

Streit v Katrine Apts. Assoc., Inc.

2021 NY Slip Op 33210(U)

July 6, 2021

Supreme Court, Ulster County

Docket Number: Index No. EF2019-731

Judge: Richard Mott

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ULSTER

-----X
PHYLLIS STREIT,

Plaintiff,

DECISION/ORDER

-against-

Index No. EF2019-731

R.J.I. No. 55-19-1335

Richard Mott, J.S.C.

KATRINE APTS. ASSOCIATES, INC.,

Defendant.
-----X

Motion Return Date:

May 14, 2021

Final submission filed May 18, 2021

APPEARANCES:

Plaintiff:

Michael Mainetti, Esq.
Mainetti & Mainetti, P.C.
130 N. Front Street
Kingston, NY 12401

Defendant:

Michael J. Kestenbaum, Esq.
Pillinger, Miller, Tarallo
555 Taxter Road, 5th Floor
Elmsford, NY 10523

Mott, J.

Defendant moves for summary judgment dismissing the complaint in this personal injury action. Plaintiff opposes.

Background

Plaintiff tripped and fell while attempting to traverse a broken post and rail fence (fence) located between Defendant's apartment complex, Lake Katrine Apartments, (Complex) and Grant Avenue on her way to work from the Complex. Her foot became

lodged in chicken wire, covered with debris that was entangled in the fence, causing her to fall.

Parties' Contentions

Defendant claims it owes no duty of care to Plaintiff because it is not the owner of the fence and never maintained it. It submits the deposition and affidavit of its 30-year maintenance manager, Jeffrey M. Litts, Sr. (Litts) stating he had observed the neighboring landowner, Edgewater, maintain the fence, but that no-one on behalf of Defendant had ever worked on it, mowed underneath it or landscaped along it, which he claims to have corroborated by searching office maintenance files. He states that the only fence work Defendant ever performed was to remove one on the Neighborhood Road entrance to the Complex. In addition, it proffers the affidavit of land surveyor John Gerd Heidecker (Heidecker) who opines, upon his certified survey, that the only area where the fence is broken corresponding to the area where Plaintiff states she fell lies 18" beyond Defendant's property line and on land dedicated by Edgewater to the Town of Ulster (Town), as part of Grant Avenue. He states that the fence is on or within 6" of Defendant's property at 2 other points, neither of which is where Plaintiff fell. In addition, it proffers its May 13, 2021 notice of expert disclosure stating Heidecker will testify that the area where the accident occurred is not on Defendant's property and Plaintiff's counsel's email acknowledgement, dated March 16, 2020, of receipt of the Heidecker survey.

Plaintiff contends that Defendant has not met its initial burden, as issues of fact persist as to whether the dangerous condition that caused Plaintiff to fall was on Defendant's property or property it maintained. She cites July and August 2009 correspondence between Defendant's property managers and the Town stating uncertainty

as to Defendant's property line *vis a vis* a fence surrounding same with one manager stating verification was required as they had begun "improvements to the fence...that surrounds [the Complex]." Plaintiff also cites her deposition that the chicken wire upon which she tripped was covered with debris and Litts' statements that Defendant's maintenance staff "mow right up to the fence" and that he was unaware of the property boundary, as proof of Defendant's maintenance of the area where she was injured. Finally, she maintains that the 2009 correspondence raises an issue of fact as to whether Defendant maintained the fence where she fell.

Discussion/Summary Judgment

To prevail on a motion for summary judgment, the moving party must establish *prima facie* entitlement to judgment as a matter of law "by adducing sufficient competent evidence to show that there are no issues of material fact." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]. "Only when the movant bears this burden and the nonmoving party fails to demonstrate the existence of any material issue of fact will the motion be properly granted." *Staunton v Brooks*, 129 AD3d 1371 [3d Dept. 2015].

In a premises liability action, a defendant must owe a duty of care to the injured party to be held liable therein. *Umanskaya v 4050 Nostrand Ave. Condominium*, 173 AD3d 812, 812-13 [2d Dept 2019]. Such liability generally is based upon ownership, occupancy, control or special use thereof. *Id.*

Here, Defendant has failed to meet its initial burden establishing that the chicken wire was not on property it maintained, as Litts concedes that maintenance staff mowed up to the fence, in light of evidence that Plaintiff's foot became caught in chicken wire covered

in debris before she traversed it.¹ Moreover, given the short distance between the fence and Defendant's property, it is reasonable to infer that it maintained the area on its side of the fence where Plaintiff's foot became entangled. Thus, Defendant has failed to establish entitlement to summary judgment. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

Accordingly, the motion is denied.

This constitutes the Decision and Order of this Court. The Court is Efiling this Decision and Order, but that does not relieve Plaintiff from compliance with the provisions of CPLR §2220 with regard to filing and entry.

Dated: Hudson, New York
July 6, 2021



RICHARD MOTT, J.S.C.

Papers Considered:

1. Notice of Motion and Affirmation of Michael J. Kestenbaum, Esq., dated April 23, 2021, with Exhibits A-J and Affidavits of Jeffrey A. Litts, Sr., dated April 15, 2021, with Exhibits A-C and of John Gerd Heidecker, L.S., dated April 14, 2021 with Exhibits A-D;
2. Opposition Affirmation of Michael A. Mainetti, Esq., dated May 7, 2021;
3. Reply Affirmation of Michael J. Kestenbaum, Esq., dated May 14, 2021 with Exhibits K-L;
4. Sur-Reply of Michael A. Mainetti, Esq., dated May 18, 2021 with Exhibit A.

¹ She states: "I was holding onto the [fence] post because the post was still up and the chicken wire was basically in the corner where I was going over and my foot got caught and I actually tried to release it and I couldn't and that's when I fell." Plaintiff's Deposition pg. 75.