

Maffai v County of Suffolk

2007 NY Slip Op 32608(U)

August 6, 2007

Supreme Court, Suffolk County

Docket Number: 0003608/2001

Judge: Robert W. Doyle

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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 3-9-07
ADJ. DATE 5-4-07
Mot. Seq. # 010 - MG

-----X
GAIL MAFFAI and ANTHONY MAFFAI, :
 :
 :
 Plaintiffs, :
 :
 - against - :
 :
 COUNTY OF SUFFOLK, TOWN OF ISLIP, :
 TOWN OF BABYLON and MTA LONG :
 ISLAND RAIL ROAD, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 16 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 10 - 11 ; Replying Affidavits and supporting papers 12 - 15 ; Other 16 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant County of Suffolk for summary judgment dismissing the complaint and any cross claims against it, is granted; and it is further

ORDERED that the plaintiffs' action against any remaining defendants is severed and continued.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Gail Maffai when she tripped and fell on a sidewalk in the parking lot at the Deer Park Long Island Railroad Station on February 18, 2000. Her husband, plaintiff Anthony Maffai, seeks damages for the loss of services. The complaint alleges that plaintiff Gail Maffai fell due to the broken, uneven, protruding, cracked and rutted cement paving. The complaint also alleges that defendant County of Suffolk (hereinafter "the County") owned, maintained, operated, and controlled the premises.

The County now moves for summary judgment dismissing the complaint based upon the fact that it had no prior written notice of the alleged defective condition. The County alleges that there is good cause for the submission of this motion later than one hundred twenty days after the filing of the plaintiffs' note of issue. The County maintains that it would have raised lack of prior written notice in its earlier summary judgment motion. It explains that it was precluded from doing so based upon a decision of the Hon. Paul J. Baisley, Jr., dated May 30, 2006, who had, in effect, stricken its eighth affirmative defense for failure to comply with discovery demands. The County alleges that the Appellate Division, Second Department, in a decision dated January 23, 2007, has reversed the decision of Justice Baisley, so that its eighth affirmative defense is now revived.

The County's eighth affirmative defense provides, "This action is barred as against the defendant County of Suffolk for lack of prior written notice to the County of the defective condition, pursuant to Section C8-2A of the Suffolk County Charter." The County claims that based upon the plaintiff's notice of claim and complaint, a search was conducted concerning prior written notice of the alleged defect. Specifically, the County submits the affidavit of Richard Bloch, an Investigator in the office of the County Attorney. Mr. Bloch alleges that his duties require him to maintain records of all written complaints concerning alleged defects pursuant to §C8-2A. He alleges that he has searched the County's records with regard to complaints of an alleged uneven and cracked sidewalk at the Deer Park Train Station on or at any time prior to February 18, 2000. He states, "A review of my search reveals that the County of Suffolk was not in receipt of any written notice or written complaints concerning the alleged defective condition of said sidewalk." The County contends that based upon the affidavit of Richard Bloch, it is clear that no prior written notice of a defect or irregularity was received at any time prior to the date of the accident, and since the plaintiffs cannot establish prior written notice, summary judgment in favor of the County is warranted.

The plaintiffs oppose this motion. They contend that the reversal by the Appellate Division of Justice Baisley's decision and the County's resurrected defenses require that this case be "uncertified" and remanded back to the IAS Part for further discovery. They argue that they did not waive discovery when they filed the note of issue. The plaintiffs claim that there was no need to complain about lack of discovery because there were no liability defenses in the case at the time the action was certified ready for trial. The plaintiffs allege that now that the County's answer has been resurrected, there remain numerous discovery deficiencies. In support, the plaintiffs submit a decision of the Hon. Paul J. Baisley, Jr., dated May 17, 2004, wherein Justice Baisley denied the County's prior motion for summary judgment with leave to renew based upon the plaintiffs' need for materials in its "FOIL" request and the plaintiffs' desire for an examination before trial of Richard Bloch. The plaintiffs assert that the status of such discovery deficiencies has not been affected by the Appellate Division's decision. They request that the County's motion for summary judgment be denied, the note of issue be vacated, and the case be remanded back to the IAS Part for further proceedings.

Initially, the court finds that the County has shown good cause pursuant to CPLR 3212(a) for its delay in making this summary judgment motion (*see, Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *Castro v Homsun Corp.*, 34 AD3d 616, 826 NYS2d 89 [2006]). The fact that its eighth affirmative defense had been stricken from its answer when it made its prior summary judgment motion, and that such affirmative defense has now been reinstated, is a satisfactory explanation for the

untimeliness

With regard to the merits of the County's motion, it is well settled that where a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by a defective roadway or sidewalk unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (*Cendales v City of New York*, 25 AD3d 579, 807 NYS2d 414 [2006]; *Ganzenmuller v Incorporated Vill. of Port Jefferson*, 18 AD3d 703, 795 NYS2d 744 [2005]). Here, the County has established its entitlement to summary judgment by demonstrating, through the affidavit of its investigator and keeper of records, that it did not have prior written notice of the alleged defective sidewalk as required by the Suffolk County Charter, §C8-2A (*Lysohir v County of Suffolk*, 10 AD3d 638, 781 NYS2d 693 [2004]).

Although an exception to the prior written notice requirement exists when a municipality creates the defective condition by an affirmative act of negligence, the plaintiffs' opposition papers are insufficient to raise a triable issue of fact as to whether the sidewalk defect was created by the County's affirmative negligence (*see, Cendales v City of New York, supra*). Rather, the plaintiffs' opposition papers simply make reference to "discovery deficiencies" which the court construes as a request for relief under CPLR 3212(f). This statutory provision provides that, "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." However, relief pursuant to CPLR 3212(f) is not available to forestall summary judgment where the request for additional discovery is nothing more than a fishing expedition (*Min Whan Ock v City of New York*, 34 AD3d 542, 824 NYS2d 651 [2006]). While CPLR 3212(f) permits a party opposing a summary judgment motion to obtain discovery under certain circumstances, it should not be resorted to where there has been a failure to demonstrate that the discovery sought would produce relevant evidence to support a plaintiff's allegations (*Riddy v HSBC USA, Inc.*, 21 AD3d 465, 799 NYS2d 741 [2005]).

In this case, the plaintiffs fail to clearly specify what information they seek to procure to oppose this motion, and fail to identify the sources of such information (*see, Kracker v Spartan Chemical Co.*, 183 AD2d 810, 585 NYS2d 216 [1992]; Higgitt, *Opposing Summary Judgment Motions under CPLR 3212(f)*, NYLJ, October 17, 2005, at 4, col.4). They merely point to the decision of Justice Baisley dated May 17, 2004, wherein summary judgment had been denied to the County, with leave to renew, to permit the plaintiffs to conduct an examination before trial of Richard Bloch and to receive a response to their "FOIL" request. Although the plaintiffs allege that they did not complain about discovery deficiencies when the case was certified because the County's defenses were stricken from its answer, these defenses were not stricken until May 30, 2006, more than two years after the plaintiffs were given the opportunity to complete discovery. The plaintiffs fail to provide any explanation as to why an examination before trial of Mr. Bloch, if he is the source of information needed, was not conducted within that two year period. Summary judgment cannot be defeated on the ground that discovery is needed, where the party advancing such argument has failed to ascertain the facts due to his or her own inaction (*Karakostas v Avis Rent A Car Systems*, 301 AD2d 632, 756 NYS2d 61 [2003]). Moreover, as to the plaintiffs' remaining discovery demands, the Appellate Division, in its decision dated January 23, 2007, found, "The record demonstrates

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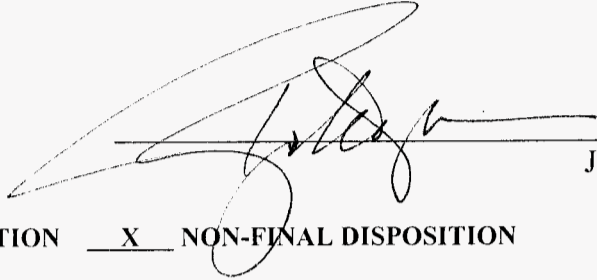
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that the appellant [the County] substantially complied with outstanding discovery requests, and was unable to produce certain documents because they did not exist or were not in its possession” (*Maffai v County of Suffolk*, 36 AD3d 765,766; 829 NYS2d 566, 567 [2007]). Thus, the plaintiffs herein have completely failed to demonstrate how further discovery might reveal the existence of facts which would warrant the denial of summary judgment (*Home Savings Bank v Arthurkill Associates*, 173 AD2d 776, 570 NYS2d 644 [1991]; *appeal dismissed*, 78 NY2d 1071).

Accordingly, the County’s motion for summary judgment dismissing the complaint and cross claims against it is granted.

Dated: AUG 06 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION