

Reiser v Town of Smithtown

2007 NY Slip Op 31372(U)

May 21, 2007

Supreme Court, Suffolk County

Docket Number: 0025663/2004

Judge: Robert W. Doyle

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12-22-06
ADJ. DATE 2-23-07
Mot. Seq. # 006 - MG; CASEDISP

-----X
 THOMAS J. REISER, JR., an infant by his :
 father and natural guardian, THOMAS J. REISER, :
 SR.. and THOMAS J. REISER, SR, individually, :
 :
 Plaintiffs, :
 :
 - against - :
 :
 TOWN OF SMITHTOWN, WILLIAM :
 DUCKHAM and HELEN DUCKHAM, :
 :
 Defendants. :
 -----X

FABER & TROY, ESQ.
 Attorneys for Plaintiffs
 180 Froehlich Farm Boulevard
 Woodbury, New York 11797
 :
 PURCELL & INGRAO, P.C.
 Attys for Deft Town of Smithtown
 204 Willis Avenue
 Mineola, New York 11501
 :
 CASCONE & KLUEPFEL, LLP
 Attys for Defts Duckham
 1399 Franklin Avenue, Suite 302
 Garden City, New York 11530

Upon the following papers numbered 1 to 25 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 ; Answering Affidavits and supporting papers 20 - 23; Replying Affidavits and supporting papers 24 - 25; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#006) by the defendant Town of Smithtown 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 October 25, 2004 and issue was joined by the filing of defendant's answer on or about November 24, 2004. Discovery has been completed, and the note of issue was filed on or about October 10, 2006. By Order of this Court (J. Burke) dated May 16, 2006, all claims against co-defendants William Duckham and Helen Duckham were dismissed and the action was severed.

This is an action for personal injuries allegedly sustained by the infant plaintiff Thomas J. Reiser, Jr., on or about September 21, 2003, when he fell off his bicycle while riding on the public sidewalk located adjacent to 12 Hill Lane, Smithtown, Suffolk County, New York. Plaintiff Thomas J. Reiser, Sr. (Reiser), individually and as the parent and natural guardian of Thomas J. Reiser, Jr., an

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infant under the age of fourteen years, alleges in the verified complaint that the defendant Town of Smithtown (Smithtown) negligently created and allowed a dangerous condition to exist in that Smithtown failed to properly maintain the sidewalk area which caused the infant plaintiff to fall from his bicycle and sustain serious permanent physical injury.

Defendant Smithtown now moves for summary judgment dismissing the complaint, pursuant to CPLR 3212, on the grounds that Smithtown did not receive prior written notice of the defective sidewalk as required by NY Town Law § 65-a. In support of its motion Smithtown submits, *inter alia*, an affirmation of counsel, copies of the pleadings and verified bill of particulars, a copy of excerpts of the deposition transcripts of Thomas J. Reiser, Jr., and William Duckham, a copy of the deposition transcript of Donna Hill, Town of Smithtown Town Clerk, and affidavits from William Murphy, Town of Smithtown Director of Parks Department, James Cordray, an employee of the Town of Smithtown Department of Environment and Waterways, and Elizabeth Elderkin, Deputy Superintendent of the Town of Smithtown Highway Department.

Plaintiff opposes the motion on the grounds that Smithtown improperly maintained or repaired the subject sidewalk allowing it to become and remain uneven and raised above the adjoining sidewalk causing the infant plaintiff to fall from his bicycle. In opposition, plaintiff submits, *inter alia*, an affirmation of counsel.

Plaintiff also argues that information concerning the removal of a tree adjacent to the subject sidewalk is material to the prosecution of this matter and requests that this court deny defendant's summary judgment motion, with leave to renew, pending determination of a discovery motion filed by plaintiff. However, the discovery motion, which plaintiff argues renders this motion premature, was denied by this Court (J. Doyle) on April 10, 2007 holding that the plaintiff failed to establish any unusual or unanticipated circumstances which would warrant additional discovery after the filing of the note of issue (*see*, 22 NYCRR 202.21[d]; ***Gomez v New York City Transit Auth.***, 19 AD3d 366 [2005]; ***Jacques v City of New York***, 7 AD3d 576 [2004]; ***Rodriguez v Lau***, 298 AD2d 376 [2002]).

Addressing the issue presented herein with regard to notice, New York State Town Law §65-a requires that "[n]o civil action shall be maintained against any town . . . unless written notice of such defective . . . condition . . . was actually given to the town clerk or town superintendent of highways" In addition, this court in its discretion takes judicial notice (CPLR 4511[a]) of Smithtown Town Code Chapter 245, Article III, Sections 13 - 14.2, enacted pursuant to its authority under the New York Municipal Home Rule Law and General Municipal Law, requiring that:

No civil action shall be maintained against the Town of Smithtown for damages or injuries to person or property sustained by reason of any . . . sidewalk, . . . being defective, out of repair, unsafe, dangerous or obstructed . . . unless written notice of such defective, unsafe, dangerous or obstructed condition shall be filed with the Town Clerk 15 calendar days prior to the event giving rise to the alleged claim (Smithtown Town Code § 245-13).

In the absence of written notice that is required above, no civil claim shall be maintained against the Town of Smithtown, nor shall any civil claim be maintained based on an

allegation that such defect, danger or obstruction existed for so long a period of time that the same should have been discovered and remedied in the exercise of reasonable care and diligence, nor a claim that any Town employee possessed actual knowledge of such defect, danger or obstruction, unless written notice is filed with the Town Clerk as required above (Smithtown Town Code § 245-14 [A]).

Nothing herein contained shall be construed to relieve a claimant of the obligation to serve a notice of claim on the Town of Smithtown as provided in § 50-e of the General Municipal Law (Smithtown Town Code § 245-14 [B]).

The written notice required by this section shall state the exact location of the alleged defect, danger or obstruction and shall specifically state the condition complained of. If this requirement is not met, such notice shall be void (Smithtown Town Code § 245-14.1).

Therefore, under both the New York Town Law and Smithtown Town Code, prior written notice of a defective or unsafe sidewalk condition must be given to the Smithtown Town Clerk before a civil action may be maintained against the Town of Smithtown to recover damages for plaintiff's personal injuries (see, *Filaski- Fitzgerald v Town of Huntington*, 18 AD3d 603, 795 NYS2d 614 [2005]; *Ganzenmuller v Incorp. Village of Port Jefferson*, 18 AD3d 703; 795 NYS2d 744 [2005]; *Oswald v City of Niagara Falls*, 13 AD3d 1155, 787 NYS2d 757 [2004]). Notice to any other entity within the town is insufficient since prior written notice statutes, enacted in derogation of common law, are to be strictly construed (see, *Poirier v City of Schenectady*, 85 NY2d 310, 624 NYS2d 555 [1995]; *Monteleone v Incorp. Village of Floral Park*, 74 NY2d 917, 550 NYS2d 257 [1989]). Thus, a municipality which has enacted a prior written notice statute, may not be subjected to liability for personal injuries caused by such defective condition unless it received 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.*). In this case neither of the exceptions applies.

Defendant Smithtown has submitted admissible evidence that Smithtown did not receive prior written notice of the defective sidewalk adjacent to 12 Hill Lane prior to the infant plaintiff's accident. Smithtown submitted affidavits from William Murphy, Director of Parks for the Town of Smithtown, James Cordray, an employee of the Smithtown Department of Environment and Waterways and Elizabeth Elderkin, Deputy Superintendent of the Smithtown Highway Department, as well as, the deposition of Donna Hill, Smithtown Town Clerk, establishing that a review of multiple records maintained by the municipality for the area located in the vicinity of 12 Hill Street failed to reveal any complaints or notifications concerning the defective sidewalk prior to the date of plaintiff's accident. Plaintiff does not claim that he notified Smithtown of the defect prior to his son's injury but argues instead that Smithtown may have created the defect when it removed a tree from the area adjacent to the subject sidewalk. Smithtown however submitted evidence that the removal of the tree was temporally distant from the happening of the infant plaintiff's accident since it was removed on or about January 13, 2000, three years prior to the infant plaintiff's accident.

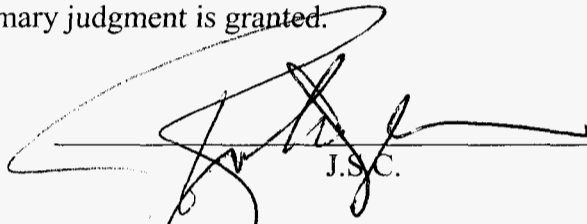
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In opposition hereto plaintiff submitted no evidence to support his speculation that the tree or the removal of the tree caused the defective sidewalk or contributed in any way to the infant plaintiff's accident. A motion for summary judgment may not be defeated by the assertion of mere conclusory allegations, expressions of hope, or unsubstantiated assertions (*V.Savino Oil & Heating Co., Inc. v Rana Management Corp.*, 161 AD2d 635, 555 NYS2d 413 [1990]). Even assuming that Smithtown had created the defect in the sidewalk by the removal of the tree the argument would still fail since this exception exists only where the municipality acted affirmatively to create a dangerous condition through its own negligence (see, *Amabile v City of Buffalo*, 93 NY2d 41, 693 NYS2d 77 [1999]; *Nixdorf v East Islip School District*, 276 AD2d 759, 715 NYS2d 432 [2000]) and the removal of a curbside tree does not constitute affirmative negligence (see, *Zawacki v Town of N. Hempstead*, 184 AD2d 697, 585 NYS2d 93 [1992]; *Zizzo v City of New York*, 176 AD2d 722, 574 NYS2d 966 [1991]; *Monteleone v Incorporated Vil. of Floral Park, supra*), it would, at most, constitute nonfeasance (see, *Lowenthal v Heidrich Realty Corp.*, 304 AD2d 725, 759 NYS2d 497 [2003]; *Michela v County of Nassau*, 176 AD2d 707, 574 NYS2d 965 [1991]).

Based on the evidence submitted, the defendant established, prima facie, that it did not receive prior written notice of the alleged defect (see, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). In opposition hereto plaintiff has failed to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557; 427 NYS2d 595 [1980]).

Accordingly, defendant's motion for summary judgment is granted.

Dated: MAY 21 2007



J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION