Lahens v Town of Hempstead
2014 NY Slip Op 33700(U)
September 8, 2014
Supreme Court, Nassau County
Docket Number: 22200/10
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 16**

JEAN ROBERT LAHENS and MARGARET LAHENS,

Plaintiffs,

- against -

THE TOWN OF HEMPSTEAD, COUNTY OF NASSAU and MARK BLACK,

Defendants.

----------X

Index No. 22200/10
Mot. Seq. # 6
Mot. Date 6.19.14
Submit Date 6.19.14

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2,3
Reply Affidavit..... 4

Plaintiffs move to renew and reargue an order of this court (Brown, J., July 3, 2013) which dismissed this action against defendants the Town of Hempstead and Mark Black. This order was entered on or about August 19, 2013.

The plaintiffs concede that they are untimely with respect to a motion to reargue. The court, however, has the jurisdiction to reconsider its prior order regardless of statutory time limits concerning motions to reargue (*Itzkowitz v King Kullen Grocery Co.*, 22 AD3d 636 [2d Dept 2005]).

In this personal injury action, plaintiff Jean Lahens was alleged to have tripped and fallen over a raised section of sidewalk. The instant application seeks to reargue this court's determination with respect to the adjoining landowner, Mark Black. The court grants reargument.

Counsel states that he has recently come across a section of the Hempstead Town Code that imposes civil liability upon an adjoining property owner.

Chapter 184-5 of the Town of Hempstead Code provides:

> "A. No tree shall be planted within the sidewalk area in front of or adjacent to any private premises except trees whose root systems normally will not cause damage to sidewalk, curbs or utility installations.
>
> "B. For the purpose of this section, the term "sidewalk" shall include all land lying between the curbline of the public highway and the building line of the premises abutting thereon which has been surfaced or improved with concrete or other paving material."

Further Chapter 184-6(A) provides:

> "A. It shall be the duty of every owner, tenant or other occupant of any house or structure, and every owner or person entitled to possession of any vacant lot, to remove trees when required to do so by Town authorities, to keep trees in front of or adjacent to their premises and within the sidewalk area trimmed so that overhanging limbs will not interfere with passersby on the sidewalk or roadway and to repair any sidewalk or curb in front of or adjacent to such premises damaged by tree roots located in front of or adjacent to said premises, whether or not within the property line or sidewalk area."

Plaintiff argues that unlike Chapter 181 of the Town Code, Town Code 184-12(B) is concerned with tree preservation and may be enforced by a civil action. Chapter 184-12 states:

> "(B) In addition, this chapter may be enforced by civil action, including an injunction, and any person who has violated or permitted a violation of this chapter may be directed by the Town to replace any trees removed, destroyed or substantially altered in violation of this chapter with new trees having a diameter not less than two inches when measured six inches above the ground level; and, where such direction has been made, no building permit or certificate of occupancy shall be issued for structures on said real property until such replacement has been completed or a guaranteed replacement bond has been posted."

Plaintiffs argue that Chapter 184-12(B) imposes the requisite civil liability upon defendant Mark Black which would require this court to modify its decision.

Counsel for the Town of Hempstead argues that although Chapter 184 may be enforced by a civil action, nowhere in this chapter is tort liability imposed upon the adjacent landowner. While Chapter 184-12 imposes a duty on the adjacent landowner, and if in violation thereof, those provisions may be enforced by a civil action, the language is clear that there is no provision that should the landowner breach that duty, he or she shall be liable to a person who may be injured.

Counsel for defendant Mark Black like co-counsel Town of Hempstead argues that there is no language in Chapter 184-12 that imposes tort liability on the adjoining landowner even if the homeowner did not comply with its provisions. Further, counsel argues that this court already has made a determination that defendant Mark Black has no duty to breach and that he did not possess any special use or benefit from the property. Further, defendant Black did not cause or create the subject defect or have actual or constructive notice of it.

In reply, plaintiffs argue that the language of Chapter 184-12 is sufficient to impose tort liability upon defendant Mark Black. By including an example, the section of the code demonstrates that "civil action" is broad and expansive, and, as a result, different types of civil remedies are available to those aggrieved by an adjoining landowner.

The Appellate Division, Second Department has determined that in order for a statute, ordinance or municipal charter to impose liability upon the abutting landowner for injuries caused by their negligence, the language thereof must not only charge the landowner with a duty, it must also specifically state that if the landowner breaches that duty, he or she will be liable for those who are injured (*see Picone v Schlaich,* 245 AD2d 555 [2d Dept 1997]; *Scalici v City of New York,* 215 AD2d 744 [2d Dept 1995]; *Conlon v Village of Pleasantville,* 146 AD2d 736 [2d Dept 1989]). No such language imposing tort liability is contained in the Town of Hempstead Code Chapter 184-12.

Further, "A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended" (McKinneys Cons Law of NY, Book 1, Statutes § 74 at 157). If the code provision intended to include tort liability as part of the code section, it would be clearly and specifically provided in the code chapter. The omission of tort liability from the code implies in the strongest sense that the omission was intentional and not inadvertent (*see Bailey v Joy,* 11 Misc3d 941 [Westchester County 2006]).

For all the foregoing reasons, the motion is **denied**.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
September 8, 2014

ENTER:

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