

Huber v Nelson

2007 NY Slip Op 32005(U)

June 25, 2007

Supreme Court, Suffolk County

Docket Number: 0025224/2003

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 4-5-07
ADJ. DATE 5-3-07
Mot. Seq. # 004 - MG
005 - XWDN
006 - XMD

-----X
CATHLEEN HUBER, :
Plaintiff, :
- against - :

GRUENBERG & KELLY
Attorneys for Plaintiff
3275 Veterans Memorial Hwy, Suite B-9
Ronkonkoma, New York 11743

KEITH NELSON, GREENLAWN :
CHIROPRACTIC CENTER, 3 BLVD. TAVERN :
CORP. and OF BROADWAY PUB, :
Defendants. :

CHRISTINE MALAFI, Suffolk Cty Atty
By: T. Michael Conlon, Esq.
Attys for 3rd Party Deft County of Suffolk
100 Vets Memorial Hwy, P.O. Box 6100
Hauppauge, New York 11788-0099

-----X
KEITH NELSON and GREENLAWN :
CHIROPRACTIC CENTER, :
Third-Party Plaintiffs, :
- against - :

JOHN J. LEO, Huntington Town Attorney
By: Valerie E. Smith, Esq.
Attys for 3rd Party Defts Town of Huntington
100 Main Street
Huntington, New York 11743

COUNTY OF SUFFOLK, SANITATION :
DIVISION OF THE DEPARTMENT OF PUBLIC :
WORKS, TOWN OF HUNTINGTON and :
TOWN OF HUNTINGTON DEPARTMENT OF :
ENVIRONMENTAL WASTE, :
Third-Party Defendants. :

MILBER, MAKRIS, PLOUSADIS, et al.
Attys for Defts/3rd Party Plaintiffs Nelson
& Greenlawn Chiropractic Center
1000 Woodbury Road, Suite 402
Woodbury, New York 11797

-----X

Upon the following papers numbered 1 to 40 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-11; Notice of Cross Motion and supporting papers 12-33; 34-39; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other letter 40
: (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by third party defendants Town of Huntington and Town of Huntington Department of Environmental Waste for summary judgment dismissing the third party complaint against them is granted; and it is

ORDERED that the cross motion by defendants/third party plaintiffs Keith Nelson and Greenlawn Chiropractic Center for summary judgment, is denied as moot, having been withdrawn by letter dated May 3, 2007; and it is further

ORDERED that the cross motion by defendant County of Suffolk, Sanitation Division of the Department of Public Works for summary judgment dismissing the third party complaint and all cross claims against it is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff when she slipped and fell on a pile of snow located between the sidewalk and curb at or near the office of Greenlawn Chiropractic, 58 Broadway (County Road 86), Greenlawn, Town of Huntington, New York on February 16, 2003, at approximately 10:30 p.m. Plaintiff alleges that defendants/third party plaintiffs Keith Nelson and Greenlawn Chiropractic Center (hereinafter "Nelson" and "Greenlawn") were negligent in the ownership, maintenance and control of the brick overlay/grassy area between the sidewalk and curb at the premises known as 58 Broadway (County Road 86), Greenlawn, in that they negligently failed to remove ice and snow in a timely fashion and/or negligently applied salt and sand to said area. Furthermore, plaintiff alleges that defendants Nelson and Greenlawn had actual and constructive notice of same. Defendants/third party plaintiffs Nelson and Greenlawn allege that third party defendants County of Suffolk, Sanitation Division of the Department of Public Works (hereinafter "County"), Town of Huntington, and Town of Huntington Department of Environmental Waste (hereinafter "Town") created the alleged hazardous condition at the location by plowing and/or removing snow in a negligent manner. By order dated January 21, 2005, defendant 3 Blvd Tavern Corp. was awarded summary judgment on liability grounds dismissing the complaint against it, without opposition. The Court notes that defendant Off Broadway Pub has not appeared or answered in this action, although it was allegedly served with process according to the records maintained by the Suffolk County Clerk's Office.

Third party defendants Town of Huntington and Town of Huntington Department of Environmental Waste (hereinafter "Town") now move for summary judgment dismissing the third party complaint against them. The Town asserts that it had no legal jurisdiction or responsibility to maintain the sidewalk adjacent to the building owned/leased by defendants Nelson and Greenlawn pursuant to Huntington Town Code, Article IV, Section 173-16, and that these defendants bore sole responsibility for same. Also, the Town alleges that it did not create the alleged defective condition that allegedly caused plaintiff's fall. Furthermore, the Town alleges that no written notice of a dangerous or defective condition was served upon it pursuant to the Huntington Town Code Section 174-3 (B) and Town Law Sect on 65-a.

In support of its motion, the Town submits, inter alia, the pleadings; the two transcripts of the deposition testimony given by plaintiff; the transcripts of the deposition testimony given by defendant/third party plaintiff Keith Nelson, Carmella Balbus, Assistant Civil Engineer on behalf of the County, and Derek Baiz, former highway project assistant on behalf of the Town; the personal affidavit of Derek Baiz; and the personal affirmation of Audrey M. Jaramillo, a clerk typist for the Town.

Plaintiff testified at her two depositions to the effect that the accident occurred on the public sidewalk adjacent to Greenlawn Chiropractic on February 16, 2003 between ten and eleven o'clock p.m.

Plaintiff testified at her two depositions to the effect that the accident occurred on the public sidewalk adjacent to Greenlawn Chiropractic on February 16, 2003 between ten and eleven o'clock p.m. The building occupied by Greenlawn Chiropractic is located on Broadway at the corner of Boulevard Avenue. The nearest intersecting street to the accident location is Boulevard Avenue. There is a beige fence affixed to the chiropractic office property on the Broadway side. A brown picket fence with an operable gate is affixed to the property of Off Broadway Pub and is accessed by a curb cut apron in the sidewalk. Prior to the accident, plaintiff was almost certain that she had been dropped off at Healy's driveway apron, which was clear of snow and well-illuminated. She had dinner at Healy's with her fiancé. Upon leaving, plaintiff crossed Healy's driveway and entered the street. She observed a large mound of snow that was obstructing both the apron and sidewalk in front of the gate of the large brown picket fence. Plaintiff then climbed back up onto the sidewalk over a small amount of snow and continued to walk in the direction of the chiropractic office. At this point, she turned right to approach her fiancé's car that was parked by the curb. The nose of the car abutted the Off Broadway Pub apron located in front of the wooden picket fence. The snow between the portion of the sidewalk between the curb and the sidewalk was approximately one to one and one-half feet deep and two to two and one-half feet wide. She attempted to grab onto the car over the snow while putting her left foot over the snow and onto the edge of the curb, which was clear of snow. Upon attempting this maneuver, her foot slipped off the curb and she fell into the road. Although plaintiff's fiancé had offered to move his car to the clear driveway apron, she told him not to bother. Plaintiff further testified that she did not make any prior complaints to the Town regarding the alleged condition and she was not aware of anyone who may have made any prior complaints.

Keith Nelson testified at his deposition to the effect that he is a licensed chiropractor and that he organized Greenlawn Chiropractic in 1981. He is the owner of the building located at 58 Broadway which is situated on the corner of Broadway and Boulevard. The property extends down Broadway to the end of the beige fence. He was responsible for maintaining the sidewalk in front of his office. Although he had shovels and salt available, he did not hire anyone to perform snow removal. Generally, he would clear the entire sidewalk from the corner to the end of the fence, and in doing so would push all the snow south towards the grate at the corner of Broadway and Boulevard Avenue. He rarely cleared the brick area except to make a small path towards his office entrance for people entering from the roadway. The owner of Off Broadway Pub helped him shovel snow on a few occasions. Mr. Nelson further testified that there was one major snowstorm that occurred during the middle or end of February 2003 while he was away on vacation.

Carmella Balbus testified at her deposition on behalf of the County to the effect that she has been employed by the County of Suffolk Department of Public Works in the highway engineering department for twenty eight years. She has been employed as an assistant civil engineer for six years. Her review of records maintained by the County showed that Broadway, which is also know as County Road 86, had been plowed on February 11, 2003, approximately five days before the accident. Although the County plows this road, snow cleared on Broadway is not carted away by the County. According to Ms. Balbus, while the County jurisdiction generally runs from property line to property line, the maintenance of sidewalks is the Town's responsibility.

Derek Baiz testified at his deposition to the effect that he was employed as a highway project

assistant in the Town's Highway Department at the time of the accident. According to Mr. Baiz, the Town does not perform snow and ice control on Broadway as it is a county road. While the Town maintains Boulevard Avenue, it does not perform snow and ice removal of sidewalks abutting commercial property within the Town of Huntington. Instead, the Town Code charges commercial property owners with responsibility for snow removal and maintenance of any abutting sidewalks. Mr. Baiz further testified that the Town did not receive any prior notice regarding Boulevard Avenue.

In his affidavit, Derek Baiz avers that, as highway project assistant, he maintained and searched Town records regarding complaints received by the Office of the Superintendent of Highways and records regarding work performed by the Highway Office for the three year period covering February 16, 2000 through to February 16, 2003. His search showed no records of written complaints or other notice regarding the subject walkway/roadway. His search also showed no record of any work being performed at that location. Mr. Baiz further avers that his search showed that Broadway/County Road 86 is not maintained by the Town as it is a County owned roadway.

In her affidavit, Audrey M. Jaramillo avers that, as part of her duties as clerk typist for the Town, she maintains and searches records received by the Town Clerk's Office. She conducted a search of the records maintained by the Town Clerk's office for the three year period covering February 16, 2000 through to February 16, 2003. Her search showed no records of written complaints or other notice regarding the subject walkway/roadway.

Defendants County of Suffolk, Sanitation Division of the Department of Public Works also moves for summary judgment dismissing the third party complaint and all cross claims against it. The County alleges that there is no evidence that it breached a duty owed to the plaintiff, and there is no proof that the County was in any way connected to the accident through any affirmative action on its part. Additionally, the County maintains that no written notice of a dangerous or defective condition was served upon the County pursuant to the Suffolk County Charter as a condition precedent to the maintenance of this suit. Furthermore, the County argues that the sole proximate cause of the plaintiff's injury was her voluntary assumption of the risk by climbing over a snow mound.

In support of this motion, the County submits, inter alia, the affidavit of John Donovan, investigator for the County of Suffolk employed by the Office of the County Attorney. Mr. Donovan avers that, as part of his duties, he maintains records of all written complaints concerning alleged defects or dangerous conditions on the streets, roads and sidewalks of the County. He conducted a search of the records maintained by the County for the period prior to, or on, February 16, 2003 for the sidewalk located adjacent to the premises known as Greenlawn Chiropractic/58 Broadway, Greenlawn, New York, and he found no records of written notice or complaints regarding the subject walkway/roadway.

Suffolk County Charter Code § C8-2 requires that prior written notice be "made in writing by certified or registered mail to the County Attorney in Hauppauge." Further, pursuant to Huntington Town Code § 174-3 and Town Law § 65-a, written notice of a defect in a highway or sidewalk must be actually given to the Town Clerk or Town Superintendent of Highways before an action may be maintained against the Town. More specifically, article IV, section 174-3 (B) of the Huntington Town Code, provides, in relevant part, that "in no event shall the [Town] *** be liable for damage or injury to

persons or property in the absence of *** prior written notice” of the existence of snow or ice upon any highway, street, sidewalk or crosswalk. It further provides that “constructive notice shall not be applicable or valid.” Additionally, article IV, section 174-16 of the Huntington Town Code provides, in part, that “the owner, lessee, tenant and occupant of lands fronting or abutting on any streets, highway [or] *** roadway *** shall keep such sidewalk free and clear of snow [and] ice.” Under the Town Code, a sidewalk is defined for the purpose of article IV as “the area between the edge of a roadway or highway pavement and the lot line of the abutting property, including but not limited to the curb, utility, brick, tree, cart or landscape areas” (Huntington Town Code § 174-2). Further, section 140 (18) of the Highway Law impresses a town superintendent of highways with the duty to

maintain all sidewalks in the town constructed by the state adjacent to state highways and all **sidewalks** in the town constructed by the county **adjacent to county roads** and, when authorized by the town board, cause the removal of snow therefrom, and the cost thereof shall be paid from the miscellaneous and other town funds (emphasis added).

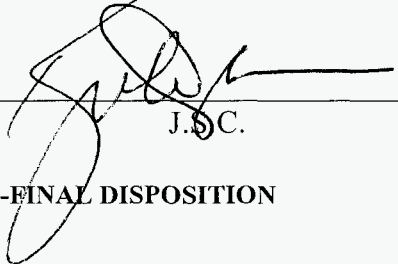
Moreover, pursuant to section 144 of the Vehicle and Traffic Law, a sidewalk is defined as “[t]hat portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for the use of pedestrians.”

Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for personal injuries caused by a defective road, highway, walkway, or pathway, unless it has either received prior written notice of the defect, or an exception to the prior written notice requirement applies (*Lopez v G&J Rudolph Inc.*, 20 AD3d 511, 799 NYS2d 254 [2d Dept 2005]). Only two exceptions to the statutory rule requiring prior written notice have been recognized, “namely, where the locality created the defect or the hazard through an affirmative act of negligence *** and where a ‘special use’ confers a special benefit upon the locality” (*Amabile v City of Buffalo*, 93 NY2d 471, 474; 693 NYS2d 77, 79 [1999]). In this case, neither of the exceptions is applicable (*see, Kravatz v County of Suffolk*, 2007 NY Slip Op 4600 [2d Dept, May 29, 2007]).

By their submissions, defendants Town and County have made a prima facie showing of entitlement to judgment as a matter of law by submitting evidence that they each had no prior written notice of the snowy/icy condition on the subject sidewalk that allegedly caused the plaintiff’s fall (Town Law § 65-a; Suffolk County Charter Code § C8-2; Huntington Town Code § 174-3; *see also, Lopez v G&J Rudolph Inc.*, *supra*). Additionally, the County has demonstrated that legal responsibility for the maintenance of the subject sidewalk, including ice and snow removal, was vested solely with the Town pursuant to New York State Highway Law § 140 (18) (*see, Rosenblum v City of New York*, 254 AD2d 474, 680 NYS2d 262 [1998], *appeal denied* 93 NY2d 803 [1999]). In turn, the Town has demonstrated that it had no duty to remedy the ice and snow on the sidewalk area in the subject location as this was the sole responsibility of defendants Nelson and Greenlawn as owners, tenants, or occupants of the adjacent property pursuant article IV, section 174-16 of the Huntington Town Code. Moreover, the evidence submitted by the defendants established, prima facie, that the placement of snow on the brick overlay portion of the sidewalk adjacent to the curb did not create an inherently dangerous condition (*see, Errett v Great Neck Park District*, NY Slip Op 4590 [2d Dept, May 29, 2007]; *Cupo v Karfunkel*, 1 AD3d 48,

767 NYS2d 40 [2d Dept 2003]). The snow bank was readily observable to those employing the reasonable use of their senses, and did not present an undue risk of harm. In any event, the snow mound, at most, merely provided the condition, but was not the cause, and the plaintiff's decision to climb over it was her independent and voluntary choice (*see, Bacon v Mussaw*, 167 AD2d 741, 563 NYS2d 854 [3d Dept 1990]). As no opposition has been filed herein, defendant/third party plaintiffs Nelson and Greenlawn have failed to raise a triable issue of fact. Accordingly, the motion and cross motion by third party defendants are granted, and the third party complaint and all third party cross claims insofar as instituted against the Town and County are dismissed in their entirety (*see, Lopez v G&J Rudolph Inc., supra; Testagrosa v Brookwood Cmtys, Inc.*, 307 AD2d 921, 762 NYS2d 881 [2d Dept 2003]).

Dated: JUN 25 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION