Mattikow v. W. Lyon Farm Condo. Ass'n

Superior Court of Connecticut, Judicial District of Stamford-Norwalk At Stamford

August 20, 2019, Decided; August 20, 2019, Filed

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Reporter
2019 Conn. Super. LEXIS 2296 *; 2019 WL 4344368

Alfred Mattikow v. West Lyon Farm Cond. Asoc., Inc.

Judges: **[*1]** Kenneth B. Povodator, Judge Trial Referee.

Opinion by: Kenneth B. Povodator

Opinion

MEMORANDUM OF DECISION re MOTION FOR SUMMARY JUDGMENT (#110.00)

This is a lawsuit arising from a fall on a deck attached to the condominium unit rented by the plaintiff and his wife. The claimed cause of the fall, for which the plaintiff claims that the defendant is responsible, is the accumulation of debris falling from a nearby (overhanging) hickory tree.[1]

More specifically, the plaintiff had rented the condominium unit in which he and his wife lived, for a number of years. There had been repeated complaints by them about the extent to which leaves, hickory nuts, pollen, and sap-like liquid continually fell onto the surface of the deck, making walking on the deck hazardous. The plaintiff contends that his complaints to management of the condominium association included reference to the fact that he walked with a cane, making him potentially somewhat more vulnerable to the conditions of the surface upon which he was walking. As may be inferred from the fact that this suit is pending, the plaintiff did fall, allegedly due to the accumulation of debris, causing, *inter alia*, a serious injury to his ankle.

The position taken in **[*2]** this motion by the defendant condominium association is fairly straightforward. Pursuant to the bylaws and rules of the association, to which the plaintiff was bound by virtue of his lease agreement, the deck was considered to be a limited common element for which the occupant of the unit benefited by the limited element was responsible for maintenance, including clearing leaves and other debris. The defendant condominium association further asserts the negative—that it had no duty with respect to the maintenance of the surface of the deck, under those bylaws and rules.

The defendant has moved for summary judgment, claiming that there is no issue of fact as to the above recitations—it had no duty to maintain the premises upon which the plaintiff fell, and conversely, the plaintiff had the obligation to maintain the deck surface himself.

Legal Standard

The legal standards for summary judgment are well established. The burden is on the moving party to establish that there is no material issue of fact, and based upon the material facts that are not in dispute, it

[1] The named plaintiff's wife has alleged bystander emotional distress and loss of consortium with respect to the claims of negligence and nuisance asserted by the named plaintiff. As her claims are essentially derivative of (dependent on) the primary liability claims of the named plaintiff, for purposes of this motion, the focus will be exclusively on the named plaintiff, except as specified otherwise.

is entitled to judgment as a matter of law. The non-moving party has no burden of proof until such time as the moving party establishes, **[*3]** at least on a prima facie basis, that there is no material issue of fact and that based on those facts it is entitled to judgment. Once the moving party has satisfied its burden, the burden shifts to the plaintiff to establish a material issue of fact, sufficient to preclude entry of judgment in favor of the moving party. (For a more detailed and technical recitation of the requirements of a motion for summary judgment, see *Fiano v. Old Saybrook Fire Co. No. 1, Inc.*, 332 Conn. 93, 209 A.3d 629 (2019).)

Procedural Issues

Before discussing the merits of the positions of the parties, there are some procedural issues that need to be identified and addressed.

First, there is the method in which the various specifications of negligence are addressed by the defendant. Rather than addressing each of the 15-16 specifications individually, it has aggregated them into what it perceives to be logical groups, and addressed the groups based on their common factors—in this context, perhaps more accurately described as claimed common deficiencies. The plaintiff counters that it is inappropriate to challenge individual specifications of negligence. While the court agrees that a party cannot obtain judgment on an individual specification (unless in some sense, an individual specification **[*4]** constitutes a distinct cause of action), the approach taken by the defendant makes sense, so long as it is understood/recognized that in order to succeed, the analysis would have to negate claimed liability under each/all of the groups of allegations. In a sense, this is no different than going through the specifications one by one, the difference being that the claim is that a common deficiency allows simplification of the process—address all of the allegations with a common deficiency in one argument.

Another issue—one that has not been identified or addressed by the parties—is that shortly after the defendant filed its motion for summary judgment, the plaintiff filed a request for leave to amend his complaint. The plaintiff did not comply with the current version of Practice Book § 10-60(a)(3)—submitting a marked up (red-line) version of the complaint so as to identify the changes being made. The court has not taken the time to examine, in a detailed fashion, the two versions to ascertain the changes being made, but it is clear that at least one change was the addition of a specification of negligence to the previous list—going from 15 specifications to 16. The defendant's motion, necessarily, could not have **[*5]** addressed that new specification, but to the extent that the analysis/approach taken by the defendant identifies group issues rather than individualized claims, the court sees no impediment to addressing the motion for summary judgment notwithstanding this facial incompleteness in the motion (necessarily, not foreseeable by the defendant).

In addition to asserting a claim based on negligence, the plaintiff claims that the defendant is liable under a theory of nuisance. The defendant gives relatively perfunctory treatment to the nuisance count—claiming that it is derivative of the negligence claim such that if the defendant prevails on summary judgment as to negligence, it also must prevail on the nuisance claim. There is no analysis, however, of why/how that is claimed to be a necessary consequence. The elements of nuisance are different—otherwise it wouldn't be a distinct cause of action. Simplistically, private nuisance is based on a theory of invasion of property rights rather than a breach of the duty to use reasonable care to avoid causing harm to others. Thus, even if there were no duty to maintain the deck on the part of the defendant, as the defendant vigorously argues, the **[*6]** lack of any duty of maintenance or control over the deck would have no automatic consequence for the nuisance claim—or at least nothing of that nature has been identified. Generally speaking, a duty of maintenance or right of control over the affected premises is irrelevant to a claim of nuisance, which focuses on the conduct of a party external to the affected property and the effect of that conduct on the use of the affected property.

Discussion

This is a not-uncommon situation in which the parties are, to an extent, talking past each other rather than focusing on the same issues. While it is understandable that the defendant felt compelled to address issues relating to the lack of any duty with respect to maintenance of the deck itself, based on the numerous specifications asserting that there was such a duty, there are at least a few allegations of negligence that focus on the tree depositing debris, rather than any claimed duty to clear the debris. (There also are assertions of a negligence with respect to design, discussed briefly below.)

The main focus, however, for purposes of this motion, at least from the perspective the court, is the responsibility of the owner of the common **[*7]** areas, including the hickory tree, for the debris constantly being rained down

on the deck from that hickory tree. The defendant has paid more attention to the seemingly clearer issue of lack of duty of maintenance, and less attention to possible liability emanating from the claimed negligence relating to the tree, for which the defendant is and was responsible. During the course of argument, the court focused on the specification set forth in P6(e)—if the defendant cannot establish that the plaintiff cannot prevail on that specification, then the defendant cannot prevail on its motion in its entirety.

Factually, there had been numerous complaints by the plaintiff or his wife. The defendant called in a licensed arborist, and he had inspected the tree on a number of occasions, repeatedly giving the tree a clean bill of health so long as it was properly pruned and had sufficient cables to ensure stability. The focus of the inspections by the arborist was on the viability of the tree—was it likely to fail. Somewhat related, he also was concerned about the stability of the tree, given the apparent shallowness of the root system. The arborist does not appear to have been charged with evaluating **[*8]** the extent to which nuts, leaves, sap, etc. were being deposited on the adjacent deck of the condominium unit occupied by the plaintiff or whether anything could or should be done in that regard.

The specification in P6(e) asserts that the defendant was negligent "[i]n that it failed to trim, remove or maintain the hickory tree or to prevent the deposit of materials on the subject deck in that it failed to remedy the condition of the deck as described in paragraph four in the deck although it or should have known that such a condition(s) existed." In turn, the condition described in paragraph four is that there was "an accumulation of materials, including but not limited to sap, mold, liquids and acorns from a large hickory tree, whose branches and limbs hung directly over said deck."

Parsing the allegations in P6(e) with respect to the evidence presented, the defendant has submitted evidence that it had taken efforts to trim and maintain the hickory tree. Specifically, the arborist had been called in September 2013, and his recommendations had been implemented during the fall of that year. The arborist was again called to inspect the tree in July 2015, and the recommendations were implemented **[*9]** in the fall of 2015. The next documented inspection and remedial work occurred after this incident, with the arborist having been called in January 2018. As summarized in P7 of the affidavit submitted in support of the motion, the arborist's assessment in January 2018 was that "as long as we continued to prune and monitor the tree, the ***tree*** posed no ***hazard***." While the term "hazard" is not defined, that would appear to relate to the viability of the tree coupled with the likelihood of it falling over, perhaps including the likelihood of large branches breaking off. Those conditions, however, are irrelevant to the claims being made by the plaintiff.

More to the point, however, the defendant does not address whether the tree should have been removed, for reasons unrelated to its viability or likelihood of toppling or shedding large branches—the plaintiff expressly claiming that the tree should have been removed. Related, the defendant does not address the issue of the existence or nonexistence of a duty to "prevent the deposit of materials on the subject deck." The defendant does not dispute that the tree was in the possession and control of the defendant rather than the plaintiff and **[*10]** although this may represent an issue that overlaps the nuisance claim, the defendant has failed to address how and why it should prevail, as a matter of law, on this claim.

The plaintiff has cited cases standing for the proposition that a party may be liable for conduct or events occurring on property it does not control, when there is a nexus to property that it does control. For example, the plaintiff cites *Ruiz v. Victory Properties, LLC*, 315 Conn. 320, 107 A.3d 381 (2015) and *Kriz v Coldwell Banker Real Estate*, 67 Conn. App. 688, 789 A.2d 1091 (2002).

A perhaps starker and closer analogy arises in the realm of the so-called municipal highway defect statute General Statutes § 13a-149. In the absence of an ordinance enacted pursuant to General Statutes § 7-163a (and limited to snow/ice conditions), a municipality is liable for maintenance of sidewalks and the abutting property owner cannot be held responsible for any injuries caused by a failure to maintain the sidewalk, even if there is an ordinance directing the abutting property owner to maintain the sidewalk (again, subject to an exception for ordinances complying with § 7-163a). However, if the abutting property owner is responsible for creating the condition on the sidewalk—and that often is a result of depositing snow on the sidewalk or having a drain/downspout releasing water onto the sidewalk which subsequently freezes—then **[*11]** despite the absence of any legal duty to maintain the sidewalk (the premises where an injury was sustained), an abutting property owner may be held responsible for injuries resulting from a condition causally related to the conduct of that owner of the abutting property. See, e.g., *Pemberton v. Kaufman*, 11 Conn.Sup. 10, 11 (Super.Ct. 1942); more recently, see,

Sbriglio v. Hatch, No. CV 950549399S, 1996 Conn. Super. LEXIS 1737, 1996 WL 412798, at *2 (Conn.Super.Ct. July 9, 1996):

> Notwithstanding § 13a-149 and corresponding lack of duty of abutting property owner to maintain sidewalk, [a]n abutting owner is liable for a hazardous condition on a public sidewalk which is of his own creation. *Perkins v. Weibel*, 132 Conn. 50, 52, 42 A.2d 360 (1945) (accumulation of cooking grease on the sidewalk); *Hanlon v. Waterbury*, 108 Conn. 197, 200, 142 A. 681 (1928) (spilled gasoline). (Internal quotation marks, omitted.)

Here, the defendant is in a role quite similar to that of an abutting property owner—it is in control of the common areas abutting the condominium unit for which the occupant of the condominium unit has primary responsibility of maintenance. Analogous to *Kriz*, it is a situation on property over which the defendant had no control but emanating from property within the control of the defendant, with an ability of control implicating the condition causing an injury to the plaintiff.[2] The defendant has not established the absence of liability, **[*12]** as a matter of law, under these circumstances, as presented to the court.

The court will address a few other points raised by the defendant. The defendant contends that because it does not have any record of a renewal/extension of the lease whereby the plaintiff occupied the condominium unit, covering the period of time in which the injury was sustained, the plaintiff may be an illegal tenant to which the defendant owes no duty. The defendant cites no authority for this proposition. To the extent that landlord-tenant law is implicated by such a situation, a tenant holding-over beyond the expiration of the lease does not become an illegal occupant but generally becomes a month-to-month tenant; see, e.g., *Spin Ghar Properties, LLC v. Stewart*, No. HFH-CV16-6001697-S, 2016 Conn. Super. LEXIS 2402, 2016 WL 5853018, at *10 (Conn.Super.Ct. Aug. 25, 2016). Even a tenant who has received a notice to quit, which terminates any prior formal tenancy, becomes a tenancy at sufferance; *Sproviero v. J.M. Scott Assocs., Inc.*, 108 Conn.App. 454, 463, 948 A.2d 379, 385 (2008). While the defendant may well have recourse against the actual owner of the unit, and may also have some level of recourse available against the occupant/tenant, that is a far cry from establishing the lack of any duty in any respect to a tenant in a condominium unit, when the basis for the claimed **[*13]** violation may be nothing more than the failure to provide to the defendant a copy of an existing and otherwise valid/appropriate formal lease.

The court also notes that the defendant has not provided any explicit argument in its motion directed to claims that the deck was improperly designed and constructed. The defendant does address the inapplicability of a certain code that was invoked by the plaintiff, but no attention is paid specifically to the specifications of negligence set forth in subparagraphs (d), (f), (i), and (k) of P6, alleging improper design of the deck. The defendant included these specifications of negligence in the group of specifications generally relating to maintenance, under the rubric that the defendant "did not have possession and control on the date of Plaintiff's injury," but possession and control of the premises on the date of injury is irrelevant to the question of improper design of the deck at some prior date (in connection with its construction).

The court recognizes that allegations of improper design may implicate other considerations that may present impediments if not a bar to a possible recovery by the plaintiff, but in connection with a motion **[*14]** for summary judgment, the court is limited to consideration of the issues actually presented by the moving party, *Greene v. Keating*, 156 Conn.App. 854, 115 A.3d 512 (2015). Unless the defendant addressed these issues itself, the court cannot consider other factors that might interfere with any such claim, and as noted, no direct effort appears to have been made to challenge the legal or factual viability of claims of negligent design.

Returning to the nuisance claim, as noted earlier, the defendant relatively perfunctorily asserts that if it is right with respect to the claim of negligence, then necessarily the nuisance claim must also be a matter for which the

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[2] *Ruiz* is a bit more remote from this case, as it involves a condition (debris) in an area within the scope of the defendant's responsibility, brought into an apartment unit over which it had no control, but then tossed off a balcony striking someone seemingly on a common area that was under the control of the defendant and therefore the responsibility of the defendant to maintain in a safe condition. The court's discussion not only addressed the ability to use debris as a projectile but also the safety concerns for children playing in the area, e.g., 315 Conn. at 331 and 336. Even as to projectiles, the court focused on conduct (unpredictable conduct) of children. The extra steps and factors are not present in this and the other cited cases, making *Ruiz* less (but still) useful.

defendant is entitled to judgment as a matter of law. No attempt has been made to explain how the lack of ability of the plaintiff to prove one or more elements of liability under a negligence theory necessarily precludes establishing liability under a nuisance theory. To succeed under a nuisance theory, a plaintiff need not establish the predicate for a negligence claim (although negligent conduct often is the basis).

> An invasion of a person's interest in the private use and enjoyment of land by *any type* of liability-forming conduct is private nuisance. The invasion that subjects a **[*15]** person to liability may be either intentional or unintentional. *Ugrin v. Town of Cheshire*, 307 Conn. 364, 376, 54 A.3d 532, 540 (2012) (quoting from the Restatement (Second) Torts, § 822 comment (b) (1979), with emphasis added by court).

Generation of odors offensive to neighbors can form the basis for a private nuisance, and the location of the odor-generating activity is an appropriate factor to be considered. *Pestey v. Cushman*, 259 Conn. 345, 788 A.2d 496 (2002). (Indeed, in *Pestey*, the claim was made that an emphasis on location was an attempt to circumvent the statutory protection for farm-type activities generating odors, as set forth in General Statutes § 19a-341.) The benchmark is the reasonableness or unreasonableness of the interference with the ability of another (the plaintiff) to enjoy his/her property.

The defendant having failed to explain how a specific perceived fatal flaw in the negligence claim necessarily is a fatal flaw in the nuisance claim, or why a claimed (if rejected) inability to prevail on any negligence claim necessarily is fatal to the nuisance claim. The court cannot grant summary judgment in favor of the defendant on the nuisance claim, particularly given the focus of the court on the negligence claims that did not implicate possession and control over the deck but rather control over the tree on property that was within the control of the defendant, **[*16]** claims closely aligned with the possible existence of a private nuisance.

Conclusion

The parties correctly have observed that the function of the court in connection with a motion for summary judgment is not to resolve factual issues, but rather to identify whether any material factual issues exist.

With respect to the negligence claim, the court did not need to address the viability of the claims based on maintenance of the deck; the defendant failed to establish the absence of any material issue of fact relating to its duty with respect to the tree's intrusion on the plaintiff's rights and whether the plaintiff could and should have taken steps to limit or control the debris falling from the tree onto the deck, which the plaintiff had already advised the defendant constituted a hazardous condition to him. As discussed above, a party need not be in control over premises to be liable for an injury occurring on such premises, if the party is responsible for creating the condition on those premises that caused the injury. The defendant has not established factually or legally why such a principle is inapplicable here. Additionally, the defendant has not addressed at all the allegations **[*17]** relating to design—while the court can imagine possible defenses and contentions that might negate any liability on that basis, the defendant has not advanced such claims much less supported them with facts and or law, entitling it to judgment.

With respect to the claim of nuisance, the differing focus of a claim of private nuisance requires separate treatment from the analysis set forth in the arguments relating to negligence (apart from the fact that the court has found the arguments relating to negligence to be insufficient to entitle the defendant summary judgment on that basis). There is no such analysis.

Finally, returning to the claims asserted by Nina Mattikow (the named plaintiff's wife), the defendant contended that these derivative-type claims would necessarily fail if the plaintiff's negligence claim failed, but a corollary of that position is that if the defendant's argument in connection with the negligence claim proved to be unsuccessful, then absent an independent basis to challenge those derivative claims, the defendant could not be entitled to summary judgment on those claims of the plaintiff-wife. The court having rejected the contention that the defendant is entitled **[*18]** to judgment on the negligence count (and separately, the nuisance count), the court cannot grant summary judgment with respect to the derivative claims.

The court is limited to the issues actually raised and presented by the defendant, *Greene, supra*. For purposes of deciding this motion, the court does not evaluate or weigh the evidence and arguments actually presented nor can the court consider arguments that could have been presented but were not. The court is charged solely with determining whether, based on the facts presented and the arguments made, the defendant

is entitled to judgment as a matter of law, without any need or ability to weigh or balance facts. Absent the requisite level of certainty—no material issue of fact—the court must deny the motion.

For all these reasons, then, the motion for summary judgment is denied in all respects.

POVODATOR, Judge Trial Referee