

Bockstruck v Town of Islip

2019 NY Slip Op 32906(U)

October 2, 2019

Supreme Court, Suffolk County

Docket Number: 11-8516

Judge: Sanford Neil Berland

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INDEX No. 11-8516
CAL. No. 18-01483OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD NEIL BERLAND
Acting Justice of the Supreme Court

MOTION DATE 1-15-19 (010 & 011)
ADJ. DATE 3-19-19
Mot. Seq. # 010 - MG
 # 011 - MD

-----X

KATHY BOCKSTRUCK and BRUCE
BOCKSTRUCK,

Plaintiffs,

- against -

THE TOWN OF ISLIP, SUFFOLK COUNTY
SEWER DISTRICT, SUFFOLK COUNTY
WATER AUTHORITY, SUFFOLK COUNTY,
and SOUTHWEST SEWER DISTRICT, WEST
ISLIP, POST #1738-AMERICAN LEGION,
INC.,

Defendants.

-----X

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Upon the following papers read on this motion for summary judgment: Notice of Motion and supporting papers by defendant West Islip Post #1738, American Legion, Inc. (American Legion), dated December 4 2018; Answering Affidavits and supporting papers by defendants Suffolk County Water Authority (SCWA) dated January 7, 2019 and by plaintiffs dated February 4, 2019; Replying Affidavits and supporting papers dated March 13, 2019; Notice of Cross-Motion and supporting papers by defendant Suffolk County Water Authority dated January 7, 2019; Answering Affidavits and supporting papers by American Legion dated January 31, 2019 and by plaintiff dated February 4, 2019; and Replying Affidavits and supporting papers dated March 18, 2019, it is.

ORDERED that the motion by West Islip Post #1738 American Legion, Inc., for summary judgment dismissing the claims against it is granted; and it is further

ORDERED that the motion by defendant Suffolk County Water Authority seeking various relief is denied.

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The plaintiffs commenced this action to recover damages for injuries that plaintiff Kathy Bockstruck allegedly sustained as a result of a trip and fall accident that occurred on May 31, 2010, while she was marching in a Memorial Day parade organized by defendant West Islip Post #1738 American Legion, Inc. (American Legion), in West Islip, New York. Bruce Brockstruck, Kathy's husband, asserts a derivative claim. They allege, among other things, that while marching in the parade, the plaintiff stepped into an uncovered utility valve sleeve in the roadway, causing her leg to be injured. By motion dated February 15, 2017, American Legion moved for summary judgment dismissing the complaint against it, and by order dated April 13, 2018, the undersigned denied the motion, finding that it was premature inasmuch discovery was not yet completed. The undersigned also found that there were material issues of fact concerning how the valve sleeve became uncovered and the extent of American Legion's responsibility, if any, for the safety of parade participants. The motion was denied without prejudice to renewal upon completion of discovery. Defendant Suffolk County Water Authority (SCWA) also moved for summary judgment, and the undersigned denied the motion on the merits in the April 2018 order.

The note of issue has been filed, and discovery is complete; thus, American Legion has renewed its motion for summary judgment. American Legion contends, among other things, that it did not owe a duty to the plaintiff; therefore, it cannot be held liable for her alleged injury. SCWA cross-moves for summary judgment, seeks leave to renew its initial summary judgment motion, seeks dismissal of the complaint pursuant to CPLR 3211 (a) (1) and seeks to amend its answer to include cross-claims against American Legion.

As an initial matter, the court must address the plaintiffs' assertion that American Legion's current motion is one seeking leave to renew its prior summary judgment motion, and as such, it is defective inasmuch as American Legion failed to adhere to CPLR 2221. The plaintiffs misconstrue the court's April 2018 order. In the prior order, the court granted permission to American Legion to renew its motion once discovery had been completed; therefore, CPLR 2221 is not applicable and the motion is not defective.

At her deposition, the plaintiff testified that while she was marching in the Memorial Day parade on Udall Road in West Islip, her left foot went into a sewer hole, causing her leg to be covered in sewerage and causing a cut on her shin. Approximately 100 other parade participants had walked the same path as the plaintiff without incident before her injury. The plaintiff did not observe the hole before her foot entered it, and there was no barricade around the hole before the incident. The plaintiff did not know firsthand whether any group had cleaned the street prior to the parade, and she did not know whether American Legion was involved in the parade.

American Legion Commander Gregory Buck testified that American Legion planned and conducted the West Islip Memorial Day parade annually. It applied for a permit from the relevant authorities, obtained insurance to indemnify the Town of Islip and organized for various groups and organizations to march in the parade. During the planning phase, American Legion submitted the permit application to the Town, and the Town notified schools as well as the fire and police departments about the parade. An American Legion member would generally notify the fire department if there was a

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safety issue on the day of the event. Although not customary, prior to the parade, Buck drove the parade route to ensure that the barricades, which the Town of Islip provided, were in place. Buck testified that he observed that flags were flown at half staff and that the wreaths and bandstand had been set up. Although he was not looking for any defects in the street, he did not observe any at that time. The parade route was approximately one mile, and American Legion was the first group to march. While he was marching with the group, Buck did not observe any holes or cracks in the street. American Legion did not participate in cleaning when the parade ended.

In his affidavit, Buck averred that American Legion did not perform any security services on the day of the parade; it did not train any safety personnel to take part in the parade; it did not maintain the roadway where the parade was held; it did not have authority to repair the roadway; and it did not direct the participating organizations how to march or how to conduct themselves during the parade. The Town of Islip provided the barricades for the parade route, and the Suffolk County Police Department controlled traffic. American Legion did not take part in any cleaning of the roadway before the parade started.

Richard Reinfrank, the director of field operations at the Suffolk County Water Authority (SCWA), testified that SCWA did not have any information concerning the plaintiff's accident in their records. Based upon the plaintiff's statement, her foot went into a valve box that holds valves used to control water flow in the water distribution system. There was one valve box, which was owned by SCWA, located at the intersection where the plaintiff's accident occurred, and that valve box would have likely been filled with water mixed with dirt and debris rather than sewerage. The SCWA was responsible for maintaining and repairing the cover of the valve box as necessary. Reinfrank did not know how the valve box became uncovered, and he testified that SCWA was not notified that the parade was taking place. SCWA did not participate in removing or replacing the cover on the valve box.

Town of Islip employee Noella Martin testified that Suffolk County owned a portion of the roadway (Higbie Lane) where the parade was held and that although the Town issues permits for parades, the Town does not maintain or inspect any county roads. The area where the plaintiff's accident occurred was owned by Suffolk County. The Town provided and placed barricades along the route of the parade, but it did not inspect the roadway prior to the parade. Because the portion of the roadway where the accident occurred was a county road, the Town did not participate in any cleaning of it before or after the parade.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be

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accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

American Legion has met its burden on the motion. New York courts have established that a parade organizer “who legally uses city streets for parade purposes is not an insurer of the safety of the participants” (*DiNardo v City of New York*, 2002 NY Slip Op 50287(U), at 3-4 [App Term July 29, 2002], *citing Plante v Hinton*, 271 AD2d 781, 782, 706 NYS2d 215 [3d Dept 2000]; *see generally Monacelli v Armstrong*, 64 AD2d 428, 435, 409 NYS2d 899 [4th Dept 1978]; *Donovan v West Indian Am. Day Carnival Assn., Inc.*, 2005 NY Slip Op 50052 [U] [Sup Ct Kings County 2005]); thus, American Legion cannot be held liable for failing to inspect the roadway prior to the commencement of the parade. Like the parade organizer in *DiNardo v City of New York*, *supra*, 2002 NY Slip Op 50287 [U], “beyond obtaining the requisite parade permit from the [town] and stationing its members at the point of assembly to assign the marching order, [American Legion] was not shown to have performed any supervisory or security functions during the event in progress” (*id.*, slip op. at 3). Testimony revealed that American Legion members gathered at the parade site and were the first to march. Although American Legion had volunteers who assisted with organizing the parade, it did not provide security for the event, and it did not control the activities of the parade participants. Plaintiff further claims that American Legion, among other things, created the dangerous condition in the roadway. However, American Legion has established that it had no control of the subject valve box or manhole cover; it did not maintain, repair, or own the valve box or cover; it did not interfere with the cover before or during the parade; it did not own the roadway; and that it had no authority to repair the roadway.

Neither the plaintiff nor SCWA has raised any issue of fact sufficient to defeat American Legion’s motion. SCWA attempts to distinguish the holding in *DiNardo v City of New York* from the facts of the instant case. It argues that American Legion organized, supervised, set up, and participated in the event; thus, it assumed a duty to the plaintiff and it breached that duty. In *DiNardo*, a parade participant was injured when she slipped and fell as a result of a hole in the roadway along the parade route. The facts established that the parade organizer did not have the authority to repair the hole. The parade organizer merely obtained the permit to conduct the parade and its members assigned the marching order to participants. It did not provide any supervisory or security functions at the parade. Like in *DiNardo*, there is no indication that American Legion had the ability or authority to cover the valve box hole in the roadway or to ensure its repair. The record shows that American Legion merely organized the parade as it had done on prior occasions. The Town of Islip set up barricades, the Suffolk County Police and Fire Departments were present, and the participating organizations directed their parade participants. The valve box and its cover was owned and maintained by SCWA. Additionally, neither the plaintiff nor SCWA raised an issue of fact whether American Legion had notice of the condition in the roadway. The facts on record show that American Legion members were the first to march in the parade and its members did not observe that the valve box was uncovered. Accordingly, the motion of American Legion for summary judgment dismissing the claims against it is granted.

Next, SCWA moves¹, for the second time, for summary judgment dismissing the complaint against it. Alternatively, it moves for leave to renew and reargue its prior motion and to dismiss the action pursuant to CPLR 3211 (a) (1).

“Generally, successive motions for summary judgment should not be entertained, absent a showing of newly discovered evidence or other sufficient cause” (*Sutter v Wakefern Food Corp.*, 69 AD3d 844, 845 [2010]; see *Coccia v Liotti*, 101 AD3d 664, 666 [2012]; *Powell v Trans-Auto Sys.*, 32 AD2d 650 [1969]; *Levitz v Robbins Music Corp.*, 17 AD2d 801 [1962]). Although, in this context, newly discovered evidence may consist of “deposition testimony which was not elicited until after the date of a prior order denying an earlier motion for summary judgment” (*Auffermann v Distl*, 56 AD3d 502, 502 [2008]; see *Coccia v Liotti*, 101 AD3d at 666; *Alaimo v Mongelli*, 93 AD3d 742, 743 [2012]; *Staib v City of New York*, 289 AD2d 560 [2001]), such evidence is not “newly discovered” simply because it was not submitted on the previous motion (*Sutter v Wakefern Food Corp.*, 69 AD3d at 845). Rather, the evidence that was not submitted in support of the previous summary judgment motion must be used to establish facts that were not available to the party at the time it made its initial motion for summary judgment and which could not have been established through alternative evidentiary means (see *Pavlovich v Zimmet*, 50 AD3d 1364, 1365 [2008]; *Capuano v Platzner Intl. Group*, 5 AD3d 620, 621 [2004]; *Rose v La Joux*, 93 AD2d 817, 818 [1983]; *Graney Dev. Corp. v Taksen*, 62 AD2d 1148, 1149 [1978]; *Harding v Buchele*, 59 AD2d 754, 755 [1977]; *Abramoff v Federal Ins. Co.*, 48 AD2d 676 [1975]; *Powell v Trans-Auto Sys.*, 32 AD2d 650 [1969]).

(*Vinar v Litman*, 110 AD3d 867, 868-869, 972 NYS2d 704 [2d Dept 2013]; *Brown Harris Stevens Westhampton LLC v Gerber*, 107 AD3d 526, 527, 968 NYS2d 32 [1st Dept 2013]; *Williams v City of White Plains*, 6 AD3d 609 [2d Dept 2004]). SCWA has failed to provide any evidence that was not available to it at the time that it made its initial motion for summary judgment, and it has failed to demonstrate other sufficient cause for making a successive summary judgment motion.

With respect to the branch of its motion seeking to dismiss the complaint pursuant to CPLR 3211 (a) (1), “such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v*

¹ SCWA has incorrectly styled its motion, which, in the first instance seeks relief against the plaintiff and not the principal moving party, the American Legion, a “cross-motion.” (See CPLR 2215.) Pursuant to CPLR 2001, this mistake will be disregarded.

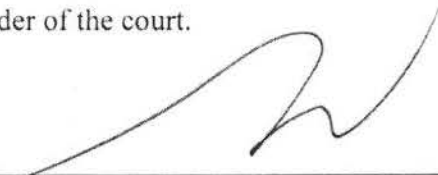
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Mut. Life Ins. Co. of New York, 98 NY2d 314, 326, 746 NYS2d 858 [2002]). SCWA has failed to provide any such documentary evidence. With respect the branch of its motion seeking leave to renew and reargue its initial motion for summary judgment, SCWA has also failed to meet its burden. "Leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion . . . [A] motion to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*U.S. Bank N.A. v Ahmed*, 174 AD3d 661, __NYS3d__ [2d Dept 2019]; see CPLR 2221). Likewise, SCWA failed to demonstrate that the court overlooked or misapprehended matters of fact in making its prior determination (*Kugler v Kugler*, 174 AD3d 876, __NYS3d__ [2d Dept 2019] ["A motion for leave to reargue must be 'based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion'"]). Furthermore, the branch of SWCA's motion seeking to amend its answer to include cross-claims against the American Legion is denied in view of the foregoing grant of summary judgment in favor of the American Legion .

The court directs that the dismissed claims be and hereby are severed and that the remaining causes of action shall continue (see CPLR 3212 [e] [1]).

The foregoing constitutes the decision and order of the court.

Dated: 10/2/2019
Riverhead, New York


HON. SANFORD NEIL BERLAND, A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION