SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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PANAGIOTA MELIS,

Plaintiff,

Index Nº.: 156637/16
Motion Seq. No. 003

-against-

HELLENIC ORTHODOX COMMUNITY OF ST. ELEUTHERIOS, INC. and HELLENIC ORTHODOX COMMUNITY OF ST. ELEFTHERIOS,

DECISION AND ORDER

Defendants.

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CAROL R. EDMEAD, J.S.C.:

In a personal injury action, defendant Hellenic Orthodox Community of St. Eleftherios Church, Inc. (the Church) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

BACKGROUND

Plaintiff Panagiota Melis alleges that, on February 5, 2015, she slipped and fell on snow and ice in the Church's parking lot. On August 9, 2016, plaintiff filed her complaint, which alleges that the Church is liable in negligence. By a decision dated March 21, 2017, the court denied the Church's motion to dismiss the complaint and granted plaintiff's cross motion seeking dismissal of the Church's fourth and fifth affirmative defenses for waiver and assumption of risk (March 2017 decision). By an order dated June 27, 2017, the court granted the Church's motion for reargument of the March 2107 and, upon reargument, adhered to the earlier decision (June 2017 decision).

Discovery has been completed since those motions were completed. The Church now

moves for summary judgment, once again arguing that plaintiff assumed the risk. Plaintiff argues that defendant's assumption of risk argument is barred by the law of the case doctrine. Moreover, plaintiff seeks sanctions against the Church, under CPLR 8303-a, for making a motion that plaintiff characterizes as frivolous.

DISCUSSION

It is well settled that the proponent of a motion for summary judgment must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The

opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

Negligence

The Church once again presents that court a document that plaintiff signed, on November 11, 2014, in connection with the Church granting her a spot in its parking lot:

> "I, Panagiota Melis, am a Fair Share Member in good standing of the Greek Orthodox Church of Saint Eleftherios, located at 359 West 24th Street, New York and hereafter referred to as the "The Church."
>
> As such a Contributing Member I may from time to time [be] permitted to park my automobile on the premises of the Church. I agree that I will do so at my own risk and will not hold the Church liable for any damage, vandalism, theft, etc., which may occur to my automobile, property or to myself or to any guest if any. I further agree that I will not permit the Church to be made a party defendant in any action brought against me by any person or persons claiming to be injured on the Church property or on exiting the Church property through my negligence or that of anyone driving my automobile.
>
> I agree to hold the Church harmless under any and all circumstances."

The March 2017 decision and the June 2017 decision held that this waiver is insufficient to serve as a basis for an affirmative defense of waiver or assumption of risk. The Church now argues that it is entitled to summary judgment dismissing the complaint because it has plaintiff's deposition testimony to supplement this document. Plaintiff, for example, was shown the document at her deposition:

> "Q: Is this your signature here towards the bottom half of the first page?
> A: Yes.

Q: Okay. And what did you understand this document to be?
A: It was a disclaimer"

(plaintiff's tr at 89).

Plaintiff, in opposition, refers to a different portion of deposition transcript in which she was questioned about a conversation she had with her brother, who was then the president of the Church, about the disclaimer:

"Q: Okay. What questions did you ask your brother about it?
A: And what did he tell you?
Q: No; that they can't waive negligence"

(*id.* at 91).

None of this testimony overturns the court's prior determinations as to waiver and assumption of risk. Nor does it provide a basis on which the court could grant the Church summary judgment. In order to further its argument that plaintiff assumed the risk, the Church refers to another portion of plaintiff's deposition transcript in which she testified that she saw ice in the parking lot before she walked towards her car:

"Q: And were you walking on ice-covered blacktop the entire distance from the gate to where you fell?
A: Yes.
Q: What did the ice look like as you were walking?
A: It was white – like a frosted – like ridged and sheer ice from – the ridges were from tire treads.
Q You could see tire treads in it?
A: Yes. That were thawed and frozen over.
Q: How thick was it?
A: Approximately two inches (indicating).
Q: And how did you fall?
A: My – I was avoiding the tire ridges, and as I was stepping across the tire ridge with my right foot, I slipped, tried to catch myself with the left foot, and it twisted in and I fell onto my left side"

(*id.* at 47).

While the Church can argue at trial that plaintiff's own negligence contributed to her accident, this testimony does not amount to a bar to recovery for assumption of risk. The Church cites to the *Duchesneau v Cornell Univ.* (559 Fed. Appx 161 [3rd Cir 2014] [applying New York law]) and *DiMaria v Coordinated Ranches, Inc.*, 138 AD2d 445 [2d Dept 1988]). Both of these cases that found that waivers could not serve as bars to liability, under NY General Obligation § 5-326, could nevertheless be introduced into evidence for other purposes. As the admissibility of the waiver is not at issue, these cases are not instructive.

The parameters of negligence cause of action are well established. A plaintiff is required to prove: "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] citing, *inter alia, Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928] [other citation omitted]). Here, as the Church has failed to make a *prima facie* showing as to any of these elements, it's motion for summary judgment dismissing all claims and cross as against it must be denied.

Sanctions

CPLR 8303-a permits courts assess reasonable attorney's fees to a party that has been forced to defend a frivolous motion. Here, while the Church's do not entitle it to summary judgment, there is no indication that the arguments were made in bad faith or with an intention to harass. Accordingly, plaintiff's application for sanctions is denied.

CONCLUSION

Accordingly, it is

ORDERED that defendant Hellenic Orthodox Community of St. Eleftherios Church, Inc.'s motion for summary judgment is denied.

Date: June 11, 2018

ENTER:

Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.