

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
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September 16, 2013

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Re: Janet Goldberg and Arnold Goldberg v. Church Street Associates, LLC,
C.A. No. S12C-11-013 THG

Date Submitted: August 29, 2013

Dear Counsel:

Pending before the Court is Defendant Church Street Associates, LLC's Motion for Summary Judgment. For the reasons set forth below, the Motion is granted.

Statement of Facts and Procedural History

On or about April 2, 2011, Plaintiff Janet Goldberg ("Goldberg") was a pedestrian on the sidewalk immediately in front of 33B Baltimore Avenue in the City of Rehoboth Beach ("City"), Delaware. While walking, Goldberg tripped and fell upon a crack in the sidewalk which the roots of a nearby City-owned tree caused. Defendant Church Street Associates, LLC ("Church Street") was the owner of the premises bordering the sidewalk upon which Goldberg fell. As a result of this incident, Goldberg suffered personal injuries.

Goldberg and her husband (collectively, "the Goldbergs") subsequently filed suit against Church Street in this Court alleging common law negligence and negligence *per se*. Goldberg

sought compensation for the personal injuries sustained from the incident and Arnold Goldberg claimed loss of consortium.

On August 1, 2013, Church Street filed a Motion for Summary Judgment, asserting that there were no material facts in question and as a result it was entitled to judgment as a matter of law. On August 28, 2013, Plaintiffs filed an opposition to Church Street's Motion for Summary Judgment, asking this Court to declare Church Street liable for the injuries sustained as a result of its failure to repair the sidewalk upon which Goldberg fell. Trial is scheduled for October 21, 2013.

Discussion

Standard of Review

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact.¹ Once the moving party has met its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.² Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must prove evidence showing a genuine issue of material fact for trial.³ If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, summary judgment must be granted.⁴ If,

¹ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

² *Id.* at 681.

³ Super. Ct. Civ. R. 56(e); *Celetex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

⁴ *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. denied*, 504 U.S. 912 (1992); *Celotex Corp.*, 477 U.S. 317.

however, material issues of fact exist, or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, summary judgment is inappropriate.⁵

Merits

The Goldbergs allege Church Street was negligent and negligent *per se* in its failure to maintain and repair the defective sidewalk abutting its property. Specifically, the Goldbergs cite to *Rehoboth Beach C. § 232-1(A)* (“the Ordinance”) to support their argument. The language of the Ordinance intends to impose a duty upon a property owner to repair any damaged sidewalk abutting one’s property line.

On the other hand, Church Street argues that it is not responsible for the injuries incurred as a result of the defective sidewalk because it was under no legal duty to repair the sidewalk. Moreover, Church Street asserts that the Goldberg’s theories of negligence and negligence *per se* are without merit because the City Ordinance did not impose civil liability on a property owner in favor of a third party injured by reason of a violation of that ordinance. I find this argument persuasive and grant Church Street’s Motion for Summary Judgment based on the following two grounds.

“*Rehoboth Beach C. (Charter) § 29(a)(5) v. Rehoboth Beach C. § 232-1(A)*”

In determining the merits of Church Street’s Motion for Summary Judgment, this Court’s analysis must begin with a determination as to whether the *Rehoboth Beach C. (Charter) § 29(a)(5)* (“the Charter”) preempts the challenged Ordinance. In accordance with the applicable Delaware Supreme Court precedent, I find the Charter does, in fact, preempt the Ordinance because the Ordinance is inconsistent with the express language of the Charter.

In *Schadt v. Latchford*, the Delaware Supreme Court determined that a Wilmington City ordinance making property owners responsible for the maintenance and repair of abutting public

⁵ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

sidewalks conflicted with the Home Rule Charter, which had previously placed the duty of sidewalk repair and maintenance on the City of Wilmington.⁶ The relevant part of the Home Rule Charter stated:

The department of public works shall have the power and its duty shall be to perform the following functions:

(a) City streets, etc., generally. It shall *itself*, or by contract, design, construct, repair and maintain city streets, which shall include highways....footways....⁷

By contrast, the Wilmington City ordinance read:

(a) Every sidewalk.... along any of the public streets in the city, *in front of lots whereon is erected any dwelling, house, office, place of business, railing, fence, stone or brick walk, or permanent structure of any kind, or in front of such vacant lots as shall have been paved, shall at all times be kept in proper condition and free from obstruction and defective conditions.*

(b) *The owner of any property or ground abutting on such defective sidewalk or footway, or curb, or the authorized agent of such owner, shall be solely responsible for any damage that may result to persons or property by reason of any hole, excavation, or obstruction in or upon such footways, or from any defective condition of such sidewalk, footway, or curb.*⁸

The Court concluded that because the Home Rule Charter expressly mandated that the City of Wilmington, *itself*, maintain City-owned sidewalks, the subsequent Wilmington City ordinance intending to transfer that duty to private property owners was inconsistent with the terms of the Home Rule Charter and therefore invalid.⁹ In reaching this conclusion, the Court held that ordinances enacted by the City Council “....must conform to, be subordinate to, not conflict with, and not

⁶ 843 A.2d 689, 690 (Del. 2004).

⁷ *Id.* at 692 (citing to 1 *Wilm. C.* §5-400) (emphasis added).

⁸ *Id.* (citing to 1 *Wilm. C.* §42-42) (emphasis added).

⁹ *Id.* at 690.

exceed the charter, and can no more change or limit the effect of the charter than a legislative act can modify or supersede a provision of the constitution of the state.”¹⁰

Similar to the challenged ordinance in *Schadt*, Article I § 232-1 of the City Code intends to place a duty upon property owners to repair damaged sidewalks abutting their property.¹¹ The

Ordinance reads:

*The owner of any lot in front of which any sidewalk or curbing has been laid or constructed shall, in the event such sidewalk or curbing shall be in any way damaged or broken, cause the sidewalk or curbing to be repaired within five days after such sidewalk or curbing shall have been damaged or broken.*¹²

On the other hand, Section 29(a)(5) of the Charter clearly mandates that the City *itself*, or by contract, repair and maintain public sidewalks.¹³ Specifically, the Charter states, in relevant part:

The Commissioners are vested by this Charter with the following powers.... To ascertain, locate, lay out, establish, open, change, alter, widen, abandon, regulate the use and enjoyment of, prevent or remove any obstruction of, level, grade, flag, dress, macadamize, pave, gravel, shell, *improve*, dredge, erect, remove, *repair or replace any new or present street....or any new or present sidewalk*. . . .in the City; . . .to enter into contracts or agreements for the doing thereof, including contracts or agreements with the State Highway of the State of Delaware for the permanent maintenance, repair, and upkeep of any street, lane, alley, roadway, or highway within the City.¹⁴

Although the Charter allows for the City to “make, adopt, and establish those ordinances that are necessary to carry into effect any of the Charter provisions,” the Delaware Supreme Court has

¹⁰ *Id.* at 691 (citing to 5 McQuilllin, *Municipal Corporations* § 15.19, p. 98 (3d ed.)).

¹¹ *Rehoboth Beach C.* § 232-1(A).

¹² *Id.* (emphasis added).

¹³ *Rehoboth Beach C. (Charter)* § 29(a)(5) (emphasis added).

¹⁴ *Id.*

held that a City may not enact a subsequent ordinance directly in conflict with a current Charter provision.¹⁵

In opposition to Church Street's Motion for Summary Judgment, the Goldbergs cite to an admission made by the property manager of Church Street in which she acknowledged she was aware of the Ordinance and responsible for the repair of the sidewalk.¹⁶ However, the Goldbergs fail to recognize that the Delaware Supreme Court has held that a municipality may not attempt to delegate an existing municipality obligation by way of an ordinance.¹⁷ Therefore, the admission by Church Street that it knew of the existence of the Ordinance and the duty to repair the sidewalk is irrelevant to this Court's analysis.

Relying on *Schadt* and subsequent Delaware Supreme Court precedent, I conclude the Ordinance is deemed null and void because it is inconsistent with the express language of the Charter.

Rehoboth Beach C. § 232-1(A)

I next analyze the events at issue under *Rehoboth Beach C. § 232-1(A)*. The Goldbergs contend that violation of the Ordinance provides the basis for claims in both negligence and negligence *per se*. However, I find the Goldbergs' argument without merit because the language of the Ordinance fails to prescribe a standard of care for third parties, the violation of which would impose civil liability upon Church Street.

¹⁵ *Id.* at §29(a)(41); *Schadt*, 843 A.2d at 692-3; *Lemos v. Willis*, 858 A.2d 955, 956 (Del. 2004).

¹⁶ Pl.'s Opp'n to Def. Church Street's Mot. for Summ. J., App., pg. A(7), line 5.

¹⁷ *Schadt*, 843 A.2d at 690.

In *Burns v. Boudwin*, the Delaware Supreme Court addressed this very issue.¹⁸ The Court held that a local ordinance, which delegated the duty to property owners of abutting sidewalks to keep the walkway free from ice and snow, did not impose civil liability on property owners in favor of a third person injured by reason of violation of the ordinance.¹⁹ The challenged ordinance read, in part:

In case any snow shall fall or ice shall be formed on the sidewalk of any public street in the city, it shall be the duty of the occupant, lessee or agent of the property which fronts or abuts upon any such sidewalk to remove, or cause to be removed, all such snow and ice from that one-half of the sidewalk of the property nearest the building line.²⁰

Additionally, there was an ordinance in place at the time to address any violations of the Wilmington City Code. Section 45-121 of the City Code read:

Every person failing, neglecting or refusing to perform any duty required by the foregoing sections of this article.... shall upon conviction thereof in the municipal court be *punished by a fine* no less than one dollar nor more than five dollars besides costs of prosecution.²¹

The Court reasoned that while the ordinance imposed a criminal penalty upon the abutting property owner for failure to comply, the ordinance did not purport to establish a general standard of care to be imposed upon the property owner for the protection of third persons.²² As a result, the Court precluded recovery on the theories of common law negligence and negligence *per se*.²³

¹⁸ 282 A.2d 620 (Del. 1971).

¹⁹ *Id.* at 622.

²⁰ *Id.* at 621 (citing to 1 *Wilm. C.* §45-116).

²¹ *Id.* at 621 (citing to 1 *Wilm. C.* §45-121) (emphasis added).

²² *Id.* at 622.

²³ *Lemos*, 858 A.2d at 956 (citing to *Burns*, 282 A.2d at 620).

As previously stated, the Ordinance at issue imposes upon property owners the duty to repair a damaged or broken sidewalk abutting their property.²⁴ Furthermore, the City Code provides for a monetary penalty in the event that a property owner is found to have been in violation of the Ordinance.²⁵ Specifically, Article IV § 1-27(A) of the City Code states:

Whenever in this Code or in any ordinance of the City any act or failure to do a required act is prohibited or is made or declared to be unlawful or an offense or a misdemeanor, where no specific penalty is provided therefore, *the violation of any such provision of this Code or any ordinance shall be punished by a fine not less than \$100 no more than \$500, such fine to be in the discretion of the court, and shall pay the cost of prosecution.*²⁶

Analogous to the ordinance at issue in *Burns*, the challenged Ordinance not only fails to impose civil liability upon property owners in favor of third persons, but also fails to set forth a specific standard of conduct constituting negligence. Therefore, I respect the well settled principle set forth by the Delaware Supreme Court that an ordinance requiring property owners to repair and maintain abutting sidewalks and imposing a penalty for failure to do so imposes no civil liability on property owners in favor of third persons injured as a result of a violation of the ordinance.²⁷

²⁴ *Rehoboth Beach C.* § 232.

²⁵ *Id.* at §1-27(A).

²⁶ *Id.* (emphasis added).

²⁷ *Burns*, 282 A.2d at 621-2.

Conclusion

For the reasons set forth above, Defendant's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

T. Henley Graves

cc: Prothonotary's Office