

<b>Jennings-Lowe v Town of Islip</b>
2020 NY Slip Op 34746(U)
January 10, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 622227/18
Judge: Vincent J. Martorana
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SHORT FORM ORDER

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**Supreme Court of the State of New York**  
**IAS Part 23 - County of Suffolk**

PRESENT:

Hon. Vincent J. Martorana

\_\_\_\_\_  
 LINDA JENNINGS-LOWE,

Plaintiff,

- against-

TOWN OF ISLIP, RIVER ROAD  
 PARKING, LLC, and SAYVILLE FERRY  
 SERVICE, INC.,

Defendants.

\_\_\_\_\_

ORIG. RETURN DATE: 5/30/19

ADJOURNED DATE: 7/11/19

MOTION SEQ. NO.: 002 - MG

003 - MD

004- MD

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Upon the following papers read on these motions for summary judgment Notice of Motion and supporting papers by defendant Sayville dated April 30, 2019 (002); by defendant River Road dated June 7, 2019 (003); by defendant Islip dated August 7, 2019 (004); Notice of Cross-Motion and supporting papers \_\_\_ Affirmation/affidavit in opposition and supporting papers by plaintiff dated May 14, 2019(002) ; by defendant Islip dated May 16, 2019(002); by plaintiff dated July 2, 2019(003); by defendant Sayville dated August 29, 2019(004); by plaintiff dated August 29, 2019(004); Affirmation/affidavit in reply and supporting papers by defendant Sayville dated May 29, 2019(002); by defendant River Road dated July 8, 2019 (003) by defendant Islip dated September 4, 2019 (004); \_\_\_; Other \_\_\_; (and after hearing counsel in support of and opposed to the motion) it is,

**ORDERED** that the motion by Sayville Ferry Service, Inc. (002) seeking summary judgment dismissing the claims against it is granted. The summary judgment motion by River Road Parking, LLC (003) and the summary judgment motion by the Town of Islip (004) are both denied with leave to renew upon the substantial completion of discovery.

The within matter was commenced seeking to recover damages for injuries sustained by Plaintiff when she allegedly tripped and fell due to the negligence of defendants. Plaintiff claims in her bill of particulars that, on May

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4, 2018 at approximately 9:20 p.m., "The incident occurred on the curbing abutting the walkway leading to the public parking area across from the terminal of the Sayville Ferry located on River Road between Terry Street and Brown River Road, Town of Islip, County of Suffolk, State of New York." Issue has been joined, each defendant interposed cross-claims for indemnification and/or contribution as against their co-defendants and each defendant now seeks summary judgment.

Defendant Sayville Ferry Service, Inc. ("Sayville Ferry") seeks summary judgment (motion seq. 002) on the basis that Sayville Ferry is on the opposite side of the street from the curb where the incident took place and that it therefore owed no duty to Plaintiff. Sayville Ferry's President, Kenneth F. Stein III attested in his affidavit that Sayville Ferry never owned, leased, operated, controlled or repaired the public walkway/crosswalk located in River Road or the curb located on the west side of River Road, across the street from the ferry. Mr. Stein further averred that Sayville Ferry did not own, install or maintain lighting in the subject area; nor did it enter into a contract with the Town of Islip to operate a parking lot; nor did it paint the crosswalk.

Plaintiff opposes Sayville Ferry's motion on the basis that it is premature and that Plaintiff is entitled to discovery, pursuant to CPLR§3212(f). Plaintiff asserts that crucial facts exist concerning any relationship that Sayville Ferry or Sayville Ferry's President may have with the parking lot across the street. The Lease Agreement for the property containing the parking lot indicates that 1999 Stein Trust and Island Trust ("Landlords") leased the parking lot premises to River Road Parking, LLC for the purpose of operating a parking lot. Plaintiff suggests that Sayville Ferry's President may also have been the individual who signed the Lease Agreement for the parking lot land on behalf of the Landlords. Plaintiff cites several news articles which seem to highlight Mr. Stein's involvement in zoning issues regarding the parking situation near the Ferry. Plaintiff argues that Mr. Stein, either individually, through a company or through a trust, has involvement in the parking lot and that the more people can park, the more money the Ferry can make. Further discovery is needed, Plaintiff urges, so that these relationships can be sorted out. Plaintiff also argues that Sayville Ferry made special use of the crosswalk and is therefore obligated to maintain the part that it uses so that it is in a reasonably safe condition.

A party moving for summary judgment "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 Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such 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, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (see *O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 52 NYS3d 68 [2017]). The opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Stonehill Capital Mgmt., LLC v. Bank of the West.*, 28 NY3d 439, 448, 68 NE3d 683, 688 [2016](quoting *Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, 501 NE2d 572). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party ( *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

When a party seeks to avoid summary judgment on the basis that facts essential to opposition may exist but cannot yet be stated due to the need for additional discovery, pursuant to CPLR§3212(f), the opposing party must demonstrate that further discovery may lead to relevant evidence (*Abraham Nat. Foods Corp. v. Mount Vernon*

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*Fire Ins. Co.*, 84 AD3d 1281, 924 NYS2d 171 [2d Dept 2011]; *Price v. Cty. of Suffolk*, 303 AD2d 571, 572, 756 NYS2d 758, 759 [2d Dept 2003]; *Greenberg v. McLaughlin*, 242 AD2d 603, 604, 662 NYS2d 100, 101 [2d Dept 1997]). The mere speculation that evidence may be uncovered during discovery is insufficient basis to deny summary judgment (*Marshall v. Colvin Motor Parts of Long Island, Inc.*, 140 AD2d 673, 528 NYS2d 1007 [2d Dept. 1988]; *Pollock v. City of New York*, 145 AD2d 550, 536 NYS2d 103 [2d Dept. 1988]).

To state a claim for negligence, a party must state sufficient facts to establish that the adverse party owed a duty to the claimant, that he or she breached that duty and that such breach proximately caused damages (*Miglino v. Bally Total Fitness of Greater New York, Inc.*, 92 AD3d 148, 937 NYS2d 63 [2d Dept. 2011], *aff'd but criticized*, 20 NY3d 342, 985 NE2d 128 [2013]; *Pulka v. Edelman*, 40 NY2d 781, 782–83, 358 NE2d 1019 [1976]; *Muallem v. City of New York*, 82 AD2d 420, 423–25, 441 NYS2d 834 [2d Dept. 1981], *aff'd*, 56 NY2d 866, 438 NE2d 1142 [1982]. The threshold issue in any negligence case is whether or not defendant owed a duty to Plaintiff. In the absence of duty, there can be no breach and no liability (*Pulka v. Edelman*, 40 NY2d 781, 782–83, 358 NE2d 1019 [1976]; *Muallem v. City of New York*, 82 AD2d 420, 423–25, 441 NYS2d 834 [2d Dept. 1981], *aff'd*, 56 NY2d 866, 438 NE2d 1142 [1982]; *Miglino v. Bally Total Fitness of Greater New York, Inc.*, 92 AD3d 148, 159–60, 937 NYS2d 63, 71–72 [2d Dept. 2011], *aff'd but criticized on other grounds*, 20 NY3d 342, 985 NE2d 128 [2013]).

The imposition of “[L]iability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property ... Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property” (*Minott v. City of New York*, 230 AD2d 719, 645 NYS2d 879 [2d Dept. 1996] *quoting Turrisi v Ponderosa, Inc.*, 179 AD2d 956; see also *Noia v. Maselli*, 45 AD3d 746, 846 NYS2d 326 [2d Dept. 2007]; *Breland v. Bayridge Air Rights, Inc.*, 65 AD3d 559, 884 NYS2d 143, 144 [2d Dept. 2009]). The special use exception may apply in a case where an abutting landowner uses a portion of a public way for his or her own benefit and exercises control over that portion of the public way such that a duty to maintain the safety of that portion is imposed (*Id.*) Access and an ability to exercise control over the special use are integral to a duty to maintain (*Kaufman v. Silver*, 90 NY2d 204, 208–09, 681 NE2d 417 [1997]).

Here, Sayville Ferry made a *prima facie* case of entitlement to judgment as a matter of law, establishing that it did not own or control the property here at issue, therefore it owed no duty to Plaintiff. The burden then shifted to Plaintiff to establish triable issues of fact. Plaintiff argued that Sayville Ferry made special use of the property and therefore was liable under an exception to the general rule regarding ownership or control. However, special use involves control over a portion of a public way that inures to the benefit of the private landowner. Directing one's patrons to the location of a public crosswalk and regularly having patrons who use such crosswalk does not involve special use and control as contemplated by the special use exception. Plaintiff has failed in its burden to raise a triable issue of fact.

Plaintiff's alternate argument is that Sayville Ferry's President (or an entity or entities in which he holds an interest) owns, controls or holds an interest in or benefits from the parking lot. Therefore additional discovery is needed to ferret out these relationships. Plaintiff has articulated a potential basis for inferring that there may be relationships between various entities and individuals; however, Plaintiff has not stated any theory pursuant to which such relationships might impute liability in the within action to Sayville Ferry. Therefore, due to the speculative nature of Plaintiff's theory and the lack of any legal theory pursuant to which liability may be imputed even if additional information were obtained through discovery in this regard, Plaintiff has failed to state sufficient basis to deny summary judgment as premature.

Based upon the foregoing, Sayville Ferry's motion (002) seeking summary judgment dismissing the claims and cross-claims against it is granted.

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Defendant River Road Parking, LLC ("River Road") also moves for summary judgment (motion seq. 003) on the basis that Plaintiff tripped over a curb that was not connected to a public walkway and that River Road did not owe a duty of care to Plaintiff, nor did it cause or contribute to the alleged accident. In support of its motion, River Road offers a portion of Plaintiff's testimony from the 50-h hearing (by annexed transcript) at which Plaintiff stated, "I am walking along, the sign--there is a bright sign--there's a walkway sign that is probably, I'd say illuminated and everything else was not, I'm crossing the crosswalk and, you know, so you have to get up to the other side and there is a little house, I feel my left foot hit something and the next thing I know I am literally face down on a pavement, I would say." Plaintiff further testified that she had to cross the crosswalk in order to get to the opening in the fence around the parking lot where the "Walkway" sign was located. River Road also submitted a Google Maps photograph which shows that the crosswalk does not line up with or lead directly to the "Walkway" sign. River Road further offered an affidavit of the Trustee of Island Trust which is a member of River Road Parking who stated that River Road never owned the property or performed work on the property, nor did River Road own or maintain the curb or lighting, nor did River Road enter into a contract with Sayville Ferry. River Road also provides a copy of video surveillance which it claims establishes where Plaintiff fell and that River Road is not responsible for maintaining that location.

Plaintiff opposes, asserting that there should have been a curb cutout in front of the "Walkway" sign, along with a painted curb and warning signs and that there was insufficient light to see that there was no curb cutout. Additionally, Plaintiff argues that River Road's motion is premature because Plaintiff needs discovery regarding the lighting and any complaints about the lighting in the area where Plaintiff fell. Plaintiff also claims that the video submitted by River Road is unauthenticated and therefore lacks evidentiary value.

Town of Islip seeks summary judgment (motion seq. 004) asserting that the existence of a curb is not an inherently dangerous condition and that a municipality's obligation to install or maintain street lighting exists only where illumination is necessary to avoid a dangerous or potentially hazardous condition. In support of its motion, the Town offers a conclusory assertion that there were no special conditions requiring street lighting, along with a copy of the unauthenticated video submitted by River Road.

Plaintiff avers in opposition that additional discovery is needed on the issue of which entity was responsible for the lighting in the subject area and that the curb was obscured, not open and obvious. Sayville Ferry opposes the Town's motion stating that the Town has a nondelegable duty to maintain the roads and adjacent lands and that the Town's argument presupposes that the curb was visible. The Court notes that the video relied upon by both Town and River Road lacks sufficient foundation. However, even if a foundation had been laid, the copy of the video received by the Court was of such poor resolution that it is of little probative value.

Based upon issues raised by the parties in opposition to the motions as well as unanswered questions in the record, River Road's summary judgment motion (003) and Town of Islip's summary judgment motion (004) are both denied as premature with leave to renew upon the substantial completion of discovery. As set forth above, Sayville Ferry's summary judgment motion (002) is granted dismissing all claims and cross-claims against it.

**Dated: Riverhead, New York**  
**January 10, 2020**

  
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**VINCENT J. MARTORANA, J.S.C.**

CHECK ONE:  FINAL DISPOSITION  NON-FINAL DISPOSITION