

Sedgh v Gramercy Chapels Inc.

2020 NY Slip Op 34561(U)

September 25, 2020

Supreme Court, Nassau County

Docket Number: 610521/2019

Judge: Antonio I. Brandveen

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT — STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

SETAREH SEDGH,

Plaintiff,

— against —

**TRIAL / IAS PART 22
NASSAU COUNTY**

Index No. 610521/2019

Motion Sequences No. 1, 2

GRAMERCY CHAPELS INC. and RIVERSIDE-NASSAU,
NORTH CHAPEL,

Defendants.

NEW YORK FUNERAL CHAPELS, LLC d/b/a and s/h/a
RIVERSIDE-NASSAU NORTH CHAPEL,

Third-Party Plaintiff,

— against —

VILLAGE OF GREAT NECK PLAZA,

Third Party Defendant

The following papers having been read on these two (2) motions:

Motion Sequence No. 1

Notice of Motion, Affidavits & Exhibits 1, 2, 3, 4, 5 ___
 Answering Affidavits..... 5 _____
 Replying Affidavits..... 6 _____
 Briefs: Plaintiff / Petitioner..... _____
 Defendant / Respondent..... _____

Motion Sequence No. 2

Notice of Cross Motion, Affidavits & Exhibits 1, 2 _____
 Answering Affidavits..... 3 _____
 Replying Affidavits..... 4 _____
 Briefs: Plaintiff / Petitioner..... _____
 Defendant / Respondent..... _____

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, including efiled documents/exhibits numbered 13 through and including 18 and 20 through and including 53, these two (2) motions are decided as follows:

The plaintiff Setareh Sedgh alleged a trip and fall on missing and uneven brickwork on November 1, 2017 while walking in front of 55 North Station Plaza, Great Neck, New York. The plaintiff claimed the exterior walkway/curb/entryway was upraised, uneven, dilapidated and a snare and tripping hazard for the unwary and physically challenged, and that condition caused the incident resulting injuries to the plaintiff.

The third-party defendant Village of Great Neck Plaza moves (Sequence No. 1) for an order pursuant to CPLR 3212 granting the defendant Village of Great Neck Plaza summary judgment dismissing all claims and crossclaims against it. The Village asserts it does not own, lease, maintain or control the accident location. The Village maintains it did not receive prior written notice of the alleged defective condition, and it did not affirmatively create it. The Village also moves for costs pursuant to CPLR 8303-A based upon frivolous claims brought against the Village by the defendant/third-party plaintiff New York Funeral Chapels, LLC d/b/a and s/h/a Riverside-Nassau North Chapel.

New York Funeral Chapels, LLC notes the plaintiff has not yet specified the exact location of the fall. New York Funeral Chapels, LLC points out only the complaint identifies the location of the fall as outside of 55 North Station Plaza specifically, the exterior front

walkway/curb/entryway due to “missing and uneven brickwork.” New York Funeral Chapels, LLC contends it is unclear exactly where the plaintiff fell, or whether the curb, brick sidewalk or both are implicated, since the plaintiff has not been deposed and no bill of particulars has been served and photographs of the area show the ambiguity.

New York Funeral Chapels, LLC maintains it admitted to ownership of 55 North Station Plaza, but not the public sidewalk and the curb adjacent to that location. New York Funeral Chapels, LLC argues the Village can be held liable for defects upon public sidewalks since the Village was in control of the sidewalk and not the New York Funeral Chapels, LLC, the abutting owner. New York Funeral Chapels, LLC indicates it did not create a condition upon the sidewalk or made a special use of the sidewalk.

New York Funeral Chapels, LLC emphasizes the Village of Great Neck Plaza Code puts the responsibility for sidewalk and curb maintenance and repair upon the adjoining owner or occupant. New York Funeral Chapels, LLC adds the Village of Great Neck Plaza Code is not a tort shifting statute, the Village is still potentially liable for the sidewalk condition.

New York Funeral Chapels, LLC asserts documents specifically provided by the Great Neck Plaza Business Improvement District detail the locations falling within the Business Improvement District. New York Funeral Chapels, LLC notes both sides of the North Station Plaza from Middle Neck Road to Barstow Road are included within the Business Improvement District. New York Funeral Chapels, LLC also points to a Google Map identifying the premises at 55 North Station Plaza, which clearly is located between Barstow and Middle Neck Road, so the location at issue clearly falls within the jurisdiction of the Village of Great Neck Plaza.

New York Funeral Chapels, LLC also remarks documents provided by the Great Neck Plaza Business Improvement District, specifically Section IV entitled ‘Services and Improvements to be Provided Within the BID,’ and more specifically Subsection (1)(f), services included a program for the maintenance of various capital improvements within the Village including brick pavers within the district. New York Funeral Chapels, LLC further observes the plaintiff specifically referenced defective brick pavers on the public sidewalk outside of 55 North Station Plaza in the complaint. New York Funeral Chapels, LLC states the Village fails to address or account for any work performed by the Great Neck Plaza Business Improvement District on its behalf at this location, so there is an exception to the prior written notice requirement is where the Village created the defective condition through the Village’s affirmative acts of negligence or the defective condition resulted from a special use of the property by the Village which conferred a special benefit on the Village.

New York Funeral Chapels, LLC asserts the third-party claims by the New York Funeral Chapels, LLC are not frivolous under CPLR 8303-A. New York Funeral Chapels, LLC contends

its contentions are grounded in law, and there are questions about the sidewalk and curb at issue. New York Funeral Chapels, LLC maintains the factual predicate of the third-party claims should be explored during discovery in this matter, and the motion of the Village should be denied.

The Village replies to that opposition. The Village asserts it did not undertake any maintenance, management or repair at the accident location as the Village has no duty or obligation to do so. The Village maintains the Business Improvement District is a separate incorporated entity from the Village of Great Neck Plaza. The Village states strict requirements exist providing for prior written notice to the Village Clerk's Office regarding any defects. The Village reiterates no such prior written notice was given, and the Village did address that no work, maintenance or repairs done at or around the time of the incident by either the Village or the Business Improvement District.

In order to establish that a summary judgment motion is premature, the nonmoving party must "offer an evidentiary basis to suggest that discovery may lead to relevant evidence, or that facts essential to opposing the motion were exclusively within the knowledge and control of the [moving party]. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the ... motion" [citation omitted]

Ulloa v Inc. Vil. of Freeport, 184 AD3d 762 [2d Dept 2020]

The Court determines the Village's motion is not premature (CPLR 3212[f]). New York Funeral Chapels, LLC does not proffer an evidentiary basis to suggest discovery may lead to relevant evidence, or facts essential to opposing this motion were exclusively within the knowledge and control of the Village (*Hill v Ackall*, 71 AD3d 829 [2d Dept 2010]). The Court notes New York Funeral Chapels, LLC has documents specifically provided by the Great Neck Plaza Business Improvement District, a Google Map, photographs and public access to the Village's Code and its records regarding ownership and leases of the site, maintenance and control the site. New York Funeral Chapels, LLC's mere hope or speculation that evidence enough to defeat the Village's motion may be uncovered during discovery is an unsatisfactory foundation for rejecting this motion.

"As a general rule, '[l]iability for a dangerous or defective condition on property is ... predicated upon ownership, occupancy, control or special use of the property ... Where none is present, [generally] a party cannot be held liable for injuries caused by the dangerous or defective condition of the property' " [citation omitted] (*Puzhayeva v City of New York*, 151 AD3d 988, 989 [2d Dept 2017]). Here, the Village proffered evidence in admissible form, to wit affidavits showing it neither owned, leased, maintained, operated, managed, repaired nor controlled the accident location, and is not responsible for any maintenance, upkeep, inspections, repairs or undertook such at the accident location. The Village also presented evidence in

admissible form, to wit an affidavit showing the work experience and the records maintained in by the Village show the Great Neck Village Business Improvement District never in 30 years of existence undertook the repair, maintenance or improvement of any brick paving or sidewalk at or near the accident location outside of 55 North Station Plaza.

A municipality that has enacted a prior written notice law is excused from liability absent proof of prior written notice or an exception thereto. The Court of Appeals has recognized two exceptions to this rule, “namely, where the locality created the defect or hazard through an affirmative act of negligence” and “where a ‘special use’ confers a special benefit upon the locality” [citation omitted]

Perrington v City of Mount Vernon, 37 AD3d 571, 572 [2d Dept 2007].

“A negligent repair of the defective condition is insufficient to establish that the municipality affirmatively created the defect” [citation omitted] (*Wilson v Inc. Vil. of Hempstead*, 120 AD3d 665, 666 [2d Dept 2014]). “Additionally, the affirmative negligence exception ‘is limited to work by the City that immediately results in the existence of a dangerous condition’ ” [citation omitted] (*Guss v City of New York*, 147 AD3d 731, 733 [2d Dept 2017]).

This Court determines the Village of Great Neck Plaza established a prima facie entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Weinstein v County of Nassau*, 180 AD3d 730 [2d Dept 2020]). Here, the Village proffers evidence in admissible form consisting of affidavits dated January 31, 2020 and July 14, 2020 from Patricia O’Byrne, the Village Clerk and Treasurer, and an affidavit dated February 3, 2020 from Village Superintendent of the Department of Public Works. There is no dispute the Village enacted a prior written notice law covering the subject defect. Moreover, the sworn statements show there was no evidence the Village received prior written notice of the condition that allegedly caused the plaintiff’s injuries, or the Village created the defect by affirmative act of negligence which immediately resulted in the existence of the subject condition or hazard or the Village made special use of the site (*see Furey v Sayville Union Free School Dist.*, 36 AD3d 588 [2d Dept 2007]).

The burden shifted to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Cordova v Vinuesa*, 20 AD3d 445, 446 [2d Dept 2005]).

In opposition, New York Funeral Chapels, LLC failed to raise a triable issue of fact regarding the Village’s liability (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). New York Funeral Chapels, LLC did not proffer evidence showing the Village received prior written notice of the condition that allegedly caused the plaintiff’s injuries, or the Village created the defect by affirmative act of negligence which immediately resulted in the existence of the subject

condition or hazard or the Village made special use of the site. New York Funeral Chapels, LLC presented no evidence of who last worked on this site before the accident, when any such work may have been carried out, or the condition of the site immediately after any work (*see generally Oboler v City of New York*, 8 NY3d 888 [2007]). Next, even if the special use doctrine applied to the site, plaintiff presented no proof of any special benefit conferred on the Village. Finally, this Court notes that the affirmation by the attorney for New York Funeral Chapels, LLC is insufficient to defeat this motion (*see Collins v Laro Serv. Sys. of New York, Inc.*, 36 AD3d 746 [2d Dept 2007]).

New York Funeral Chapels, LLC moves (Sequence No. 2) for an order pursuant to CPLR 3124 and 3126 dismissing the plaintiff's complaint for failure to provide any discovery in this matter as directed by the preliminary conference order dated March 12, 2020. New York Funeral Chapels, LLC alternatively moves for an order compelling plaintiff to provide a verified bill of particulars and response to combined demands by a date certain or be precluded from presenting any evidence as to liability or damages at the time of trial of this matter. New York Funeral Chapels, LLC further moves for an order extending the discovery deadline and the note of issue filing date of the plaintiff and the deposition schedule due to the plaintiff's failure to provide any discovery in this matter.

The plaintiff asserts the motion to dismiss and preclude by New York Funeral Chapels, LLC should be denied. The plaintiff maintains fully complying with all New York Funeral Chapels, LLC d/b/a and s/h/a Riverside-Nassau North Chapel's discovery demands.

New York Funeral Chapels, LLC asserts the plaintiff provided a bill of particulars and response to combined demands since the filing of this motion. New York Funeral Chapels, LLC indicates there is still discovery issues which remain, and the plaintiff failed to provide requested items.

Actions should be resolved on the merits wherever possible, and the nature and degree of the penalty to be imposed pursuant to CPLR 3126 is a matter of discretion with the court. In addition, "the drastic remedy of striking an answer is inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith." The moving party must "clearly demonstrate" that the failure to comply was willful and contumacious [citation omitted]

Pascarelli v City of New York, 16 AD3d 472, 472-73 [2d Dept 2005].

"[T]he Supreme Court is vested with broad discretion in supervising disclosure, and its determination that sanctions are not warranted will not be disturbed absent an improvident exercise of that discretion" [citation omitted] (*Bach v City of New York*, 304 AD2d 686, 686 [2d Dept 2003]).

The Court determines New York Funeral Chapels, LLC does not satisfy the burden of clearly demonstrating the plaintiff's alleged failure to comply with the discovery and New York Funeral Chapels, LLC's demands was willful and contumacious or in bad faith. In opposition, the plaintiff proffers proof of substantially complying with outstanding discovery requests while the motion to strike was pending (*see A.F.C. Enterprises, Inc. v New York City School Const. Auth.*, 33 AD3d 737 [2d Dept 2006]). The plaintiff also provides a reasonable explanation for any delay in compliance. The plaintiff's attorney points out the State of New York went into a lockdown to prevent the spread of Covid-19 shortly after the execution of the preliminary conference order. The plaintiff's attorney notes, as a result of the lockdown, New York State courts were shut down, and law firms, like other nonessential businesses, were directed to operate remotely. The plaintiff's attorney asserts New York Funeral Chapels, LLC filed the instant motion to dismiss on May 15, 2020, and the plaintiff served discovery responses on May 20, 2020.

ORDERED that the branch of the motion by the third-party Village of Great Neck Plaza (Sequence No. 1) is GRANTED awarding the Village of Great Neck Plaza judgment dismissing all claims and crossclaims against it, and it is also,

ORDERED that the branch of the motion by the third-party Village of Great Neck Plaza (Sequence No. 1) is GRANTED for a hearing on November 18, 2020, at 10:30 A.M., before the Court to consider and determine whether costs pursuant to CPLR 8303-A should be imposed in favor of the Village of Great Neck Plaza upon the alleged frivolous claims brought by the New York Funeral Chapels, LLC d/b/a and s/h/a Riverside-Nassau North Chapel against the Village of Great Neck Plaza, and it is also,

ORDERED that the branch of the motion (Sequence No. 2) by the New York Funeral Chapels, LLC d/b/a and s/h/a Riverside-Nassau North Chapel is DENIED to dismiss the plaintiff's complaint for failure to provide any discovery in this matter as directed by the preliminary conference order dated March 12, 2020, and it is also,

ORDERED that the branch of the motion (Sequence No. 2) by the New York Funeral Chapels, LLC d/b/a and s/h/a Riverside-Nassau North Chapel is DENIED to alternatively compel the plaintiff to provide a verified bill of particulars and response to combined demands by a date certain or be precluded from presenting any evidence as to liability or damages at the time of trial of this matter, and it is further,

ORDERED that the branch of the motion (Sequence No. 2) by the New York Funeral Chapels, LLC d/b/a and s/h/a Riverside-Nassau North Chapel is GRANTED to extend the discovery deadline and the note of issue filing date of the plaintiff and the deposition schedule,

and the parties are directed to negotiate the extension of the discovery deadline, the note of issue filing date of the plaintiff and the deposition schedule, if negotiations fail the parties are directed to submit proposed orders for such by November 12, 2020 to the Court.

This decision will constitute the order of the Court.

Dated: September 25, 2020

ENTERED

Sep 28 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTERED



ANTONIO I. BRANDVEEN
J. S. C.

NOT FINAL DISPOSITION