FBT-CV22-6112489-S

CHERYL ANDERSON

VS.

CITY OF BRIDGEPORT

CONNECTICUT SUPERIOR COURT

JUDICIAL DISTRICT OF BRIDGEPORT

AT BRIDGEPORT

June 3, 2024

MEMORANDUM OF DECISION re: MOTION FOR SUMMARY JUDGMENT (#119.00)

Background

According to her complaint, on February 22, 2021, at approximately 7:15 AM, the plaintiff was walking her dog in Nob Hill Dog Park, located at 115 Virginia Avenue in the city of Bridgeport. She further claims that as she was walking on the sidewalk in the dog park, she was caused to slip and fall due to an accumulation of ice on the sidewalk, resulting in the injuries and losses for which she is seeking compensation.

Her claim is based on the claimed breach of the City's duty to maintain its roads (and associated sidewalks) in a reasonably safe condition. Although subparagraphs (a) through (h) of ¶ 8 readily could be read as asserting aspects of common law negligence, the introductory portion of that paragraph makes it clear that this cause of action is asserting a breach of statutory duty:

> "Said occurrence was due to the breach or violation by the defendant CITY OF BRIDGEPORT of its statutory duty to use reasonable care to keep its highway, or streets reasonably safe for public use and travel in one or more of the following ways:"

Adding a layer of uncertainty if not confusion, the notice given to the defendant, as attached to the complaint, cites General Statutes § 7-101a and General Statutes § 7-465a (the latter presumably a typographical error, intended as a reference to § 7-465(a)). Each statute relates to a municipality's potential liability to protect an employee and/or pay for any liability of a municipal employee to which the statute

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applies and with respect to claims of liability of the employee for matters covered by the respective statute. Recognizing that statutory titles are not conclusive but are useful guides, the title for § 7-101a is "Sec. 7-101a. Protection of municipal officers and municipal employees from damage suits. Reimbursement of defense expenses. Liability insurance. Time limit for filing notice and commencement of action," and the title for § 7-465 is "Sec. 7-465. Assumption of liability for damage caused by employee of municipality or member of local emergency planning district. Joint liability of municipalities in district department of health or regional council of governments." While the statutes may authorize a direct action against a municipality, the necessary predicate is a claim of liability directed to an employee or other municipal official. There is no claim of individual negligence that might support either form of statutory claim. Therefore, these statutory references must be disregarded.

Notwithstanding the preceding paragraph, the parties are in agreement that the plaintiff's claim is intended to be based on General Statutes § 13a-149, the so-called municipal highway defect statute. That "notwithstanding" statement, itself, is subject to qualification. By way of amended answer (#118.00), the defendant added a special defense, asserting immunity under General Statutes § 52-557g, based on the factual claim that this incident occurred in a public park for which that statutory immunity for recreational property can apply.

The defendant has moved for summary judgment, primarily asserting that a highway defect claim does not apply to a sidewalk running through a park; that such a sidewalk is not within the scope of § 13a-149. As an alternative, the defendant relies on the statutory immunity conferred by § 52-557g to recreational land, which subject to certain conditions applies to municipal parks.

The plaintiff has opposed the motion; in both aspects, she has argued that there is a material issue of fact.

In support of the motion, the defendant has submitted the transcript of the plaintiff's deposition; an affidavit of Mr. Burgos, identified as "Manager of the Parks & Roadway Divisions of the Department of Public Facilities of the City of Bridgeport" with attached photographs and other images (including a Google Maps aerial view of the park, with markings placed on it during the deposition of the plaintiff); and a video walk-through of the park taken by a friend of the plaintiff shortly after the incident giving rise to this litigation. The plaintiff has submitted no materials in support of her objection. The court heard argument on March 4, 2024.

Discussion

As noted above, the plaintiff's position is that there are material issues of fact that need to be resolved, precluding summary judgment, and that she has submitted nothing of an evidentiary nature in opposition.

It is well established that the non-moving party has no burden of production in connection with opposition to a motion for summary judgment, at least in an ab initio sense. However, once the moving party has established the absence of any material issue of fact at least in a prima facie sense, there is a burden on the non-moving party to establish the existence of a material issue of fact sufficient to preclude summary judgment.

> "When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue.... Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue.... It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact ... are

insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]...." (citations and internal quotation marks, omitted) *Ferri v. Powell-Ferri*, 317 Conn. 223, 228 (2015).

The plaintiff cites a number of authorities for boilerplate summary judgment motions, but at least some of them clearly are inapplicable. In particular, the oft-cited proposition that summary judgment is ill-suited to negligence claims is inapposite on a number of levels. In a technical (hyper-technical) sense, this is not a claim based on negligence; it is a claim asserting a breach of statutory duty. More practically, the "breach of statutory duty" aspect points to the more substantial distinction. The observation that negligence actions are ill-suited for summary judgment is generally premised on the need for a determination of whether an actor was, in fact, negligent, whether the defendant breached an applicable duty of reasonable care. In this case, however, the issue is more accurately characterized as to whether there was a statutory duty owed to the plaintiff, the breach of which might be actionable (or more narrowly, if the statute creating a cause of action for breach of a duty is applicable). The existence of a duty, or the related issue of availability of a statutory remedy, generally is a matter of law, and routinely is addressed by way of motion – and often by way of motion to strike where it is solely based on the pleadings. See, e.g., *Durham v. Southern New England Telecommunications Corp.,* CV 970258671S, 1997 Conn. Super. LEXIS 3243, 1997 WL 771577 (Super. Dec. 3, 1997), where the court concluded that the issue could not be resolved via motion to strike, needing presentation of evidence to determine whether § 13a-149 applied.; cf. *Landerman v. Town of Simsbury*, No. CV 990593934, 2000 WL 234317, 2000 Conn. Super. LEXIS 411 (Conn. Super. Ct. Feb. 16, 2000), citing *Durham* but granting motion to strike. (Both cases address applicability of § 13a-149 to specific circumstances.)

More generally, duty-related issues and whether a complaint alleges sufficient facts to support a cause of action, or whether the known facts could support such a claim. are far from rare. In *Marsala v. Yale-New Haven Hospital, Inc.*, 166 Conn. App. 432, 142 A.3d 316 (2016), the court affirmed summary judgment where the plaintiffs had failed to allege and submit sufficient proof to satisfy a cause of action sounding in bystander emotional distress. In *Di Teresi v. Stamford Health System*, 142 Conn. App. 72, 63 A.3d 1011 (2013), the court affirmed summary judgment on both negligent and intentional infliction of emotional distress claims, finding neither to have been satisfied by the allegations asserted and facts submitted by the plaintiff. Particularly with respect to claims of intentional infliction of emotional distress, trial courts routinely perform a gatekeeping function as to sufficiency of the allegations and/or facts. *Cassotto v. Aeschliman*, 130 Conn. App. 230, 235, 22 A.3d 697 (2011).

Here, the question is one-step-removed from determining whether there was a breach of a statutory duty (or whether the burden of proof can be met as to the merits of a statutory cause of action) – the issue is whether the facts submitted and alleged are sufficient to invoke application of the identified statute authorizing a claim for statutory relief.

The plaintiff correctly observes that in some situations, a sidewalk independent of an abutting street has been characterized as coming within the scope of the term "highway" to the extent that the term "highway" encompasses sidewalks – generally abutting a road but for purposes of the cases allowing a sidewalk to be governed by the statute, the sidewalk essentially always has been deemed a means of access to a public facility, essentially a public accessway to a public structure. (A number of the cases involve access to a school.)

Here, however, there is no claimed or apparent or inferable "accessway" quality to the sidewalk on which the plaintiff was walking. The plaintiff's complaint describes the incident as having occurred in a park, owned by the defendant. Her complaint further describes her conduct as "walking her dog" in the park, and in her deposition (page 23), she estimated that she might have been walking 10-15 minutes in the park prior to the incident described whereby she was injured. On Exhibit 24, an aerial view of the park, she drew a dashed line approximating her path, with an "o" showing the approximate location of her fall. (There is an "x" at the entrance she used, showing the starting point for the dashed line.)

A number of relevant issues were addressed in *Pramuka v. Town of Cromwell*, 160 Conn. App. 863, 127 A.3d 320 (2015), reversing a trial court decision which had held that a sidewalk leading from a parking lot was not a road or highway within the scope of § 13a-149. The decision, however, repeatedly referred to status as a traveler, and the ultimate issue was whether the sidewalk leading from a parking lot to a public building (a school) came within the scope of the statute. Aside from location in proximity to identified streets and driveways accessing those streets, the plaintiff had asserted that she had been directed to park in the parking lot in order to then escort her grandchildren to the school.

Pramuka and the cases cited therein (including *Cuozzo v. Town of Orange*, 315 Conn. 606, 109 A.3d 903 (2015)) all relate to an area used as an accessway to a destination. (In *Cuozzo*, the defendant had claimed that the accessway was public in nature, such that § 13a-149 was the exclusive remedy available to the plaintiff.) The situation at hand does not colorably encompass a traveler; there is no destination identified other than the park. The park was not a means of access but the destination itself.

There is no material issue of fact as to the absence of some "destination" other than the park itself. She was not traveling anywhere; she was walking within the confines of her destination.

Implicit in the plaintiff's argument is that any trail or path in a park is potentially subject to the highway defect statute – the only distinction being that this path was paved and many paths and almost by definition all trails are not paved. Paved status would seem to have no direct bearing on whether an area dedicated to (intended for) walking is within the scope of the statute. At the time the predecessor to what is now § 13a-149 was initially enacted (over two centuries ago – see, *Goshen & Sharon Turnpike Co. v. Sears*, 7 Conn. 86 (1828)), paved status could hardly have been determinative. (*Ferreira v. Pringle*, 255 Conn. 330, 766 A.2d 400 (2001), discussed below, involved a grassy area as coming within the scope of the statute.)

The court will now shift its focus to the recreational land immunity claimed by the defendant based on General Statutes § 52-557g. The court, during argument, tentatively explained its concerns about applicability of that immunity to the facts of this case. Especially of concern is that there is an implicit exception for matters where there is potential liability under General Statutes § 13a-149, precisely because the definitions in § 52-557f exclude from the definition of "land" in subsection (b) (for scope of coverage of the immunity) property described as a "road" when dealing with municipalities.

In an indirect sense, the recreational immunity statutes appear to be in the nature of a confirmation that General Statutes § 13a-149 is inapplicable here. Implicit in the definition of "land" as excluding (for municipalities) certain roads, where the otherwise applicability of immunity to roads in connection with recreational use of land, for municipalities, "does not include a paved public through road that is open to the public for the operation of four-wheeled private passenger motor vehicles,"

implicitly if not necessarily means that liability for such "roads" is governed by General Statutes § 13a-149. (General Statutes § 52-557n(a)(1)(C) generally makes § 13a-149 the exclusive remedy "for damages resulting from injury to any person or property by means of a defective road or bridge."

It makes no sense for the recreational immunity statutes to be interpreted so as to defer to potential liability under § 13a-149 for purposes of a road "that is open to the public for the operation of four-wheeled private passenger motor vehicles," but by its silence, also (if silently) defer to § 13a-149 for purposes of liability of a "road" that is not "open to the public for the operation of four-wheeled private passenger motor vehicles," which essentially necessarily means roads that either are not large enough for four-wheeled private passenger motor vehicles, or while perhaps large enough are not actually open for such use.

To put it differently: harmonizing the two statutory schemes, and especially in the context of the current version of General Statutes § 52-557f having been enacted just over a decade ago (as opposed to the centuries-old history of § 13a-149), a highway defect claim in the context of recreational use of land can only be asserted in connection with "a paved public through road that is open to the public for the operation of four-wheeled private passenger motor vehicles."

If there were any theoretical question as to whether the park was "open to the public for the operation of four-wheeled private passenger motor vehicles," the pictures of blue signs submitted with the affidavit of Mr. Burgos, each reflecting a ban on all motor vehicles (other than authorized trucks), has not been questioned by the plaintiff. There is no identified aspect of this park constituting a road that is not subject to immunity, and therefore there is no identified road that might be the basis of a highway defect claim.

The court is satisfied that the defendant has satisfied its burden of establishing, on a prima facie basis, that the sidewalk in question is not and cannot be a road or highway within the intended scope of General Statutes § 13a-149 – both because it is not a means of travel but is rather part of a destination, compounded by the statutory immunity if it is not a road available for use by motor vehicles. Absent such coverage, there can be no actionable cause of action predicated on that statute, as the failure to maintain a road or highway, within the contemplation of the statute, is an essential predicate (condition) for possible liability.

Conclusion

As reflected by cases in which a municipality (or other defendant) has tried to establish that a claim is or is not, as a matter of law, governed by § 13a-149, defendants are prone to assert whichever contention is more beneficial, in cases anywhere near the boundaries of applicability. In this case, the plaintiff effectively is arguing the diametrically-opposite position as compared to *Ferreira v. Pringle*, 255 Conn. 330, 766 A.2d 400 (2001). In *Ferreira*, the plaintiff sought to avoid characterization of an injury as caused by a defect in a roadway; the court determined that the undisputed (indisputable) reality was that the injury had been caused by a condition in a public roadway such that the plaintiff could only recover under the unasserted highway defect statute. As noted earlier, the claims included reference to the fact that the area of the fall was an unpaved (no sidewalk") grassy area, and there were arguments that the court could not consider the sufficiency of the action as a statutory highway defect because there had been no claim under the statute. The court considered the actual conditions present, unswayed by what specifically had or had not been alleged in an attempt to avoid application of the statute.

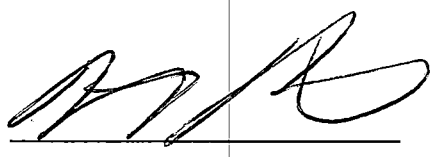
Here, almost everything is the reverse. There is an explicit claim that this is a claim arising under § 13a-149. In *Ferreira*, there was a claim that the injured party was not a traveler; here, there is an implicit claim that the plaintiff was a traveler. Despite the failure of the plaintiff in *Ferreira* to invoke § 13a-149 explicitly in the pleadings, the court concluded that the circumstances necessarily implicated the statute:

> "It is clear to this court, therefore, both from the express words employed by the plaintiff and from the unchallenged affidavits of the defendants, that the dangerous condition complained of constitutes a highway defect and that the defendants were responsible for keeping the area of the alleged injury in repair. Therefore, § 13a-149 necessarily is invoked." Id. at 354.

Here, the reverse is true; "both from the express words employed by the plaintiff and from the unchallenged [affidavit] of the [defendant]," the condition complained of was not a highway defect and, if anything, governed by the recreational land use immunity statutes invoked by the defendant.

"It is an abiding principle of jurisprudence that common sense does not take flight when one enters a courtroom." *American National Fire Insurance Co. v Schuss*, 221 Conn. 768, 778 (1992). The plaintiff was injured as a result of an incident that occurred on a sidewalk integral to the park in which she was walking her dog, with no relationship to being a traveler. She was not en route to some other location; she was walking within the confines of her destination. That she indisputably/admittedly was in a public park, that she was engaged in a recreational activity, that the park was her intended destination, that the park banned all vehicular traffic (including motorcycles, not just cars and larger vehicles), all point to the sidewalk in question not being a road or similar thoroughfare for the purpose of allowing invocation of General Statutes § 13a-149 (and especially in the context of General Statutes § 52-557f et seq.).

For all of these reasons, the motion for summary judgment is granted.



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