Kollie v Canales
2014 NY Slip Op 30411(U)
February 11, 2014
Supreme Court, Suffolk County
Docket Number: 44009/2009
Judge: William B. Rebolini

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Yatta Kollie, an infant by her Mother and Natural Guardian, Lila Kollie,

Plaintiff,

-against-

Marta Canales, Hugo O. Castro, Town of Islip, Bay Shore Union Free School District and Suffolk Transportation Service, Inc.,

Defendants.

Index No.: 44009/2009

Motion Sequence No.: 007; MG
Motion Date: 7/17/13
Submitted: 12/4/13

Motion Sequence No.: 008; MG
Motion Date: 8/27/13
Submitted: 12/4/13

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Clerk of the Court

Upon the following papers numbered 1 to 39 read upon these motions for summary judgment: Notice of Motion and supporting papers, 1 - 14; 16 - 26; Answering Affidavits and supporting papers, 27 - 35; Replying Affidavits and supporting papers, 36 - 37; 38 - 39; Other, Memorandum of Law, 15; it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion by the defendants Marta Canales and Hugo O. Castro for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against them is granted; and it is further

ORDERED that this motion by the defendants Bay Shore Union Free School District and Suffolk Transportation Service, Inc. for an order pursuant to CPLR 3212 dismissing the complaint and all cross claims against them is granted.

This action was commenced to recover damages, personally and derivatively, for personal injuries allegedly sustained by the infant plaintiff, Yatta Kollie (Yatta) on March 17, 2009 when she tripped and fell on the sidewalk located in front of 1367 Lombardy Boulevard, Bay Shore, New York. In the complaint the plaintiff alleges, *inter alia*, that the defendants Marta Canales (Canales) and Hugo O. Castro (Castro) and/or the defendant Town of Islip (Town) are liable for the infant plaintiff's injuries based on their failure to maintain the sidewalk in a reasonably safe condition. The complaint further alleges that the defendant Bay Shore Union Free School District (School District) and the defendant Suffolk Transportation Service, Inc. (STS) are liable for the infant plaintiff's injuries because they "deviat[ed] from the assigned bus stops and failed to drop students at their assigned school bus stops."

The defendants Canales and Castro (collectively the Homeowners) now move for summary judgment on the grounds that they did not create the alleged defective condition, that they are not statutorily liable for a breach of duty to maintain the subject sidewalk, and the alleged defect was open and obvious. In support of their motion, the Homeowners submit, among other things, the pleadings, and the deposition transcripts of the parties. The deposition transcript of the witness produced by STS, Bricieda Malcolm, is certified but unsigned, and the movants have failed to submit proof that the transcript was forwarded to the witness for her review (*see* CPLR 3116 [a]). However, the Court may consider the unsigned deposition transcript submitted in support of the motion as the parties have not raised any challenges to its accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also* ***Bennet v Berger***, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; ***Zabari v City of New York***, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]).

At her deposition, the infant plaintiff testified that she was a student at Bay Shore Middle School on the day of this accident, that her assigned bus stop at the beginning of the school year was at the intersection of Brooklyn Boulevard and Huron Drive in Bay Shore, New York, and that her bus stop was located right in front of her residence. She stated that the school bus continued to pick her up in front of her home throughout the school year, but that sometime between Thanksgiving and Christmas that year her bus driver started to drop her off after school at the intersection of Lombardy Boulevard and Huron Drive. Yatta further testified that, on March 17, 2009, the school bus stopped a little further from the intersection of Lombardy Boulevard and Huron Drive, that she walked on

the sidewalk along Lombardy Boulevard towards the crosswalk at the intersection, and that she walked approximately 30 seconds before she fell. She indicated that the sneaker on her left foot "got caught in between the unleveled sidewalk." She stated that she did not make any complaints about the condition of the sidewalk to any of the defendants in this action, and that she was unaware of anyone making such a complaint.

Yatta's mother, Lila Kollie, testified that she first learned of Yatta's accident at 6:00 p.m. that day, that one week before the accident she had become aware that Yatta was being dropped off at the intersection of Lombardy Boulevard and Huron Drive, and that she did not contact the School District or STS regarding the change. She stated that she did not make any complaints about the condition of the sidewalk to any of the defendants in this action, and that she was unaware of anyone making such a complaint.

At her deposition, Canales testified that she purchased 1367 Lombardy Boulevard with her husband, Castro, on December 12, 2008, that they did not make any repairs to the sidewalk between their purchase and March 17, 2009, and that they received no complaints about the condition of the sidewalk in front of their residence before this accident. She stated that they did not receive any notices from the Town directing them to make repairs to the subject sidewalk, and that her husband or nephew had shoveled snow from the sidewalk and mowed the grassy area adjacent to the sidewalk in front of their house before this incident. Canales further testified that she had walked on the sidewalk in front of her residence before this incident, that she did not witness Yatta's accident, and that she and her husband did not make any complaints to the other defendants in this action.

At his deposition, Peter Kletchka (Kletchka) testified that he is employed by the Town as its Public Works Project Supervisor in the Department of Public Works (DPW), that he directed the DPW staff to undertake a search of department records to determine if the Town received any complaints regarding the sidewalk in front of 1367 Lombardy, and that no such complaints were discovered. He stated that DPW did not ascertain if any complaints regarding the subject sidewalk were filed with the Town Clerk's Office, that he did not search whether the Town Board issued any notices to the Homeowners to repair the subject sidewalk, and that in his 26 years employed with the Town he never recalls the Town issuing such a notice. Kletchka further testified that it appears from the photographs of the accident site that the tree which disrupted the subject sidewalk is within the Town's right of way along Lombardy Boulevard, and that, if such is the case, then the Town would be responsible for making repairs to the subject sidewalk.

At her deposition, Bricieda Malcolm (Malcolm) testified that she was employed by STS as a bus driver at the time of this incident, that she was assigned to six routes for the School District at that time, and that the School District designates the routes and bus stops used by STS bus drivers. She stated that the intersection of Lombardy Boulevard and Huron Drive was a designated bus stop in March 2009 and at the time of her deposition, that bus routes do not change once issued, and that she did not recall if the intersection of Brooklyn Boulevard and Huron Drive was a bus stop in March 2009. She indicated that students are not required to have a note in order to get off a school bus at

a stop other than their normal bus stop, that she did not drop any student off at a non-designated bus stop in March 2009, and that it is not permitted to drop a student off at a stop that is not listed on her trip summary. Malcolm further testified that, for safety reasons, bus drivers are supposed to stop their bus approximately 50 feet from the place where the students stand at the bus stop, requiring the students to walk towards the bus to enter, and that the 50-foot rule applies when dropping off students. She states that she first became aware of this alleged incident when she was called into the offices of STS to complete an incident report.

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; *see also* ***Schindler v Ahearn***, 69 AD3d 837, 894 NYS2d 462 [2d Dept 2010]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]; ***Elliot v Long Is. Home, LTD***, 12 AD3d 481, 784 NYS2d 615 [2d Dept 2004]). In the absence of duty, there is no breach and without a breach there is no liability (***Pulka v Edelman***, *supra*; ***Miglino v Bally Total Fitness of Greater N.Y., Inc.***, 92 AD3d 148, 937 NYS2d 63 [2d Dept 2011]; ***Schindler v Ahearn***, *supra*). In addition, the determination whether a duty is owed by one member of society to another is a legal issue for the courts (***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 728 NYS2d 731 [2001]; ***Eiseman v State of New York***, 70 NY2d 175, 518 NYS2d 608 [1987]; ***De Angelis v Lutheran Med. Center***, 58 NY2d 1053, 462 NYS2d 626 [1983]; ***Miglino v Bally Total Fitness of Greater N.Y., Inc.***, *supra*).

Generally an abutting landowner is not liable for injuries sustained by a third-party as a result of negligent maintenance of, or the existence of dangerous and defective conditions on, the public sidewalk (***Lobel v Rodco Petroleum Corp.***, 233 AD2d 369, 649 NYS2d 939 [2d Dept 1996]; *see also* ***Berkowitz v Spring Creek, Inc.***, 56 AD3d 594, 868 NYS2d 682 [2d Dept 2008]). There are exceptions to the general rule, however, where a landowner may be liable, if the sidewalk was constructed in a special manner for his benefit, he affirmatively caused the defect, he negligently constructed or repaired the sidewalk, or a local ordinance or statute specifically charges him with a duty to maintain and repair and expressly imposes liability for injuries resulting from the breach of that duty (***Hausser v Giunta***, 88 NY2d 449, 646 NYS2d 490 [1996]; ***Sachs v County of Nassau***, 60 AD3d 1032, 876 NYS2d 454 [2d Dept 2009]; ***Berkowitz v Spring Creek, Inc.***, *supra*; ***Lindesay v City of New York***, 56 AD3d 532, 871 NYS2d 148 [2d Dept 2008]; ***Jacobs v Village of Rockville Centre***, 41 AD3d 539, 838 NYS2d 597 [2d Dept 2007]).

The Homeowners have established their prima facie entitlement to judgment as a matter of law by demonstrating that they did not receive any special benefit from the sidewalk, they did not create the condition complained of, perform any repairs on the sidewalk, or violate any statute (***Lindesay v City of New York***, *supra*).

In opposition to the Homeowners motion, the plaintiff submits, among other things, excerpts from the deposition transcripts summarized above and the affirmation of their attorney who contends that the Homeowners violated the Town of Islip Code §47A-17. Said statute reads in pertinent part:

> Each owner or occupant of any house or other building ... in the Town shall ... keep the sidewalk in front of the lot or house ... in good and safe repair and maintain it in a clean condition and free from filth, dirt, weeds or other obstructions or encumbrances.

Here, the relevant statute does not expressly impose liability for injuries resulting from the breach of the duty to maintain an abutting sidewalk (***Hausser v Giunta***, *supra*; ***Sachs v County of Nassau***, *supra*; ***Berkowitz v Spring Creek, Inc.***, *supra*; ***Lindesay v City of New York***, *supra*; ***Jacobs v Village of Rockville Centre***, *supra*).

Counsel for the plaintiff further contends that, despite Canales' testimony, there is an issue of fact whether the Homeowners repaired the subject sidewalk because Castro has not been deposed in this action. However, the party opposing summary judgment must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***New York State Higher Educ. Servs. Corp. v Feher***, 291 AD2d 736, 738 NYS2d 456 [3d Dept 2002]; ***Johnson v Lovett***, 285 AD2d 627, 728 NYS2d 753 [2d Dept 2001]; ***Borst v Sunnydale Farms***, 258 AD2d 488, 685 NYS2d 269 [2d Dept 1999]; ***Matos v New York City Health & Hosps. Corp.***, 181 AD2d 505, 581 NYS2d 31 [1st Dept 1992]; ***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2d Dept 1979]; ***Derby v Bitan***, 38 Misc 3d 516, 954 NYS2d 444 [Sup Ct, Dutchess County2012]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Avant v Cepin Livery Corp.***, 74 AD3d 533, 904 NYS2d 381 [1st Dept 2010]; ***Morgan v New York Tel.***, 220 AD2d 728, 633 NYS2d 319 [2d Dept 1995]; ***Illumalights Mfg. v Neo-Ray Prods.***, 124 AD2d 644, 507 NYS2d 899 [2d Dept 1986]; ***New York State Urban Dev. Corp. v Garvey Brownstone Houses***, 98 AD2d 767, 469 NYS2d 789 [2d Dept 1983]; ***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). The plaintiff has not submitted any evidence that the Homeowners created the alleged defective condition or undertook any repairs to the subject sidewalk.

Viewing the facts in the light most favorable to the plaintiff, she has failed to rebut the Homeowners' showing of entitlement to summary judgment herein. Accordingly, the Canales and Castro's motion for summary judgment dismissing the complaint and all cross claims against them is granted.

School District and STS now move for summary judgment on the grounds that their conduct was not a proximate cause of the infant plaintiff's injuries, but rather "merely furnished the condition or occasion for the occurrence of the event." It is undisputed that the plaintiff does not allege that the School District or STS owned or had a duty to inspect, repair or maintain the subject sidewalk, and that the claims against the School District and STS consist solely of allegations that they failed to drop Yatta at the assigned or designated bus stop.

It has been held that, "[g]enerally, issues of proximate cause are for the fact finder to resolve" (***Gray v Amerada Hess Corp.***, 48 AD3d 747, 748, 853 NYS2d 157 [2d Dept 2008], quoting ***Adams v Lemberg Enters., Inc.***, 44 AD3d 694, 695, 843 NYS2d 432 [2d Dept 2007]; *see also* ***Derdiarian***

v Felix Contractor Corp., 51 NY2d 308, 315, 434 NYS2d 166 [1980]). However, "liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes" (***Ely v Pierce***, 302 AD2d 489, 755 NYS2d 250 [2d Dept 2003]; *see also* ***Castillo Amjack Leasing Corp.***, 84 AD3d 1298, 924 NYS2d 156 [2d Dept 2011]; ***Iqbal v Thai***, 83 AD3d 897, 920 NYS2d 789 [2d Dept 2011]; ***Ortiz v Jimtion Food Corp.***, 274 AD2d 508, 712 NYS2d 122 [2d Dept 2000]; ***Arumugam v Smith***, 277 AD2d 979, 716 NYS2d 518 [4th Dept 2000]; ***Tryon v Square D Co.***, 275 AD2d 567, 712 NYS2d 676 [3d Dept 2000]). In addition, "[w]here the evidence as to the cause of an accident that injured a plaintiff is undisputed, the question as to whether any act or omission of the defendant was the proximate cause of the accident is for the court and not the jury ... and the law draws a distinction between a condition that merely sets the occasion for and facilitated an accident and an act that is a proximate cause of the accident" (***D'Avilar v Folks Elec. Inc.***, 67 AD3d 472, 889 NYS2d 554 [1st Dept 2009]; *see also* ***Akinola v Palmer***, 98 AD3d 928, 950 NYS2d 569 [2d Dept 2012]; ***Iqbal v Thai***, *supra*; ***Lee v New York City Hous. Auth.***, 25 AD3d 214, 803 NYS2d 538 [1st Dept 2005]).

Here, even if the plaintiff were to establish that the infant plaintiff was dropped off at a non-designated bus stop, and that the School District and STS "deviat[ed] from the assigned bus stops and failed to drop students at their assigned school bus stops" as alleged in their complaint, liability may not be imposed on said defendants as they merely furnished the condition or occasion for this occurrence (*see eg.* ***Singh v McCrossen***, 111 AD3d 531, 975 NYS2d 336 [1st Dept 2013] [lack of sidewalks in the area of plaintiff's accident merely furnished the occasion for the accident]; ***Christ the King Regional High School v Zurich Ins. Co. of N. Am.***, 91 AD3d 806, 937 NYS2d 290 [2d Dept 2012] [defendant's dance competition at local school merely furnished the occasion for trip and fall on sidewalk]; *see* ***Sheehan v City of New York***, 40 NY2d 496, 387 NYS2d 92 [1976] [city bus stopping in traveling lane of street to discharge passenger, rather than using designated bus stop, not proximate cause of passenger's injuries]). Accordingly, the School District and STS's motion for summary judgment dismissing the complaint and all cross claims against them is granted.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: 2/11/2014

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**