Royce-Roll v City of Ithaca
2018 NY Slip Op 30211(U)
February 9, 2018
Supreme Court, Tompkins County
Docket Number: 2015-0645
Judge: Eugene D. Faughnan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 1st day of December, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

WINTER ROYCE-ROLL

Plaintiff,

-vs-

CITY OF ITHACA,
CASCADILLA BOAT CLUB, LTD.,

Defendants.

DECISION AND ORDER

Index No. 2015-0645
RJI No.: 2016-0211-C

APPEARANCES:

COUNSEL FOR PLAINTIFF:

ZIFF LAW FIRM, LLP
BY: Christina Bruner Sonsire, Esq.
303 William Street
Elmira, NY 14901

COUNSEL FOR DEFENDANT
CITY OF ITHACA:

LAW OFFICE OF THERESA J. PULEO
By: Leigh Lieberman, Esq.
301 Plainfield Road, Suite 210
Syracuse, NY 13212-4580

COUNSEL FOR DEFENDANT
CASCADILLA BOAT CLUB:

MACKENZIE HUGHES LLP
By: Mark R. Schlegel, Esq.
440 South Warren Street, Suite 400
Syracuse, NY 13202-2601

EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court to address separate motions by both Defendants, Cascadilla Boat Club ("Boat Club") and the City of Ithaca ("City") for Summary Judgment dismissing the Complaint of Plaintiff, Winter Royce-Roll ("Royce-Roll"). For the reasons set forth below, the motions are DENIED.

BACKGROUND FACTS

On May 11, 2011, Plaintiff sustained injuries when she stepped in a hole at Stewart Park in Ithaca, New York, during rowing practice with the Boat Club. Stewart Park is a public park owned and maintained by the City. The Boat Club had signed a License Agreement to use a portion of Stewart Park, including the boathouse and launch area, for the Boat Club activities. Testimony was obtained stating that the area in question is primarily used by the Boat Club for its activities, but the general public has access to that area and can use it also.

On the day of the accident, Royce Roll had finished her warm up exercises on a concrete area near the dock, and went to the boathouse to retrieve her water bottle. As she ran back to join her team, she ran across a grassy area and stepped into a hole. Various accounts indicate that the hole may have remained following the removal of a wooden post, but the circumstances surrounding the placement or removal of the post are vague.

Plaintiff commenced this action against the Boat Club and City on August 17, 2015 alleging negligence on the part of either, or both of them. Following discovery, the City filed a motion for Summary Judgment seeking dismissal of Plaintiff's Complaint. The City contends that it did not have any prior written notice of the allegedly defective condition, and that the Plaintiff has not shown that the City created the dangerous condition. The Boat Club also filed a motion for Summary Judgment contending that it did not cause or create the allegedly defective condition, and the land in question was not under its direction or control. The Boat Club also

argued that it did not make special use of the area where Plaintiff fell. Royce-Roll filed opposition to both motions, and the parties appeared before the Court for oral arguments on the motions.

LEGAL ANALYSIS AND DISCUSSION

1. City's Motion for Summary Judgment

The City is seeking Summary Judgment and dismissal of the Plaintiff's complaint on the basis that the City did not have notice of a defect as required by the City Code, and that Plaintiff did not provide proof that the City created the condition so as to obviate the prior written notice requirement. "On a motion for summary judgment, the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept. 2014) [*citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Walton v. Albany Community Dev. Agency*, 279 AD2d 93, 94-95 (3rd Dept. 2001)]. If the movant fails to make this showing, the motion must be denied. *Alvarez, supra*. Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact. *Zuckerman v. City of New York,* 49 NY2d 557, 562 (1980); CPLR 3212(b). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 (2007).

The City argues it did not receive any prior written notice of a defect. A plaintiff may not bring a civil action against a municipality for injuries resulting from a defective street, highway, bridge, culvert, sidewalk or crosswalk unless prior written notice of the alleged defect has been provided. General Municipal Law §50-e(4); *See also Smith v. Village of Hancock,* 25 AD3d 975 (3rd Dept. 2006). Likewise, "[i]t is well settled that, where a municipality has enacted a prior

written notice statute, it cannot be held liable for damages resulting from an injury arising from a defective [condition] without prior written notice of the allegedly defective or dangerous condition." *Hockett v. City of Ithaca*, 149 AD3d 1378, 1379 (3rd Dept. 2017) *citing Amabile v. City of Buffalo*, 93 NY2d 471, 474 (1999) (other citations omitted); *General Municipal Law* § 50-e. The City had a prior written notice statute in effect which stated that:

> The City of Ithaca shall not be liable for damage or injury sustained by any person in consequence of any street, highway, bridge, culvert, sidewalk, park, playground, stream... building or other City-owned property or structure being out of repair, unsafe, dangerous...unless written notice of the defective unsafe, dangerous... or concealed conditions of said street, highway, bridge, culvert, sidewalk, crosswalk, park, playground, stream ... building or other City-owned property shall have been given to the Board of Public Works of the City of Ithaca by delivery to the office of the City Clerk or to the office of the Superintendent of Public Works...

Ithaca City Code §C-107.

A prior written notice statute is limited to the six enumerated categories listed in General Municipal Law §50-e(4) [*See Walker v. Town of Hempstead*, 84 NY2d 360 (1994)], or their functional equivalents. *See e.g. Groninger v. Village of Mamaroneck*, 17 NY3d 125 (2011) (parking lot served the functional purpose of a highway); *Woodson v. City of New York*, 93 NY2d 936 (1999) (stairway served as functional equivalent of sidewalk); *Schneid v. White Plains*, 150 AD2d 549 (2nd Dept. 1989) (paved pedestrian path) *cf. Smith v. Village of Hancock, supra* (paved area use by fire department, but not general public, was not the functional equivalent of a highway); *Cieszynski v. Town of Clifton Park*, 124 AD3d 1039 (3rd Dept. 2015) (grassy area not designed or intended to provide general right of passage not a functional equivalent). If the area does not fit within the six enumerated categories, or their functional equivalents, then prior written notice is not required. *Cieszynski, supra*; *Giarraffa v. Town of Babylon*, 84 AD3d 1162 (2nd Dept. 2011).

Thus, the Court must consider if the area in question in this case fits within the six enumerated categories of General Municipal Law §50-e(4) or their functional equivalents.

Plaintiff contends that the grassy area is not a sidewalk, and the City is not permitted to enact a written notice requirement covering a "park." The City argues that it can enact notice requirements for parks, and that the area in question is the functional equivalent of a sidewalk because it involved a general right of passage for the traveling public.

Although a municipality may want a broad law requiring prior written notice of defects, the City's notice law cannot exceed the scope of General Municipal Law §50-e(4). *Walker v. Town of Hempstead, supra*; *see Newman v. City of Glens Falls*, 256 AD2d 1012 (3rd Dept. 1998); *Quackenbush v. City of Buffalo*, 43 AD3d 1386 (4th Dept. 2007); *Dominianni v. Town/Village of Harrison*, 37 Misc3d 129(A) (App Term, 2nd Dept. 2012). Based upon the photographs, maps and all the other evidence presented, the Court concludes that the area where the Plaintiff fell was not the functional equivalent of a sidewalk, and therefore Plaintiff was not required to give prior written notice in order to commence this action. *See e.g. Dominianni v. Town/Village of Harrison, supra.*

The area in question lies between the road at the entrance to the boathouse and another roadway. Although "a grass strip between the sidewalk and the pavement of the road is part of the sidewalk" (*Castiglione v Village of Ellenville*, 291 AD2d 769, 770 [2002], *lv denied* 98 NY2d 604 [2002]), the area in question here does not lie between a sidewalk and roadway. And the mere fact that the Plaintiff was going across this grassy area to rejoin her team at the practice area "does not render this area the functional equivalent of a sidewalk." *Cieszynski*, 124 AD3d at 1041; *see e.g. Quackenbush v. City of Buffalo, supra*; *Iannuzzi v. Town of Wallkill*, 54 AD3d 812 (2nd Dept. 2008); *Giarraffa v. Town of Babylon*, 84AD3d 1162 (2nd Dept. 2011). Although the City urges the Court to view this as an area where the public has a general right of passage and the functional equivalent of a sidewalk, such reasoning would make every grassy area in the park the functional equivalent of a sidewalk. Simply because the public can walk across a given area does not make it a sidewalk.

For example, in *Ciezynski*, the plaintiff was walking alongside a roadway and cut across a grassy area to reach a shopping plaza. The Third Department concluded that the area was not a

highway or sidewalk, despite the fact that it was a grassy area over which plaintiff was traversing. Similarly, even in a park setting, more is required to show it is a sidewalk. In *Quackenbush v. City of Buffalo, supra,* the Fourth Department concluded that an unimproved trail or path was not the functional equivalent of a sidewalk. If an area that has been traversed enough to create a trail or path is not a sidewalk, then a lesser traversed (and still grassy) area, should not be considered a sidewalk. Likewise, in *Inannuzzi*, the Second Department concluded that an unpaved dirt path in a public park where plaintiff was walking did not constitute a sidewalk. In *Giarraffa*, the plaintiff stepped in a dirt covered sinkhole that was located next to the bulkhead for a slip for his boat. The Second Department held that was not the functional equivalent of a sidewalk nor serving as part of a connected standard sidewalk.

In the instant case, the Court concludes that the area where Royce-Roll fell was not a sidewalk, or the functional equivalent of a sidewalk, and therefore prior notice of an alleged defect was not required. Accordingly, the evidence concerning lack of notice is not relevant.

The City points out that if it established there was a lack of notice, then the burden would be shifted to Plaintiff to come forward with an exception to the notice requirement, such as the City created the condition. *See, Yarborough v. City of New York*, 10 NY3d 726 (2008); *Hinkley v. Village of Ballston Spa*, 306 AD2d 612 (3rd Dept. 2003). The City argues that Plaintiff could not raise a triable issue as to the City creating the condition. However, the City did not meet its burden on the notice question, so the burden is not shifted to the Plaintiff. Having failed to show that notice was required, it is unclear if the City still believes it would be entitled to Summary Judgment on the facts of the case. However, absent the notice argument, the Court concludes that the City has not met its burden for Summary Judgment. The City has not pointed to any evidence that it did not create the condition, and concedes that there is no proof as to how the hole came to exist. Thus, in that context, the Court concludes that the City has failed to meet its burden for Summary Judgment, and the burden is not shifted to the Plaintiff at all.
The Court concludes that the City is not entitled to Summary Judgment.

2. Boat Club's motion for Summary Judgment

The Boat Club also seeks Summary Judgment dismissing the Plaintiff's complaint. The Boat Club contends that it did not owe a duty to Plaintiff because it did not own, possess or control the area of the dangerous condition, did not create it, and did not make special use of the area. In support of the motion, the Boat Club submitted an affidavit of Darrin Brock, a licensed Land Surveyor, who opined that the area where Royce Roll fell was outside the portion of Stewart Park granted to the Boat Club under the License Agreement with the City. The Boat Club claims that the record does not reveal how or why the hole was created, but that there is insufficient information to conclude the Boat Club had any involvement; or that the Boat Club made special use of the property where Royce Roll fell.

"In order to sustain a cause of action for negligence, a court must first determine, as a matter of law, that the defendant owed a duty to the plaintiff." *Daversa v. Harris*, 167 AD2d 810, 811 (3rd Dept. 1990); *see*, *Pulka v. Edelman*, 40 NY2d 781, 782 (1976); *Palsgraf v. Long Is. R. R. Co.*, 248 NY 339 (1928); *Matthews v. Scotia-Glenville School Sys.*, 94 AD2d 912 (3rd Dept. 1983), *lv denied* 60 NY2d 559; *Donohue v. Copiague Union Free School Dist.*, 64 AD2d 29, 33 (2nd Dept 1978), affd 47 NY2d 440 (1979). "In the absence of a duty, there is no breach and without a breach there is no liability." *Pulka* at 782; *Bacon v. Mussaw*, 167 AD2d 741, 742 (3rd Dept. 1990) (citing *Palsgraf*, 248 NY at 342, "It is equally well established that before a defendant may be found liable for its negligence, a duty must exist, the breach of which is the proximate cause of the plaintiff's injury"). "Negligence in the air, so to speak, will not do." *Pulka at 782 quoting* Pollock, Torts (13th ed), p.468. The existence and scope of a defendant's duty in a particular case is a question of law for the court. *Moons v. Wade Lupe Constr. Co., Inc.*, 43 AD3d 501 (3rd Dept. 2007).

In a premises liability action, recovery "is predicated on 'ownership, occupancy, control or special use of [a] property' where a dangerous or defective condition exists." *Martuscello v. Jensen*, 134 AD3d 4,8 (3rd Dept. 2015) *quoting Seymour v. David W. Mapes, Inc.*, 22 AD3d 1012, 1013 (3rd Dept. 2005); *Semzock v. State of New York*, 97 AD3d 1012 (3rd Dept. 2012). A

lessee (or licensee) is not liable for conditions in a common area where it does not exercise control or have a right of possession. *Bridgham v. Fairview Plaza*, 257 AD2d 914 (3rd Dept. 1999). "The general rule is that an owner of land abutting [public property] does not, solely by reason of being an abutter, owe to the public a duty to keep the [public property] in a safe condition." *Little v. City of Albany*, 169 AD2d 1013, 1013 (3rd Dept. 1991) (citation omitted); *Melamed v. Rosefsky*, 291 AD2d 602 (3rd Dept. 2002). The courts have recognized "three exceptions to this rule, applicable when the abutting owner 1) uses the area for a 'special purpose', 2) creates the dangerous condition, or 3) violates a statute or ordinance requiring the abutter to maintain the area." *Oles v. City of Albany*, 267 AD2d 571, 571-572 (3rd Dept. 1999), *citing Margulies v. Frank*, 228 AD2d 965, 966 (3rd Dept. 1996); *see Moons, supra.*

There is no dispute that the Boat Club did not own the premises where Royce Roll fell. Testimony was obtained from Bruce Fabens, a former vice president of the board of directors of the Boat Club. In 2009, he had been part of a committee of the Stewart Park Rehabilitation Action Plan, which was formed to help plan and fund various improvements to the park. A summary booklet was prepared by the group which included pictures from various areas of the park, some of which had been taken by Mr. Fabens, before this accident occurred. One of the photos (from 2009 or earlier) showed the boat house and area where Plaintiff fell, and appears to show a wooden post in the same location as the hole Royce Roll stepped in. Mr. Fabens did not know when the post had been placed there, its purpose, or when it was removed. To the best of his knowledge, the Boat Club did not have any involvement in maintenance activities in the grassy area where Plaintiff fell. He was never present when the area was mowed, so he was not sure who did that, but did believe that the area was City property.

Testimony was also obtained from Raymond Benjamin, who is the assistant superintendent of public works at the City. In that capacity, he had supervisory duties over Stewart Park. He testified that he inspected the area after this accident and located the hole, which appeared from his inspection (and other evidence) to have been a post hole, but the post had been removed. The post had not been placed there by the City, and he did not know who had

put the post there. However, he stated that the post "goes to a lift station."[1] He described a "lift station" as a forced main that is used as a pump to service the water and sewer in that area. He noted that the lift station was maintained by a City department. With respect to the area around the lift station and post, as well as maintenance he testified that:

> We mowed the area. The area isn't an active part of the park except the boathouse club, the boat club uses that area... But they are about the only ones. There is nothing else over there unless somebody's going to the bathroom. There's a bathroom in one corner of the building.
>
> *
>
> *
>
> *
>
> [The Boat Club] did some maintenance on maintaining the boathouse for their storage of their sculls. And I know we've had to talk to them before about having to clean up around it. But they are usually the ones that took care of that area.

Benjamin transcript at pp. 23-24.

The Boat Club has not met its burden on the question of control over the area. Mr. Fabens' testimony showed that the Boat Club members did make use of the grassy area, although it was not frequently . Although he stated that the Boat Club did not maintain the area because it was City property, that does not necessarily lead to a conclusion that the Boat Club did not have some degree of control over the area. The testimony from Mr. Benjamin suggests that the area in question was primarily used by Boat Club members. Even though the evidence shows that the City mowed the area, if the area was under the control of the Boat Club, liability could attach. [*See Turrisi v. Ponderosa*, 179 AD2d 956, 958 (3rd Dept. 1992) ("It is clear that control is the test which generally measures the responsibility of the owner or occupant of real property for defects relating to it.")].

Whether an entity has exercised control over an area is a matter of proof, and in this case,

---

[1]Later in his testimony, Mr. Benjamin also stated that he saw no purpose for the post being there. Despite what appears to the Court to be inconsistent statements, it does not bear on the conclusions reached by the Court.

the Boat Club has not established its lack of control. Mr. Fabens' testimony simply said the grassy area was City property, and he provided little detail about any control over this area. Yet, there is evidence that the Boat Club had almost exclusive use in this area, and regularly used more space than what was listed in the License Agreement. Further, Mr. Benjamin's testimony was that the Boat Club usually took care of the area. Thus, the Boat Club has not met its burden with respect to control over the area. There is also a question as to placement and removal of the post. Although the Boat Club argues that there no evidence at this point as to who placed the post, or why it was removed, it is their burden as the moving party, to establish the Boat Club was not involved. That evidence is lacking. Even if the Court concluded that the Boat Club had met its burden, the Plaintiff has raised questions of fact as to control over the area and removal of the post which would preclude Summary Judgment.

Plaintiff has also raised a triable issue as to whether this was a "special use" situation. Where an abutting landowner "derives a special benefit from that [public property] unrelated to the public use," the person obtaining the benefit is "required to maintain" that property in a reasonably safe condition to avoid injury to others. *Poirier v. City of Schenectady*, 85 NY2d 310, 315 (1995). When the abutting owner leases a portion of the property and both the owner and the tenant jointly control the special use, both may be liable. *Olivia v. Gouze*, 285 AD 762 (1st Dept. 1955). " Imposition of the duty to repair or maintain a use located on adjacent property is necessarily premised, however, upon the existence of the abutting land occupier's access to and ability to exercise control over the special use structure or installation....[I]t is the express or implied access to, and control of, the special use which gives rise to the duty." *Kaufman v. Silver*, 90 NY2d 204, 207-208 (1997). As described by Mr. Benjamin, the post hole apparently had some connection with the "lift station" and the lift station was needed in order to provide water and sewer service to the restrooms contained in the building. Although the public was not prohibited from using the restroom or building, the area was not an active area of the park, except for the Boat Club activities. The Court concludes that Plaintiff has raised a triable issue as to whether the Boat Club's "special use" of the lift station and restrooms gave rise to a duty to maintain, inspect and/or warn of any dangerous conditions in that area. Therefore, the Boat Club's motion for Summary Judgment is DENIED.

CONCLUSION

Based upon the foregoing discussion, the City's motion for Summary Judgment is DENIED; furthermore, the Boat Club's motion for Summary Judgment is also DENIED.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: February 9, 2018
Ithaca, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice