

Zeleny v Suffolk County Police Dept.

2013 NY Slip Op 30917(U)

April 19, 2013

Sup Ct, Suffolk County

Docket Number: 19770/09

Judge: Joseph C. Pastoressa

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SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH C. PASTORESSA
JUSTICE OF THE SUPREME COURT

Mot Seq: #001-MG
#002-MG

VICTOR ZELENY AND DONNA ZELENY, X

Plaintiff(s),

-against-

SUFFOLK COUNTY POLICE DEPARTMENT,
MASTIC-MORICHES-SHIRLEY COMMUNITY
LIBRARY, SMITH POINT BEACH PROPERTY
OWNERS ASSOCIATION AND DELIA
MCKERNAN,

Defendant(s).

X

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Pages Numbered
 Notice of Motion/Order to Show Cause/
 Petition/Cross Motion and Affidavits (Affirmations) Annexed 1, 2
 Opposing Affidavits (Affirmations) _____
 Reply Affidavits (Affirmations) _____
 Affidavit (Affirmation) _____
 Other Papers _____

Upon the foregoing papers, the defendant Mastic-Moriches-Shirley Community Library moves for summary judgment (#001) dismissing the complaint and all cross-claims; and the defendant Suffolk County Police Department moves for summary judgment (#002) dismissing the action and all cross-claims. It is

ORDERED that this motion (#001) by the defendant Mastic-Moriches-Shirley Community, pursuant to CPLR 3212 seeking summary judgment dismissing the complaint and all cross-claims asserted by the co-defendants is granted.; and it is further

ORDERED that this motion (#002) by the defendant Suffolk County Police Department pursuant to CPLR 3212 seeking summary judgment dismissing the complaint and all cross-claims asserted by the co-defendants is granted.

This is an action sounding in defamation and/or slander wherein it is claimed that on May 27, 2008 at approximately 7:00 p.m. the plaintiff sustained injuries at a meeting of the Smith Point Beach Property Owners Association being conducted at the Mastic-Moriches-Shirley Community Library when he was allegedly improperly removed from the board of the defendant Smith Point Beach Property Owners Association and allegedly as a result of numerous statements made impinging his reputation in the community¹

In support of the application, the defendant Mastic-Moriches-Shirley Community Library has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, its answer, and copies of the transcripts of the 50 h hearing of Victor and Donna Zeleny dated December 1, 2008; the application for the use of the library by Smith Point Beach Property Owner's Association; notice of claim for Eric Hakam, Victor Zeleny, and Donna Zeleny dated August 19, 2008; and an affidavit of Kerri Rosalia, Director of the defendant Mastic-Moriches-Shirley Community Library; the defendant Suffolk County Police Department submits in relevant part affidavits of Suffolk County Police Officer Scott Carey and Police Officer Thomas D. Henry and a DVD recording of the subject meeting.

The complaint alleges that co-defendant, McKernon, was the President of co-defendant, Smith Point Beach Property Owners Association, and a committee member of co-defendant, Smith

¹ The court by order (Pastoressa, J.) dated January 26, 2010 consolidated for joint trial this matter with the matter entitled: Eric Hakam v Suffolk County Police Department, Mastic Moriches-Shirley Community Library, Smith Point Beach Property Owners, Association, Smith Point Village Committee, Delia McKernan, Bob Licari, Helen Licari, Patrick Wrenn, Anthony Dimaria, Nicholas Bouhouris and Flori Marchionni, under index number 19771/08.

Point Village Committee. The complaint further alleges that part of the agenda for the meeting on May 28, 2008 was to take a vote of the members of co-defendant, Smith Point Beach Owners Association, for the removal of the president/co-defendant McKernan but that he unilaterally changed the agenda of the meeting to take a vote of the members of co-defendant Smith Point Beach Property Owners Association for the removal of Erik Hakem a member of the board of directors of the Association. The complaint avers that several of the defendants began turning away and physically removing many members of co-defendant Smith Point Beach Property Owners Association, who were at the meeting to vote for the removal of the president/co-defendant McKernan and who allegedly supported Erik Hakem. The complaint alleges that the defendant Smith Point Beach Property Owners Association previously signed a contract with co-defendant library indicating that all meetings would be open to the public and that plaintiffs as well as numerous members of the Association were denied the right to vote at the subject meeting. The complaint avers that plaintiffs were improperly removed from the association meeting and that several newspapers reported the incident in its papers.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065; Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co., 79 AD2d 1014).

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. “Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises.... The existence of one or more of these elements is sufficient to give rise to a duty of care” (Bruhns et al v Antonelli et al, 255 AD2d 478; Franks v G & H Real Estate Holding Corp., 16 AD3d 619). A property owner is subject to liability for a defective condition on its premises if a plaintiff demonstrates that the owner either created the alleged defect or had actual or constructive notice of it (Singh v United Cerebral Palsy of New York City, Inc. et al, 72 AD3d 272). Liability is predicated only on a failure of defendant to remedy the danger presented after actual or constructive notice of the condition (see, Placquadio v Recine Realty Corp., 84 NY2d 967; Murphy v Conner, 84 NY2d 969). To constitute constructive notice, a condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit a defendant’s employees to discover and remedy it (Granillo v Toys “R” us, Inc et al, 72 AD3d 1024; Pelow v Tri-Main Development et al, 303 AD2d 940). Moreover, a general awareness that a dangerous condition might exist is legally insufficient to constitute notice of the specific condition which caused the injury (Baumgartner v Prudential Ins. Co. of Am., 251 AD2d

358). “The issue whether a condition was readily observable impacts on a plaintiff’s comparative negligence and does not negate a defendant’s duty to keep the premises reasonably safe. An open and obvious condition merely negates the duty to warn. Likewise, the issue of whether the hazard was ‘trivial’ is also one of fact, dependent on the peculiar facts and circumstances of the case” (Pelow v Tria-Main Development et al, supra). Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (see, Moons v Wade Lupe Constr. Co., 24 AD3d 1005).

“Landowners who hold their property open to the public have a general duty to maintain it in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries. Encompassed within this duty is the duty to warn of potential dangerous conditions existing thereon, whether they are natural or artificial. This duty extends, however, only to those conditions not readily observable. The landowners owe no duty to warn of conditions that are in plain view and easily discoverable by those employing the reasonable use of their senses” (Meyer et al v Tyner et al, 272 AD2d 364). In Meyer, the appellants, while looking at a house for sale by the respondent owners, went up to a dimly lit attic, stepped off a plywood landing, and fell through the insulation, sustaining injury. The appellants claimed that the respondent owners had a duty to warn them of the unfinished attic floor. Summary judgment was granted by the trial court dismissing the complaint and on appeal, the court affirmed, holding that the respondent owners had a general duty to maintain their property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries, but they owed no duty to warn of conditions that were in plain view, and easily discoverable by those employing the reasonable use of their senses. The court held that the unfinished floor was readily observable and in plain view.

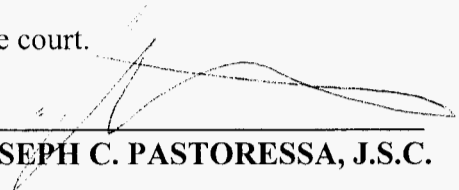
Here, it is determined that the defendant Mastic-Moriches-Shirley Community Library has demonstrated prima facie entitlement to summary judgment dismissing the complaint and any cross-claims asserted against it. The defendant Library had no notice of the possibility of any dangerous condition and there was no duty on the part of them to supervise the meeting. The defendant Mastic-Moriches-Shirley Community Library submitted the uncontroverted affidavit Kerri Rosalia, Director of the defendant Mastic-Moriches-Shirley Community Library which stated that “the library did not have any prior notice, whether that be actual or constructive, that there would be any type of problem at the meeting that was held on May 27, 2008 by the Smith Point Beach Property Owner’s Association that took place at defendant Mastic-Moriches-Shirley Community Library”. In opposition, no evidence has been submitted by the plaintiffs to raise a factual issue to demonstrate that the defendant Mastic-Moriches-Shirley Community Library presented a potentially dangerous condition which the landowner should have warned of. Except for conclusory assertions, no evidence has been submitted to raise a factual issue that the defendant Mastic-Moriches-Shirley Community Library did not maintain their property in a reasonably safe condition. Thus, plaintiffs have failed to raise a triable issue of fact to preclude summary judgment being granted to the defendant Mastic-Moriches-Shirley Community Library. Accordingly, motion (022) by the defendant Mastic-Moriches-Shirley Community Library for summary judgment dismissing the complaint and any cross-claims asserted against it is granted.

Finally, the defendant Suffolk County Police Department’s motion for summary judgment dismissing the complaint and any cross-claims is granted. The defendant Suffolk County Police

Department established a prima facie entitlement to summary judgment as matter of law dismissing the complaint and any cross-claims against it in tendering admissible evidence in the form of affidavits. The defendant Suffolk County Police Department submitted the uncontroverted affidavits of Suffolk County Police Officers Carey and Henry, which each aver that they were both present at the subject meeting and did not prevent anyone from attending the subject meeting nor remove anyone from the subject meeting. In opposition, the plaintiff submitted a cursory, conclusory, and unsubstantiated affidavit which failed to raise a triable issue of fact to preclude the issuance of summary judgment against the defendant Suffolk County Police Department. Accordingly, the defendant Suffolk County Police Department's motion for summary judgment dismissing the complaint and any cross-claims against it is granted.

This shall constitute the decision and order of the court.

DATED: April 19, 2013



HON. JOSEPH C. PASTORESSA, J.S.C.

~~FINAL~~ **FINAL DISPOSITION**

~~NON-FINAL~~ **NON-FINAL DISPOSITION**