

**Arkin v Wagner**

2018 NY Slip Op 30960(U)

May 21, 2018

Supreme Court, Tioga County

Docket Number: 47180

Judge: Eugene D. Faughnan

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At a Motion Term of the Supreme Court of the State  
of New York held in and for the Sixth Judicial  
District at the Tioga County Courthouse, Owego,  
New York, on the 16<sup>th</sup> day of March, 2018.

**PRESENT: HON. EUGENE D. FAUGHNAN**  
Justice Presiding

**STATE OF NEW YORK**  
**SUPREME COURT : COUNTY OF TIOGA**

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**NANCY ARKIN and DAVID ARKIN,**

**Plaintiffs**

**vs.**

**DECISION AND ORDER**

**Index No. 47180**  
**RJI No. 2017-0050-M**

**JAMES H. WAGNER**  
**and/or LORRAINE M. WAGNER,**

**Defendants.**

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**APPEARANCES:**

**Counsel for Plaintiffs:**

**Welch, Donlon & Czarples, PLLC**  
**By: Anna Czarples, Esq.**  
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**Corning, NY 14830**

**Counsel for Defendants**  
**James H. Wagner and**  
**Lorraine M. Wagner:**

**Barclay Damon, LLP**  
**By: Matthew J. Rosno, Esq.**  
**243 Lake Street**  
**Elmira, NY 14901**

**EUGENE D. FAUGHNAN, J.S.C.**

This matter comes before the Court on Motion of Defendants, James H. Wagner and Lorraine M. Wagner (“Wagners”) for Summary Judgment dismissing the Complaint of Plaintiffs Nancy Arkin and David Arkin (“Arkins”). The case arises from a trip and fall sustained by Nancy Arkin in December, 2015 on a public sidewalk in front of the Wagners’ property.<sup>1</sup> The case has been the subject of two prior decisions of this court. The first was a Decision dated October 12, 2016 granting Plaintiffs leave to file a late notice of claim against the Village of Owego pursuant to General Municipal Law §50-e(5) (Tioga County Index 46690). Thereafter, Plaintiffs commenced the current action, and upon Motion of the Village of Owego to Dismiss the complaint, the Court issued its second Decision, dated May 16, 2017, granting the Motion to Dismiss the complaint against the Village of Owego, for lack of prior written notice.

The Wagners now seek Summary Judgment, claiming that they did not owe a duty of care to the Plaintiffs because the injury occurred on a public sidewalk. Defendants contend that the municipality is responsible for keeping sidewalks in a safe condition, and not the abutting landowner, and that no exception would remove this case from the general rule. The Wagners also claim that the Village of Owego Municipal Code does not impose any liability on an abutting landowner for claims from sidewalk related injuries.

Plaintiffs contend that the provisions of the Village of Owego code do impose a duty on adjoining landowners to maintain the sidewalks in good repair, and preserves civil liability if that duty is breached-although they note they are unable to point to any published decisions dealing with the Village’s sidewalk law and adjoining landowner liability. Plaintiffs argue that public policy favors the imposition of adjoining landowner liability, so that the adjoining landowners will keep their sidewalks in good repair, and so that the Village does not bear all the cost of sidewalk maintenance. They argue that Summary Judgment should be denied.

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<sup>1</sup>Plaintiff Nancy Arkin seeks to recover for personal injury and David Arkin seeks to recover for loss of companionship and consortium.

## **LEGAL ANALYSIS AND DISCUSSION**

“On a motion for summary judgment, the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact.” *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3<sup>rd</sup> Dept. 2014) [citing *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Walton v. Albany Community Dev. Agency*, 279 AD2d 93, 94-95 (3<sup>rd</sup> Dept. 2001)]. If the movant fails to make this showing, the motion must be denied. *Alvarez, supra*. Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980); *Kaufman v. Silver*, 90 NY2d 204 (1997); CPLR 3212(b). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 (2007); *Negri v. Stop & Shop, Inc.*, 65 NY2d 625 (1985). The Wagners, as the moving party, bear the initial burden.

“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 (1996) (citations omitted). This is consistent with the common law rule that “the duty of maintaining the sidewalks--which are recognized as part of the street or highway--in a safe condition belonged to the municipality.” *Pardi v. Barone*, 257 AD2d 42, 44 (3<sup>rd</sup> Dept. 1999), citing *Roark v. Hunting*, 24 NY2d 470, 475 (1969). An abutting landowner will be liable only if the owner affirmatively caused the defect, negligently made repairs to the sidewalk or used the sidewalk in a special manner for its own benefit, or “where a local ordinance or statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalks and imposes liability for injuries

resulting from the breach of that duty.” See *Hausser*, 88 NY2d at 453 *supra*; *Vucetovic v. Epsom Downs, Inc.*, 10 NY3d 517 (2008).

Plaintiffs claim that the sidewalk was defective because of a 2 to 4 inch height differential between sidewalk blocks. The Wagners have provided deposition testimony that they purchased the property in August, 2013, and did not construct or undertake any repairs on the sidewalk where this accident occurred. The sidewalk and trees near the sidewalk were present when the Wagners purchased the property. Defendants claim, and Plaintiffs do not contest, that the Defendants did not create the raised sidewalk condition, and the sidewalk was not constructed in a special manner for the Defendants.

Plaintiffs contend that the Village of Owego’s Municipal Code (“Code”) imposes a duty on abutting landowners to keep the sidewalks in good repair (Code §172-12, 172-13 and 172-14) and allows for civil liability upon a breach of that duty (Code §1-18).

Section 172-12, titled “Construction and repair of sidewalks, curbs and gutters” provides that the Board of Trustees may construct and repair sidewalks within the Village, and may require an adjoining landowner to contribute all, or some, to the cost of the repairs. If the Village chooses to assess the whole expense of the project to the adjoining landowner, it must provide advance notice to the landowner. If the landowner does the work “[a]ll grading done on sidewalks, curbs or gutter laid or repaired by the owners of adjoining land shall be in accordance with the specifications and under the direction and supervision of the Board of Trustees.”

Section 172-13 titled “Criteria for determining need to repair sidewalks” provides specific criteria to determine which sidewalks need replacing. One of the criteria is where there is a one inch or more differential from one sidewalk section to the next section.

Section 172-14 titled “Penalties for offenses” provides for a fine and/or imprisonment for a violation of the Article, and allows for the assessment of an administrative fee and the cost of

repairs, if the Village ultimately performs those tasks. The fee can be added to the owner's property taxes.

Section 1-18 states that compliance with Code provisions may be by criminal information "as well as by prosecution of the offender or by civil action for a penalty or by civil remedy at law or equity by way of injunction or otherwise." It goes on to state that neither a criminal prosecution nor a civil action shall "be a bar to the other form of proceeding."

"[W]here an ordinance, statute or municipal charter specifically imposes both a duty to maintain the sidewalk and liability to injured third parties for failure to do so, the adjoining property owner must assume the duty or face liability; however, if only a duty and no liability is imposed, the adjacent landowner generally may not be held so accountable." *Pardi v. Barone*, 257 AD2d at 44-45, citing, *Willis v. Parker*, 225 NY 159 [1919], *City of Rochester v. Campbell*, 123 NY 405 [1890] (other citations omitted). Thus, the statute must have both elements- a duty and liability. "In order for a statute, ordinance or municipal charter to impose tort liability upon abutting owners for injuries caused by their negligent conduct, the language thereof must not only charge the landowner with a duty but must also specifically state that if the landowner breaches such duty he will be liable to those who are injured for any defects in the sidewalk." *Kiernan v. Thompson*, 137 AD2d 957, 958 (3<sup>rd</sup> Dept. 1988) (citations omitted); see, *Montalvo v. Western Estates*, 240 AD2d 45 (1<sup>st</sup> Dept. 1998). "If tort liability is to be imposed upon an abutting owner, it must be unequivocally set forth in the express words of a statute, charter or ordinance." *Jacques v. Maratskey*, 41 AD2d 883, 883 (3<sup>rd</sup> Dept. 1973).

The section(s) of the Owego Municipal Code that deal with the obligations of an abutting landowner (§§ 172-12, 172-13 and 172-14) do not specifically and unequivocally impose tort liability on the abutting landowner. Those sections only provide enforcement mechanisms for the Village. Plaintiffs attempt to show liability by reference to Section 1-18. However, that section simply permits the pursuit of civil actions to ensure compliance with the Code. Plaintiffs argument is that Section 1-18 "preserves" civil liability. But that presumes there was civil

liability in the first place. However, the ordinance must actually create the liability, which in this case it does not. The Court concludes that Section 1-18 is insufficient to constitute specific and unequivocal tort liability to abutting landowners. “[L]egislative enactments in derogation of common law, and especially those creating liability where none previously existed’ must be strictly construed.” *Vucetovic v. Epsom Downs, Inc.*, 10 NY3d 517, 521 (2008), quoting *Blue Cross & Blue Shield of N.J., Inc v. Phillip Morris USA Inc.*, 3 NY3d 200, 2006 (2004); see, *Pardi v. Barone, supra*; McKinney’s Cons. Laws of NY, Book 1, Statutes §301[c]. The Court concludes that the Code does not explicitly impose tort liability on the landowner, and Plaintiffs cannot proceed on that basis.

Therefore, the only issue is whether there are questions of fact that Defendants created the allegedly defective condition or caused it to occur because of some special use. The evidence submitted by Defendants shows that they did not install the sidewalk and did not undertake any repairs on the sidewalk. The evidence also shows that Nancy Arkin fell on the public sidewalk, and there is no indication that defendant derived any special benefit different from the general traveling public. Therefore, Defendants have made a prima facie case for summary judgment.

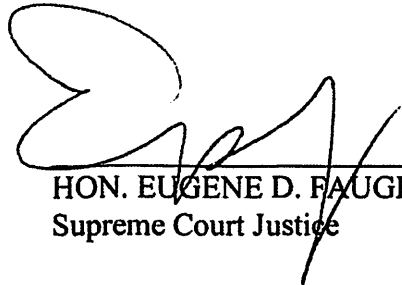
Plaintiffs have failed to raise a question of fact sufficient to defeat the motion. Plaintiffs opposition is based only on their claim that the Owego Sidewalk Law imposes liability on abutting landowners, and the more than one inch differential in sidewalk slabs is evidence of negligence. They provide no additional evidence. Plaintiffs have not submitted any evidence to raise an issue of fact as to whether Defendants installed the sidewalk, or otherwise created a hazardous condition. Plaintiffs also have not submitted any evidence that Defendants made any special use of the sidewalk. Therefore, Plaintiffs have failed to rebut Defendants’ prima facie case.

**CONCLUSION**

Accordingly, Defendant's motion for Summary Judgment dismissing the Plaintiffs' Complaint is GRANTED.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: May 21, 2018  
Owego, New York



HON. EUGENE D. FAUGHNAN  
Supreme Court Justice

The following papers were received and reviewed by the Court in connection with this motion:

- 1) Defendants' Notice of Motion to Dismiss Complaint, dated January 30, 2018 Affirmation of Matthew J. Rosno, Esq., dated January 30, 2018, with attached Exhibits, and Memorandum of Law;
- 2) Plaintiffs' Opposition to Defendants' Motion consisting of Affirmation of Anna Czarples, Esq., dated March 5, 2018, with attached Exhibits;
- 3) Defendants' Reply Affirmation in Further Support of Defendants' Motion for Summary Judgment dated March 13, 2018 and Memorandum of Law;