Rigas v Serpico
2017 NY Slip Op 32115(U)
October 3, 2017
Supreme Court, Suffolk County
Docket Number: 12174-15
Judge: Daniel Martin

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 9 SUFFOLK COUNTY

PRESENT:
HON. DANIEL MARTIN

x

INDEX NO.: 12174-15
Motion Dates: 2/19/16, 4/16/16, 5/17/16, 6/28/16
Submitted: 9/6/16
Motion Sequence Nos.: 01 - **MD**
02, 03, 04, 05, 06 - **MG**

JOANNA RIGAS, as Executor of the Estate of ANDREW RIGAS, Deceased, and MARIA WYNNYCKYJ,

Plaintiffs,

-against-

RALPH SERPICO, ROSE SERPICO, THE SOCIETY OF SAINT PARASKEVI GREEK ORTHODOX SHRINE CHURCH, ARCHDIOCESE OF AMERICA AND CANADA OF THE AUTONOMOUS GREEK ORTHODOX CHURCH a/k/a AND d/b/a THE GREEK ORTHODOX ARCHDIOCESE OF AMERICA, DENNIS LICHAS, EAST COAST MIDWAYS, LLC, FARON JOSEPH YOUNG & BILLY SWAFFORD III/BREWSTERS AMUSEMENTS, LLC, FEDERAL REALTY INVESTMENT TRUST, TOWN OF HUNTINGTON, COUNTY OF SUFFOLK and COUNTY OF SUFFOLK POLICE DEPARTMENT,

Defendants.

x

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The following named papers have been read on this motion:	
Notice of Motion/Order to Show Cause	6X
Cross-Motion	
Answering Affidavits	X
Replying Affidavits	X

This involves six motions by eleven different defendants which the Court will treat seriatim. These motions are hereby consolidated for purposes of this determination.

This action involves a motor vehicle accident in which three pedestrians were struck by a vehicle driven by defendant RALPH SERPICO on Pulaski Road, Greenlawn, New York on September 20, 2014 at approximately 10:30 P. M.. ANDREW RIGAS (81) was killed and his wife JOANNA RIGAS (81) and his daughter MARIA WYNNYCKYJ were injured. They had attended the Greek Festival at St. Paraskevi's Church and were returning to their car parked in the Greenlawn Plaza across Pulaski Road. Federal Realty Investment Trust (hereinafter referred to as FRIT) owns the Shopping Center. St. Paraschevi (and a volunteer parishioner Dennis Lichas) have organized and run the fundraiser event for many years. The Greek Archdiocese's Chief Operating Officer and Executive Director Jerome Demetriou swears in his affidavit that the Archdiocese has absolutely no financial, ownership, or business connection with St. Paraskevi's Church and is completely unconnected with this accident. East Coast Midways, LLC, Faron Joseph Young & Billy Swafford III/Brewster's Amusements, LLC provided the rides and amusements at the festival. Since the accident took place in the County of Suffolk on a roadway allegedly designed and owned by Suffolk County and in the jurisdiction of the Suffolk County Police Department, those two entities are also named as defendants. Since the festival is located within the Town of Huntington which required town permits and inspections, the Town of Huntington was named as a defendant as well.

In motion sequence #1, FRIT moved to dismiss the complaint pursuant to CPLR §3211(a)(7), arguing as to it that plaintiff fails to state a cause of action and, secondly, requests summary judgment pursuant to CPLR §3212.

In this motion to dismiss based upon §3211(a)(7), defendant must establish that plaintiffs' complaint does not allege facts which fit into some cognizable legal theory as derived from the four corners of plaintiffs' complaint. Leon v. Martinez, 84 NY2d 83 (1994); Monroe v. Monroe, 50 NY2d 481; Rebello v. Orofino Realty Co., 40 NY2d 635.A §3211(a)(7) requires that plaintiff be given every possible inference and without reviewing the credibility of witnesses. It is not that plaintiff has proved a case but rather that the complaint contain facts from which a cause of action could be made out. Dinerman v. Jewish Board of Family & Children's Services, Inc. 55 A.D. 3d 530, 530-31 (2nd Dept. 2008). Here, since the complaint makes out a cause of action with allegations, if true, could sustain liability against defendant, then defendants motion to dismiss must be denied.

Contrary to defendant FRIT's argument that it can move for summary judgment pursuant to §3212, the Court finds that issue has not been joined and, therefore, a summary judgment motion by defendant is premature. Rochester v. Chiarella, 65 NY 2nd 92, 101, 479 AND 82nd 810, 490 NYS 2nd 174 (1985). Gaskin v. Harris, 90 8A. D. 3rd 941, 942 (app div 2nd Dept 2012). Union Turnpike

Associates, LLC v. Getty Realty Corp., 27 A. D. 3rd 725, 727 (app div 2nd Dept 2006); Wexelman v. Irteza , 22 Miss. 3rd 1103 (A) (Supreme Court 2009). Under the facts of this case, defendant FRIT argues that issue is joined by the making of a 3211 (a) (7) motion and the filing of an RJ I. New York law says otherwise. This court is powerless to grant defendant's motion for summary judgment under 3212 since issue has not been joined. Consequently, the motion by defendant FRIT is denied.

Motion sequence #2 is termed a cross-motion by St. Paraskevi Church and Dennis Lichas pursuant to CPLR §3212 for summary judgment to dismiss plaintiffs' complaint as to them. Sequence #2 is post answer. Plaintiffs must demonstrate a breach of a duty owed to them in order for there to be tort liability. Pulka v. Edelman, 40 NY2d 781, 358 NE 2nd 1019, 390 NYS 2nd 393 (1976); Palsgraf. v. LIRR, 248 NY 339, 162 ANY 99 (1928). A property owner owes a duty to those coming on his land to keep it in a reasonably safe condition; however, when a plaintiff is not on defendant's land and defendant has not taken action to modify or change public or another's land, then defendant has no duty of care owed to that plaintiff or plaintiffs. Basso v. Miller, 40 NY 2nd 233, 352 NE2d 868, 386 NYS 2nd 564 (1976); Smith v. Taylor, 279 A. D. 2nd 566, 179 NYS 2nd 686 (2nd Dept 2001).

Defendants St. Paraskevi Church and Dennis Lichas support their motion to dismiss with the Lichas affidavit (paragraph 8) which clearly states a saw horse and a sign to the event and several cones were placed across Shrine Place to prevent vehicles from turning onto that street, used for festival purposes, and therefore precluding vehicular traffic. Plaintiffs support their opposition with plaintiff Joanna Rigas' affidavit which, with careful reading, does not contradict the Lichas affidavit or the various photographs submitted by both sides. All lead to the conclusion that the saw horse and cones were across the south end of Shrine and did not funnel pedestrian traffic in any way; moreover, there were no obstructions, barriers, cones on the road surface of Pulaski Road on which the accident took place.

Summary judgment is a drastic remedy and should be granted only in the absence of any triable issues of fact (see Rotuba Extruders, Inc. v. Ceppos, 46 NY 2nd 223, 413 NYS 2nd 141 (1978); Andre v. Pomeroy, 35 NY 2nd 361, 362 NYS 2nd 131 (1974). It is well-settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact. (Alvarez v. Prospect Hosp., 68 NY 2nd 320, 324, 508 NYS 2nd 923, 925 (1986). Failure can such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Winegrad v. New YorkUniv. Med. Ctr. 64 NY 2nd 851, 853, 487 NYS 2nd 316, 318 (1985). Further, the credibility of the parties is not an appropriate consideration for the Court (S.J. Capelin Assocs., Inc., Globe MFG. Corp., 34 NY 2nd 338, 357 NYS 2nd 478 (1974), and all competent evidence must be viewed in the light most favorable to the party opposing summary judgment (Benincasa v. Garrubbo, 141 AD 2nd 636, 3 637, 529 NYS 2nd 797, 799 (2nd Dept 1988). Once a prima facie showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of the material issue of fact (see Alvarez v. Prospect Hosp., supra.

Here, since there is not an issue of fact and, since the defendants in this sequence owes no

duty to these plaintiffs who were not on church property, but on a public roadway unencumbered by anything Dennis Lichas placed thereon, Pulka v. Edelman, supra would control. In fact, the fact patterns in Pulka and this case are quite similar and have recently been confirmed in St. Andrew v.O'Brien, 45 AD2d 1024, 845 NYS2d 184 (2007). Therefore, the cross motion seeking summary judgment and a dismissal of all claims and cross claims asserted against the Church and Lichas is granted.

In motion sequence #3, the Archdiocese of the Greek Orthodox Church of America moves to dismiss plaintiffs' complaint pursuant to CPLR §3212. The Archdiocese supports its motion with the affidavit of the CEO and Executive Director Jerome Dimitriou, with offices at 8-10 E. 79th St., New York, NY 10075. Mr. Demetriou swears as follows: "the archdiocese does not and never has owned, leased, managed, maintained, controlled or supervised the physical property on which St. Paraskevi is situated nor does it oversee or control its local, lay employees and members. The archdiocese has no role whatsoever in connection with the aforementioned carnival/festival."

As was contained in the Court's analysis of the motions for summary judgment by FRIT and Church and Mr. Lichas, here the plaintiffs must present an issue of fact, together with a duty of the defendant owed to the plaintiffs in order to establish a breach of that duty to establish tort liability. Lopez v. McKenzie Electrical Contractors, 203 A. D. 2nd 262, 610 NYS 2nd 55 (2nd Dept 1994); Pulka v. Edelman, 40 NY 2nd 781, 350 8N. D. 2nd 1019, 390 NYS 2nd 393 (Court of Appeals 1976).

As is contained in the Demetriou affidavit, the Archdiocese had no nexus to the Greek food festival and it's only connection was on "ecclesiastical" issues. St. Peraskevi's church is a wholly not-for-profit religious Corporation, which solely owns, operates, maintains and supervises its parish, its property and indeed the annual food festival; the fundraiser is in no way a benefit to the Archdiocese and, therefore, there is no connection between these plaintiffs and the Archdiocese.

Therefore, the Archdiocese's motion to grant summary judgment in its favor and its request to dismiss all cross-claims made against it is granted.

Motion sequence #4 involves a motion by the vendors at the Greek Festival who provide the amusements and rides. (Midway's, Young, Swafford III and Brewsters). They present their motion for summary judgment to dismiss plaintiffs' action and cross-claims as to them. Supporting the motion is a copy of their contract between the vendors and the church, the affidavit of Billy Swafford III, and the litigation documents.

As regards the vendors, there is the same requirement already covered above that, in order for defendant to be liable on a tort theory, a threshold question is whether defendant owes a duty of care to the plaintiffs. Hamilton v. Beretta USA Corp., 96 NY 2nd 222, 727 NYS 2nd 7 (2001); Palsgraf v Long Island Railroad Company, 248 N. Y. 339 (1928).

Here, the agreement used for the vendors for rides and games was specific that the vendors were not to provide "security services, cross-guards, police assistance, parking facilities, parking attendants, and/or traffic control devices." Likewise the affidavit of Billy Swafford III confirmed the

vendor had no responsibility for entrance areas, and/or barricades, or pedestrian traffic.

Consequently, applying all the same concepts and theories in sequences 2 and 3, the court grants the vendors' motion for summary judgment and to dismiss any cross–claims against them.

Once again as was true in sequences 2 through 4, in order to hold Suffolk County liable for tort liability in Motion sequence #5, plaintiff must first establish the existence of a duty owed by the county to the plaintiffs.

As regards the Suffolk County Police Department specifically, defendant documents that is not a separate entity and it cannot sue or be sued independently. Young v. Suffolk County 920 2 F. Supp. 2nd 368 (EDNY 2013); Guinta v. County of Suffolk, at al., Index number 64564/13 (Supreme Court, Suffolk County 2014 (Pitts, J); Carthew v. County of Suffolk, 709 F. Sup. 2nd 188 (EDNY 2010); Ceparano v. Suffolk County, 2010 WL5437212 (EDNY 2010); see also David v. Lynbrook Police Dept, 224 F. Supp. 2nd 463, 277 (EDNY 2002). Therefore, as a preliminary issue as regards the Suffolk County Police Dept, the department is a subdivision of Suffolk County and the cause of action against it individually must be dismissed.

The second part of sequence #5 - tort liability involving the provision of artificial street lights - plaintiff here again must demonstrate a municipal duty. As a general proposition the case law for liability due to hazardous condition denies liability against the municipality and its police force unless there exists a special relationship between the injured party and a municipal defendant. Balsam v. Delva Engineering Corp., 90 NY 2nd 966, 688 N. E. 2nd 487, 665 NYS 2nd 613 (1997); Kovit v. Hallums and Lazan v. County of Suffolk, 4 NY 3rd 499 829 N. E. 2nd 1188, 797 NYS 2nd 20 (2005) (cases joined for joint argument and decision).

Here, plaintiffs contend that they County should be held liable due to poor lighting conditions at the site of the accident on Pulaski Road in Greenlawn; however the necessary elements required in Kovit are not present and, therefore, an affirmative duty to the injured plaintiffs' did not exist. Consequently, liability without a special duty and liability against the municipality must be denied. See Kovit. Santoro v. City of New York, 17 AD 2nd 563, 795 NYS 2nd 60 (2nd Dept 2005); Eckert v. State, 3A. D. 3rd 470 771 NYS 2nd 132 (2nd Dept 2004).

Therefore, based upon the voluminous amount of case law favoring the municipality, the Court grants Suffolk County's motion for summary judgment since there is no authority to sue the Suffolk County Police Department and, as to Suffolk County, there is no specific duty owed by defendant to plaintiffs and, consequently, no liability owed by defendant to plaintiffs.

The last motion sequence #6 is a motion by defendant Town of Huntington for summary judgment to dismiss plaintiffs' complaint on the same basis as the earliest sequences, stating the town has no duty of care to the plaintiffs.

Going to the threshold question whether the town owes a duty of care to these plaintiffs, this Court finds that the Town of Huntington has no such duty and, using the prior five (5) sequences as

examples, without a special duty or some notice to the municipality of an existing dangerous condition which requires repair, there is no duty of care created which in turn creates liability to the Town of Huntington. Schulman v. City of New York, 190 A. D. 2nd 63, 593 NYS 2nd 289; Hamilton v. Beretta USA Corp., 96 N. Y. 2nd 222, 727 NYS 2nd 7 (2001).

The Town of Huntington does not own or control Pulaski Road and supports its motion with an affidavit of Michael Kaplan, employee of the Town of Huntington Highway Department.

Regarding the alleged obligation to illuminate the subject roadway, the case law confirms that artificial street lights are a municipal benefit, not a municipal duty. Mastro v. Maiorino, 170 4A. D. 2nd 654, 571 NYS 2nd 515 (2nd Dept 1991); Cracas v. Zisko, 204 A. D. 382, 612 NYS 2nd 55 (2nd Dept 1994).

§327 NYS Highway Law provides that a Town Board may either provide lighting or discontinue lighting of any roadway at their choosing. Thompson v.City of New York, 78 N Y. 2nd 682, 684 (1991); see Rios v. City of New York 33 A. D. 3rd 780 (2006); Abbott v. County of Nassau, 223 A. D. 2nd 662 (1996). Therefore, as against the Town, there is an absence of duty to provide lighting which eliminates a duty of care by the municipality and, therefore, liability. Even installed lighting which fails is considered "withholding of benefits" if burned-out bulbs are not replaced. Moch Co v. Rensslaer Border Company, 247 NY 160, 168, 159 N.E 96; Mastro v. Maiorino, 174 A. D. 2nd 654 571 NYS 2nd 515 (2nd Dept 1991).

As regards the traffic control devices, there was no notification to the Town that they were not functioning properly and indeed two independent witnesses (Jonathan Casilli and Carlos DiGrazia) indicated the traffic lights were functioning properly immediately after the accident. Stephen McGloin, Director of Traffic and Safety for the Town, also provided an affidavit that he did not find in the town records any notices of complaints, repairs or malfunctions involving the traffic control devices on Pulaski Road in Greenlawn in the vicinity of the accident.

As regards a carnival permit to St. Paraskevi's Church which was issued by the Town of Huntington, the Town is protected by municipal immunity for actions requiring the exercise of discretion. The Town's exercise of discretion cannot result in liability unless the plaintiffs plead and prove a "special relationship" between plaintiff's and the Town Matter of Freed v. Fox, 40 9A. D. 2nd 877, 373 NYS 2nd 197 (2nd Dept 1975); Perazzo v. Lindsay, 30 A. D. 2nd 179, 290 NYS 2nd 971 (1st Dept 1968); Garrett v. Holiday Inns, 447 And. E. 2nd 717, 58 NY 2nd 253, 460 NYS 2nd 774; Cuffy v. City of New York , 69 N.Y. 2nd 255, 513 NYS 2nd 372 (1987).

The Court finds that the Town of Huntington has established through credible admissible evidence that it owed no special duty (as required if liability is to be found)) to the plaintiffs who were injured on September 20, 2014 on County Road 11 (Polaski Road). When issuing the carnival permit, the Town was performing a governmental function which is protected by governmental immunity. Furthermore, there is nothing to indicate that the traffic control devices were not functioning properly or that the Town had received prior notice of malfunction which might begin to create a "special duty.".

Therefore, based on the above, defendant FRIT'S motion pursuant to CPLR §3211(a)(7) and section 3212 are denied (mot.seq.. #1). The Court grants the other defendants' motions and dismisses all cross motions against those parties in motion sequence #2 through #6. Consequently, this action will continue against FEDERAL REALTY INVESTMENT TRUST and the alleged tortfeasors RALPH SERPICO and ROSE SERPICO.

The Clerk is directed to remove the dismissed named defendants from the caption.

So Ordered

Dated: October 3, 2017
Riverhead, NY

HON. DANIEL MARTIN, A.J.S.C.