

Adler v Suffolk County Water Auth.

2002 NY Slip Op 30001(U)

July 23, 2002

Supreme Court, Suffolk County

Docket Number: 0023533/1999

Judge: W. Bromley Hall

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SHORT FORM ORDER

INDEX NO. 23533/99

**SUPREME COURT - STATE OF NEW YORK
PART XXXIV SUFFOLK COUNTY**

PRESENT:

HON. W. BROMLEY HALL

MOTION DATE: July 2, 2002
MNEMONICS: MG/MD/MG
RETURN DATE: Mar. 12, 2002
SEQ. NO.: 002/003/004

David N. Adler, et. al.,

Plaintiffs,

PLTF'S/PET'S ATTY:
Tartamella, Tartamella
235 Brookside Dr.
Hauppauge, N.Y. 11788

v

Suffolk County Water Auth.,
et. al.,

Defendants.

DEFT'S/RESP'S ATTY:
Suffolk County Attorney
100 Vet. Mem. Hw.
Hauppauge, N.Y. 11788

Upon papers submitted (notice of motion, notice of cross motion, notice of cross motion, opposition, further reply in opposition to defendant SCWA's motion for summary judgment' and reply affirmation) it is,

ORDERED that the motion and cross motion of defendants, Town of Smithtown and County of Suffolk, for summary judgment are granted and it is further

ORDERED that the cross motion by defendant, Suffolk County Water Authority, for summary judgment is denied.

Plaintiff, David N. Adler, was riding his bicycle on August 23, 1998 around 9:00 a.m. when he fell. He alleges that his bicycle came into contact with a depression in the roadway near the intersection of Maple Avenue and Columbus Avenue, specifically an open concentric region surrounding a water valve

¹. As a conference to understand the motions and possible settlement, the parties were permitted to submit further papers on the issue of actual construction of the dangerous condition. It was felt that the issue was not crystalized sufficiently to establish good cause for further submissions. CPLR 2214(c)

box. Defendant, County of Suffolk, has moved for summary judgment establishing that they do not own, maintain nor control the roadway where the accident occurred. Defendant, Suffolk County Water Authority (SCWA), has cross moved for summary judgment arguing that there was no actual or constructive notice of the alleged dangerous condition. SCWA cites plaintiff's testimony that while riding his bicycle, he struck something causing the fall. He thereafter observed an open area around a meter cover that was flush with the street. It claims that there were no complaints about the area and that they had not worked in the area for at least six months prior to the occurrence. Defendant, Town of Smithtown, has cross moved for summary judgment arguing that pursuant to section 245-13 of the Code of the Town of Smithtown, prior written notice is required to maintain this action.

Plaintiff submits opposition only to the SCWA's motion. Therefore, the motions of the County of Suffolk and Town of Smithtown are granted. As to SCWA, plaintiff argues that by installing its water valves underneath Maple Avenue, SCWA enjoyed a special use of the road and was under a duty to maintain the road in a safe condition. Second, by failing to properly restore the roadway surrounding the water valve box, SCWA created the condition.

Initially, plaintiff has not established notice, either actual or constructive notice sufficient to raise an issue of fact. Moreover, plaintiff has failed to establish any special use exception. As Second Department recently held, in a similar case involving a water valve box that the water company " had no duty to maintain the area surrounding the box. It did not own the land on which the box was located, and there was no evidence that the area was constructed in a special manner for its use. Moreover, there was no evidence that [water company] created the defect by installing the box in a negligent manner." *Pierre v. City of New York*, 273 A.D.2d 368 (cites omitted); see *Verdes v. Brooklyn Union Gas Co.*, 253 A.D.2d 552; *Delano v. Consolidated Edison Co. of New York, Inc.*, 231 A.D.2d 671; *Kobet v. Consolidated Edison Co. of N.Y.*, 176 A.D.2d 785. However, plaintiff has raised an issue of fact that SCWA created the dangerous condition.² Plaintiff argues that SCWA circular cut out street asphalt and left an open pit about five inches deep around the cover of a water valve box, which plaintiff believes he struck.³ A review of the photographs and the expert's

². SCWA position about an independent contract involves cases not involving dangerous conditions on the property.

³. Mr. Foy, regional manager for SCWA indicated that the installation of the valve box is contracted out but he did not have the specific contract for Maple Avenue nor could he establish the date of the work. In fact, SCWA may not have carried its burden of establishing, as a matter of law, that it did not create the condition. SCWA attempts to use the testimony of Daniel Ryan, who states that he had no recollection of any permit to do work on Maple Avenue around the subject area. It is incumbent of SCWA to present proof that it did not create the

