

Sclafani v Town of Islip

2007 NY Slip Op 30126(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0007397

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 7/31/06
ADJ. DATE 10/31/06
Mot. Seq. # 002 - MG; CASEDISP

-----X		
KENNETH G. SCLAFANI,	:	BYRON LASSIN, ESQ.
	:	Attorney for Plaintiff
Plaintiff,	:	35-57 89 th Street
	:	Jackson Heights, New York 11372
- against -	:	
	:	JOHN P. FINNERTY, ESQ.
TOWN OF ISLIP and LONG ISLAND RAILROAD,;	:	Attorney for Deft. Town of Islip
	:	21 Maple Avenue, P.O. Box 5151
Defendants.	:	Bay Shore, New York 11706
-----X		

Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers _____;
Answering Affidavits and supporting papers 12 - 19; Replying Affidavits and supporting papers 20 - 24;
Other _____: (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#002) by the defendant for summary judgment dismissing the complaint, pursuant to CPLR 3212, is granted.

The summons and verified complaint in this action were filed on or about March 17, 2005, and issue was joined by the filing of defendant's answer on or about April 27, 2005. Discovery has been completed, and the note of issue was filed on or about April 19, 2006.

This is an action for personal injuries allegedly sustained by plaintiff, Kenneth G. Sclafani (Sclafani), on or about February 6, 2004, at approximately 6:25 a.m., when he tripped and fell on an accumulation of snow and/or ice in the municipal parking lot located on the north side of the LIRR train station, Railroad Plaza and Park Avenue, Bay Shore, Suffolk County, New York. Plaintiff alleges in his complaint that he was walking in the parking lot between parked cars and slipped and fell on an accumulation of snow and/or ice which had not been cleared and which had remained for an unreasonable period of time. Plaintiff alleges that defendant Town of Islip (Islip) failed to remove and adequately clear the snow and/or ice from the parking area surface and failed to apply salt to the parking lot allowing the accumulation of snow and/or ice which hardened, creating a dangerous condition which caused plaintiff to suffer permanent serious physical injury.

Defendant Islip now moves for summary judgment dismissing the complaint, pursuant to CPLR 3212, on the grounds that it did not receive prior written notice of the defective condition pursuant to New York Town Law § 65-a and Islip Town Code § 47A-3. Defendant Islip also asserts the “continuing storm” doctrine and plaintiff’s inability to prove actual and/or constructive notice of the defect. In support of its motion Islip submits, *inter alia*, an affirmation of counsel, a copy of the verified complaint and verified bill of particulars¹, the affidavit of Peter Kletchka, executive assistant to the Town of Islip Commissioner of Public Works, a certified meteorological report and excerpts of the deposition testimony of Kenneth G. Selafani.

Plaintiff opposes this motion on the grounds that prior written notice is not required because the municipal parking lot is not a public highway or sidewalk. Plaintiff also argues that Islip had actual notice of the snow and ice conditions and did not correct it, that Islip had constructive notice of the snow and ice conditions for an unreasonable period of time and failed to correct it, that the “continuing storm” doctrine does not apply, that new snow obscured the hardened and compacted older snow and that the actions of the defendant affirmatively created the condition through inadequate plowing of the parking lot and failure to remove the snow between parking spaces. Plaintiff submits in opposition, *inter alia*, an affirmation of counsel, a copy of the General Municipal Law § 50-h deposition of Kenneth G. Selafani, a copy of the deposition of Peter Kletchka, an affidavit from William Sherman, meteorologist, and a copy of the deposition of nonparty witness Christopher J. Jaisle.

Addressing first the issue of prior written notice, defendant Islip has submitted sufficient evidence, through the affidavit of Peter Kletchka, establishing that the municipality did not receive prior written notice of the defect, consisting of an accumulation of snow and ice, in accordance with New York Town Law § 65-a and Islip Town Code § 47A-3. Mr. Kletchka admitted that Islip maintains the parking lot at the Bay Shore railroad station. He stated that he searched the official records of Islip for the parking lot at the Bay Shore railroad station and did not find any prior written notice concerning snow and/or ice problems or concerning the accumulation of snow and/or ice in the parking lot. On the issue of prior written notice Islip has established its prima facie entitlement to summary judgment as a matter of law (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1985]). Where on a motion for summary judgment the moving party has made its prima facie showing of entitlement to summary judgment as a matter of law, the burden then shifts to the opposing party, who must establish the existence of material issues of fact requiring a trial (*see, Romano v St. Vincent’s Medical Center*, 178 AD2d 467, 577 NYS2d 311 [1991]).

Plaintiff argues in opposition that this municipal parking lot does not fall within the definition of a “public highway,” and therefore, prior written notice requirements do not apply. This Court disagrees. Prior notification laws are a valid exercise of legislative authority and reflect a legislative judgment which modifies the duty of care owed by a locality with regard to municipal liability (*Amabile v City of Buffalo*, 93 NY2d 471, 473, 693 NYS2d 77,79 [1999]). For the purpose of prior written notice, it is well settled that a parking lot is considered a “highway” within the meaning of Town Law § 65-a (*see, Bang v Town of Smithtown*, 291 AD2d 516, 738 NYS2d 72 [2002]). In addition, the Court in *Doherty v*

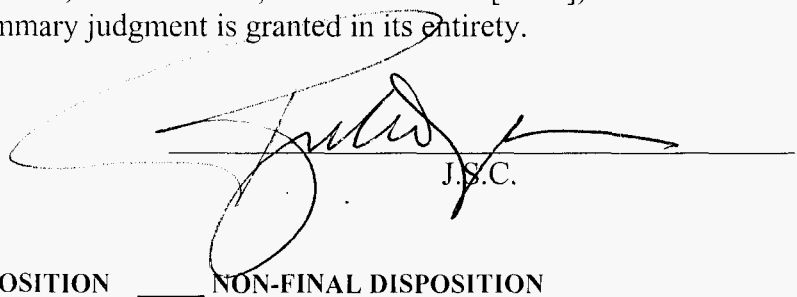
¹For clarification purposes, CPLR 3212 (b) requires supporting documentation to include the pleadings consisting in general of the articulated complaint, a responsive pleading and verified bill of particulars. Counsel for the moving defendant is also reminded that moving papers are required to be double-spaced pursuant to McKinney’s 2006 New York Rules of Court § 202.5 (22 NYCRR 202.5).

Town of Clarkstown (233 AD2d 477, 650 NYS2d 31 [1996]) held that the term “highway,” as used in local laws and ordinances pertaining to prior written notification requirements, encompasses parking lots. The primary use of a municipal parking lot is that cars are left stationary and unattended, and it is essential to this use that both cars and pedestrians have passage on and through the parking lot (*see, Stratton v City of Beacon*, 91 AD2d 1018, 457 NYS2d 893 [1983]). The affidavit of Peter Kletchka specifically states that no permit or fee is required to access this parking lot, that this municipal parking lot is bordered and is accessible on three sides by town streets, that the parking lot is wide open and is not contained by any gates or barriers, and that there are no signs limiting parking to LIRR patrons only. He states that the parking lot is open to the general public without regard to residency or LIRR usage. Thus, the parking lot at issue herein falls well within the recognized parameters of a “highway” with regard to prior notification requirements. There are only two recognized exceptions to the prior written notice requirement -- where the locality created the defect or hazard through an affirmative act of negligence or where a “special use” confers a special benefit upon the locality (*Amabile v City of Buffalo, supra*). In the instant matter neither exception applies, and constructive notice of a defect, which is also argued by plaintiff, may not override the statutory requirement of prior written notice (*id.*). Therefore, defendant Islip has sufficiently established that it did not receive prior written notification of the defect which it is alleged caused plaintiff to fall.

In addition to the prior written notification requirement, Islip also argues that the “continuing storm” doctrine entitles it to summary judgment as a matter of law since it is well settled that a municipality, or other landowner, cannot be found liable for failure to correct a snow/ice condition while the precipitation producing storm is ongoing (*see, Grau v Taxter Park Associates*, 283 AD2d 551, 724 NYS2d 497 [2001]). Islip submitted a certified meteorological report substantiating that snow was falling on the morning of February 6, 2004. In opposition plaintiff admitted in his deposition that it was snowing during his drive to the train station and that he had to use the windshield wipers on his vehicle. Furthermore, the affidavit of plaintiff’s expert also confirmed that snow was falling on the morning of February 6, 2004. Plaintiff’s expert stated that light snow occurred between 4 a.m. and 6 a.m. and thereafter a mixture of light freezing rain, sleet and light snow occurred until approximately 8:30 a.m. Plaintiff’s alleged accident, therefore, at 6:25 a.m. occurred while a storm was ongoing. Defendant has made a prima facie showing of entitlement to judgment as a matter of law (*see, Solazzo v New York City Transit Auth.*, 6 NY3d 734, 810 NYS2d 121 [2005]; *Dowden v Long Island Rail Road*, 305 AD2d 631, 759 NYS2d 544 [2003]; *Pelliccio v TCW Realty Fund*, 291 AD2d 388, 737 NYS2d 120 [2002]) with regard to the “continuing storm” doctrine.

The defendant has established its prima facie entitlement to summary judgment as a matter of law (*see, Alvarez v Prospect Hosp., supra*) on both the issue of lack of prior written notice to the municipality and the “continuing storm” doctrine. In opposition hereto plaintiff failed to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557; 427 NYS2d 595 [1980]) as to either issue. Accordingly, defendant’s motion for summary judgment is granted in its entirety.

Dated: MAR 05 2007



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION