Szydlowski v Town of Bethlehem
2017 NY Slip Op 32931(U)
January 4, 2017
Supreme Court, Albany County
Docket Number: 03569-16
Judge: Christina L. Ryba
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ORIGINAL

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

FRANCIS J. SZYDLOWSKI and
MARY F. SZYDLOWSKI,

Plaintiffs,

-against-

TOWN OF BETHLEHEM, NORMANSKILL CREEK LLC, 165 SALISBURY ROAD LLC and CHAZEN ENGINEERING, LAND SURVEYING & LANDSCAPE ARCHITECTURE CO. DPC,

Defendant.

DECISION/ORDER

Index No. 03569-16
RJI No. 01-16-122053

APPEARANCES:

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RYBA, J.,

This action arises out of a significant landslide that occurred on April 19, 2015 in the Town of Bethlehem when approximately 120,000 cubic yards of soil and debris descended the banks of the Normans Kill creek, causing substantial damage and flooding to surrounding properties, including the property owned by plaintiffs. The landslide originated from property in the Town of Bethlehem located

at 146-162 Salisbury Road, which is owned by defendant 165 Salisbury Road LLC and serves as the location of Normanskill Country Club, which is operated by defendant Normanskill Creek LLC. Allegedly, the landslide occurred in a location where Normanskill Creek had been engaging in significant filling and grading activities prior to obtaining the permit required by Town Code § 128-49, a comprehensive statutory scheme which requires landowners to procure a Fill Permit prior to engaging in certain land disturbance activities in geographic areas that are prone to soil erosion and slope failures.

Plaintiffs, whose property located adjacent to the Normans Kill creek was allegedly damaged by the landslide, commenced this negligence action claiming that the filling and grading activities at the subject premises were performed without a proper assessment of the risks associated with dumping fill in an area known to be highly unstable and prone to landslides. Prior to serving an answer, defendant Town of Bethlehem filed the present CPLR 3211 motion to dismiss the complaint for failure to state a cause of action based upon the defense of governmental immunity. The motion is opposed by plaintiffs, and by defendants Normanskill Creek and 165 Salisbury Road.

It is now well established that the criterion in considering a motion to dismiss under CPLR 3211 (a) (7) "is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]; see, Lin v County of Sullivan, 100 AD3d 1076, 1076-1077 [2012]; Griffin v Anslow, 17 AD3d 889, 891 [2005]). Thus, affidavits and other evidentiary material may be considered to establish whether the plaintiff has a cause of action (see, Wilhelmina Models, Inc. v Fleisher, 19 AD3d 267, 268–269 [2005]; Rovello v Orofino Realty Co., 40 NY2d 633, 636 [1976]). "This is particularly true where the plaintiff submits affidavits in opposing the motion" (Albert v Solimon, 252 AD2d 139, 140 [1998], affd. 94 NY2d 771 [1999]). Moreover, when deciding whether the plaintiff's claim fits within any cognizable legal theory, the Court is required to liberally

construe the complaint in the plaintiff's favor, afford the plaintiff the benefit of every favorable inference and accept the facts alleged as true (see, Heslin v Metropolitan Life Ins. Co., 9 AD3d 581, 582 [2004]; Venditti v Liberty Mut. Ins. Co., 6 AD 3d 961, 962 [2004]). Here, the allegations of the complaint asserted against the Town of Bethlehem include claims that the Town was negligent in issuing a Fill Permit without conducting a proper assessment of the potential risks, in "allowing fill to be dumped" at the subject property risks, and in "[b]eing otherwise negligent at the premises". The Town of Bethlehem argues that the complaint fails to state a cause of action because the enforcement of the Fill Permit requirements of Town Code § 128-49 and the decision as to whether to grant or deny such a permit are discretionary governmental functions that are protected by absolute governmental immunity.

It is well settled that discretionary actions taken during the performance of governmental functions may not give rise to liability even if the actions are negligent (see, DiMeo v Rotterdam Emergency Med. Servs., Inc., 110 AD3d 1423, 1424 [2013]). Discretionary functions are recognized as those government acts that involve "the exercise of reasoned judgment which could typically produce different acceptable results" (Haddock v City of New York, 75 NY2d 478, 484 [1990] [internal quotation marks and citation omitted]; see, Murchison v State of New York, 97 AD3d 1014, 1017 [2012]). Where the complaint alleges negligence on the part of a municipal defendant, it is the defendant's burden to timely raise the governmental immunity defense, to establish that the alleged negligent act or omission involved the exercise of discretionary authority, and to demonstrate that discretion was indeed exercised in relation to the conduct alleged to give rise to liability (see, Valdez v City of New York, 18 NY3d 69, 76, [2011]; Mon v City of New York, 78 NY2d 309, 313 [1996]; Haddock v City of New York, 75 NY2d at 484 [1990]). Notably, the availability of governmental immunity defense depends on whether the conduct giving rise to the claim is the consequence of an actual decision or choice made after the exercise of

reasoned judgment and consideration of relevant competing factors, rather than a result of the mere failure to adhere to the applicable decision-making procedures (see, Haddock v City of New York, 75 NY2d at 484 [1990]; Tango v Tulevech, 61 NY2d 34, 41 [1983]).

Although the Town correctly asserts that as a general rule a municipality's decision to grant or deny a permit constitutes a discretionary governmental act entitled to immunity (see, Rickson v Town of Schuyler Falls, 263 AD2d 863, 864 [1999]; Miller v State of New York, 125 AD2d 853 [1986], appeal denied 69 NY2d 608 [1987]), this rule does not automatically require the conclusion that the complaint in this case fails to state a cause of action. Here, although some of plaintiff's negligence allegations could be construed to relate to the discretionary decision-making process set forth in Town Code § 128-49, the Town has failed to establish that discretion was indeed exercised in relation to all of the conduct alleged in the complaint. To the contrary, the affidavits and other evidentiary materials submitted in the context of the motion to dismiss tend to establish that the Town may have known that fill was being dumped on the subject premises without a permit for over a decade prior to the landslide and may have even affirmatively encouraged and authorized the disposal of fill on the subject property during that time period. Based upon these allegations, the Town's role in the events culminating in the April 19, 2015 landslide could be construed to extend beyond the scope of the decision-making process involved in reviewing Fill Permit applications. Thus, accepting the allegations of the complaint as true and affording plaintiffs the benefit of every favorable inference (see, Hopkinson v Redwing Const. Co., 301 AD2d 837, 838 [2003]; Fernicola v New York State Ins. Fund, 293 AD2d 844, 845 [2002]), the Court concludes that under the circumstances of this case the governmental immunity defense for discretionary actions does

not render the complaint subject to dismissal for failure to state a cause of action[1] (see, Allen v City of N.Y., 49 AD3d 1126, 1127 [2008]).

Next, the Town contends that even if immunity for discretionary governmental actions is unavailable, the complaint nonetheless fails to state a cause of action because it owed no duty to plaintiffs. Ministerial governmental acts may give rise to municipal liability only if they violate a special duty owed to the plaintiff, apart from any duty owed to the public at large (see, Valdez v City of New York,18 NY3d 69, 76-77 [2011]; McLean v City of New York, 12 NY3d 194, 198 [2009]). "A special relationship can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation" (Metz v State of New York, 20 NY3d 175, 180 [2012][citation omitted]; see, McLean v City of New York, 12 NY3d at 198 [2009]; Garrett v Holiday Inns Inc., 58 NY2d 253, 261–262 [1994]). The Court of Appeals has held that a special relationship may exist between a landowner and a municipality where a "known, blatant, and dangerous violations existed on these premises, but the town affirmatively certified the premises as safe, upon which representation [the landowner] justifiably relied in their dealings with the premises" (Garrett v Holiday Inns Inc., 58 NY2d at 262 [1994]). Here, viewing the allegations of the complaint in a light most favorable to plaintiffs, the Court concludes that there are facts alleged which, if true, could potentially give rise to a special relationship between the Town of Bethlehem and plaintiffs. Accordingly,

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[1]It should be noted that in the related case of Normanskill Creek LLC v Town of Bethlehem (Index No. 02711-16), which arises out of the same underlying facts and circumstances as the instant case, this Court applied the same reasoning in denying a virtually identical motion by the Town of Bethlehem to dismiss the complaint against it under a theory of governmental immunity.

dismissal of the complaint against the Town of Bethlehem is not warranted at this juncture.

In light of the foregoing conclusion, the Court need not address the contention raised by defendants 165 Salisbury Road and Normanskill Creek that their respective cross claims against the Town of Bethlehem should remain viable in the event that complaint is dismissed against the Town.

For the foregoing reasons, it is

ORDERED that the motion by defendant Town of Bethlehem is denied, without costs, and it is further

ORDERED that defendant Town of Bethlehem is directed to serve an answer to the complaint within 20 days from the date of service of this decision with notice of entry..

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the plaintiffs. The original papers are being transferred to the Albany County Clerk. The signing of this Decision and shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

ENTER.

Dated: January 4, 2017

HON. CHRISTINA L. RYBA
SUPREME COURT JUSTICE

JN 1-13-17