

Golfinopolous v City of New York

2017 NY Slip Op 30739(U)

March 29, 2017

Supreme Court, Queens County

Docket Number: 11039/11

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IA Part 6
Justice

KOSTAS GOLFINOPOLOUS, Administrator of the
Estate of YU YAO,
Plaintiff,

-against-

THE CITY OF NEW YORK, et al.,
Defendants.

Index
Number 11039/11

Motion
Dates September 13, 2016

Motion Seq. Nos. 5 & 6

Motion Cal. Nos. 65 & 66

The following papers numbered 1 to 18 read on these separate motions by defendant Her Ping Chiu pursuant to CPLR 3212 for summary judgment in her favor dismissing plaintiff's complaint and the cross claims of co-defendant The City of New York (City) against her on the grounds that: (1) defendant Her Ping Chiu did not create or have actual or constructive notice of any dangerous condition on her premises proximately causing plaintiff's decedent's incident; (2) defendant Her Ping Chiu did not have a duty to plaintiff's decedent; and (3) defendant Her Ping Chiu is not liable for the intentional, unforeseeable, intervening and criminal acts of the co-defendant Carlos Salazar Cruz, and by defendant City pursuant to CPLR 3212 for summary judgment in its favor.

Papers
Numbered

Notices of Motion - Affidavits - Exhibits	1-8
Answering Affidavits - Exhibits	9-14
Reply Affidavits	15-18

Upon the foregoing papers it is ordered that the motions are consolidated and

determined as follows:

This action was commenced by plaintiff Kostas Golfinopoulos, as administrator of the estate of Yu Yao, to recover damages for the personal injuries and wrongful death of Yu Yao, who died on May 18, 2010, from injuries sustained on May 16, 2010, when she was beaten and sexually assaulted by defendant Carlos Salazar Cruz, near and on property owned by defendant Her Ping Chiu, located at 133-23 41st Road, Flushing, New York. In the complaint, plaintiff alleges, among other things, that on May 16, 2010, at approximately 9:00 P.M., while walking on 41st Road in Flushing, New York, Yu Yao was dragged off the street by defendant Cruz and into the driveway/alleyway of defendant Her Ping Chiu's premises, where she was severely beaten and sexually assaulted. Nonparty witness, David Chiu, who is defendant Her Ping Chiu's son, witnessed the beginning of the assault and notified the police by calling 911. Upon arriving at the scene, New York City police officers apprehended defendant Cruz, who was identified by David Chiu as the assailant. Defendant Cruz was thereafter charged, tried, convicted and ultimately incarcerated.¹

Plaintiff testified as follows:

He is an attorney, who was appointed as administrator of the estate of Yu Yao. He did not know Yu Yao and his knowledge of the events of May 16, 2010, came from his attorney, Steven Louros, Esq. Yu Yao was walking down 41st Road and defendant Cruz was sitting on the stoop of premises at 133-23 41st Road. When defendant Cruz saw Yu Yao, he picked up a pipe and started to hit her on the head while she was on the sidewalk. He then dragged her to the side of the house and continued to assault her. Plaintiff believes that the homeowner, defendant Her Ping Chiu, and her son were home and witnessed part of the incident. He also believes Yu Yao herself telephoned the police, but is not sure if she actually made contact. The lighting was poor and the subject neighborhood, near downtown Flushing, is a high crime area. He did not know if any assaults, robberies or murders were committed in that area prior to the subject date. He did not know if anyone complained to defendant Her Ping Chiu about a dangerous condition on her property, or about its exterior lighting and fencing.

Defendant Cruz testified as follows:

¹In an order, dated April 29, 2012, plaintiff obtained a default judgment against defendant Cruz, with an inquest to be held at the time of trial of this action.

He was getting high and drinking all week before the subject date. He would black out, hear voices and feel like someone was grabbing hold of him. He previously had been hospitalized in Mexico for mental health issues. At the time of his deposition, he was taking prescription medication for anxiety and paranoia. At the time of the incident, he was staying with his sister and cousin in Elmhurst, Queens. He had spent the whole day of May 16, 2010, drinking and most likely, had walked from Elmhurst to the subject property in Flushing. He did not know the decedent Yu Yao. His first memory is waking up and being told of the incident by the police. He did not remember anything that happened before he spoke with the police, except drinking from a bottle at an unknown location and hearing voices. He denied ever being present at the subject premises before the incident occurred.

David Chiu testified as follows:

On the subject date, he lived with his mother and father on the second floor of the subject property, a two-family home, owned by his mother, defendant Her Ping Chiu. The downstairs unit was vacant, but previously had been used as a medical office by his father. While home alone that night, he heard a woman yell, the fence rattling and the front gate opening. He went to the front window and saw three people across the street looking toward his family's property and someone on his family's property, inside the driveway gate, striking another person with a pipe. At that time, the driveway gate was closed, but the walkway gate was open. Within seconds of witnessing this assault, he went and called 911 from his cell phone. The call lasted approximately four to five minutes, and then he returned to the window. He did not see anyone at that time, but heard a shuffling noise and groaning from the side of the house. He called 911 a second time and went downstairs to wait for the police. While waiting, he saw the assailant leave the property and walk down the sidewalk toward College Point Boulevard. He went out onto the sidewalk, flagged down an approaching police car, told the officer what happened and identified the assailant. The officer went down the block and apprehended the assailant. A second police car arrived and he told the officer inside to check the back of the property. He started walking toward the back with that officer, but after seeing part of the crime scene, which was visible by the street lights and exterior lights on the building next door, he had to look away. He called 911 for an ambulance. Another police car arrived and drove him down the block to identify the assailant. There were no prior criminal incidents at the property

other than one which took place 25 years earlier, in which someone pretending to be a patient of his father, entered the house with a gun and threatened his father. He was unaware of any other criminal incidents in the neighborhood.

Defendant Her Ping Chiu testified as follows:

On the date of the subject incident, she owned the subject property, but was not at home. There was one prior criminal incident at the home, 25 years earlier, in which someone gained access to the medical office under false pretenses and threatened her husband. The police were called and that person was arrested. They lived in a safe neighborhood. There were two exterior lights on the front of her house and two lights on the exterior of the building next door, which was adjacent to her driveway. There were also street lights. Her husband had built a two-foot wall in the driveway to control flooding, and on the other side of that wall was an alley, which ran along the side of the home. She never received any summonses, citations or violations concerning the exterior condition of her property.

Defendant Her Ping Chiu further averred, in an affidavit, that she and her family neither possessed, nor observed a metal pipe on the property before May 2010.

In the causes of action asserted against defendant City, plaintiff alleges, among other things, that the City failed to provide proper police protection to the decedent, Yu Yao. In the causes of action asserted against defendant Her Ping Chiu, plaintiff alleges, among other things, that defendant Her Ping Chiu failed to keep and maintain her property in a safe and proper condition; failed to install and maintain sufficient lighting thereat; maintained a dangerous instrumentality, that is, a metal pipe, thereon; and failed to timely notify the police.

Defendant City and defendant Her Ping Chiu now separately move for summary judgment.

It is well settled that “[t]he 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 demonstrate the absence of any material issues of fact.” (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Failure to make such a prima facie “showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to

produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact requiring a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

“Liability for a claim that a municipality negligently exercised a governmental function ‘turns upon the existence of a special duty to the injured person, in contrast to a general duty owed to the public’.” (*Coleson v City of New York*, 24 NY3d 476, 481 [2014], quoting *Garrett v Holiday Inns, Inc.*, 58 NY2d 253, 261 [1983]). The provision of police protection is a classic governmental function, and a municipality’s general duty to furnish police protection “does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created.” (*Valdez v City of New York*, 18 NY3d 69, 75 [2011]). A special duty is “a duty to exercise reasonable care toward the plaintiff,” and “is born of a special relationship between the plaintiff and the governmental entity.” (*Pelaez v Seide*, 2 NY3d 186, 198-199 [2004]; *see Coleson v City of New York, supra*). The elements required to establish a special relationship are: “(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality’s agents that inaction could lead to harm; (3) some form of direct contact between the municipality’s agents and the injured party; and (4) that party’s justifiable reliance on the municipality’s affirmative undertaking.” (*Cuffy v City of New York*, 69 NY2d 255, 260 [1987]).

In this case, defendant City established its prima facie entitlement to judgment as a matter of law by submitting competent evidence, including the parties’ examinations before trial testimony, which demonstrated that it and its police officers owed no special duty to the decedent, Yu Yao (*see Valdez v City of New York, supra*), other than “that owed the public generally.” (*Lauer v City of New York*, 95 NY2d 95, 100 [2000]). Thus, the burden shifts to plaintiff to present competent evidence to raise a triable issue of fact. (*See Zuckerman v City of New York, supra*).

Plaintiff has failed to meet this burden. Plaintiff contends that an issue of fact exists concerning whether defendant City breached a special duty to the decedent, Yu Yao. In support of this contention, plaintiff relies on his own testimony that Yu Yao called the police prior to the attack and further asserts that the police assumed an affirmative duty to act on Yu Yao’s behalf and that Yu Yao justifiably relied on the police’s affirmative undertaking. Plaintiff, however, testified that he had no personal knowledge or proof of Yu Yao having contacted the police, and instead was relying on statements by attorney, Steven Louros, Esq. Plaintiff thus failed to present competent evidence to demonstrate that Yu Yao communicated any information to the police prior to the attack concerning her assailant or that the police ever made a direct promise to her on

which she relied (*see Alava v City of New York*, 54 AD3d 565 [2008]).

Plaintiff also contends that defendant City's motion should be denied for spoliation of evidence, namely the negligent destruction of the decedent Yu Yao's cell phone, which was being stored in a warehouse that flooded during 2012's Superstorm Sandy. In addition, plaintiff seeks sanctions pursuant to CPLR 3126 for spoliation, including the striking of defendant City's answer or to preclude defendant City from contesting liability.

Inasmuch as plaintiff failed to serve a notice of motion (*see* CPLR 2214) or cross motion (*see* CPLR 2215), plaintiff is not entitled to the affirmative relief requested in his answering papers, that is, to sanction defendant City for spoliation of evidence (*see Khaolaead v Leisure Video*, 18 AD3d 820 [2005]; *see also Thomas v The Drifters, Inc.*, 219 AD2d 639 [1995]; *Matter of Barquet v Rojas-Castillo*, 216 AD2d 463 [1995]). Moreover, plaintiff was not prejudiced by the alleged negligent destruction of Yu Yao's cell phone since plaintiff simply could have subpoenaed her cell phone records. Summary judgment, however, may not be defeated on the ground that more discovery is needed, where, as here, the side advancing such an argument has failed to ascertain the facts due to his own inaction (*see Meath v Mishrick*, 68 NY2d 992 [1986]; *see also Nunez v Long Is. Jewish Med. Center-Schneider Children' Hosp.*, 82 AD3d 724 [2011]; *Karakostas v Avis Rent a Car Sys.*, 301 AD2d 632 [2003]).

Accordingly, defendant City's motion for summary judgment is granted and plaintiff's complaint and all cross claims against defendant City are dismissed.

A landowner has a duty to maintain its property in a reasonably safe condition, whether the property is open to the public or not (*see Peralta v Henriquez*, 100 NY2d 139 [2003]). A "natural corollary" of this common-law duty is the obligation to maintain minimal security precautions to protect users of premises against injury caused by the reasonably foreseeable criminal acts of third parties (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507 [1980]). The duty of a property owner to provide minimal security precautions against the foreseeable criminal conduct of third parties, however, does not "embrace members of the public at large, with no connection to the premises, who might be victimized by street predators." (*Waters v New York City Hous. Auth.*, 69 NY2d 225, 229 [1987]; *see also Matter of Brown v New York City Hous. Auth.*, 39 AD3d 744 [2007]; *Audrey B. v New York City Hous. Auth.*, 202 AD2d 532 [1994]). In determining the scope of a property owner's duty in a "street predator" situation, two factors must be considered: (1) the relationship between the landowner and the victim and (2) the relationship between the landowner and the assailant (*see Waters v New York City Hous. Auth.*, *supra*).

In this case, defendant Her Ping Chiu established her prima facie entitlement to judgment as a matter of law by demonstrating that she owed no duty since independent of the crime itself, neither plaintiff's decedent, Yu Yao, nor the assailant, defendant Cruz, had any association or relationship with her or her premises (*see Matter of Brown v New York City Hous. Auth.*, *supra*) .

Plaintiff, in opposition, failed to raise a triable issue of fact. Plaintiff contends that a triable issue exists concerning whether the subject assault was foreseeable. Even if foreseeable, however, because the property owner, defendant Her Ping Chiu, had no relationship at all to the wrongdoer, defendant Cruz, whose attack on Yu Yao began on the public sidewalk, and because Yu Yao had no association with the premises independent of the crime itself, defendant Her Ping Chiu's duty to maintain the security of her property may not be deemed to extend to Yu Yao (*see Waters v New York City Hous. Auth.*, *supra*). In any event, plaintiff has not submitted any competent documentary evidence establishing prior reports and/or records of any similar type of criminal activity at defendant Her Ping Chiu's premises (*see Sepulveda v Empire of Hempstead, LLC*, 6 AD3d 603 [2004]; *see also Pascarelli v LaGuardia Elmhurst Hotel Corp.*, 294 AD2d 343; *Novikova v Greenbriar Owners Corp.*, 258 AD2d 149 [1999]). In addition, plaintiff's claim that the neighborhood was a high crime area is speculative, and ambient neighborhood crime, alone, is insufficient to establish foreseeability (*see Novikova v Greenbriar Owners Corp.*, *supra*).

Plaintiff next contends that triable issues of fact exist concerning defendant Her Ping Chiu's liability because of the alleged dangerous conditions on her property, including an unlocked gate, inadequate lighting, the driveway wall and the pipe. These claims that dangerous conditions existed on the property are unsupported and without merit. Moreover, the causal connection between defendant Cruz's criminal acts which began on the public sidewalk and any alleged negligence on the part of defendant Her Ping Chiu is too attenuated, as a matter of law, to serve as a basis for plaintiff's recovery against defendant Her Ping Chiu (*see Graham v New York City Hous. Auth.*, 225 AD2d 520 [1996]). Plaintiff's remaining contentions are unsupported and without merit.

Accordingly, defendant Her Ping Chiu's motion for summary judgment is granted and plaintiff's complaint and all cross claims against defendant Her Ping Chiu are dismissed.

Plaintiff may proceed to inquest for an assessment of damages against the defaulting defendant, Carlos Salazar Cruz.

Dated: March 29, 2017

Howard G. Lane, J.S.C.

