

**Hannon v Town of Babylon**

2007 NY Slip Op 32245(U)

July 18, 2007

Supreme Court, Suffolk County

Docket Number: 0021507/2002

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 3-1-07  
ADJ. DATE 5-30-07  
Mot. Seq. # 002 - MG  
003 - MG  
004 - MG  
005 - XMD

-----X  
DOROTHY HANNON, :  
 :  
 :  
 Plaintiff, :  
 :  
 :  
 - against - :  
 :  
 TOWN OF BABYLON, JOEL HINDERSTEIN :  
 and ELEANOR HINDERSTEIN, :  
 :  
 Defendants. :  
-----X

JOSEPH S. CARAMAGNO, P.C.  
Attorney for Plaintiff  
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Deer Park, New York 11729  
  
CHRISTINE MALAFI, Suffolk Cty Atty  
By: T. Michael Conlon, Esq.  
Atty for 3<sup>rd</sup> Party Deft County of Suffolk  
100 Veterans Memorial Hwy, P.O. Box 6100  
Hauppauge, New York 11788-0099

TOWN OF BABYLON, :  
 :  
 :  
 Third-Party Plaintiff, :  
 :  
 :  
 - against - :  
 :  
 KINGS PARK INDUSTRIES INC and THE :  
 COUNTY OF SUFFOLK, :  
 :  
 Third-Party Defendants. :  
-----X

HAMMILL, O'BRIEN, CROUTIER, et al.  
Attys for Defendants Hinderstein  
6851 Jericho Turnpike, P.O. Box 1306  
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Attys for Deft/3rd Party Pltf Town of Babylon  
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ROBERT C. WERTZ, ESQ.  
Atty for 3<sup>rd</sup> Party Deft Kings Park Industries  
1355 Motor Parkway, Suite 2  
Hauppauge, New York 11749-5227

Upon the following papers numbered 1 to 51 read on these motions for summary judgment; Notice of Motion/  
Order to Show Cause and supporting papers 1 - 30; Notice of Cross Motion and supporting papers 31 - 35; Answering  
Affidavits and supporting papers 36 - 44; Replying Affidavits and supporting papers 45 - 51; Other       ; (~~and after hearing~~  
counsel in support and opposed to the motion) it is,

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**ORDERED** that the motion for summary judgment by defendants Joel Hinderstein and Eleanor Hinderstein (#002) is granted.

**ORDERED** that the motion for summary judgment by defendant Kings Park Industries, Inc. (#003) is granted.

**ORDERED** that the motion for summary judgment by defendant Suffolk County (#004) is granted.

**ORDERED** that the motion for summary judgment by defendant Town of Babylon (#005) is denied.

This is an action by plaintiff Dorothy Hannon to recover damages for personal injuries she sustained as a result of a trip and fall over what is alleged to be the stump of a sign post protruding from the sidewalk in front of an office building owned by defendants Joel and Eleanor Hinderstein located at 799 Deer Park Avenue, North Babylon, New York on April 27, 2002.

The Hindersteins served an answer, with cross-complaint against the Town of Babylon. Defendant Town of Babylon served an answer and cross-claim against defendants Hinderstein on September 27, 2002. Thereafter, the Town of Babylon commenced a third-party action in August 2003 against Kings Park Industries, Inc. and the County of Suffolk.

The Hindersteins have moved for summary judgment on the grounds they owed no duty of care to the plaintiff as they neither owned, controlled or made special use of the public sidewalk. Kings Park Industries, Inc., ("Kings Park") has moved for summary judgment on the grounds that they neither owed a duty of care to plaintiff, breached that duty, or that a breach of that duty caused the damages to the plaintiff. The County of Suffolk maintains they owed no duty to plaintiff but if any defect or dangerous condition did exist on the sidewalk, responsibility for its maintenance is vested solely within the Town of Babylon. In the alternative, the County argues, even if they did retain some responsibility for maintenance of the sidewalk, they were not provided with prior written notice of any such dangerous condition. The Town of Babylon argues they neither created the alleged dangerous condition or had actual or constructive knowledge of its existence.

In support of their respective positions, the parties offer the pleadings, the deposition testimony of plaintiff and each of their representatives.

Plaintiff testified she tripped and fell on the sidewalk adjacent to the medical building located at 799 Deer Park Avenue, North Babylon on April 27, 2002. Plaintiff claims an iron bar was protruding from the sidewalk and caught her toe. Plaintiff testified she did not see the "iron bar" prior to her fall or during the time she remained at the accident scene. The first time plaintiff identified the iron bar was approximately a week and a half after the accident when she went back with her husband to take pictures.

Dr. Joel Hinderstein testified that he is the owner of the medical building adjacent to the sidewalk where the accident occurred. He has owned the property for 47 years with his wife, Eleanor Hinderstein. Dr. Hinderstein testified he was not aware of the protruding metal until after being served with the

summons and complaint in this matter. Hinderstein testified he then inspected the sidewalk and observed a metal nub protruding from the sidewalk. It was the broken remnants of a sign post. He immediately called the Babylon Town attorney and reported the condition. He was assured that it would be fixed and it was in fact repaired that same day. Hinderstein testified he did know whether the Town or County made the repair.

Carmella R. Balbus testified on behalf of Suffolk County. She is employed by the County as an assistant civil engineer. Her duties include researching FOIL requests, claims against the County, and providing surveyors and consultants with surveys and maps of county roads. Balbus determined that the roadway adjacent to the sidewalk where plaintiff fell was owned and maintained by the County but that the metal nub that had been protruding from the sidewalk/curb area had been a Town of Babylon "No Stopping" sign. The County did not install the original "No Stopping" sign nor did it have statutory authority to do so. The site inspection revealed that a repair had been made which involved pounding down the protrusion and covering it with asphalt. Balbus further testified that the Uniform Code of Traffic ordinances of the Town of Babylon contains an ordinance for a "No Stopping" sign at the accident location. The County, according to Balbus, does not regulate parking. It is the responsibility of a town or village to regulate parking. Ms. Balbus also testified she checked to determine whether any construction had been undertaken by the County in that location. The records reveal the last construction undertaken by the County in this area was in 1988. Balbus also located a work order dated 2001 in which Kings Park Industries, Inc. resurfaced and re-striped the roadway between the curbs lining each side of the road.

Peter J. DiNunzio testified that at the time of plaintiff's accident he worked in the Department of Public Works for the Town of Babylon in the "sign shop". He described the "sign shop" as a division of the Public Works Department which handles all municipal signs including traffic control signs. The Town installed and maintained parking control signs, which specifically included "No Standing" and "No Stopping" signs. A record search the beginning of 2000 until September 29, 2003 revealed that there had been no complaints or reports of damage to signs in the area where plaintiff fell.

The Town of Babylon has also submitted the affidavits of Deputy Town Clerk Ronnise J. Miller and of the Commissioner of the Department of Public Works, Philip A. Berdolt in which they aver they have searched the records and there has been no written notice of any defective, dangerous, unsafe, out of repair and/or obstructed condition for the sidewalk area located adjacent to 799 Deer Park Avenue prior to and up to April 27, 2002.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 774 NYS2d 792 [2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). However, a defendant in moving for summary judgment bears the initial burden of establishing a prima facie entitlement to judgment as a matter of law (*Altieri v Golub Corporation*, 292 AD2d 734, 741 NYS2d 126 [2002]) and the burden will only shift to the plaintiff after the defendant has demonstrated that it did not negligently repair or affirmatively create the defective condition (*Elmy v City of Amsterdam*, 25 AD3d 1038, 807 NYS2d 490, [2006]; *Portanova v Trump Taj Mahal Associates*, 270 AD2d 757, 704 NYS2d 380 [2000]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue of fact (*Rebecchi v*

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*Whitmore*, 172 AD2d 600, 568 NYS2d 423 [1991]).

Generally, a landowner does not owe a duty to maintain a public sidewalk in a safe condition (*Lehner v Boyle*, 7 AD3d 677, 776 NYS2d 834 [2004]) and will not be held liable for defects in the sidewalk that cause a pedestrian to sustain injuries where the landowner's property abuts the public sidewalk (*Hausser v Giunta*, 88 NY2d 449, 646 NYS2d 490 [1996]; *Sammarco v City of New York*, 16 AD3d 657, 794 NYS2d 54 [2005]). However, liability on behalf of the landowner will result where the sidewalk was specially constructed for the benefit of the landowner, where the landowner negligently repaired or affirmatively created the defect in the sidewalk, or where a local ordinance or statute specifically places the duty to maintain and repair the sidewalk on the abutting landowner and the breach of that duty imposes liability for injuries directly stemming from the landowner's breach of duty (*Fishelberg v Emmons Ave. Hospitality Corp.*, 26 AD3d 460, 810 NYS2d 502 [2006]; *Farmer v City of New York*, 25 AD3d 1038, 807 NYS2d 490 [2006]; *Stanchic v Lim*, 20 AD3d 411, 797 NYS2d 306 [2005]).

Here, the Hindersteins have established their entitlement to summary judgment as a matter of law by presenting evidence that none of the elements required to impose liability upon an abutting landowner have been met (*Sammarco v City of New York*, *supra*; *Elmy v City of Amsterdam*, 25AD3d 1038, 807 NYS2d 490 [2006]). The evidence demonstrates defendants neither owned, controlled or made special use of the public sidewalk. Plaintiff has not demonstrated that the defendants affirmatively created the defect, i.e. the broken "No Stopping" sign that caused Ms. Hannon to trip and fall and sustain injuries (*Poirier v City of Schenectady*, 85 NY2d 310, 642 NYS2d 555 [1995]; *Farmer v City of New York*, *supra*; *Lehner v Boyle*, *supra*). Moreover, there is no evidence of an ordinance or statute within the Town of Babylon imposing liability on the defendant as an abutting landowner for the maintenance and repair of defects in the sidewalk abutting its property (*Poirier v City of Schenectady*, *supra*; *Lehner v Boyle*, *supra*) and as such there can be no breach of any duty to the plaintiffs by the defendant (*Stanchic v Lim*, *supra*). The portion of the Town of Babylon Code entitled "Keeping Sidewalk Clear", Section 191-1, clearly imposes a duty relating to clearing snow, ice, dirt, and debris deposited on the adjacent sidewalk. However, there is no duty imposed by the Ordinance to otherwise maintain or repair the sidewalk.

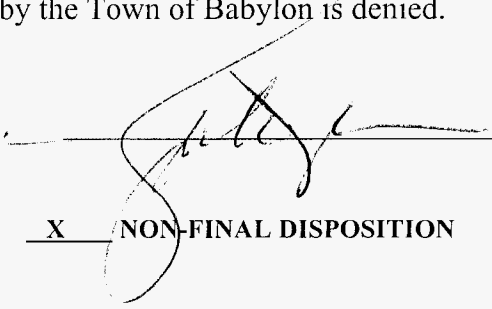
The motion by Kings Park Industries, Inc. is granted. It is fundamental that to recover damages in a negligence action, plaintiff must establish that the defendant owed plaintiff a duty to use reasonable care, that the defendant breached that duty, and that a resulting injury was proximately caused by the breach (*see, Turcotte v Fell*, 68 NYS2d 432, 510 NYS2d 49 [1986]). Here, the evidence clearly establishes that Kings Park did not own, maintain, install or complete any work in the area of the sidewalk where this sign was located. The work order and contract between Suffolk County and Kings Park confined the work to be performed to the area of the roadway between the curb lines solely for the purposes of resurfacing and re-stripping the roadway. Kings Park did not perform any work on the sign or sidewalk. Accordingly, they have demonstrated their entitlement to summary judgment.

The motion for summary judgment by defendant County of Suffolk is granted. The proofs submitted demonstrate that legal responsibility for maintenance of sidewalks is vested solely with Town government by the provisions of Section 140(18) of the NYS Highway Law. Further, 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 County 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 County which would exempt the plaintiff from compliance with the written notice requirement (*see, Poirier v City of Schenectady*, 85 NY2d 310, 624 NYS2d 555) nor any evidence that the County created the dangerous condition.

The Court finds that the Town has not demonstrated its entitlement to summary judgment. Pursuant to Town Law §65-a(2) and the applicable local ordinance, Babylon Town Code §158-2, prior written notice is a condition precedent to maintaining an action against the Town arising from a sidewalk defect (*see, Sloan v Village of Hempstead*, 223 AD2d 632, 636 NYS2d 852 [1996]; *Tyschak v Incorporated Village of Westbury*, 193 AD2d 670, 597 NYS2d 474 [1993]). Noncompliance with the prior written notice requirement is fatal to the maintenance of a cause of action unless an exception to the rule is applicable (*Brooks v Village of Horseheads*, 14 AD3d 756, 788 NYS2d 437 [2005]). Only two exceptions to the statutory rule requiring prior written notice have been recognized, namely, where the locality created the defect or 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, 693 NYS2d 77 [1999]). Here, while the Town has demonstrated that it did not receive prior written notice through the affidavits of the Town Clerk of Babylon and the Commissioner of the Department of Public Works, there exists an issue of fact as to whether the Town created the allegedly dangerous condition since they were responsible for maintenance and repair of the sidewalks, street signs, and parking regulations. Accordingly, the motion for summary judgment by the Town of Babylon is denied.

Dated:     JUL 17 2007    

  
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J.S.C.

     FINAL DISPOSITION      X   NON-FINAL DISPOSITION