Maqueda v Town of Islip
2018 NY Slip Op 30749(U)
April 26, 2018
Supreme Court, Suffolk County
Docket Number: 13-25216
Judge: Arthur G. Pitts
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[* 1]

SHORT FORM ORDER

COPY

INDEX No. 13-25216
CAL. No. 17-00341OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 6-19-17
ADJ. DATE 11-30-17
Mot. Seq. # 001- MG; CASEDISP

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WALTER S. MAQUEDA, Individually and as Administrator of the ESTATE OF PATRICIA B. SALEGNA-MAQUEDA,

Plaintiffs,

- against -

TOWN OF ISLIP,

Defendant.

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SAMUEL J. DIMEGLIO, JR., ESQ.
Attorney for Plaintiffs
191 East Main Street
Huntington, New York 11743

WILLIAM D. WEXLER, ESQ.
Attorney for Defendant
816 Deer Park Avenue
North Babylon, New York 11703

Upon the following papers numbered 1 to 28 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-9; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 10-26; Replying Affidavits and supporting papers 27-28; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant Town of Islip for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted.

This action arises as a result of a gas explosion that destroyed a single-family dwelling located at 12 Prospect Drive, Brentwood, New York (the premises) on August 14, 2012. It is undisputed that the basement of the premises had flooded prior to this incident, and that the homeowners had filed a property damage claim with their insurer. The plaintiff's decedent, Patricia B. Salegna-Maqueda (the deceased or Patricia), was in the basement of the premises at the time of the explosion investigating said claim on behalf of the homeowners' insurer. The plaintiff's decedent passed away approximately one week after this incident.

It is further undisputed that there were two 100-pound propane gas tanks at the premises which provided propane gas to certain appliances in the dwelling, that the owners of the premises were cited for violations of the Town Code, including use as an illegal multi-family dwelling, and that none of those alleged violations involved the presence of the propane tanks or the propane gas lines at the premises. The owners of the premises pled guilty to certain of the alleged violations and were given a conditional discharge permitting them to correct the violations before a date which fell after the date of this incident.

In his complaint, the plaintiff alleges that the defendant Town of Islip (Town), its agents, servants, and/or employees, were present, inspected, performed work, conducted an investigation, ordered repairs, and issued violations regarding the premises. In addition, the plaintiff alleges, among other things, that the Town "failed to

properly detect, inspect, regulate, maintain, supervise, order repairs, warn, condemn, and order removal of the gas propane tanks and illegal appliances and ensure said devices were kept in a reasonably safe condition." The plaintiff further alleges that the Town had a special duty to the [plaintiff's] decedent and other invitees to properly inspect the premises," and to ensure that all municipal codes were complied with by the homeowners and occupants of the premises.

The plaintiff commenced this action by the filing of a summons and complaint dated October 16, 2013, which set forth causes of action for personal injuries, wrongful death, and loss of consortium. In its answer, the Town sets forth affirmative defenses asserting that the plaintiff's injuries were caused by third-parties, that the plaintiff lacks standing, and that it did not owe a special duty to Patricia. The Town now moves for summary judgment dismissing the complaint against it.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore***, *supra*).

As a general rule, an agency of government is not liable for the negligent performance of a governmental function unless there existed a special duty to the injured person (***McLean v City of New York***, 12 NY3d 194, 878 NYS2d 238 [2009]; ***Thompson v Town of Brookhaven***, 34 AD3d 448, 825 NYS2d 83 [2d Dept 2006]). The four elements that are required to establish a special relationship are (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of a party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking (*see* ***McLean v City of New York,*** *supra*; ***Kovit v Estate of Hallums***, 4 NY3d 499, 797 NYS2d 20 [2005]). To sustain liability, the duty breached must be more than that owed to the public generally (***Lauer v City of New York***, 95 NY2d 95, 100, 711 NYS2d 112 [2000]). The burden of proof of establishing a special relationship is on the plaintiff (***Valdez v City of New York***, 18 NY3d 69, 936 NYS2d 587 [2011]; ***Lauer v City of New York***, *supra*).

A special duty does not arise when a municipality fails to properly enforce its codes and regulations, or does not monitor a party's compliance in correcting code violations (see ***Ferreira v Cellco Partnership***, 111 AD3d 777, 976 NYS2d 488 [2d Dept 2013]; ***Gibbs v Paine***, 280 AD2d 517, 720 NYS2d 184 [2d Dept 2001]). In order to invoke the special duty rule, a plaintiff must establish that, through affirmative acts, the municipality has lulled him or her into foregoing other avenues of protection or that it has voluntarily assumed a duty separate from that owed to the public at large (***Bishop v Bostick***, 141 AD2d 487, 529 NYS2d 116 [2d Dept 1988]). It is the plaintiff's burden to show that the defendants conduct lulled him or her into a false sense of security, induced him or her to relax his or her own vigilance or forego other avenues of protection and thereby placed him or her in a worse position than if the defendants never assumed the duty (***Davis v Village of Spring Valley***, 50 AD3d 943, 856 NYS2d

243 [2d Dept 2008]; *see also* ***Dinardo v City of New York***, 13 NY3d 872, 893 NYS2d 818 [2009]; ***Brown v City of New York***, 73 AD3d 1113, 902 NYS2d 594 [2d Dept 2010]).

Moreover, it is well settled that a plaintiff must allege a special duty owed to him or her to state a cause of action in negligence against a municipality or governmental agency (*see* ***Merin v City of New York***, 154 AD3d 928, 63 NYS3d 84 [2d Dept 2017]; ***Kirchner v County of Niagara***, 107 AD3d 1620, 969 NYS2d 277 [4th Dept 2013]; *see also* ***Lauer v City of New York***, *supra*). Here, the plaintiff does not allege an affirmative duty on the part of the Town to act on behalf of Patricia as opposed to any duty owed to the general public, that Patricia had any direct contact with the Town's agents, servants, or employees, or that Patricia relied upon the Town's undertaking to inspect or otherwise act regarding the propane tanks or gas piping at the premises.

In support of its motion, the Town submits the pleadings, the transcripts of the deposition testimony of the plaintiff, one of its employees, and a friend of the owners of the premises, and documents regarding the code violations issued to the owners of the premises. At his deposition, the plaintiff testified that the deceased had been his wife for nine years at the time of this incident, that she was employed by State Farm Insurance as an insurance claims specialist, and that she was at the premises investigating an insurance claim at that time. He stated that he heard about this incident from a police officer, who informed him that the premises had "exploded," and that his wife was hospitalized and passed away on August 21, 2012. He indicated that he did not have a conversation with anyone associated with, or employed by, the Town about this incident.

At his deposition, nonparty Irving Justiniano testified that he was at the premises on the day of this incident as a favor to one of the homeowners, who gave him the keys to the premises, and that he met nonparty Michael Ray (Ray), a plumber, and an insurance adjuster to allow them to inspect the boiler located in the basement of the premises. He stated that, approximately ten days before that date, the basement had flooded and the three were there regarding the owners' insurance claim, that they went down to the basement, and that Ray asked them if they detected an odor. He indicated that he did smell "something out of the ordinary," that he went upstairs to check on the kitchen appliances, and that, on his return, he told Ray that "the odor is here, down here, not nothing upstairs." The plaintiff further testified that Ray said "okay," that he saw Ray push the "starter button" for the boiler, and that immediately thereafter "everything went up" in an explosion. He stated that he had previously seen a "disabled" clothes dryer in the basement not connected to electric or gas service, that he had seen a stove outside of the dwelling which had been removed by nonparty AMS Restoration Services LLC when cleaning the flooded basement, and that he had seen two propane tanks at the side of the dwelling which were blocked by a bush and flowers but were visible "to some degree."

Daniel Eckert (Eckert) testified that he is employed as an investigator by the Town, that his duties include responding to complaints about properties by the public or Town departments, and that he was assigned to investigate a complaint made by a tenant at the premises. He stated that the tenant granted him limited access to the premises on September 26, 2011, including the first and second floor, although some rooms had padlocks which prevented access, and the basement which had been "converted to habitable living space ... it was vacant and was being used for storage." He indicated that he issued a number of violations to the owner of the property, including a lack of smoke and carbon monoxide detectors, mold issues, and illegal use as a multi-family dwelling. Eckert further testified that a senior investigator with the Town served the owners with tickets to appear at the Fifth District Court regarding these violations in November 2011, that he reinspected the premises at the request of one of the owners on December 16, 2011, and that he determined that the violations were "partially corrected." Eckert further testified that he did not see, and he was never told that there were propane tanks on the property, that he did not observe any gas pipes in the basement, and that he did not know if he inspected the backyard of the premises. He stated that a prior violation for use of the premises as an illegal multi-family dwelling and basement habitation in

2003 was dismissed as "unfounded," and that a violation for use of the premises as an illegal multi-family dwelling in 2005 was marked "closed" on March 13, 2006. He testified that he received information on June 28, 2012 indicating that, as a result of their court appearances, the owners of the premises were issued a conditional discharge by the Fifth District Court in which the owners were given until October 13, 2012 to address the violations, that he took steps to prepare for a reinspection of the premises before that date, and that he received a call from a senior investigator on August 14, 2012 that there had been a gas explosion at the premises.

Here, the Town has established its prima facie entitlement to summary judgment on the ground that it did not owe a special duty to the deceased, that it did not have knowledge, or any awareness, that the propane tanks existed at the premises, or that the tanks presented a hazard to the occupants of the premises or members of the community. It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]).

Thus, the Town has established it prima facie entitlement to summary judgment dismissing the plaintiff's causes of action for negligence and wrongful death. Generally, "[a] cause of action for damages for wrongful death may, in fact, be asserted independently of any claim for damages for personal injuries" (***McDaniel v Clarkstown Cent. School Dist. No. 1***, 110 AD2d 349, 494 NYS2d 885 [2d Dept 1985]). However, it is well settled that an action for wrongful death is available only if the decedent would herself have had a cause of action against the defendant based on the defendant's commission of a wrongful act, neglect, or default (*see* ***Cragg v Allstate Indem. Corp.***, 17 NY3d 118, 926 NYS2d 867 [2011]; ***Heslin v County of Greene***, 14 NY3d 67, 896 NYS2d 723 [2010]; see also EPTL 5–4.3). Inasmuch as the Town has established its prima facie entitlement to summary judgment dismissing the first two causes of action, the plaintiff's third cause of action, which is a derivative cause of action on behalf of the plaintiff, is subject to dismissal (*see* ***Flanagan v Catskill Regional Med. Ctr.***, 65 AD3d 563, 884 NYS2d 131 [2d Dept 2009]). Thus, the Town has established its prima facie entitlement to summary judgment dismissing the complaint in its entirety.

The Town having established its prima facie entitlement to summary judgment dismissing the complaint, it is incumbent upon the plaintiff to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). In opposition to the motion, the plaintiff submits, among other things, the affirmation of his attorney, the transcripts or excerpts of the deposition testimony of Eckert and certain nonparties involved in this incident, the investigation report of the Suffolk County Police Department regarding this incident, printouts from certain media web sites, and the affidavit of an expert witness. In his affirmation, counsel for the plaintiff contends that there are issues of fact whether the Town is liable herein based on its "acts of negligence in failing to carry out its governmental functions of inspection and protection," on "its failure to take reasonable action once there has been an inspection which calls the hazardous condition to the attention of the authorities," and on the fact that various newspaper articles "indicate that the Town of Islip was well aware the [the premises] was being used as an illegal multiple-family dwelling." However, counsel for the plaintiff does not address whether Patricia is owed a special duty by the Town regarding this incident.

New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (*see* ***McNamee Constr. Corp. v City of New Rochelle***, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]; ***Welden v Rivera***, 301 AD2d 934, 754 NYS2d 698 (3d Dept 2003]; ***Hajderlli v Wiljohn 59 LLC***, 24 Misc 3d 1242[A], 2009 NY Slip Op 51849[U] [Sup Ct, Bronx County 2009]). Thus, it is determined that the plaintiff cannot maintain a cause of action for negligence against the Town for its alleged failure to perform its governmental functions based on a special relationship with the Town or a special duty owed to

Patricia. More importantly, the plaintiff fails to submit any admissible evidence to raise an issue of fact whether the Town owed Patricia such a special duty.

In addition, assuming for the sake of argument that the plaintiff's contention that the Town can be held liable if it failed to take reasonable action after its inspection called the hazardous condition to its attention is correct, the plaintiff has failed to raise an issue of fact whether any specific condition at the premises brought the propane tanks and gas piping or appliances to the attention of the Town. Regardless, it is well settled that, even if it were alleged that Eckert failed to observe those conditions, such a failure would not give rise to liability on the part of the Town (***Metz v State of New York***, 20 NY3d 175, 958 NYS2d 314 [2012]; ***O'Connor v City of New York***, 58 NY2d 184, 460 NYS2d 485 [1983][gas piping regulations designed to benefit plaintiffs as members of the community]). "To sustain liability against a municipality, the duty breached must be more than that owed the public generally" (***Lauer v City of New York***, 95 NY2d at 100, 711 NYS2d at 118, citing ***Florence v Goldberg***, 44 NY2d 189, 195, 404 NYS2d 583 [1978]). Neither does the plaintiff raise an issue of fact whether the Town assumed positive direction and control in the face of a known, blatant, and dangerous safety violation, as required to impose liability on municipality for failure to enforce statute or regulation (*see* ***Bell v Village of Stamford***, 51 AD3d 1263, 857 NYS2d 804 [3d Dept 2008]).

The unauthenticated copies of newspaper and internet articles downloaded from the internet, submitted by the plaintiff, are not in admissible form (***Pu v Bruni***, 24 Misc 3d 1245[A], 899 NYS2d 62 [Sup Ct, New York County 2009]; ***Morgan, Lewis & Bockius v IBuyDigital.com, Inc.***, 14 Misc 3d 1224[A], 836 NYS2d 486 [Sup Ct, New York County 2007], and they have not been considered by the Court in making this determination (***Young v Fleary***, 226 AD2d 454, 640 NYS2d 593 [2nd Dept 1996] [newspaper articles submitted on summary judgment motion constitute inadmissible hearsay]; *see also* ***P&N Tiffany Props. Inc. v Maron***, 16 AD3d 395, 790 NYS2d 396 [2d Dept 2005]). In any event, said articles do not establish that the Town was aware of the subject propane tanks, or the presence of any gas piping or working gas appliances in the basement of the premises.

The transcripts of the deposition testimony of the nonparties submitted by the plaintiff do not raise an issue of fact regarding the liability of the Town, and they need not be summarized herein. Finally, the affidavit of the plaintiff's expert witness does not raise issues of fact requiring a trial of this action. In his affidavit, Steven Pietropaolo (Pietropaolo) swears that he is licensed as a professional engineer in New York State, that he is designated a certified fire and explosion investigator and certified fire investigation instructor by the National Association of Fire Investigators, and that he has reviewed the depositions and relevant documents herein. He states that, based on his review, it is his opinion with a reasonable degree of engineering certainty that the Town was "on notice of the installation of improper and non-approved gas appliances in the illegal basement apartment by virtue of its numerous inspections of the property," that the Town "should have observed these inherently dangerous conditions" at its inspections, and that the Town "should have caused the property to be immediately vacated and guarded prior to the explosion."

An expert "may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (*see* ***Shi Pei Fang v Heng Sang Realty Corp.***, 38 AD3d 520, 835 NYS2d 194 [2d Dept 2007]). "Speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment" (*see* ***Zuckerman v City of New York*** *supra*; ***Leggis v Gearhart***, 294 AD2d 543, 743 NYS2d 135 [2d Dept 2002]; ***Levitt v County of Suffolk***, 145 AD2d 414, 535 NYS2d 618 [2nd Dept 1988]). Here, to the extent that Pietropaolo's affidavit attempts to render an expert opinion, it primarily consists of theoretical allegations with no independent factual basis and it is therefore speculative, unsubstantiated, and conclusory (*see* ***Mestric v Martinez Cleaning Co.***, 306 AD2d 449, 761 NYS2d 504 [2d Dept 2003]).

More importantly, Pietropaolo's affidavit does not address the issue of Patricia's special relationship to the Town, and the plaintiff's submission fails to offer any admissible evidence on this critical issue. The plaintiff only addresses this issue in the affirmation in opposition to the Town's motion wherein counsel for the plaintiff contends that the Town can be held liable based upon its knowledge of the danger herein and its failure to take reasonable steps to abate the danger. However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issue of fact (*see* ***Zuckerman v City of New York***, *supra*; ***Perez v Grace Episcopal Church***, *supra*; ***Rebecchi v Whitmore***, *supra*). In addition, the affirmation of an attorney who has no personal knowledge of the facts herein, is insufficient to defeat a motion for summary judgment (***Sanbria v Paduch***, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; ***Warrington v Ryder Truck Rental, Inc.***, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]). Thus, the plaintiff has failed to raise an issues of fact regarding the absence of a special duty owed to the plaintiff by the Town or the negligence of the Town herein.

Accordingly, the Town's motion for summary judgment dismissing the complaint is granted.

Dated: Riverhead, New York
April 26, 2018

ARTHUR G. PITTS, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION