

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

Kearns v. Cedar Cove Dev. Corp.

2022 NY Slip Op 04795 (App. Div. 2022) · No. 2020-03703 · Decided August 3, 2022

SUMMARY

The New York Appellate Division, Second Department, reversed an order granting summary judgment to an abutting property owner in a sidewalk-injury action. The court held that the defendant failed to establish entitlement to judgment as a matter of law because the applicable town code did not expressly impose tort liability and triable issues remained as to whether the defendant created the alleged sidewalk defect.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Hector D. LaSalle, P.J.; Francesca E. Connolly, J.; Lara J. Genovesi, J.; William G. Ford, J.
JURISDICTION	New York
DECIDED	August 3, 2022
DOCKET	2020-03703
DISPOSITION	reversed
PROCEDURAL POSTURE	Appeal from an order granting a defendant's motion for summary judgment dismissing a personal-injury complaint against it.
STANDARD OF REVIEW	Summary judgment is appropriate only when the movant establishes prima facie entitlement to judgment as a matter of law; if the movant fails to meet that burden, the motion must be denied regardless of the sufficiency of the opposing papers.
PRECEDENTIAL VALUE	published appellate decision
PARTIES	Sherman Kearns, Sherman Kearns's wife v. Cedar Cove Redevelopment Company Owners Corp.

TOPICS

- premises liability
- negligence
- municipal law
- ordinances
- appellate procedure

PRACTICE AREAS

premises liability

personal injury

negligence

municipal law

appellate procedure

QUESTIONS PRESENTED

1. Whether the abutting landowner was entitled to summary judgment on the plaintiffs' sidewalk-injury claims because it did not own the public sidewalk.
2. Whether the Town of Hempstead ordinance imposed tort liability on the abutting landowner for failure to maintain the sidewalk.
3. Whether the defendant established prima facie entitlement to summary judgment by eliminating all triable issues of fact as to whether it created the dangerous sidewalk condition.

HOLDINGS

1. An abutting landowner is liable for a pedestrian's injury from a public-sidewalk defect only if the owner created the condition, caused the defect through a special use, or is subject to a statute or ordinance that both imposes a maintenance obligation and expressly makes the owner liable in tort for breach of that obligation.
2. Section 181-11, which requires an abutting landowner to keep a sidewalk in good and safe repair, does not expressly impose tort liability for breach of that maintenance duty.
3. The defendant was not entitled to summary judgment because, although it showed that it did not own the sidewalk, it failed to eliminate all triable issues of fact as to whether it created the alleged dangerous condition.

KEY QUOTATIONS

“An abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty” (at 1)

“Since the defendant failed to meet its prima facie burden as the movant, the Supreme Court should have denied the motion without regard to the sufficiency of the plaintiffs' opposition papers” (at 2)

FACTUAL BACKGROUND

In November 2012, Sherman Kearns allegedly tripped and fell over a raised sidewalk flag on a public sidewalk abutting property in Seaford. The plaintiffs alleged that the defendant negligently maintained the sidewalk and created the dangerous condition. Although the defendant's evidence established that it did not own the sidewalk, it did not eliminate triable issues concerning whether it created the alleged defect.

PROCEDURAL HISTORY

The plaintiffs commenced an action alleging that Sherman Kearns was injured after tripping over a raised sidewalk flag adjacent to property owned by Cedar Cove Development Corp. and that the defendant negligently

maintained the sidewalk. After issue was joined, Cedar Cove Redevelopment Company Owners Corp. moved for summary judgment. The Supreme Court, Suffolk County, granted the motion, and the plaintiffs appealed.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The order granting summary judgment is reversed, and the motion of Cedar Cove Redevelopment Company Owners Corp. for summary judgment dismissing the complaint insofar as asserted against it is denied.

CASES CITED

- Hausser v Giunta, 88 NY2d 449, 452-453
- Daniel v Khadu, 190 AD3d 817, 818
- Petrillo v Town of Hempstead, 85 AD3d 996, 997
- Lahens v Town of Hempstead, 132 AD3d 954, 956
- Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853

OPINION

PER CURIAM.

Kearns v Cedar Cove Dev. Corp. (2022 NY Slip Op 04795) Kearns v Cedar Cove Dev. Corp. 2022 NY Slip Op 04795 Decided on August 3, 2022 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on August 3, 2022 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department HECTOR D. LASALLE, P.J. FRANCESCA E. CONNOLLY LARA J. GENOVESI WILLIAM G. FORD, JJ. 2020-03703 (Index No. 607625/15) [*1]Sherman Kearns, et al., appellants, vCedar Cove Development Corp., defendant, Cedar Cove Redevelopment Company Owners Corp., respondent.

Dell & Dean, PLLC (Joseph G. Dell and Mischel & Horn, P.C., New York, NY [Scott T. Horn, Liss M. Mendez, and Andrew J. Fisher], of counsel), for appellants. Law Offices of Buratti, Rothenberg & Burns, East Meadow, NY (Alan M. Shushan and Veronica A. Roza of counsel), for respondent. DECISION & ORDER In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Suffolk County (George Nolan, J.), dated May 8, 2020.

The order granted the motion of the defendant Cedar Cove Redevelopment Company Owners Corp. for summary judgment dismissing the complaint insofar as asserted against it. ORDERED

that the order is reversed, on the law, with costs, and the motion of the defendant Cedar Cove Redevelopment Company Owners Corp. for summary judgment dismissing the complaint insofar as asserted against it is denied.

In November 2012, the plaintiff Sherman Kearns (hereinafter the injured plaintiff) allegedly was injured when he tripped and fell over a raised sidewalk flag on a sidewalk abutting property owned by the defendant Cedar Cove Redevelopment Company Corp. (hereinafter the defendant) in Seaford.

The injured plaintiff, and his wife suing derivatively, commenced this action to recover damages for personal injuries, alleging, inter alia, that the defendant negligently maintained the sidewalk at issue, creating the alleged dangerous condition.

After issue was joined, the defendant moved for summary judgment dismissing the complaint insofar as asserted against it. The Supreme Court granted the motion, and the plaintiffs appeal. "Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous [or] defective conditions to public sidewalks is placed on the municipality and not the abutting landowner" (*Hausser v Giunta*, 88 NY2d 449, 452-453; see *Daniel v Khadu*, 190 AD3d 817, 818).

"An abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty" (*Petrillo v Town of Hempstead*, 85 AD3d 996, 997; see *Daniel v Khadu*, 190 AD3d at 818).

Here, the defendant failed to demonstrate its prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it. Although section 181-11 of [*2]the Code of the Town of Hempstead requires an abutting landowner to keep a sidewalk in good and safe repair, it does not specifically impose tort liability for a breach of that duty (see Code of the Town of Hempstead § 181-11; *Lahens v Town of Hempstead*, 132 AD3d 954, 956; see also Code of the Town of Hempstead § 184-6[a]).

While the evidence submitted by the defendant established that it did not own the sidewalk at issue, it failed to eliminate all triable issues of fact as to whether it created the alleged dangerous condition. Since the defendant failed to meet its prima facie burden as the movant, the Supreme Court should have denied the motion without regard to the sufficiency of the plaintiffs' opposition papers (see *Winegrad v New York Univ.*

Med. Ctr., 64 NY2d 851, 853). LASALLE, P.J., CONNOLLY, GENOVESI and FORD, JJ., concur. ENTER: Maria T. Fasulo Clerk of the Court

