

<b>Ahmad-Pai v South St. Seaport L.P.</b>
2018 NY Slip Op 33054(U)
November 29, 2018
Supreme Court, New York County
Docket Number: 158135/2013
Judge: Kelly A. O'Neill Levy
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**KELLY O'NEILL LEVY  
JSC**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 19**

-----X  
ALI AHMAD-PAI,

Plaintiff,

- v -

SOUTH STREET SEAPORT LIMITED PARTNERSHIP, THE  
HOWARD HUGHES CORPORATION,

Defendants.

**INDEX NO.** 158135/2013

**MOTION DATE** 09/12/2018

**MOTION SEQ. NO.** 004, 005

**DECISION AND ORDER**

-----X  
SOUTH STREET SEAPORT LIMITED PARTNERSHIP, THE HOWARD  
HUGHES CORPORATION,

Third-Party Plaintiffs,

- v -

GCA SERVICES GROUP OF NORTH CAROLINA, INC.,

Third-Party Defendant.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 004) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 132, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 151, 152, 153

were read on this motion to/for

SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 005) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 133, 134, 135, 150, 154, 155

were read on this motion to/for

SUMMARY JUDGMENT

HON. KELLY O'NEILL LEVY:

Motion sequence numbers 004 and 005 are hereby consolidated for disposition.

This is a personal injury action arising from an alleged biking accident.

Third-party defendant GCA Services Group of North Carolina, Inc. (hereinafter, GCA) moves for an order (mot. seq. 004), pursuant to CPLR § 3212, granting summary judgment in its

favor and dismissing the third-party complaint. Plaintiff Ali Ahmad-Pai partially opposes. Defendants South Street Seaport Limited Partnership (hereinafter, SSSLP) and The Howard Hughes Corporation (hereinafter, HHC) oppose and move for an order (mot. seq. 005), pursuant to CPLR § 3212, (1) granting summary judgment in their favor and dismissing the complaint, (2) granting summary judgment dismissing GCA's counterclaims, (3) granting conditional summary judgment on their contractual indemnity claim, and (4) granting summary judgment on their contractual indemnity claim for attorney's fees and costs. Plaintiff opposes.

### BACKGROUND

On May 9, 2013, at approximately 4:00 p.m., plaintiff was riding his bicycle on the designated bike path adjacent to the South Street Seaport in Manhattan (hereinafter, the bike path). Plaintiff alleges the front tire of his bicycle got caught in a lip, or a mis-leveled edge, on the bike path with a height differential of 2-3 inches, causing him to fall from his bike onto the ground [Plaintiff tr. (ex. C to the Toquica aff.) at 88, 92-93, 108-109]. Plaintiff had biked on the bike path almost daily for several years prior to the accident (*id.* at 59). Plaintiff alleges that he was biking at a nominal speed at the time of the accident (*id.* at 89).

New York City owns the South Street Seaport [Deposition of William Flemm, Senior Operations Manager at HHC (ex. H to the Toquica aff.) at 12-13, 53]. In the 1980s, New York City leased a portion of the South Street Seaport to SSSLP to operate a retail shopping mall on Pier 17 [Lease (ex. J to the Caruana aff.)]. The bike path was not part of SSSLP's leasehold (Flemm tr. at 53-54). In 2009, the New York City Economic Development Corporation designed and built the bike path as part of the East River Waterfront Esplanade and Piers Project. New York City owns the bike path and the New York City Parks Department maintains and controls the bike path (*id.*).

HHC is a real estate development company that owns SSSLP. SSSLP entered into a Master Services Agreement with GCA for the performance of janitorial and maintenance services for the leased property [Master Services Agreement (ex. M to the Toquica aff.)]. The Master Services Agreement does not include coverage for the bike path and GCA was not responsible for maintaining or inspecting the bike path [*id.* at 12, 14; Deposition of Michael Scharf, Regional Manager for GCA (ex. I to the Toquica aff.) at 18, 20, 27].

### DISCUSSION

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a *prima facie* showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

GCA asserts that the bike path, was not owned, leased, operated, maintained, or supervised by defendants, and thus the bike path was not an area that GCA was responsible to maintain. Plaintiff contends that defendants' special use of the bike path is in dispute and that GCA's duty to maintain the bike path runs with the area of special use. Defendants maintain that they did not own, control, or make special use of the bike path and that defendants did not derive an exclusive benefit from the bike path. Defendants assert that the recreational use statute,

General Obligations Law § 9-103, bars this action. Plaintiff argues that issues of fact exist over whether defendants' use of the bike path constitutes special use and that the recreational use statute is not applicable to this action.

It is undisputed that the bike path was not owned or leased by defendants. The bike path was not included in SSSLP's leasehold or in the Master Services Agreement.

The special use doctrine imposes liability on a possessor of land for injuries on a public way where a municipality has been given authority to interfere with the public way solely for private use and "in no way connected with the public use." *Kaufman v. Silver*, 90 N.Y.2d 204, 207 (1997). The structure must be for the landowner's sole benefit. *Id.* Imposition of a duty to repair or maintain use of a structure or installation located on an adjacent property under the special use doctrine is premised upon existence of an abutting land occupier's access to and ability to exercise control over the structure or installation. *Id.* at 207-208. Special use cases typically involve the installation of some object in the sidewalk or a variance in the construction of the sidewalk intended specifically for the benefit of no one other than those on or using the owner's land. *See, e.g., Granville v. City of New York*, 211 A.D.2d 195, 197 (1st Dep't 1995) (involving a concrete step mounted on the sidewalk beneath the elevated doorway of a restaurant); *Santorelli v. City of New York*, 77 A.D.2d 825, 826 (1st Dep't 1980) (involving a heating oil filler cap in the sidewalk); *Nickelsburg v. City of New York*, 263 A.D. 625, 626 (1st Dep't 1942) (involving iron bars that were embedded in the sidewalk to facilitate removal of refuse).

Here, in contrast, there is no such object in the bike path or a variance in the construction of the bike path intended for the benefit of defendants. There is no evidence that the bike path was created for defendants' benefit as to impose a duty on defendants to maintain and repair the

bike path. Even if pedestrians would use the bike path to access and patronize the stores on Pier 17, this would not establish a special use. The bike path was not constructed for defendants' exclusive use or benefit, or at their request. It was constructed for the recreational use of the public. There is no evidence that defendants were able to exercise any control over the bike path. Moreover, liability in this case based on special use would place on every homeowner and commercial establishment a duty to maintain an abutting bicycle path whenever it could be shown that they reap a special benefit from the use of the bicycle path. *See Balsam v. Delma Eng'g Corp.*, 139 A.D.2d 292, 299 (1st Dep't 1988) (the court refused to invoke the special use doctrine where the plaintiff claimed that the defendant gas station made special use and obtained commercial benefit of the public street because its customers used the street to wait in line for an available gas pump). Thus, the special use doctrine does not apply to this case.

The recreational use statute, General Obligations Law § 9-103, grants immunity from liability for ordinary negligence to owners of property who permit members of the public to come on their property to engage in one of several enumerated recreational activities. *Iannotti v. Consolidated Rail Corp.*, 74 N.Y.2d 39, 42 (1989). While plaintiff was engaged in bicycle riding, which is an enumerated recreational activity, the recreational use statute does not apply here because defendants are not the owners or lessees of the bike path. Therefore, the recreational use statute likewise does not apply to this case.

Therefore, in the absence of any material, triable issues of fact, and since the bike path was not owned, leased, operated, maintained, or supervised by defendants, and it was not an area that GCA was responsible to maintain, the court grants GCA and defendants' respective motions for summary judgment on liability, dismissing the action and third-party action. The branches of defendants' motion regarding contractual indemnity, attorneys' fees, and costs are moot.

### CONCLUSION AND ORDER

For the foregoing reasons, it is hereby,

**ORDERED**, that third-party defendant GCA Services Group of North Carolina, Inc.'s motion for an order (mot. seq. 004), pursuant to CPLR § 3212, granting summary judgment in its favor and dismissing the third-party complaint is granted; and it is further

**ORDERED**, that the branch of defendants South Street Seaport Limited Partnership and The Howard Hughes Corporation's motion for an order (mot. seq. 005), pursuant to CPLR § 3212, granting summary judgment in their favor and dismissing the complaint is granted; and it is further

**ORDERED**, that the branch of defendants South Street Seaport Limited Partnership and The Howard Hughes Corporation's motion for an order (mot. seq. 005), pursuant to CPLR § 3212, granting summary judgment dismissing GCA's counterclaims is granted; and it is further

**ORDERED**, that the branch of defendants South Street Seaport Limited Partnership and The Howard Hughes Corporation's motion for an order (mot. seq. 005), pursuant to CPLR § 3212, granting conditional summary judgment on their contractual indemnity claim is moot; and it is further

**ORDERED**, that the branch of defendants South Street Seaport Limited Partnership and The Howard Hughes Corporation's motion for an order (mot. seq. 005), pursuant to CPLR § 3212, granting summary judgment on their contractual indemnity claim for attorney's fees and costs is moot; and it is further

**ORDERED**, that the complaint and third-party complaint are dismissed.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

11/29/18  
DATE

Kelly O'Neill Levy  
KELLY O'NEILL LEVY, J.S.C.  
**KELLY O'NEILL LEVY**  
JSC

CHECK ONE:

X
X

CASE DISPOSED

GRANTED

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DENIED

APPLICATION:

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SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN


NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

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OTHER

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REFERENCE