

Pakulat v Town of Brookhaven

2007 NY Slip Op 30419(U)

March 27, 2007

Supreme Court, Suffolk County

Docket Number: 0015232

Judge: Melvyn Tanenbaum

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY

COPY

PRESENT:
Hon. MELVYN TANENBAUM
Justice

MOTION #001-~~001~~ Mot D
R/D: 092006
S/D 011607

MARISA PAKULAT, an infant under 14 years of age, by
her Mother and Natural Guardian, JOSEPH PAKULAT,
and JOSEPH PAKULAT, Individually

PLTF'S/PET'S ATTY:
KEEGAN & KEEGAN, P.C.
147 North Ocean Avenue, POB 918
Patchogue, New York 11772

Plaintiff,

- against -

TOWN OF BROOKHAVEN

DEFT'S/RESP'S ATTY:
LEWIS JOHS AVALLONE AVILES
425 Broadhollow Road
Melville, New York 11747

Defendants.

Upon the following papers numbered 1 to 21 read on this motion for an order pursuant to CPLR §3212

_____ Notice
of Motion/Order to Show Cause and supporting papers 1-21; Notice of Cross Motion and supporting papers 1-11 Answering
Affidavits and supporting papers 12-19 Replying Affidavits and supporting papers 20-21 Other
_____ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant TOWN OF BROOKHAVEN ("Town") for an order pursuant to CPLR §3212 dismissing plaintiffs complaint is denied.

On June 14, 2004 infant plaintiff Marisa Pakulat ("Pakulat") claims to have been injured when she fell while riding her bicycle over a raised portion of sidewalk owned and maintained by the Town of Brookhaven. Plaintiffs action seeks damages based upon defendants negligent failure to maintain the sidewalk in a reasonably safe condition.

In support of the motion defendant "Town" submits an affidavit from a "Town" highway department clerk and two affirmations of counsel and claims that no basis exists upon which plaintiffs can maintain a viable claim against the municipality. Defendant claims that "Town" records for the period between 1999 to 2004 confirm that no prior written notice of defect exists concerning the area where the infant plaintiff fell. It is defendant's position that absent prior written notice of the claimed defect, no valid claim can be maintained against the "Town". Defendant claims that plaintiff Joseph Pakulat's affidavit contradicts his deposition testimony concerning his knowledge about prior complaints about the sidewalk and must therefore be disregarded. Defendant also claims that the two affidavits submitted by neighbors provide no relevant evidence to prove the "Town" had notice of the alleged defect or to prove the "Town" created the

claimed dangerous condition. Defendant maintains that copies of two letters allegedly sent to the "Town" concerning a sidewalk on the roadway are irrelevant since even if the complaints were received by the "town" the sidewalk area complained of was across the street from where "Pakulat" was riding her bicycle. Defendant claims that the affidavit of the neighbor who lives immediately in front of the area where plaintiff fell also does not provide any relevant evidence to defeat the "Town's" motion since no evidence exists to support her claims that the sidewalk was defectively repaired sometime between February 1, 1998 and June 2001. It is the defendant's position that plaintiff's complaint must therefore be dismissed since no admissible proof is submitted to show that the "Town" had prior notice of the alleged defective condition of the sidewalk prior to June 14, 2004.

In opposition plaintiffs Joseph Pakulat and Marisa Pakulat each submit an affidavit, together with affidavits from two neighbors and an attorney's affirmation. Plaintiffs claim that substantial issues of fact exist concerning whether the "Town" had prior written notice of the dangerous sidewalk condition and whether the "Town" negligently repaired the sidewalk. Plaintiffs claim that based upon the affidavit of the neighbor who owns the house adjacent to the sidewalk where the accident occurred, the "Town" performed sidewalk repairs sometime before the incident. Plaintiffs also contend that the "Town" created the raised sidewalk condition by planting trees in close proximity to the sidewalk resulting in the tree roots uplifting the sidewalk. Plaintiffs also claim that the "Town" failed to diligently search the records for prior complaints in the area based upon submission of two neighboring property owner affidavits who testify that oral and written complaints were made to the "Town" about the dangerous sidewalk condition. It is plaintiff's position that based upon the submission of proof substantial issues of fact exist sufficient to defeat defendant's summary judgment motion.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES, INC., 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981).

Brookhaven Town Code §84-1(a) provides:

No civil action shall be commenced against the Town of Brookhaven or the Superintendent of Highways for damages or injuries to persons or property sustained by reason of the defective, out of repair, unsafe, dangerous or obstructed condition of any highway, street, bridge, culvert or crosswalk of the Town of Brookhaven, unless, previous to the occurrence resulting in such damages or injuries, written notice of such defective, out of repair, unsafe dangerous or obstructed condition, specifying the particular place

and location was actually given to the Town Clerk or Town Superintendent of Highways and there was a failure or neglect within a reasonable time, after the giving of such notice, to repair or remove the defect, danger or obstruction complained of.

Brookhaven Town Code §84-4 provides:

Nothing herein contained shall be construed to relieve a claimant of any obligation created by subdivision 2 of Section 65-a of the Town Law.

Town Law §65-a(2) provides:

No civil action shall be maintained against any town or town superintendent of highways for damages or injuries to person or property sustained by reason of any defect in its sidewalks or in consequence of the existence of snow or ice upon any of its sidewalks, unless such sidewalks have been constructed or are maintained by the town or superintendent of highways of the town pursuant to statute, nor shall any action be maintained for damages or injuries to person or property sustained by reason of such defect or in consequence of such existence of snow or ice unless written notice thereof, specifying the particular place, was actually given to the town clerk or to the town superintendent of highways, and there was a failure to neglect to cause such defect to be remedied, such snow or ice to be removed, or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice.

Prior notification laws are a valid exercise of legislative authority. Such laws reflect a legislative judgment to modify the duty of care owed by a locality in order to address the “vexing problem of municipal street and sidewalk liability” (AMABILE v. BUFFALO, 93 NY2d 471, 693 NYS2d 77 (1999) citing BARRY v. NIAGARA FRONTIER TR. SYS., 35 NY2d 629, 633 (1975)). The only two exceptions to the statutory rule are: 1) where the locality created the defect or hazard through an affirmative act of negligence; and 2) where a “special use” confers a special benefit upon the locality (KIERNAN v. THOMPSON, 73 NY2d 840 (1989)).

Based upon the submission of evidence by the parties substantial issues of fact exist concerning whether the “TOWN” created a dangerous condition which caused injuries to the infant plaintiff and whether the “TOWN” had prior notice of the dangerous condition sufficient to require a plenary trial. Defendant’s motion for an order granting summary judgment dismissing plaintiffs complaint must therefore be denied. Accordingly, it is

ORDERED that defendant’s motion for an order pursuant to CPLR §3212 is denied.

Dated: March 27, 2007

MELVYN TANENBAUM

NON-FINAL DISPOSITION

J.S.C.

[* 3]