Torres v Washington
2020 NY Slip Op 35113(U)
January 28, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 601137/2018
Judge: Martha L. Luft
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.

Short Form Order

Index No. 601137/2018

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

P R E S E N T:
Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER

_____x
JUANA TORRES,

Plaintiff,

-against-

RODNEY WASHINGTON and TOWN OF BABYLON,

Defendants.
_____x
RODNEY WASHINGTON,

Third-Party Plaintiff,

-against-

PARAMOUNT OAKS CORPORATION,

Third-Party Defendant.
_____x

Mot. Seq. No.: 002 - MG
Orig. Return Date: 01/29/2019
Mot. Submit Date: 03/26/2019

Mot. Seq. No.: 003 - Mot.D
Orig. Return Date: 02/26/2019
Mot. Submit Date: 03/26/2019

PLAINTIFF'S ATTORNEY
Cannon & Acosta LLP
Attorneys for Plaintiff Juana Torres
23 New York Avenue
Huntington Station, NY 11746

Devitt Spellman Barret LLP
Attorneys for Plaintiff/Third Party
Defendant Rodney Washington
50 Route 111, Suite 314
Smithtown, NY 11787

DEFENDANTS' ATTORNEYS
Joseph Wilson
Babylon Town Attorney
Babylon Town Attorney's Office
200 East Sunrise Highway
Lindenhurst, NY 11757

Law Office of Mark E. Goidell
Attorneys for Third-Party Defendant
Paramount Oaks Corporation
666 Old Country Road, Suite 700
Garden City, NY 11530

Upon the e-filed documents numbered 34 through 68, it is

ORDERED that the motion by the third-party defendant Paramount Oaks Corporation for, *inter alia*, an order dismissing the third-party complaint, or in the alternative, compelling arbitration of the third-party claim, is granted, the third-party complaint is dismissed, and Rodney Washington and Paramount Oaks Corporation are hereby compelled to arbitrate the claims raised in the third-party complaint; it is further

ORDERED that the cross motion by the plaintiff Juana Torres for, *inter alia*, an order granting summary judgment in her favor on the issue of liability, and severing the third-party action, is granted to the extent described herein, but is otherwise denied; it is further

ORDERED that the portion of the cross motion seeking an order granting partial summary judgment in favor of the plaintiff and against Mr. Washington on the issue of liability is granted; it is further

ORDERED that the portion of the cross motion seeking an order granting partial summary judgment in favor of the plaintiff and against the Town of Babylon on the issue of liability is denied; it is further

ORDERED that, upon a search of the record, pursuant to CPLR 3212 (b), summary judgment is granted to the Town of Babylon, and the complaint and all cross claims as asserted against it are dismissed; and it is further

ORDERED that the portion of the cross motion seeking an order severing the third-party action is denied, as moot.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff Juana Torres as the result of an accident that occurred on July 12, 2017. The accident allegedly happened when the plaintiff tripped and fell on a sidewalk abutting the premises located at 2 Dr. Reed Boulevard, near the intersection with Albany Avenue, in North Amityville, New York. By her verified complaint, the plaintiff alleges, among other things, that this sidewalk was owned and controlled by the defendant Rodney Washington and/or the defendant the Town of Babylon ("the Town"). As a result of the instant action, Mr. Washington served a third-party summons and complaint upon Paramount Oaks Corporation ("Paramount"), alleging, among other things, that it was bound by contract to perform exterior repairs at the subject premises prior to the plaintiff's accident, including on the sidewalk and adjacent area.

Paramount now moves for an order dismissing the third-party action, or in the alternative, compelling arbitration of Mr. Washington's claims set forth therein, arguing, *inter alia*, that the contract of sale for the subject premises expressly provides that Paramount is not liable for consequential, incidental, or special damages arising therefrom, that Mr. Washington waives any

such claims, and that the parties agreed to arbitrate any claims that arise under same. Further, Paramount argues that the subject sidewalk was repaired in November 2017, and that it paid for same in December 2017, about five months after the subject accident. In support, Paramount submits, among other things, a copy of a contract of sale, dated October 20, 2014; a deed conveying the subject premises from Paramount to Mr. Washington, dated December 4, 2014; and an affidavit of Desiree Criscuolo, its president. No papers have been submitted in response to the motion.

The plaintiff cross-moves for an order granting summary judgment in her favor on the issue of liability, arguing that Mr. Washington had actual notice of the dangerous condition on the sidewalk, and that he is liable for her injuries under town and village code provisions. In support, the plaintiff submits, among other things, an affirmation of her attorney, and transcripts of her testimony at a General Municipal Law (GML) § 50-h hearing. The Town opposes the cross motion, arguing, *inter alia*, that same is premature, as only limited discovery has taken place, and that further discovery is necessary to establish the plaintiff's comparative fault, if any, in the happening of the accident. In addition, the Town argues that, as Babylon Town Code § 191-16 (A) imposes tort liability on an abutting landowner to keep sidewalks in a safe condition, further discovery is necessary to ascertain Mr. Washington's acts or omissions as to the maintenance of the sidewalk. In opposition, the Town submits, among other things, an affirmation of its attorney and a certified copy of a portion of the Babylon Town Code.

Where there is no substantial question whether a valid agreement was made or complied with, the court shall direct the parties to arbitrate (*see* CPLR 7503 [a]; ***Degraw Const. Group, Inc. v McGowan Builders, Inc.***, 152 AD3d 567, 569, 58 NYS3d 152 [2d Dept 2017]; ***Sutphin Retail One, LLC v Sutphin Airtrain Realty, LLC***, 143 AD3d 972, 973, 40 NYS3d 457 [2d Dept 2016]). Accordingly, on a motion to compel or stay arbitration, a court must determine, in the first instance, whether the parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement (*see* ***Sisters of St. John the Baptist, Providence Rest Convent v Geraghty Constructor***, 67 NY2d 997, 998, 502 NYS2d 997 [1986]; ***Degraw Const. Group, Inc. v McGowan Builders, Inc.***, *supra*). The agreement to arbitrate must be clear, explicit, and unequivocal, and it must not depend upon implication or subtlety (*see* ***Waldron v Goddess***, 61 NY2d 181, 183-184, 473 NYS2d 136 [1984]; ***God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP***, 6 NY3d 371, 374, 812 NYS2d 435 [2006]).

A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff, and that the defendant's negligence was a proximate cause of the alleged injuries (*see* ***Rodriguez v City of New York***, 31 NY3d 312, 319, 76 NYS3d 898 [2018]; ***Poon v Nisanov***, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]). To be entitled to partial summary judgment, a plaintiff does not bear the burden of establishing the absence of his or her own comparative fault (*see* ***Rodriguez v City of New York***, *supra*, at 324-325; ***Lopez v Dobbins***, 164 AD3d 776, 79 NYS3d 566 [2d Dept

2018]; ***Poon v Nisanov***, *supra*).

Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk is placed on the municipality, and not on an owner of the abutting land (*see* ***Hausser v Giunta***, 88 NY2d 449, 452-453, 646 NYS2d 490, 491-492 [1996]; ***Metzker v City of New York***, 139 AD3d 828, 31 NYS3d 175 [2d Dept 2016]; ***Gyokchyan v City of New York***, 106 AD3d 780, 965 NYS2d 521 [2d Dept 2013]; ***Crawford v City of New York***, 98 AD3d 935, 950 NYS2d 743 [2d Dept 2012]). However, if a town has enacted a statute or ordinance imposing a duty upon on an abutting landowner to repair and maintain the sidewalk, such a landowner who violates the statute may be held liable for injuries caused by a dangerous or defective condition thereon (*see* ***Metzker v City of New York***, *supra*; ***Gyokchyan v City of New York***, *supra*; ***Crawford v City of New York***, *supra*). To impose tort liability on an abutting landowner, the language of such a statute or ordinance must not only charge the landowner with a duty, it must also specifically state that if the landowner breaches that duty, he or she will be liable to those who are injured (*see* ***Kilfoyle v Town of N. Hempstead***, 138 AD3d 1069, 30 NYS3d 292 [2d Dept 2016]; ***Bachvarov v Lawrence Union Free Sch. Dist.***, 131 AD3d 1182, 17 NYS3d 168 [2d Dept 2015]; ***Morelli v Starbucks Corp.***, 107 AD3d 963, 968 NYS2d 542 [2d Dept 2013]).

At the outset, Paramount's submissions, namely the October 2014 contract of sale and Ms. Criscuolo's affidavit, establish that Paramount and Mr. Washington's agreement to arbitrate is clear, explicit, and unequivocal (*see* ***Waldron v Goddess***, *supra*; ***God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP***, *supra*). In relevant part, paragraph 17 of this contract of sale states, "The parties hereby agree that any litigation arising of, from or in any way relating to this contract, its underlying property and/or the Babylon subdivision, shall be resolved by binding arbitration, and that trial by judge or jury is hereby expressly waived." Further, these submissions demonstrate that Mr. Washington's claims as set forth in the third-party complaint are within the scope of the binding arbitration clause, precluding him from seeking relief from the Court (*see* ***Sisters of St. John the Baptist, Providence Rest Convent v Geraghty Constructor***, *supra*; ***Degraw Const. Group, Inc. v McGowan Builders, Inc.***, *supra*). Paragraph 27 of the contract states, "Purchasers shall, at or prior to the closing, provide the Seller with a list of items which need to be corrected or finished. Seller shall provide Purchaser with a signed statement at closing indicating that the items to be corrected or finished will be done within sixty days after closing, unless a longer period is required." By her affidavit, Ms. Criscuolo avers that Mr. Washington provided a signed statement at closing indicating the items to be corrected or finished, including repairs to the sidewalk. As there is no substantial question as to whether this binding arbitration clause is a valid agreement, the Court must direct the parties to arbitrate, and the third-party complaint must be dismissed (*see* CPLR 7503 [a]; ***Degraw Const. Group, Inc. v McGowan Builders, Inc.***, *supra*; ***Sutphin Retail One, LLC v Sutphin Airtrain Realty, LLC***, *supra*).

As to the plaintiff's cross motion, the parties' submissions, namely the December 2014 deed, the plaintiff's § 50-h hearing testimony, and a certified copy of the Babylon Town Code

establish, prima facie, that Mr. Washington breached a duty owed to her, and that this breach was a proximate cause of her alleged injuries (*see* ***Rodriguez v City of New York***, *supra*; ***Lopez v Dobbins***, *supra*; ***Poon v Nisanov***, *supra*). The plaintiff's § 50-h hearing testimony establishes that, as she was walking on a sidewalk on Albany Avenue, near the intersection with Dr. Reed Boulevard, she was caused to fall to the ground by a piece of broken concrete, sustaining injuries. In addition, Babylon Town Code § 191-16 (A) states, "Each owner, lessor, lessee, tenant, occupant or other person in charge of any property within the Town shall keep the sidewalk in front of or abutting the lot, house, or building in good and safe repair and shall maintain and repair the sidewalk adjoining his property. Such owner, lessor, lessee, tenant or occupant, and each of them, shall be liable for any injury or damage to person or property by reason of the omission, failure or neglect to repair or maintain such sidewalk in a safe condition." As the December 2014 deed establishes that Mr. Washington owned the property abutting the sidewalk where the plaintiff's accident occurred, and the language of the Town's statute specifically states that tort liability will be imposed for breaching the duty to maintain the sidewalk (*see* ***Kilfoyle v Town of N. Hempstead***, *supra*; ***Bachvarov v Lawrence Union Free Sch. Dist.***, *supra*; ***Morelli v Starbucks Corp.***, *supra*), the record before the Court establishes that the plaintiff is entitled to summary judgment as to Mr. Washington's liability, and the plaintiff was not required to establish her freedom from comparative fault (*see* ***Rodriguez v City of New York***, *supra*, at 324-325; ***Lopez v Dobbins***, *supra*; ***Poon v Nisanov***, *supra*).

However, as to the portion of the plaintiff's motion seeking partial summary judgment against the Town, the record before the Court demonstrates that the Town cannot, as a matter of law, be held liable to the plaintiff for her injuries (*see* Babylon Town Code § 191-16 [A]; ***Kilfoyle v Town of N. Hempstead***, *supra*; ***Metzker v City of New York***, *supra*). As a court may search the record and award summary judgment to a nonmoving party with respect to an issue that was the subject of the motion (*see* CPLR 3212 [b]; ***Dunham v Hilco Const. Co., Inc.***, 89 NY2d 425, 430, 654 NYS2d 335 [1996]; ***Fair Chase Holdings II, LLC v County of Dutchess***, 165 AD3d 1237, 87 NYS3d 602 [2d Dept 2018]), this portion of the plaintiff's cross motion is denied, the Court awards summary judgment in favor of the Town, and the complaint and all cross claims asserted against it are dismissed.

Accordingly, Paramount's motion is granted, and the plaintiff's cross motion is granted in part, and denied in part.

ENTER

Date: January 28 2020
Riverhead, New York

Martha L. Luft
HON. MARTHA L. LUFT, A.J.S.C.

___ FINAL DISPOSITION

✓ NON-FINAL DISPOSITION