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SHORT FORM ORDER

INDEX No. 04-21979
CAL. No. 06-02704-OT

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 1-4-07
ADJ. DATE 2-15-07
Mot. Seq. # 003- MG
004- XMG
005- XMD

LORRAINE DELIROD, Plaintiff, - against - ELK STREET GRILLE, KEK REALTY INC., INCORPORATED VILLAGE OF PORT JEFFERSON and TOWN OF BROOKHAVEN Defendants.	FRANK J. LAINE, P.C. Attorney for Plaintiff 449 South Oyster Bay Road Plainview, New York 11803 WILLIAM RICIGLIANO, P.C. Atty. for Defts. Elk Grille & KEK Realty 232 Madison Avenue, Suite 1200 New York, New York 10016 DEVITT SPELLMAN BARRETT, LLP Atty. for Deft. Village of Port Jefferson 50 Route 111 Smithtown, New York 11787 CURTIS, VASILE, DEVINE & MCELHENNY Attys. for Deft. Town of Brookhaven 2174 Hewlett Ave., P.O. Box 801 Merrick, New York 11566-0801

Upon the following papers numbered 1 to 53 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-19; Notice of Cross Motion and supporting papers 20-38; Answering Affidavits and supporting papers 39-47; Replying Affidavits and supporting papers 50-53; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#003) by defendant Incorporated Village of Port Jefferson for an order granting summary judgment is granted.

ORDERED that the cross motion (#004) by defendant Town of Brookhaven for an order granting summary judgment is granted.

ORDERED that the cross motion (#005) by defendants Elk Street Grille and KEK Realty, Inc. for an order granting summary judgment is denied.

Plaintiff, Lorraine Delirod, instituted this negligence action to recover damages resulting from an alleged slip and fall which took place on the sidewalk near the entrance ramp to defendant Elk Street Grille located at 321 Main Street in Port Jefferson, New York. Plaintiff alleges that snow fell from a mound that had been created on or near the sidewalk, covering some ice, thereby creating a dangerous condition. Plaintiff alleges that Elk Street Grille, KEK Realty, Inc, the Incorporated Village of Port Jefferson, and the Town of Brookhaven are jointly and severally liable for the maintenance and clearing of snow on the sidewalk.

A 50-H municipal hearing was conducted on August 9, 2004. Plaintiff's examination before trial (EBT) was conducted on November 15, 2005. Plaintiff's testimony at both proceedings was essentially the same and can be summarized as follows: Plaintiff testified that prior to the accident, she parked her car on Arden Place, the street adjacent to Elk Street Grille because the municipal parking lot located in that area was full. The weather was cold (freezing), clear, and sunny. Plaintiff could not recall whether it had snowed the day or night before but did know that there had been an accumulation of snow over the past few days. Plaintiff was bringing her son to a barber shop on Main Street. As plaintiff and her son walked about a half-block on the sidewalk to get to Main Street, plaintiff testified she observed a big mound of snow near the Elk Street Grille and that some of the snow fell from the mound onto the sidewalk right in front of the ramp/entranceway into the restaurant. She further testified that it appeared that there had been some shoveling of the sidewalk adjacent to, and in front of, the Elk Street Grille but that the sidewalk was only partially shoveled. At that time, plaintiff testified, she did not see any patches of ice on the sidewalk. Plaintiff also noted there was a pile of snow approximately three feet high and three feet wide that ran along the roadway for the entire length of Arden Place.

Plaintiff testified that after her son's haircut, she again walked on the sidewalk on Arden Place, but this time, she walked closer to the road, whereas earlier she had walked closer to the Elk Street Grille building. Plaintiff testified she fell on ice on the sidewalk in front of the Elk Street Grille's entrance ramp, which had been partially covered by snow which fell from the mound of snow near the sidewalk. Plaintiff also testified that she walked side-by-side with her son as they walked along the sidewalk, and that the portion of the sidewalk on which her son was walking was clearer than where plaintiff was walking. The plaintiff did not attempt to walk behind her son in that area where there was less snow. After falling down, the plaintiff looked at the sidewalk and noticed that snow had fallen off the snow bank and that underneath the snow were shiny spots of ice that measured about two feet. Plaintiff testified that after falling, she did not observe any salt or sand on the ground.

Steven Gallagher, an employee of the Incorporated Village of Port Jefferson ("the Village") for approximately thirteen years, and the Highway Superintendent, testified that in January, 2004, the Village was responsible for plowing the roadway known as Arden Place. He testified that when there are no cars in the parking spaces along the road, the snow plow would clear the snow curb to curb, with snow accumulation under such circumstances falling upon the sidewalk. He added that when Village parking lots are cleared, the snow is piled up within the parking lot and not transported to other areas. Mr. Gallagher testified that the Village does not undertake any measure to remove snow that a plow accumulates on the side of the road. On April 11, 2006, Robert J. Juliano, the Clerk/Village Administrator for the Village provided an affidavit, attesting, *inter alia*, that no prior written notice of the alleged condition was ever received by his office prior

to plaintiff's accident. Further, the Village code, Section 215-12 states in relevant part, that "[e]very owner, lessee, occupant or other person having charge or possession of improved or unimproved land fronting on any sidewalks within the Incorporated Village of Port Jefferson shall remove snow and ice from such sidewalks within four hours after the snow causing such condition ceases to fall on such sidewalks..."

In support of their position, defendant Brookhaven Town has submitted an affidavit from Ann Marie Slocum, an employee of the town clerk's office who avers that a search of the Town records for Arden Place reveals no record of any prior complaints of snow and ice accumulation at that location for 60 days prior to plaintiff's accident. They also offer the affidavit of Suzanne Mauro, principal clerk in the town's Highway Department, who states that the sidewalk in question is not under the jurisdiction of the Town of Brookhaven nor maintained by the Town. Rather, it falls under the jurisdiction of the Village of Port Jefferson and is maintained by them, or the adjacent homeowner.

Thomas Kane, president of KEK Realty, Inc. and president and sole shareholder of Morgan T., Inc. d/b/a Elk Street Grille testified that pursuant to the written lease agreement, tenants were responsible for snow removal around the entire footprint of the building. He testified that there was a procedure in place for snow removal, and that his employees followed that procedure the day plaintiff fell. Specifically, the employees of Elk Street Grille would remove snow in order to make the sidewalk as clean and "passable" as possible, which meant shoveling down to the cement and applying salt and sand, if necessary. Mr. Kane testified that the restaurant manager would inspect the sidewalk to make sure these instructions were followed. Mr. Kane did not know if employees of the Elk Street Grille ever shoveled snow from the sidewalk to the curb adjacent to Arden Place back in January 2004, and he did not know who created the pile of snow on Arden Place. Kane testified he was not at the restaurant on the date of plaintiff's accident.

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact. If the moving party fails to meet this burden, summary judgment must be denied. If, however, this burden is satisfied, then the burden 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 [1984]. In order to grant summary judgment it must clearly appear that no material issue of fact has been presented (***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 (2d Dept [1999]).

The motion for summary judgment by defendant Village of Port Jefferson is granted. Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for personal injuries caused by an improperly maintained sidewalk unless it receives written notice of the defect or an exception to the written notice requirement applies ***(Ganzenmuller v Incorp. Village of Port Jefferson,*** 18 AD3d at 704: 795 NYS2d at 745]). The New York Court of Appeals has recognized only two exceptions to the prior written notice rule, namely, 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 (*id.*). Here, the defendant Village established that it had no prior written notice of the alleged sidewalk defect which caused the plaintiff to fall. There was no special benefit conferred upon the defendant Village which would exempt the plaintiff from compliance with the written notice requirement (***see, Poirier v City of Schenectaty***, 85 NY2d 310, 624 NYS2d 555) nor any evidence that the Village created the dangerous condition in front of the Elk Street Grille.

Addressing Brookhaven's motion, New York State Town Law § 65-a requires that "no civil action shall be maintained against any town . . . for damages ... in consequence of the existence of snow or ice upon any of its sidewalks unless written notice thereof, specifying the particular place was actually given to the town clerk or town superintendent of highways . . ." Plaintiff has conceded that Brookhaven did not have jurisdiction over the area in which plaintiff fell and did not contribute to the conditions existing at the time of her fall. Accordingly, plaintiff does not oppose Brookhaven's motion to the extent it is premised on lack of notice. Further, neither of the exceptions to the prior written notice rule are applicable to the Town. The Town has demonstrated their entitlement to summary judgment.

With respect to defendants Elk Street Grille and KEK Realty, Inc., a defendant will only be held liable in a slip-and-fall accident involving snow and ice when it created a dangerous condition or had actual or constructive notice thereof (***Zabbia v Westwood, LLC***, 18 AD3d 542, 795 NYS2d 319 [2d Dept 2005]). Landowners owe "a duty to exercise reasonable care in maintaining their property in a safe condition under all the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk and the foreseeability of a potential plaintiff's presence on the property" (***Perrelli v Orlow***, 273 AD2d 533; 708 NYS2d 742 [3d Dept 2000]). Questions of foreseeability are ordinarily questions of fact and summary judgment may only be granted when only a single inference can be drawn from undisputed facts (*Id*). Further, "a party in control of real property may be held liable for accidents occurring as a result of a hazardous condition created on the premises because of an accumulation of snow or ice only if an adequate period of time has passed following the cessation of a storm to allow the party to remedy the condition" (***Russo v 40 Garden St. Partners***, 6 AD3d 420, 420-421 [2d Dept 2004]) and only if the owner has "notice of the defect, or, in the exercise of due care, should have had notice" (***Arcuri v Vitolo*** 196 AD2d 519; 601 NYS2d 173 [2d Dept 1993]); *see*, ***McCabe v Easter***, 128 AD2d 257, 258-259, 516 NYS2d 515 [3d Dept 1987]).

The Court finds that defendants Elk Street Grille and KEK Realty have not met their burden to establish prima facie that they lacked actual or constructive notice of the alleged icy condition or that a reasonable amount of time had not elapsed within which they could have remedied the situation (*see*, ***Shivers v Price Bottom Stores, Inc.***, 289 AD2d 389, 734 NYS2d 235 [2d Dept 2001]). At bar, there is no evidence as to when the sidewalk was cleared or what procedures were followed that day. Thomas Kane, president of defendant KEK Realty, Inc. and president and owner of Elk Street Grille could only testify there was a custom and practice in January 2004 for the employees to clear snow from the sidewalk (and, if necessary, apply salt and sand). There is no testimony as to what was actually done on the date of plaintiff's accident, what time it was done, or whether the clearing was ever checked by the manager. Plaintiff's evidence establishes that there are triable issues of fact regarding whether defendants adequately cleared the snow and ice from the sidewalk in front of the ramp/entranceway and whether the allegedly icy condition posed a hazardous condition of which the defendants had actual or constructive notice. Accordingly, the motion of the defendants Elk Street Grille and KEK Realty, Inc. for summary judgment is denied.

The motion for summary judgment by the Incorporated Village of Port Jefferson is granted. The cross-motion by the Town of Brookhaven for summary judgment is also granted. Plaintiff's complaint against them is dismissed. The cross motion by defendants Elk Street Grille and KEK Realty, Inc. is denied. The action is therefore severed and continued against defendants Elk Street Grille and KEK Realty, Inc.

Dated: APR 19 2007

J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**