Rodriguez v Maya Café & Cantina, Inc.
2021 NY Slip Op 33502(U)
June 1, 2021
Supreme Court, Dutchess County
Docket Number: Index No. 51305/19
Judge: Maria G. Rosa
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

STACY L. RODRIGUEZ,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 51305/19

MAYA CAFÉ & CANTINA, INC. and
CAFÉ MAYA EXPRESS, INC.,

Defendants.

The following papers were read on Defendant's motion for summary judgment.

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - K

AFFIRMATION IN OPPOSITION
AFFIDAVIT IN OPPOSITION
EXHIBITS A - C

REPLY AFFIRMATION

This is a negligence action in which Plaintiff seeks damages for injuries sustained when she was hit by a car while crossing Route 9 in Fishkill, New York. The incident occurred on May 5, 2016 at approximately 10:00 p.m. after Plaintiff left a Cinco De Mayo celebration being held at the Maya Café & Cantina restaurant. Defendant Maya Café & Cantina, Inc. ("Defendant") moves for summary judgment.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). If a movant has met this threshold burden, to defeat the motion the opposing party must present the existence of a triable issue of fact. See Zuckerman v. New York, 49 NY2d 557, 562 (1980). In deciding a motion for summary judgment, "the trial court must afford the party opposing the motion every inference which may be properly drawn from the facts presented, and the facts must be considered favorable to the nonmovant." Szczerbiak v. Pilat, 90 NY2d 553 (1997).

In support of the motion Defendant has submitted copies of the pleadings, deposition transcripts, photographs and a police accident report. Plaintiff testified at her deposition that she arrived at the restaurant with a friend at approximately 6:00 p.m. There was a Cinco De Mayo celebration happening both inside and outside of the restaurant. In the parking lot there was music and there were tents with venders selling food and alcohol. Plaintiff asserts that she drank two sangrias while waiting for a table between 6:00 p.m. and 7:00 p.m. She drank one more sangria while eating dinner with her friend between 7:00 p.m. and 9:00 p.m. Plaintiff states that her friend left at approximately 9:00 p.m. but planned to pick her up later that evening. Plaintiff then spent an hour outside dancing and socializing. At approximately 10:00 p.m. she called her friend to pick her up. Her friend then called back and said that the police outside the restaurant told her that she was not allowed to pick Plaintiff up in the restaurant parking lot. They informed her that she had to pick her up in a parking lot adjacent to the Home Depot across Route 9. Plaintiff contends that she then walked to the corner where there was a traffic light and that she had the intention of crossing Route 9. She states that she observed numerous people crossing Route 9 at that time in different locations, but that she was alone when she proceeded to cross at the traffic light. Plaintiff claims she waited for the light to turn red and then crossed the three northbound lanes of traffic to the median in the center of Route 9. She remembers stepping off the median into the southbound lane and then waking up in the middle of Route 9. Matthew McNamara testified at his deposition that he was driving southbound on Route 9 and slowed in the vicinity of the Maya Café because numerous people were outside and crossing Route 9. He asserted that as he continued driving his vehicle struck Plaintiff as she was crossing Route 9. Plaintiff asserts that prior to crossing Route 9 she did not speak with police officers who were standing on the periphery of the Cinco De Mayo celebration. She claims that she was not intoxicated and felt "perfectly fine" when she decided to cross Route 9.

The foregoing is sufficient to demonstrate Defendant's *prima facie* entitlement to summary judgment as a matter of law. Plaintiff asserts Defendant was negligent in failing to provide Plaintiff with safe access to the parking lot across the street from its restaurant. She asserts that because Defendant closed its parking lot to motor vehicles and used it to serve food and alcoholic beverages, this created a dangerous situation in which patrons had to cross Route 9 at night. She maintains that Defendant was negligent because it did not provide warning signs, crossing guards, adequate lighting or a shuttle service to ensure that patrons could safely cross Route 9.

To establish negligence, a plaintiff must demonstrate the existence of a duty the defendant owed the plaintiff, a breach of that duty and that the breach was a proximate cause of injury. Kievman v. Philip, 84 AD3d 1031 (2nd Dept 2011). Liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property. Giglio v. Saratoga Care, Inc., 117 AD3d 1143 (3rd Dept 2014). A abutting owner will be liable to a pedestrian injured by a dangerous condition on public property only when the owner created the condition or caused the condition to occur because of a special use. See Morelli v. Starbucks Corp., 107 Ad3d 963 (2nd Dept 2013). The principal of special use imposes an obligation on the abutting landowner only where he puts part of a public way to a special use for his own benefit and the part used is subject to his control. Ruffino v. NYC Transit Auth., 55 AD3d 819 (2nd

Dept 2008).

Defendant has established that it owed no duty to Plaintiff to ensure her safe passage across Route 9, a public road. Defendant's evidence establishes that it had no ability to control the conditions on Route 9. Under such circumstances, Defendant owed no duty to Plaintiff for the alleged dangerous condition posed to pedestrians attempting to cross Route 9 at night. The mere fact that Defendant closed its parking lot to motor vehicles did not create such a duty. Plaintiff's allegation that Defendant's knowledge that patrons would cross the street created a duty to provide safe passage across public roads presumes that: (1) Defendant had the obligation to provide patrons with safe access to and from its property beyond the borders of that property; and (2) that Defendant had the authority to control pedestrian crossing conditions on Route 9. This court is unaware of any law or precedent that creates a duty of a commercial establishment to ensure that patrons have safe access to the property boundaries of that establishment.

Defendant has also established that it did not assume a duty of reasonable care by placing Plaintiff in a more vulnerable position than Plaintiff would have been in had Defendant done nothing. See generally Giglio v. Saratoga Care, Inc., 117 AD3d at 1144-45. Plaintiff unequivocally testified that she was not intoxicated when she decided to cross Route 9 and did not rely on Defendant in any capacity to ensure her safe passage across Route 9. Plaintiff stated that she did not see any escorts or signs pertaining to crossing Route 9 and that she unilaterally made the decision where to cross. In sum, the unfortunate fact that Plaintiff was struck by a motor vehicle while crossing Route 9 does not demonstrate that Defendant owed her a duty to ensure safe passage. Plaintiff does not allege that she was crossing Route 9 in a manner different than that of the general public. The mere fact that Defendant had a Cinco De Mayo celebration occurring on its premises in the vicinity of the motor vehicle accident does not alter this result.

In opposition, Plaintiff fails to raise a material issue of fact. The conflicting deposition testimony about whether Defendant employed a crossing guard or had signs warning of the dangers of crossing Route 9 do not create an issue of fact. Plaintiff testified that she did not rely on anyone or any actions of the defendant to help her cross the street. As Defendant had no duty to Plaintiff with respect to the conditions attendant to crossing Route 9, it does not matter whether Defendant had a crossing guard or signs present. As noted above, Defendant did not create a dangerous condition. While crossing six lanes of travel on Route 9 in a location that is not well lit and does not have a crosswalk could constitute a dangerous condition, Defendant was not responsible for the maintenance or safety of pedestrians crossing Route 9 as the roadway was beyond the bounds of its property. The mere fact that it had an event in proximity to Route 9 did not create such a duty. Notably, Plaintiff testified that a police officer and not Defendant advised her friend that she was required to park across the street to pick up Plaintiff. There is no evidence in the record that the conditions surrounding the crossing of Route 9 were under Defendant's control.

Nor does the expert opinion of Plaintiff's traffic engineer provide grounds to avoid summary judgment. Plaintiff's expert asserts that Defendant created a dangerous condition for pedestrians crossing Route 9. The engineer, however, is not qualified to offer a legal opinion as to whether

Defendant owed a duty to pedestrians outside the boundaries of its property. As a matter of law, on the facts of this case the court finds that Defendant did not have such a duty. There is no evidence that Defendant benefitted from Route 9 in a manner different from that of the general public. To construe the benefit Defendant received from the use of a parking lot across Route 9 as a "special benefit" would effectively allow the special use exemption to eviscerate the rule exempting abutting landowners from liability for injury on public ways. See Balsam v. Delma Eng'g Corp., 139 AD2d 292 (1st Dept 1988). Moreover, Plaintiff's deposition testimony demonstrates that she did not rely on any actions of Defendant to ensure safe passage across Route 9.

Plaintiff's claims that Defendant's violation of the New York State Alcohol Beverage Control Law and Fishkill Town Code improperly assert new theories of liability for the first time in opposition to Defendant's motion. See Marti v. Rana, 173 AD3d 576 (1st Dept 2019). Therefore, these theories may not be used to defeat Defendant's motion. Id. While Plaintiff raised these claims in a supplemental bill of particulars served on March 10, 2021, that document was filed after Defendant filed its motion for summary judgment. Based on the foregoing, it is

ORDERED that the motion of Defendant Maya Café & Cantina, Inc. for summary judgment dismissing Plaintiff's claims is granted. The jury selection scheduled for September 27, 2021 is hereby canceled. The court file does not reflect that Defendant Café Maya Express, Inc. has appeared in this action. Plaintiff shall notify this court in writing on or before June 25, 2021 as to how it intends to proceed against that Defendant.

The foregoing constitutes the decision and order of the Court.

Dated: June 1, 2021
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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