Schultz-Prepscius v Incorporated Vil. of Port Jefferson

2007 NY Slip Op 32556(U)

August 14, 2007

Supreme Court, Suffolk County

Docket Number: 0020702/2006

Judge: Paul J. Baisley

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SHORT FORM ORDER **INDEX NO. 20702/2006**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr.

CAROL SCHULTZ-PREPSCIUS,

Plaintiff,

-against-

THE INCORPORATED VILLAGE OF PORT JEFFERSON, THE TOWN OF BROOKHAVEN CRYSTAL STAR REALTY, INC., MARIA MOLDONADO, LOS PIPLES, INC. and PORFIRIO GOMEZ,

Defendants,

ORIG. RETURN DATE: April 13, 2007
FINAL RETURN DATE: May 10, 2007
MTN. SEQ. #: 002-MotD

PLTF'S ATTORNEY:
Berkman, Henoch, Peterson & Peddy, P.C.
100 Garden City Plaza
Garden City, New York 11530

ATTORNEYS FOR THE INCORPORATED VILLAGE OF PORT JEFFERSON:
Devitt, Spellman, Barrett, LLP.
50 Route 111
Smithtown, New York 11787

ATTORNEYS FOR THE TOWN OF BROOKHAVEN:
Sobel & Seidell, LLP.
811 West Jericho Tpke., Suite 201W
Smithtown, New York 11787

ATTORNEYS FOR CRYSTAL STAR REALTY, INC. and MARIA MOLDONADO:
Baxter & Smith, P.C.
125 Jericho Tpke, Suite 302
Jericho, New York 11753

ATTORNEYS FOR LOS PIPLES, INC. and PORFIRIO GOMEZ,:
Fishman & Callahan, P.C.
4 Executive Blvd., Suite 101
Suffern, New York 10901

Upon the following papers numbered 1 to 40 read on this motion to reargue, etc.: Notice of Motion and supporting papers 1 - 15 ; Affirmation in Opposition 16 - 25; Additional Affirmation in Opposition and supporting papers 26 - 33; Reply Affirmation 34 - 40; it is,

ORDERED that this motion (002) by the defendant The Incorporated Village of Port Jefferson for leave to reargue is granted; and it is further

ORDERED that upon reargument the court's underlying decision and order, dated February 7, 2007, is adhered to; and it is further.

ORDERED that counsel for the plaintiff is directed to serve a copy of this Decision and Order upon counsel for all the parties pursuant to CPLR 2103(b)(1), (2) or (3) within 30 days of the date of this Decision and Order.

One of the bases for this motion by the defendant The Incorporated Village of Port Jefferson (hereinafter the Village) for reargument of the prior amended decision and order denying the Village's motion for summary judgment dismissing the complaint as to it (***Schultz-Prepscius v Village of Port Jefferson,*** Sup Ct, Suffolk County, Feb. 7, 2007, Baisley, J., Index No. 20702/06) is its contention that it neither received nor had the opportunity to reply to the affirmation in opposition to its prior motion for summary judgment submitted by the defendants Crystal Star Realty, Inc. and Maria Maldonado (hereinafter the Maldonado defendants).

Indeed, the Maldonado defendants admit they inadvertently failed to mail their affirmation in opposition to the Village's counsel and mistakenly sent it directly to the Village instead. This is particularly significant because those opposing papers contained evidence of the Village allegedly receiving prior written notice of the subject sidewalk defect (sent to the Village's Parks Department) which was sufficient, based upon the papers before the court, to deny the Village's motion for summary judgment premised upon its having no prior written notice of the defect in question.

Had the Village had the opportunity to reply, it would have supplied the court with the applicable Village[1] and state[2] statutes and case law supporting its argument that any such prior written notice must be "actually given to the Village Clerk" and providing it to any other official, department or employee is insufficient as a matter of law (*see e.g.* ***Rogers v Port Chester,*** 234 NY 182, 185-186 [1922]; ***Sola v Halsted Auto Laundry Corp.,*** 229 NYS2d 273 [Sup Ct, Westcheter County 1962]; *cf.* ***Johannes v New York,*** 257 AD 197, 199, 12 NYS2d 430, 432 [1st Dept 1939], *aff'd* 282 NY 825 [1939]).

The court agrees with the Village's general position on the applicable statutes and case law and coupled with the acknowledged failure on the part of the Maldonado defendants to properly serve their opposition papers upon the Village's attorneys, the court grants that part of the Village's present application for leave to reargue (*see* CPLR 2221).

Upon this reargument, however, while the court agrees with the Village's basic premise that only the Village Clerk may receive such prior written notices of sidewalk defects, the court also notes that there may

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[1] Code of the Village of Port Jefferson §177-1.

[2] Village Law of the State of New York §6-628.

be exceptions to this strict proviso such as when notice to a different department, official or employee is made under circumstances where the writer of the notice is given reason to believe by the municipality that she wrote to the appropriate person or department and, furthermore, such writing resulted in some response by the municipality (*see* ***Gilmore v City of Rochester,*** 163 Misc 2d 660, 622 NYS2d 189 [Sup Ct, Monroe County 1995]).

In the ***Gilmore*** case (*Id.)*, the law required such notices to be given to the City Engineer but Ms. Gilmore sent the notice, instead, to the Mayor's office. Notwithstanding this statutory failure on Ms. Gilmore's part, Ms. Gilmore received a response from the Mayor's office indicating that her letter had been recorded in that office, that the sidewalk in issue had then been inspected by a city engineer who also met with her and evaluated her complaint before reporting that said inspection failed to reveal any defect.

The court in ***Gilmore*** found it significant that although notice had been sent to the wrong office in contravention of the statutory requirements, nevertheless, Ms. Gilmore was led to believe that she had communicated to the appropriate municipal office, that her communication was responded to, that, in essence, the Mayor's office had assumed the function of the City Engineer as far as the notice was concerned and that, therefore, Ms. Gilmore's prior written notice under those facts and circumstances was "sufficient compliance" with the statute (***Gilmore v City of Rochester,*** 163 Misc 2d at 664, 622 NYS2d at 192).

In the instant action, according to Ms. Maldonado's affidavit, she contacted the Village in order to ascertain the appropriate party or department to send a written notice of the sidewalk defect in issue (involving tree roots) and after speaking to the Village Planner, William Rau, she was "advised to contact the Parks Department." Ms. Maldonado goes on to state that not only did she send a writing (prior to the plaintiff's underlying accident), as instructed, to the Parks Department detailing the nature and location of the defect but that same month the Parks Department then "looked at the sidewalk but never did any repairs."

Ms. Maldonado's affidavit evidences circumstances very similar to Ms. Gilmore's, to wit: both reasonably relied upon the actions and representations of the respective municipalities to believe they had contacted the appropriate official or department with their written notices and both obtained responses to their notices by way of municipal employees going to the sites of the complained of defects.

In ***Gilmore***, the court observed that, "It was surely not the intention of the City to avoid tort liability by drawing off complaints to an office not specified in its prior notice law" and if the court were to grant the city's motion to dismiss, "it would be permitting just such a result" (***Gilmore v City of Rochester,*** 163 Misc 2d at 664, 622 NYS2d at 191-192). Thus, the court in ***Gilmore*** denied the city's motion to dismiss.

In this case, Ms. Maldonado is in the very same situation as Ms. Gilmore. Furthermore, the court notes that the Village has submitted no affidavits from its Village Planner or a representative of its Parks Department in contravention of Ms. Maldonado's sworn statements. Accordingly, notwithstanding the statutory requirements which would, in general, require dismissal for failure to serve the prior written notice upon the statutorily required official (*see* ***Rogers v Port Chester,*** 234 NY 182, 185-186 [1922]; ***Sola v Halsted Auto Laundry Corp.,*** 229 NYS2d 273 [Sup Ct, Westcheter County 1962]; *cf.* ***Johannes v New York,*** 257 AD 197,

199, 12 NYS2d 430, 432 [1st Dept 1939], *aff'd* 282 NY 825 [1939]), the facts and circumstances of this case equate to sufficient compliance with the applicable prior written notice statutes to defeat the Village's motion to dismiss (*see* ***Gilmore v City of Rochester,*** 163 Misc 2d 660, 622 NYS2d 189 [Sup Ct, Monroe County 1995]).

This decision constitutes the order of the court.

Dated: August 14, 2007

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.