

Parrell v Village of Ossining

2019 NY Slip Op 34265(U)

October 25, 2019

Supreme Court, Westchester County

Docket Number: Index No. 70525/2017

Judge: Lawrence H. Ecker

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X

NOREEN PARRELL,
Plaintiff,

-against-

THE VILLAGE OF OSSINING and RICHARD SCANLAN,
Defendants.

-----X

ECKER, J.

**INDEX NO. 70525/2017
DECISION/ORDER
Motion Seqs. 1, 2
Motion Dates: 08/28/2019
09/18/2019**

The following papers were read on the motion by defendant THE VILLAGE OF OSSINING (the Village) [Mot. Seq. 1], made pursuant to CPLR 3211 (a)(7) and 3212, for an order dismissing the complaint and all cross-claims alleged against it, and the motion of defendant RICHARD SCANLAN (Scanlan) [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint and all cross-claims alleged against him, both motions as against plaintiff NOREEN PARRELL:

Papers

- Mot. Seq. 1 [the Village]*
- Notice of Motion, Affirmation, Exhibits A-L
- Affirmation in Opposition [plaintiff], Exhibits A-E
- Reply Affirmation
- Mot. Seq. 2 [Scanlan]*
- Notice of Motion, Affidavit, Exhibits A-L
- Affidavit in Opposition [plaintiff], Exhibits A-B
- Affidavit in Opposition [the Village]
- Affirmation in Reply

Upon the foregoing papers the court determines as follows:

On May 5, 2017, a tree located on a strip of grass between the sidewalk and street curb in front of 17 Lafayette Avenue, Ossining N.Y. (the Grassy Area) fell and struck plaintiff Noreen Parrell (plaintiff) while she was on the sidewalk. Scanlan owns the house located at 17 Lafayette Avenue.

Plaintiff alleges that she sustained serious physical injuries as a result of her having been struck by the falling tree. Neither plaintiff nor her husband saw the tree fall. Plaintiff's husband took a photograph one-half hour after the tree fell. The tree branches had green

leaves, but according to plaintiff's husband, no root system. It is undisputed that the Village removed the tree after it fell.

On a motion for summary judgment it is the obligation of the court to determine whether or not there are issues of fact that militate against granting that relief to either plaintiff or defendant. It is not the court's function on a motion for summary judgment to assess credibility (*Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Garcia v Stewart*, 120 AD3d 1298, 1299 [2d Dept 2014]), or to engage in the weighing of evidence (*Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]). "Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact" (*Bykov v Brody*, 150 AD3d 808 [2d Dept 2017]; *Kahan v Spira*, 88 AD3d 964 [2d Dept 2011]). Thus a motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010]; *Civil Serv. Empls. Assn. v County of Nassau*, 144 AD3d 1077 [2d Dept 2016]).

Furthermore, it is well-settled that the proponent of the summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *De Souza v Empire Transit Mix, Inc.*, 155 AD3d 605 [2d Dept 2017]). Importantly, once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, *supra*; *Alvarex v Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606 [1st Dept 2012]; *see De Souza v Empire Transit Mix, Inc.*, *supra*). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact (*Zuckerman v City of New York*, *supra*; *Hammond v Smith*, 151 AD3d 1896 [4th Dept 2017]).

The Village

The Village moves pursuant to CPLR 3211 (a)(7) and 3212, for an order dismissing the complaint and all cross-claims on the ground that it had neither actual or constructive notice of the condition of the tree prior to the occurrence. As for plaintiff's cause of action based on negligent hiring, training, and supervision, the Village argues that the claim lacks merit as the Village employees acted reasonably within the scope of their employment.

It is undisputed that the Village had no actual notice of any defect in the tree. Moreover, to the extent that the complaint sets forth a claim of negligent hiring, training and supervision, plaintiff fails to oppose the Village's motion to dismiss said claim, and as such it is dismissed without opposition (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]; *see also Funk v Seligson, Rothman & Rothman, Esq.*, 165 AD3d 429 [1st Dept 2018]; *Madeline D'Anthony Ener., Inc. v Sokolowsky*, 101 AD3d 606 [1st Dept 2012]).

The court has reviewed the transcripts of the depositions, the photographs, the exhibits, and the submitted affidavits, including the affidavit of plaintiff's expert. Upon doing so, it is clear that there are questions of fact that require the denial of the motion for summary judgment. The parties dispute the appropriateness of the type of tree for the location, the condition of the tree, and whether the tree had visible outward signs of decay prior to the accident, with each party criticizing the reliability and truthfulness of the other's witnesses and expert. Questions of fact also exist as whether an inspection by the Village was conducted, and whether a dangerous condition was readily observable. It is not for this court on a summary judgment motion to decide which witness or expert opinions are to be accepted. That is the function of the trier of fact (*see generally, Ferrigno v County of Suffolk*, 60 AD3d 726 [2d Dept 2009]; *Pantojas v Lajara Auto Corp.*, 117 AD3d 577 [1st Dept 2014]).

Scanlan

Scanlan argues that he owed no duty of care to maintain the tree as it was not located on his property, and was planted in the Village's right of way. In addition, he alleges he had no notice of the alleged defective condition of the tree.

In support of the claim, Scanlan makes a *prima facie* showing that he does not own the Grassy Area by submitting a copy of a certified survey (the Survey), dated August 12, 1986, in which Schedule A describes Scanlan's property as ending at the sidewalk. According to the Survey, Scanlan's property does not extend over the sidewalk to the Grassy Area.

In opposition, plaintiff submits an uncertified copy of a Quit Claim Deed on the stationary of Thoroughbred Title & Service, LLC. (Title Document) that includes, in Schedule A, the identical property boundaries that are set forth in Schedule A in the Survey. The Schedule A in the Title Document includes, however, the additional language that:

"For Conveyancing Only:

The policy to be issued under this report will insure the title to such buildings and improvements erected on the premises which by law constitute real property.

TOGETHER with all the right, title, and interest of the party of the first part, of, in and to the land lying in the street in front of and adjoining said premises."

Plaintiff fails to generate an issue of fact as to Scanlan's ownership of the relevant area. In terms of the submitted Title Document, it is an uncertified document and is not competent evidence to prove legal property boundaries (CPLR 4518). In any event, the additional language in Schedule A that plaintiff relies upon is referring to the limits of title insurance coverage, and is not in any way a legal determination of the property lines.

As for the Village's opposition to Scanlan's motion, the Village does not expressly contradict Scanlan's claim that the Grassy Area is not on his property. Instead, the Village reiterates that Scanlan admitted that his tenants mow the relevant area, and that, as a general principle, a homeowner is responsible for maintaining his property. These general facts and principles, without more, are inadequate to generate issues of fact as to Scanlan's ownership of the Grassy Area or duty to maintain the relevant tree.

Nor do the sections of the Village of Ossining Code mentioned by the Village support a different conclusion. To the extent that the Village mentions Code C5-32¹ "Sidewalk and Curbstone," that provision, by its language only requires that the abutting landowner maintain the stone sidewalk and curb, and does not reference any other area or trees. As for the Village of Ossining Code C5-22, it provides:

"§ C5-22 Trimming trees. [Amended 8-3-1999 by L.L. No. 1-1999]

The Board of Trustees may require the owners of land to trim the trees and remove dead or dangerous trees thereon and upon default may cause such trees to be trimmed or removed and assess the expense thereof upon the adjoining land."

The court finds that, by its express language, this provision only requires that owners of land maintain trees that are located on the landowner's property. It does not in any way create an additional legal obligation on the part of an abutting property owner to maintain the trees that are not on his property.

Under the circumstances, therefore, Scanlan demonstrates that he is not the owner of the Grassy Area and that he had no duty to maintain the tree. Plaintiff and the Village

¹§ C5-32 Sidewalks and curbstones. [Amended 3-20-1984 by L.L. No. 3-1984]

A.

Any owner or occupant of any lot bounding on or abutting any of the streets in said Village shall construct, relay and keep in repair the sidewalks and curbstones opposite their respective lots, in such time and manner, and of such materials as the Trustees may, by a bylaw, resolution or local law for that purpose direct, the grade of said sidewalk and the setting of said curbstone to be done under the directions of said Trustees, and it shall also be the duty of the owner, occupant or other person in possession of any land bounding or abutting on any street, sidewalk or other public place in said Village to fence, protect, excavate, drain or fill the same within such time and in such manner and of such materials as said Trustees may by resolution direct and under their supervision whenever deemed necessary for the protection, safety and health of the public.

B.

If the owner or occupant of any lot bounding on or abutting any of the streets of said Village fails to construct, relay or repair the sidewalk or curbstone as required by any bylaw, resolution or local law, the Board of Trustees may cause the same to be constructed or repaired and shall assess the cost thereof upon the adjoining land, which shall be levied and collected in the manner provided by § C5-23 of this Charter hereby amended,... provided, however, that the entire cost of relaying or repairing existing concrete, slate or granite curbstones which have not been damaged by any owner or occupant of any lot bounding on or abutting such curbstones which are installed on or after January 1, 1984, shall be a Village charge and shall not be apportioned.

fail to generate an issue of fact as to the question. Accordingly, the motion to dismiss the complaint and cross-claims against Scanlan is granted.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the part of the motion by defendant THE VILLAGE OF OSSINING [Mot. Seq. 1], made pursuant to CPLR 3211 (a)(7) and 3212, for an order dismissing the cause of action based on negligent hiring, training and supervision as against plaintiff NOREEN PARRELL is granted without opposition; and it is further

ORDERED that the part of the motion by defendant THE VILLAGE OF OSSINING [Mot. Seq. 1], made pursuant to CPLR 3211 (a)(7) and 3212, for an order dismissing the cause of action based on negligence as against plaintiff NOREEN PARRELL is denied; and it is further

ORDERED that the motion of defendant RICHARD SCANLAN [Mot. Seq. 2], made pursuant to CPLR 3212, for an order dismissing the complaint and all cross-claims alleged against him is granted; and it is further

ORDERED that the cross-claims of defendant RICHARD SCANLAN alleged against defendant THE VILLAGE OF OSSINING are dismissed as moot; and it is further

ORDERED that the remaining parties shall appear at the Settlement Conference Part, Room 1600, on December 10, 2019, 9:30a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
October 2019

ENTER,

HON. LAWRENCE H. ECKER, J.S.C.

Appearances

All parties via NYSCEF