury is not a sufficient basis on which to impose liability (Benenati v. City of New York, 282 AD2d 418 [2d Dept 2001]).

Here, the plaintiff allegedly tripped and fell on a defective condition in the public pathway. The evidence fails to

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support the plaintiff's allegation that the defect was caused by the defendant's special use of the public pathway which merely was to walk across to visit her daughter who resided in property that abutted the public pathway in any way contributed to the allegedly defective condition or subjected pedestrians such as the plaintiff to unnecessary dangers. The Court finds that the defendant has sustained her burden of establishing that she did "nothing to either create the defective condition or cause the condition through" the special use of the portion of the public pathway where plaintiff's accident occurred (see, Breger v. City of New York, 297 AD2d 770, 771 [2d Dept 2004]; Katz v. City of New York, 18 AD3d 818 [2d Dept 2005]).

Accordingly, as the plaintiff has failed to "to raise any questions of fact as to any connection between the defendant and the accident" (Tsamos v. Volmar Construction Co., 231 AD2d 709 [2d Dept 1996]), defendant's motion for summary judgment is granted and the complaint is dismissed.

This constitutes the decision and order of the Court.

Dated: March 18, 2011 ....

Howard G. Lane, J.S.C.