

Gorman v Town of Huntington

2006 NY Slip Op 30216(U)

March 21, 2006

Supreme Court, Suffolk County

Docket Number: 0020854/2003

Judge: Gary J. Weber

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INDEX No. 03-020854SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY**PRESENT:**Hon. Gary J. Weber
Acting Justice of the Supreme CourtMOTION DATE February 24, 2006
Motion Seq. # 002-MG
003 -MDNORMA GORMAN and HUGH GORMAN,

Plaintiffs,

-against-

TOWN OF HUNTINGTON,

DefendantTHOMAS J. LAVALLEE, ESQ.
ATTORNEY FOR PLAINTIFFS
490 WHEELER ROAD
HAUPPAUGE, NY 11788JOHN J. LEO, ESQS.
TOWN ATTORNEY FOR TOWN OF HUNTINGTON
BY: MARGARET L. PEZZINO, ESQ.
TOWN HALL
100 MAIN STREET
HUNTINGTON, NY 11743

Plaintiff, by Notice of Motion dated January 30, 2006, has moved this Court for an Order directing that the Defendant permit inspection by counsel of the records maintained by the Defendant concerning all reports, repair orders, photographs, inspection reports, documents, correspondence, letters, and work orders pertaining to the sidewalk located on Cheshire Place in East Northport. (Mot. # 002) Defendant, by Notice of Motion dated February 9, 2006, has Cross Moved for Summary Judgment.

DECISION

THE MOTION

By law, the Defendant is required to maintain a record of notices of defects received by either the Town Clerk or the Superintendent of Highways. *Town Law § 65-a*. The Defendant has adopted its own ordinances in furtherance of this statutory obligation and the Court takes judicial notice of Huntington Town Code §§ 174-4 and 174-5 which provide as follows:

“The Town Superintendent of Highways shall transmit all notices of defect received by him or her pursuant to this article to the Town Clerk within ten (10) working days of receipt. The Town Clerk shall keep an indexed record, in a separate book, of all written notices received pursuant to this article. Such record shall contain the date of receipt of such notice, the nature and location of the condition stated to exist and the name and address of the person from whom the notice is received. All such written notices shall be indexed by location of the alleged defect or obstruction. A record of such notices shall be preserved for a period of five (5) years of the date of receipt by the Town Clerk.”

“Written notice of defect shall be served upon the Superintendent of Highways and/or Town Clerk by personal delivery or by registered, certified or regular mail. Such notice shall be made by a person with first-hand knowledge of the condition, defect or obstruction specified in the notice and shall identify, with particularity, the specific nature and location of each condition, defect or obstruction. In order to be valid, the notice of defect must be actually received by the Superintendent of Highways and/or Town Clerk

as specified herein. Service of such notice upon a person other than as authorized in this article shall invalidate the notice.”

This record is subject to the Freedom of Information Law, and there is no basis for any privilege asserted by the Town. *See Public Officers Law Article 6*. Accordingly, Defendant is directed to permit counsel for Plaintiff the opportunity to examine all of the written records he has requested at a time during regular business hours, in a place suitable for reasonably accomplishing this examination, on a date of Plaintiff's choosing within 10 days of service of this decision and order together with notice of entry. The Defendant's assertion that it has searched the records does not preclude counsel's personal examination of the same. If it proves to be a fool's mission, that is a choice for Plaintiff's counsel to make.

THE CROSS MOTION

Defendant's Cross Motion for Summary Judgment is denied.

Discovery on this Issue is Not Completed

It is inimical to due process to deny discovery bearing upon a question of fact, and then move for summary judgment and claim that the adversary has failed to prove that fact. Specifically, Defendant contends that it was not on proper notice¹ of the defect in the sidewalk which is alleged to have caused Plaintiff's fall. Plaintiff's foregoing meritorious discovery motion is directed to this very issue. Accordingly, Defendant's motion for summary judgment ought to be denied for this reason alone. But there is more.

Even if There Was No Written Notice, Whether The Town Was On Constructive Notice is a Question of Fact Which Precludes Summary Judgment

Prior written notice of defective condition to either the Town Clerk or the Superintendent of Highways is not the *sine qua non* for a trip and fall cause of action against a municipality. A statutorily created exception to this element of such a cause of action is that if the condition has persisted for such a lengthy period of time that it should have been discovered and remedied in the exercise of reasonable care and diligence, then the notice requirement is satisfied. This is a form of constructive notice, and is alleged in the complaint. *See Town Law § 65-a(1) and the complaint at paragraph 8*. Whether the defective sidewalk condition persisted for such a lengthy period of time that it should have been discovered and remedied in the exercise of reasonable care and diligence remains a question of fact which precludes summary judgment.

The Town's Own Violation of Town Law § 65-a Requires that Its Motion for Summary Judgment Be Denied

Defendant actually submits, in support of its cross motion, the Affidavit of Bruce Creamer wherein Mr. Creamer states that a part of his job duties was to both maintain and search for records regarding sidewalk complaints received by the Department of Engineering Services and records regarding work performed by the Department. He further states that upon receipt of a sidewalk complaint, he would create a record of the complaint using an index file system, conduct an investigation and coordinate the scheduling of repair, if warranted. This affidavit identifies the numerous complaints made over the years concerning the condition of the sidewalk in front of the church where the complainant is alleged to have tripped and fallen.

These materials include numerous letters written to the Director of Engineering, among them letters by Defendant's then Town Councilman Steven Israel; letters by Rev. Richard Horning over the years concerning the defective conditions of the sidewalk in front of the church where complainant fell. These letters began in 1999 with the last letter being in February of 2002. Notably, by letter dated April 2, 2002 the Director of the Department of Engineering Services advised Rev. Richard Horning that the person to contact on matters such as this was Bruce Creamer in the Department of Engineering. *The foregoing attached as Defendant's Exhibit I*. The Creamer affidavit is concluded with the assertion that Creamer did not provide any of his Departmental records to either the Town Clerk or the

¹This is not to say Defendant was not on notice through the procedures Defendant employed in its Department of Engineering.

Superintendent of Highways. Defendant now asserts that written notice to the Town's Department of Engineering Services is not the statutory notice required to either the Clerk or the Superintendent of Highways.

The Town's Department of Engineering Services was directly responsible for sidewalk maintenance and repair, corresponded regularly with residents concerning sidewalk defects and was responsible for addressing them. Thus, Defendant, instead of referring the complaint to either the Superintendent of Highways or to the Town Clerk, delegated this function to the Department of Engineering Services which regularly undertook to directly provide the record keeping functions that, by statute, repose in the Superintendent of Highways and the Town Clerk. There is nothing wrong with this delegation, unless Defendant wishes to assert the defense that written notices that have regularly and routinely been directed by the Defendant to the Town's Department of Engineering Services are inadequate. Under the limited facts of this case, Defendant by its own admissions, is estopped from asserting the defense of lack of written notice under *See Town Law § 65-a*.

The requirements of *Town Law § 65-a* were not designed to grant Towns total immunity from suit. Had the legislature wanted to permit a blanket assertion of sovereign immunity it could have simply made Towns immune from trip and fall actions. The purpose of this law was threefold. First, it was designed to make certain that Towns put in place a system of record keeping so that they could timely address complaints by their constituent taxpayers and fulfill their governmental functions properly. Second, the law recognizes that Towns should be immune from liability from injuries caused by minor defects of which they have no actual notice, which have not persisted over time, and that naturally come to exist from time to time in the miles of sidewalk for which Towns are responsible. The third purpose was to remove from the Courts an evidentiary thicket of questions surrounding whether a Town had, in fact, been placed on actual notice of a defect. Here the Defendant set up its own distinct system within the Town's Department of Engineering Services in so doing has, as a practical matter, given up the statutory defense that would otherwise require notice to either the Town Clerk or the Superintendent of Highways.

ORDER

ORDERED that Plaintiff's Motion (Mot. # 002) is granted; and it is further

ORDERED that Defendant is directed to permit counsel for Plaintiff the opportunity to examine all of the written records he has requested at a time during regular business hours, in a place suitable for reasonably accomplishing this examination, on a date of Plaintiff's choosing within 21 days of service of this decision and order together with notice of entry; and it is further

ORDERED that Defendant's Cross Motion for Summary Judgment (Mot. # 003) is denied; and it is further

ORDERED that Defendant is estopped from asserting the defense of lack of written notice under *Town Law § 65-a* and written notice given to the Town Clerk, the Superintendent of Highways, or the Department of Engineering Services is sufficient to provide actual notice; and it is further

ORDERED that Plaintiff, in accordance with *22 NYCRR § 202.21*, is directed to file and serve a note of issue together with a certificate of readiness on or before 60 days of service of this decision and order together with notice of entry; and it is further

ORDERED that Plaintiff is directed to serve a copy of this decision and order together with a notice of entry upon all other parties to this action, forthwith.

The foregoing shall constitute the decision and order of the court.

Dated: 03/21/06



Gary J. Weber, Acting J.S.C.

Non-Final Disposition

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