

McLaughlin v Sea Cliff Yacht Club, Ltd.
2021 NY Slip Op 32986(U)
August 18, 2021
Supreme Court, Nassau County
Docket Number: Index No. 616962/18
Judge: Diccia T. Pineda-Kirwan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

Short Form Order

NEW YORK SUPREME COURT - NASSAU COUNTY

Present: Honorable DICCIA T. PINEDA-KIRWAN Justice

IA PART 20

-----X
KAREN McLAUGHLIN, Individually as surviving spouse and as Administratrix on behalf of all Beneficiaries for the Estate of EDWARD J. McLAUGHLIN, Deceased,

Index No.: 616962/18
Motion Date: 5/27/21
Seq. No.: 3, 4, 5, 6, 7, 8, 9
Teams: 10:45 A.M.

Plaintiff(s),

-against-

THE SEA CLIFF YACHT CLUB, LTD., ET AL,

Defendant(s).

-----X

The following numbered papers read on these motions by defendants County of Nassau, Sea Cliff Yacht Club, LTD., and Incorporated Village of Sea Cliff for summary judgment, cross motions by plaintiff for an adverse inference as against County of Nassau, and to strike the Incorporated Village of Sea Cliff's defenses, and cross motion by plaintiff to correct the signature page of its expert witness.

Table with 2 columns: PAPERS, NUMBERED. Rows include Notices of Motion-Affidavits-Exhibits, Notices of Cross-Motion-Affidavit-Exhibits, Answering Affidavits-Exhibits, Reply.

Upon the foregoing cited papers, and after Microsoft Teams conference, it is ordered that inasmuch as the Court was apprised that this matter has been settled as to defendants County of Nassau ("County") and Sea Cliff Yacht Club, LTD., ("Yacht Club"), the motions by the County (Seq. 3) and the Yacht Club (Seq. 4 & 9) for summary judgment, and cross motion by plaintiff for an adverse inference as against the County (Seq. 6), are denied as moot. The remaining motions, by the Incorporated Village of Sea Cliff ("Village") for summary judgment (Seq. 5), cross motion by plaintiff to strike the Village's defenses (Seq. 7), and cross motion by plaintiff to correct the signature page of its expert witness (Seq. 8), are consolidated for disposition, and are determined as follows:

Plaintiff commenced the instant action to recover for the injures and wrongful death her husband, Edward J. McLaughlin, allegedly suffered when a tree branch fell onto his vehicle on March 2, 2018, as he was parking it on a road adjacent to the real property located at 42 The Boulevard, Sea Cliff, New York (the "Premises"). The tree was on the Premises, which is owned by the Yacht Club. The Yacht Club is situated in the Village, and the street Mr. McLaughlin parked on was a Nassau County road. The Village now moves for summary judgment and plaintiff cross-moves to strike the Village's answer, and separately cross-moves to correct the signature page of its expert witness.

Beginning with the Village's motion, a party seeking summary judgment has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its *prima facie* burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The Village maintains that it is not liable for the happening of the accident on the basis that it had no actual, constructive, or prior written notice of the dangerous condition, and that the Nassau County Administrative Code ("NCAC") places responsibility for trees overhanging County roads on the County.

NCAC § 12-4.2(a) provides that the County has a statutory duty to maintain "all trees . . . between the property lines on county roads" unless the trees are "in villages of the first and second class," as defined in an old version of the State's Village Law that was adopted by the State Legislature in 1909, pursuant to which a first class village was defined as one with a population of 5,000 or more, and a second class village is one with a population of 3,000 to less than 5,000. The NCAC was passed by the New York State Legislature in 1939, at which point, according to census data, the Village qualified as a "second class" Village, and would thus have fallen into the NCAC exclusion. The Village asserts that since the old Village Law was repealed in 1972, and replaced with the new Village Law, which does not contain similar village classifications, the exception for first and second class villages was removed from the NCAC, and thus it did not have a duty to maintain the tree.

The Village, however, does not present any support for its contention, and the authorities lead to a contrary conclusion. This exact issue was addressed in an informal opinion by the Office of the New York State Attorney General dated July 7, 1975, which stated that the new Village Law "does not in any way change the application of the provisions of the Administrative Code in its relevancy to villages."

This Informal Opinion is consistent with the well-settled law that municipalities have a duty to maintain and inspect trees on Village or County property which borders County roads (*see Harris v Village of E. Hills*, 41 NY2d 446, 448-49 [1977]). The repeal of the old Village Law "does not mean that villages no longer have any duty with respect to dangerous trees" as "the Harris case rests on a general common-law duty of towns, villages, and the state alike" (*Hilliard v Town of Greenburgh*, 301 AD2d 572, 572

[2003]). The fact that the tree in question here was situated on the Yacht Club's property does not relieve the Village of liability as the exact location of a tree with respect to the Village's "right of way is not dispositive: the duty of a municipality to maintain its roadways in a reasonably safe condition extends to trees that are adjacent to the roadway and which could reasonably be expected to pose a danger to travelers" *Machicado v Paradise*, 112 AD3d 680, 680 [2013]). Thus, the Village fails to demonstrate that it did not have a duty with respect to the tree.

The Village cannot, however, be held liable unless it had actual or constructive notice of the dangerous condition (*see Connolly v Incorporated Vil. of Lloyd Harbor*, 139 AD3d 656, 657 [2016]). Here, the Village has not established, *prima facie*, that it did not have actual notice of the allegedly dangerous condition. Joanna Greenspon, a non-party witness who lived next to the Yacht Club, testified that in February of 2018, she spoke to Russell Gorog, a volunteer with the Village's Tree Commission and Beautification Committee, about concerns regarding the health of the tree. Mr. Gorog explained that the Tree Commission evaluates resident applications to remove trees in the Village, and that once a request is made, the Tree Commission will inspect the tree and report their findings to the Village, which can then choose to issue a permit for its removal. On February 23, 2018, he sent an e-mail to the other Tree Commission members notifying them of Ms. Greenspon's request, and asked them to take a look at the tree. He also attached a Google Maps image of the tree taken in July of 2015 and mentioned that the tree "has been leaning severely toward the street and power lines across the street." Despite this, neither he nor the Village conducted a visual inspection of the tree or notified the Yacht Club or the County prior to the accident.

Nor has the Village demonstrated that it did not have constructive notice of the condition. While a Village does not need to "consistently and constantly check all trees for nonvisible decay" (*Ivancic v Olmstead*, 66 NY2d 349, 351 [1985]) constructive notice of a defect may be imputed where a reasonable inspection would have revealed the allegedly dangerous or defective condition. In this case, plaintiff raises triable issues of fact as to whether the Village had constructive notice of the dangerous condition through the affidavit of Wayne Cahilly, an arboriculture, cartography, and horticulture expert. Mr. Cahilly inspected the tree eight days after the accident, and opined that it was "visibly deteriorated, decayed and hollow," "had several cavities," was leaning over the sidewalk and road "at a severe angle of 40 degrees," and that these factors were open and obvious and a reasonable inspection would have revealed the tree's dangerous condition (*see Harris* at 449). Despite Mr. Cahilly's uncontroverted opinion, the Village admittedly did not inspect the tree or have anyone assigned to inspect its trees, thereby precluding summary judgment (*see Hilliard* at 573).

The Village's contention that Mr. Cahilly's affidavit is inadmissible since it was executed in New Jersey, notarized by a New Jersey notary, and not accompanied by a certificate of conformity pursuant to CPLR 2309(c), is without merit. Failure to submit a certificate of conformity is not a fatal defect (*see Hunter Sports Shooting Grounds, Inc. v Foley*, 120 AD3d 759, 761 [2014]), and is an error which can be corrected *nunc pro tunc* (*see E. W. Acupuncture v Safeco Ins. Co. of Indiana*, 35 Misc3d 50 [App Term, 2d Dept, 2nd, 11th & 13th Jud Dists 2012]). Here, upon learning of the Village's objection, plaintiff immediately cross-moved to correct this defect (Seq. 8) by submitting the same affidavit containing a notarization before a New York notary, which cross motion is granted *nunc pro tunc*.

The Village next argues that it is not liable for the falling branch since it was an "act of God." The Village, however, fails to establish that the tree did not have any visible indicia of decay that could be found upon reasonable inspection, and that the incident was solely caused by an act of God, and could not have been prevented by human care, skill and foresight (*see Priore v New York City Dept. of Parks and Recreation*, 124 AD3d 749, 750 [2015]; *Abarca v Clarks Shoes*, 81 AD3d 675, 676 [2011]).

Moreover, since questions of fact remain as to the Village's negligence in failing to timely respond to complaints and notify the Yacht Club of same, it is not entitled to summary judgment on its cross claims.

Lastly, plaintiff's cross motion for sanctions to strike the Village's affirmative defenses (Seq. 7), is denied. Pursuant to CPLR 3126, sanctions are appropriate a party refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed. In order to invoke the drastic remedy of striking a party's pleadings, there must be a clear showing that the party's failure was "willful and contumacious," which is evidenced by either a repeated failure to respond to demands or comply with court-ordered discovery without a reasonable excuse, or by failure to comply with court-order discovery over an extended period of time (*Llanos v Casale Constr. Servs., Inc.*, 188 AD3d 864, 865 [2020]).

Plaintiff contends that striking the Village's affirmative defenses is justified because on February 16, 2019, plaintiff demanded all "communications concerning complaints transmitted by any form to the Village, including the tree commission," and yet the Village did not produce Mr. Gorog's February 23, 2018 email until after his May 4, 2020 deposition. Plaintiff has not, however, demonstrated that the Village's failure to produce the email before Mr. Gorog's deposition was willful and contumacious as the Village did not repeatedly fail to respond to demands or comply with court-ordered discovery.

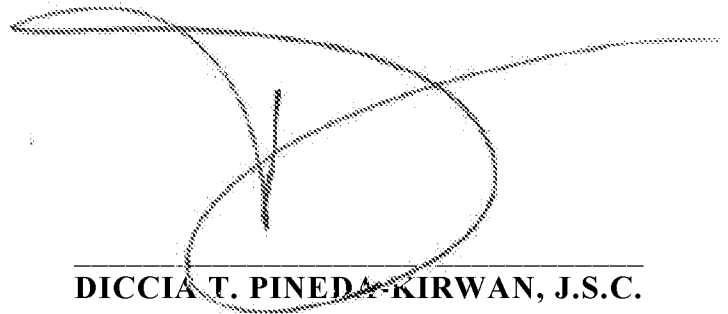
Additionally, Bruce Kennedy, the Village Administrator, testified that both he and the Village Clerk searched the Village's records and did not find the email. The email addresses show that the email was in Mr. Gorog's possession and was sent to the private email accounts of members of the Tree Commission, none of which are parties to this action. The record further reflects that the email was produced less than two weeks after Mr. Gorog's testimony as to its existence, at a time when discovery was still ongoing. Thus, plaintiff's cross motion for sanctions is denied.

Accordingly, the motions by the County (Seq. 3) and the Yacht Club (Seq. 4 & 9) for summary judgment, and by plaintiff for an adverse inference as against the County (Seq. 6) are denied as moot. The Village's motion for summary judgment (Seq. 5) is denied. Plaintiff's cross motion for sanctions (Seq. 7) is denied, and cross motion to correct the signature page of its expert's affidavit (Seq. 8), is granted.

Any request for relief not expressly granted herein is denied.

This constitutes the decision and order of the Court.

Dated: August 18, 2021



DICCIA T. PINEDA-KIRWAN, J.S.C.

ENTERED

Sep 09 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE