

Hakem v Suffolk County Police Dept.

2013 NY Slip Op 30918(U)

April 19, 2013

Sup Ct, Suffolk County

Docket Number: 19771/09

Judge: Joseph C. Pastorella

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

COPY

Hon. JOSEPH C. PASTORESSA
JUSTICE OF THE SUPREME COURT

Mot. Seq. # 022 - MG
#023 - MG
#024 - MG
#14,#16, #17, #18, #021-Mot-d
#15-Mot-d
#19-MG

ERIC HAKAM, PRO SE
182 WILLIAM FLOYD PKWY.
SHIRLEY, NY 11967

ERIC HAKEM,

Plaintiffs, :
:

- against -

TROMELLO, MCDONNELL & KEHOE, PLLC
Attorney for Defendants
P.O. BOX 9038
MELVILLE, NY 11747 :

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 BOUHOIRIS AND FLORI
MARCHIONNI,

Defendants. :
-----X

:
CHRISTINE MALAFI, ESQ.
SUFFOLK COUNTY ATTORNEY
H. LEE DENNISON BLDG.
100 VETERANS MEM. HWY.
HAUPPAUGE, NY 11788

BAXTER, SMITH & SHAPIRO, P.C.
99 N. BROADWAY
HICKSVILLE, NY 11801

RYAN, PERRONE & HARTLEIN, P.C.
200 OLD COUNTRY RD., STE. 300
MINEOLA, NY 1150

PETER BIRZON & ASSOC.
400 JERICHO TURNPIKE, STE. 100
JERICHO, NY 11753

KELLY, RODE & KELLY, PLLC
300 OLD COUNTRY RD., STE. 305
MINEOLA, NY 11501

NICHOLAS BOUHOUS
131 ST. GEORGE ST.
SHIRLEY, NY 11967

SCHONDEBARE & KORCZ
3555 VETERANS MEM. HWY., STE. P
RONKONKOMA, NY 11779

Pages Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and Affidavits (Affirmations) Annexed 1, 2, 3, 4, 5, 6, 7, 8, 9, 10

Opposing Affidavits (Affirmations) 11, 12, 13, 14, 15, 16,

Reply Affidavits (Affirmations) 12, 15, 17

Affidavit (Affirmation) _____

Other Papers _____

Upon the foregoing papers, the defendants Mastic-Moriches-Shirley Community Library, Anthony Dimaria, and Suffolk County Police Department each move for an order (motion sequence #022, 023, & 024) pursuant to CPLR 3212 dismissing the complaint and all cross-claims; defendant Suffolk County Police Department moves for order (motion sequence #14) to compel the co-defendant Delia McKernan to respond to discovery demands and for an order (motion sequence #17) to dismiss the plaintiff's complaint for failure to respond to its discovery demands; the defendant Anthony Dimaria cross-moves for an order (motion sequence #16) to compel the co-defendant McKernan to comply with discovery demands and for an order (motion sequence #18) dismissing the plaintiff's complaint for failure to comply with its outstanding discovery demands; and the defendant Mastic-Moriches-Shirley Community Library moves for an order (#21) dismissing the complaint for the plaintiff's failure to comply with its discovery demands; the defendants Robert Licari and Helen Licari cross-move for an order (motion sequence #15) to dismiss the complaint for plaintiff's failure to comply with their discovery demands and/or compelling the Delia McKernan to comply with its Notice to Produce; and the defendant Florence Marchionni moves for an order (motion sequence #19) dismissing the plaintiff's complaint for failure to comply with her discovery demands. It is

ORDERED that this motion (#022) 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 (#023) by the defendant Anthony Dimaria 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 (#024) 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; and it is further

ORDERED that the motions for discovery by defendants Mastic-Moriches-Shirley Community Library, Anthony Dimaria, and Suffolk County Police Department (mot seq. #014, #016, #17, #21) are denied as moot; and it is further

ORDERED that the motion (motion sequence #15) by defendant Licari to compel discovery of the co-defendant Delia McKernan is denied as moot based on the stipulation between the parties; and it is further

ORDERED that the motion (motion sequence #19) by defendant Marchionni seeking the dismissal of the plaintiff's complaint for failure to respond to discovery demands is granted to the extent that the plaintiff shall respond to the defendant Marchionni's discovery demands including a demand for a bill of particulars within thirty (30) days from service of a copy of this order with notice of entry.

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 Eric Hakam 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 Zelany, and Donna Zeleny dated August 19, 2008; and an affidavit of Kerri Rosalia, Director of the defendant Mastic-Moriches-Shirley Community Library; the defendant Anthony Dimaria submits in relevant part an affidavit of the defendant Anthony Dimaria; 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, McKernan, was the President of co-defendant, Smith Point Beach Property Owners Association, and a committee member of co-defendant, Smith 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 plaintiff from the Association. The complaint further 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 the plaintiff. The complaint further avers that the employees of the defendant Mastic-Moriches-Shirley Community Library and defendant Dimaria witnessed the actions of the defendants and did nothing to stop the actions of the other defendants from removing the plaintiff from the board of the Smith Point Beach Property Owners Association on May 27, 2008. 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 numerous members of the Association were denied the right to vote. The complaint avers that plaintiff was improperly removed from the Board of Directors of co-defendant Association and that several newspapers reported the incident.

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 (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 present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499) and 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). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (Friends of

¹ The court by order (Pastoressa, J.) dated January 26, 2010 consolidated for joint trial a related action entitled "Victor Zeleny and Donna Zeleny v Suffolk County Police Department, Mastic-Moriches Shirley Community Library, Smith Point Beach Property Owner's Association and Delia McKernan, index number 19770/2009".

Animals v Associated Fur Mfrs., 46 NY2d 1065).

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).

Here, it is determined that the defendant Mastic-Moriches-Shirley Community Library has demonstrated prima facie entitlement to summary judgment dismissing the complaint and cross-claims asserted against it. The defendant Mastic-Moriches-Shirley Community 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 plaintiff 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 its 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.

Turning to the defendant Anthony Dimaria’s motion for summary judgment dismissing the action against him, the complaint makes a cursory reference to the defendant Dimaria’s alleged actions on May 27, 2008 which include claims sounding in defamation and the wrongful removal of the plaintiff from the board. The elements of a cause of action to recover damages for defamation are: a false statement; published without privilege or authorization to a third party; constituting fault as judged by, at a minimum, a negligence standard; which causes

special harm or constitutes defamation per se (see, Epifani v Johnson; 65 AD3d 224; Salvatore v Kumar, 45 AD3d 560). “A false i.e., defamatory statement is libelous per se if it charges another with a serious crime or tends to injure another in his or her trade, business or profession” (Matovcik v Times Beacon Record Papers, 46 AD3d 636, 637). “Whether particular words are reasonably susceptible of a defamatory meaning presents a question to be determined by the court in the first instance” (Kamalian v Reader’s Digest Assn., Inc., 29 AD3D 527, 528). The court must look at the content of the entire communication, its tone and apparent purpose, to determine whether a reasonable person would consider it as conveying facts about the plaintiff (see, Gjoniekaj v Sot, 308 AD2d 471). Moreover, the complaint must set forth the particular words allegedly constituting defamation (see, CPLR §3016 [a]), and it must also “allege the time, place and manner of the false statement and specify to whom it was made” (Dillion v City of New York, 261 AD2d 34, 38; Epifani v Johnson, 65 AD3d 224). Here, the complaint failed to allege the particular words allegedly constituting the defamation and the time, place, and manner of the statements. The defendant Dimaria established a prima facie entitlement to summary judgment as matter of law dismissing the complaint against him by tendering admissible evidence in the form of an affidavit. The defendant Dimaria submits an uncontroverted affidavit of Dimaria which avers in relevant part that “[a]t no time during, before, or after that meeting on May 27, 2008, nor in any way, directly or indirectly, did I individually, or as the member of any group, or a member of the Smith Point Beach Property Owners Association, turn away or physically remove plaintiff from the meeting” and “[a]t no time on May 27, 2008, beforehand or thereafter, did I participate in any campaign of hate against plaintiff Eric Hakem”. In opposition, the plaintiff submitted a cursory and unsubstantiated affidavit which failed to raise a triable issue of fact to preclude the issuance of summary judgment. Accordingly, the defendant Dimaria’s motion for summary judgment dismissing the complaint and any cross-claims against him is granted.

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

The discovery motions by defendants Mastic-Moriches-Shirley Community Library, Anthony DiMaria, and Suffolk County Police Department (mot seq.# 014, #016, #17,#18, #21) are denied as moot in light of the above referenced summary judgment motions dismissing the complaint against each moving defendant.

Turning to the defendant Marchionni’s motion for discovery, “Actions should be resolved on the merits wherever possible, and the nature and degree of the penalty to be imposed pursuant to CPLR §3126 is a matter of discretion with the court... The moving party must ‘clearly demonstrate’ that the failure to comply was willful and contumacious” (see, Pascarelli v City of New York, 16 AD3d 472). In the case at bar, the court does not condone the plaintiff’s failure to provide discovery, however, under the circumstances the movant has failed to “clearly demonstrate” that the plaintiff’s failure to appear for a deposition and provide discovery was willful and/or contumacious conduct (see, Mangiapane v Brookhaven Beach Health Related Facility, 305 AD2d 642; Patterson v New York City Health & Hosps. Corp., 284 AD2d 516; Centerport Ins. Agency v Atlantic Fabricators of Rhode Is., 277 AD2d 414). Accordingly, the defendant Marchionni’s motion to dismiss is denied. Nonetheless, the plaintiff shall have thirty days (30) from service of a copy of this order with notice of entry to provide a response to the defendant’s demands for discovery and demand for bill of particulars.

This shall constitute the decision and order of the court.

Dated: April 19, 2013



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

 FINAL DISPOSITION X NON-FINAL DISPOSITION