Pylarinos v Town of Huntington
2016 NY Slip Op 30006(U)
January 5, 2016
Supreme Court, Suffolk County
Docket Number: 12-6632
Judge: Arthur G. Pitts
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[* 1]

SHORT FORM ORDER

INDEX No. 12-6632
CAL No. 14-02126OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 4-29-15 (008)
MOTION DATE 5-14-15 (009, 010, 011)
ADJ. DATE 5-14-15
Mot. Seq. #008 - MG
#009 -XMD
#010 - XMG
#011 - MG

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MAGDA PYLARINOS,

Plaintiff,

- against -

TOWN OF HUNTINGTON, HUNTINGTON TOWNSHIP CHAMBER OF COMMERCE, SPICE VILLAGE GRILL and MNM REALTY, LLC, COUNTY OF SUFFOLK, SUFFOLK COUNTY POLICE DEPARTMENT, LONG ISLAND SONS OF ITALY and TABASSUM ALI d/b/a SPICE GRILL,

Defendants.

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Upon the following papers numbered 1 to 49 read on these motions for summary judgment ; Notices of Motions/ Order to Show Cause and supporting papers 1 - 5, 14 - 17; Notices of Cross Motions and supporting papers 6 - 13; Answering Affidavits and supporting papers 18 - 39 ; Replying Affidavits and supporting papers 40 - 47 ; Other 48 - 49 Defts' Spice Grill Village and Tabassum Ali Memo of Law in Support ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion sequence numbers 008 through 011 are combined herein for disposition; and it is further

ORDERED that the motion for summary judgment by defendant Long Island Sons of Italy (#008) is granted and the complaint is hereby severed and dismissed as to this defendant; and it is further

ORDERED that the cross motion for summary judgment by defendant Town of Huntington (#009) is denied; and it is further

ORDERED that the cross motion to renew and reargue by defendant M&M Realty, LLC s/h/a MNM Realty LLC (#010) is granted and upon reargument, summary judgment is granted dismissing the complaint and any all other claims, if any, asserted against it; and it is further

ORDERED that the motion for summary judgment by defendants Spice Village Grill and Tabassum Ali d/b/a Spice Grill (#011) is granted and the complaint and all other claims, if any, are hereby severed and dismissed as to these defendants.

The facts were recited in this Court's previous decisions, and thus, familiarity therewith is presumed. Therefore, only those facts relevant to the instant motions will be discussed herein.

After discovery was commenced and depositions taken, plaintiff added as defendants Spice Village Grill and Tabassum Ali d/b/a Spice Grill & Sons (hereinafter the "Spice Grill Defendants" when referred to collectively), prompting additional depositions. During her second deposition, plaintiff again testified that after leaving a restaurant, she was talking with her mother as she walked on Main Street towards Wall Street to the parking lot where the car was parked. She testified that although nothing obstructed her view, and the lighting conditions were sufficient, she did not see the dismantled sawhorses on the sidewalk at the corner of Wall and Main Streets as she was not looking at the ground, but at her mother. She testified that they were walking at a slow to moderate pace. She also testified that she did not see any signs that there had been a parade in the area on that day.

Michael Kaplan, Highway Project Assistant, deposed on behalf of the Town of Huntington ("Town"), testified that what plaintiff described as sawhorses are traffic control barricades owned by the Town which were used along the parade route for the Columbus Day parade. The parade, which took place on Saturday, October 2, 2011, was organized by defendant Long Island Sons of Italy (the "Sons of Italy"). Kaplan testified the route of the parade, and the placement and number of traffic barricades used were determined by the Town's Superintendent of Highways, who determined that two traffic barricades were needed at the intersection of Main and Wall Streets. Kaplan testified that as Town offices are closed on weekends and holidays, dismantled traffic barricades were delivered by employees of the Town Highway

Department on Friday, September 30th and were scheduled for pick up on Tuesday, October 4th.[1] Kaplan further testified that business owners and residents along Main Street are not required to assemble or dismantle the traffic barricades, and are not permitted to move them in any way as only defendant Suffolk County Police Department (the "SCPD") is authorized to do so. Kaplan also testified that Town Highway Department employees deliver traffic barricades dismantled and stacked on the sidewalk; the SCPD was responsible for assembling and dismantling them. Upon dismantling, the SCPD places the traffic barricades in the same location where they were dropped off for pick up by the Town. Kaplan explained that a safe location for the dismantled barricades is off the roadway, away from foot traffic, leaving three to four feet in width to traverse the sidewalk. However, based on Kaplan's responses, tables and chairs set up for alfresco dining are not taken into account when deciding to which intersection the unassembled traffic barricades will be delivered.

Lieutenant Joseph Condolff testified on behalf of the SCPD, stating that he was on duty as the officer in charge of the Columbus Day parade. Condolff confirmed that on the day of this parade, police officers were responsible for assembling and dismantling the traffic barricades. Condolff testified that it is within an officer's discretion as to the placement of the dismantled barricades at the curb, as there are no rules or regulations or special training with regards thereto. According to Condolff, the traffic barricades are dismantled after the parade, and the streets are cleared. The officers dismantling the barricades stack them in the same location as they were delivered where they will remain until picked up by the Town. He stated that the scheduled pick up day of the traffic barricades is not a factor as to the timing of the dismantling. Condolff testified that the traffic barricades were dismantled within thirty minutes after the parade ended, which was approximately 2:00 P.M.

Tabassum Ali owner of the Spice Village Grill restaurant testified that he has leased the building abutting the sidewalk where plaintiff's accident occurred from defendant MNM Realty, LLC ("MNM") since 1991 first for use as a photo shop, and as of 2010, as a restaurant with a permit from the Town for outside seating for up to 20 people. Ali testified that he was aware of the parade and the traffic barricades in front of the restaurant, however, neither he, nor his employees moved the barricades or witnessed the plaintiff's accident. Ali testified that after the parade, he noticed that the traffic barricades were dismantled and on the ground touching the curb and on the brick area foot path, but not on the sidewalk at the subject intersection. When asked if he ever noticed pedestrians walking on the brick area, he responded that pedestrians can walk anywhere.

A finding of negligence must be based on the breach of a duty, and thus, the threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 347, 728 NYS2d 731, 753 N.E.2d 160 [2001]; ***Pulka v. Edelman***, 40 N.Y.2d 781, 782, 390 NYS2d 393, 358 N.E.2d 1019 [1976]; ***Izzo v Proto Constr. & Dev. Corp.***, 81 AD3d 898, 917 NYS2d 287 [2d Dept. 2011]). The issue of the "existence and scope of a duty of care is a question of law" (***Church v Callanan Industries, Inc.***, 99 NY2d 104, 110–111, 752 NYS2d 254 [2002]; *see* ***Palka v Servicemaster Mgt. Servs.***

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[1]The Town offices were closed on Monday, October 3, 2011 for Columbus Day.

Corp., 83 NY2d 579, 611 NYS2d 817 [1994]). "A duty is found to exist only where a defendant [has] sufficient control over the event to be in a position to prevent the negligence" (***Vogel v West Mtn. Corp.***, 97 AD2d 46, 49, 470 NYS2d 475 [3d Dept 1983]).

"Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner" (***Hausser v Giunta***, 88 NY2d 449, 452–453, 646 NYS2d 490 [1996]; ***Bachvarov v Lawrence Union Free Sch. Dist.***, 131 AD3d 1182, 1184, 17 NYS2d 168 [2d Dept 2015]; ***Sachs v County of Nassau***, 60 AD3d 1032, 1032-1033, 876 NYS2d 454 [2d Dept 2009]). However, a municipality may shift liability to the abutting landowner with the promulgation of a statute imposing a duty upon that landlord to maintain the sidewalk and expressly renders the abutting landlord liable for a breach of the duty (*see* ***Hausser v Giunta***, *supra*; ***Bachvarov v Lawrence Union Free Sch. Dist.***, *supra*; ***Sachs v County of Nassau***, *supra*). Huntington Town Code (the "Town Code"), Article IV, § 173-16 fulfills this requirement as it specifically places a duty upon not only the owner, but also a lessee, tenant and occupant abutting any street to maintain and repair the sidewalk adjoining the land and to keep it free and clear of snow, ice, filth, dirt, weeds, and all other obstructions, objects or other material. This section further provides that the failure of such duty shall result in liability for any personal injuries sustained.

It is asserted that section 173-16 of the Town Code transfers liability for the accident to Spice Village as the tenant/occupant, and to MNM as the owner of the land abutting the sidewalk, thereby absolving the Town of liability for plaintiff's accident. However, given the imposition of liability on abutting landowners is in derogation of common law, the provision must be strictly construed against the Town (*see* ***Vucetovic v Epsom Downs, Inc.***, 10 NY3d 517, 860 NYS2d 429 [2008]; ***Almadotter v City of N.Y.***, 15 AD3d 426,789 NYS2d 729 [2d Dept 2005]).

Town Code Section 173-15 defines a sidewalk as, "[t]he area between the edge of a roadway or highway pavement and the lot line of the abutting property, including but not limited to the curb, utility, brick, tree, dirt or landscape areas. The Town Code does not define obstructions, objects or other material, nevertheless, the Vehicle and Traffic Law ("VTL") is instructive. VTL § 1115(a) governs conduct with regard to the traffic barricades. This section provides, in pertinent part, that no person shall without lawful authority attempt to or in fact remove, or otherwise interfere with any official traffic-control device. Hence, if the intent of Town Code § 173-16 was to transfer the responsibility for keeping the sidewalk clear of traffic control devices, it would have had to do so in clear and unmistakable language; it did not. In fact, common sense dictates that such a duty was not intended to be placed on the abutting landowner or tenant.

Hence, as there is no evidence that the Spice Village Defendants had any authority to move the traffic barricades, no duty can be imposed upon them. Thus, the Spice Village Defendant are not liable for plaintiff's accident and resulting injuries, thereby entitling them to summary judgment dismissing the complaint and any cross claims. Similarly, there is no evidence that MNM, the out-of-possession owner of the abutting property had such authority, thus, it also had no duty to plaintiff. Therefore, the motion by MNM to reargue is granted, and upon reargumemnt, summary judgment dismissing the complaint is granted.

Defendant Long Island Sons of Italy ("Sons of Italy") urges that, its role as the organizer of the parade did not create a duty of care to the plaintiff, therefore, it cannot be held liable for her accident and

resulting injuries. The deposition testimony establishes that the Sons of Italy did not have any control over the delivery, dismantling or placement of the subject traffic barricades on the sidewalk, nor was it in a position to assume such control. Its "mere sponsorship, absent control, does not render [it] legally responsible" for any dangerous condition on the sidewalk (***Vogel v West Mtn. Corp.***, *supra* at 47–48; *see also* ***Mongello v Davis Ski Resort***, 224 AD2d 502, 638 NYS2d 166 [2d Dept 1996]). Therefore, the motion by the Sons of Italy for summary judgment is granted and the complaint is dismissed.

The Town argues that since it did not have prior written notice of the alleged dangerous condition, it cannot be held liable for the plaintiff's accident, and therefore, should be granted summary judgment dismissing the complaint as asserted against it. Town Code § 174-3 states:

> Written notice of defect shall be served upon the Superintendent of Highways and/or Town Clerk by personal delivery or by registered, certified or regular mail. Such notice shall be made by a person with first-hand knowledge of the condition, defect or obstruction specified in the notice and shall identify, with particularity, the specific nature and location of each condition, defect or obstruction. In order to be valid, the notice of defect must be actually received by the Superintendent of Highways and/or Town Clerk as specified herein. Service of such notice upon a person other than as authorized in this article shall invalidate the notice.

Where, as here, a municipality has enacted a prior written notice statute pursuant to Town Law, Article 65, it may not be subjected to liability for personal injuries caused by an improperly maintained sidewalk unless either it has received prior written notice of the defect or obstruction, or an exception to the prior written notice requirement applies (***Barnes v Incorporated Vil. of Port Jefferson***, 120 AD3d 528, 529, 990 NYS2d 841 [2d Dept 2014]; ***Carlucci v Village of Scarsdale***, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]; ***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006], citing ***Amabile v City of Buffalo,*** 93 NY2d 471, 693 NYS2d 77 [1999]; ***Ganzenmuller v Incorporated Vil. of Port Jefferson,*** 18 AD3d 703, 795 NYS2d 744 [2d Dept 2005]).

Here, there is no dispute as to the lack of written notice. Moreover, neither constructive notice nor actual notice of a defect obviates the need for prior written notice to the Town (*see* ***Amabile v City of Buffalo***, *supra*; ***Wilkie v Town of Huntington***, *supra*; ***Cenname Town of Smithtown***, *supra*). However, there are two exceptions to the prior written notice rule, namely, where the locality created the defect or hazard through an affirmative act of negligence and where a special use confers a special benefit upon the locality (*see* ***Amabile v City of Buffalo***, *supra*; ***Ganzenmuller v Incorporated Vil. of Port Jefferson***, *supra*). Here, there is a question of fact as to whether the Town's act of leaving the dismantled traffic barricades on the sidewalk for hours after the conclusion of the parade constitutes an affirmative act of negligence. Therefore, summary judgment is not warranted in the Town's favor.

It is also noted that whether the traffic barricades were an open and obvious condition which plaintiff should have noticed, or a trap for the unwary, creates an issue as to plaintiff's comparative negligence, and does not absolve the Town of its duty to maintain the sidewalk in a safe condition (*see* ***Cupo v Karfunkel***, 1 AD3d 48, 767 NYS2d 40 [2d Dept 2003]; *see also* ***Westbrook v WR Activities–Cabrera Markets***, 5 AD3d

69, 773 NYS2d 38 [1st Dept 2004] [Even if the alleged dangerous condition qualifies as open and obvious as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the property owner's broader duty to maintain the premises is a reasonably safe condition]).

Accordingly, summary judgment is granted in favor of the Sons of Italy, MNM and the Spice Grill Defendants and the complaint and all other claims, if any, asserted against them are hereby severed and dismissed. The motion by the Town for summary judgment is denied.

Dated: January 5, 2016

J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION