Scutari v Drapala
2020 NY Slip Op 35776(U)
November 18, 2020
Supreme Court, Westchester County
Docket Number: Index No. 71003/2018
Judge: Mary H. Smith
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period 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.

P R E S E N T:
HON. MARY H. SMITH
JUSTICE OF THE SUPREME COURT

JONATHAN SCUTARI and BESNIK ISLAMI,

Plaintiff(s),

- against -

DECISION & ORDER
Index No.: 71003/2018

DESIREE DRAPALA, 777 HUDSON STREET PROPERTIES, LLC, VILLAGE OF CROTON-ON-HUDSON, JOHN M. DRAPALA, and TARA B. DRAPALA,

Defendant(s).

Defendant Village of Croton-on-Hudson moves (Motion #3) for summary judgment. Plaintiffs cross-move (Motion #4) for summary judgment on against the Village on the Fifth Cause of Action

The following papers were read:

Motion ## 3 and 4

Notice of Motion, Affirmation, and Exhibits (8)	1-10
Notice of Cross-Motion, Affirmation, Affidavits (3), Exs (40), Memo of Law	11-56
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By way background, plaintiffs reside in a house located at 172 Grand Street, Village of Croton-on-Hudson, New York (Premises). In 2014, a neighboring house (Neighboring Premises) burned down, allegedly causing some damage to the Premises. Subsequently, an application to build another house on the Neighboring Premises was approved by the Village Planning Board by way of a resolution (Resolution). In July 2018, plaintiffs complained that work on the Neighboring Premises was causing damage to their Premises. The Village Engineer issued a "stop work" order, which was later lifted. On December 26, 2018, plaintiff commenced this action against defendants Desiree Drapala and 777 Hudson Street Properties, LLC, the alleged owners of the Neighboring Premises (Defendant Owners). The complaint was later amended to add defendant Village of Croton-on-Hudson

(Village),[1] seeking damages for the Village's alleged negligence (the Fourth Cause of Action) and a declaratory judgment that the Defendant Owners violated the Resolution and Zoning Code (the Fifth Cause of Action).

The Fourth Cause of Action alleges, among other things, that, after being apprised of the issues with the construction of the Neighboring Premises in July 2018, the Village made affirmative representations that it would address plaintiffs' concerns and perform an investigation to ascertain the extent of the damage and the status of excavations impermissibly performed to date. The Fourth Cause of Action alleges that the Village assumed a special duty as a result of these representations and that the Village breached this special duty by permitting the Defendant Owners to increase the foundation size of the Neighboring Premises, by failing to ensure safe working conditions, and by permitting the Neighboring Premises to be installed in violation of the Resolution and the Zoning Code. The Fifth Cause of Action seeks a declaration that the Defendant Owners violated the Resolution and Zoning Code.

Now, the Village moves for summary judgment and plaintiffs cross-move for summary judgment against the Village on the Fifth Cause of Action. On a motion for summary judgment, the Court is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant must set forth a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

In support of its motion, the Village sets forth a number of arguments. First, the Village contends, among other things, that there is no evidence that the Village made any promises beyond the general assurance that it would inspect and address plaintiffs' concerns, which, the Village contends, is insufficient to establish the existence of a special relationship. Second, the Village contends that the Fifth Cause of Action is time-barred because plaintiffs failed to challenge the Village's actions within the applicable statute of limitations of a CPLR Article 78 proceeding.

In support of their motion, plaintiffs explain why they were not required to commence a CPLR Article 78 proceeding. Plaintiffs also proffer some evidence that the Neighboring Premises violated, among other things, the Resolution.

The Village has not made a *prima facie* showing as to the Fifth Cause of Action. "The burden rests on the party seeking to assert the Statute of Limitations as a defense to establish that its decision provided notice more than four months before the proceeding

[1] Defendants John M. Drapala Tara B. Drapala were later added as party defendants, as the alleged new owners of the Neighboring Premises.

was commenced" (*see Matter of Raffaele v Town of Orangetown*, 224 AD2d 430, 431 [2d Dept 1996]). The Village has failed to identify the decision or action, which triggered the running of the applicable statute of limitations. As noted above, plaintiffs do not allege that the Village erred by issuing the Resolution, but that the Defendant Owners have violated it and the Zoning Code in the construction of the Neighboring Premises.

Plaintiffs have not made a *prima facie* showing as to the Fifth Cause of Action. CPLR 3001 permits the Court to "render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." As noted above, the Fifth Cause of Action seeks a declaration that the Defendant Owners violated the Resolution and Zoning Code. It is unclear how this presents a justiciable controversy vis-à-vis the Village. Accordingly, plaintiffs' cross-motion for summary judgment as against the Village on the Fifth Cause of Action is denied.

The Village has made a *prima facie* showing that it owed no special duty to plaintiffs and, as such, is entitled to summary judgment on the Fourth Cause of Action. As such, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

In response, plaintiffs contend that the Village was obligated to enforce the terms of the Resolution and to ensure that the plaintiffs' Premises was protected from the construction on the Neighboring Premises. Plaintiffs contend that this obligation was a ministerial act, not a discretionary one. Plaintiff also contend that there is, at the least, a question of fact as to whether the Village should have done more to prevent further damage to plaintiffs' Premises. In addition, plaintiffs contend that the Village assumed a duty to protect plaintiffs' Premises from further harm and the Village assumed control and direction in the face of multiple known safety violations on the Neighboring Premises.

It is well settled that "in the absence of some special relationship creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for failure to enforce a statute or regulation" (*O'Connor v City of New York*, 58 NY2d 184, 192 [1983]). Two ways in which a special relationship can be formed occur "[1] when [the municipality] voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty[] or [2] when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation" (*Metz v State*, 20 NY3d 175, 180 [2012]). Regarding the first, it must be proved, among other things, that the municipality assumed, through promises or actions, an affirmative duty to act on behalf of the party who is injured (*see Brown v City of New York*, 73 AD3d 1113, 1114 [2d Dept 2010]). Regarding the second, it arises in those rare circumstances where, "having actual knowledge of a blatant violation of safety laws, [a municipality] nevertheless provides affirmative assurances of safety on which the injured plaintiff relies"

(*Abraham v City of New York*, 39 AD3d 21, 28 [2d Dept 2007]). However, the failure to act is insufficient to establish a special relationship (*id.*). Rather, "[t]he municipality must somehow *affirmatively act* to place the plaintiff in harm's way, as by giving assurances that the situation is safe when in fact it is not, thereby inducing the plaintiff to embark on a dangerous course he or she would otherwise have avoided" (*id.*, emphasis in original)

Here, plaintiffs have proffered evidence that they apprised the Village of safety issues in the construction of the Neighboring Premises and that the Village Engineer assured them that he would look into it and address their concerns. Such vague and ambiguous assurances are insufficient to establish an affirmative undertaking by the Village to act on plaintiffs' behalf (*see Brown*, 73 AD3d at 1114). Plaintiffs also proffered evidence that, after apprising the Village of the safety in the construction of the Neighboring Premises, the Village Engineer took action, issuing a "stop work" order, but after investigation, did not take the affirmative steps to ensure that plaintiffs' Premises was not further damaged by the construction on the Neighboring Premises. This evidence falls well short of raising a material issue of fact as to whether the Village affirmatively placed plaintiffs in harm's way and gave assurances that the situation was safe, thereby inducing plaintiffs to embark on a dangerous course they would otherwise have avoided (*Abraham*, 39 AD3d at 28). Accordingly, the Village's motion for summary judgment is granted to the extent that the Fourth Cause of Action is dismissed.

Dated: November 18, 2020
White Plains, New York

HON. MARY H. SMITH
Justice of the Supreme Court