

Levy v Town of Huntington

2007 NY Slip Op 32623(U)

August 6, 2007

Supreme Court, Suffolk County

Docket Number: 0020566/2004

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 2-16-07 (001)
4-13-07 (002)
ADJ. DATE 4-13-07
Mot. Seq. # 001 - MD
002 - MG

-----X			
BEATRICE LEVY and NEIL LEVY,	:	SIBEN & SIBEN, LLP	
	:	Attorneys for Plaintiffs	
Plaintiffs,	:	90 East Main Street	
	:	Bay Shore, New York 11706	
	:		
- against -	:	JOHN J. LEO, Huntington Town Attorney	
	:	By: Margaret L. Pezzino, Esq.	
	:	Attorneys for Defendant Town of Huntington	
	:	100 Main Street	
TOWN OF HUNTINGTON and LONG ISLAND	:	Huntington, New York 11743	
POWER AUTHORITY,	:		
	:	GEORGE D. ARGIRIOU, ESQ.	
	:	Attorney for Defendant Long Island Power	
Defendants.	:	175 East Old Country Road	
-----X		Hicksville, New York 11801	

Upon the following papers numbered 1 to 42 read on these motions and cross motion for summary judgment; Notice of Motion;/ Order to Show Cause and supporting papers 1-15; Notice of Cross Motion and supporting papers 16-30; Answering Affidavits and supporting papers 31-38; Replying Affidavits and supporting papers 39-40; 41-42 Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (001) by the defendant the Town of Huntington for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing the complaint and cross claims asserted against it is denied.

ORDERED that this motion (002) by the defendant Long Island Power Authority for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing the complaint and cross claims asserted against it is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff when she tripped and fell on September 13, 2003 on a roadway located in front of 5 Weathervane Way, Dix Hills, Town of Huntington, New York. A Notice of Claim was received by the Town of Huntington on

December 10, 2003. Plaintiff alleges that while she was walking on the roadway, she was caused to step into a depressed, broken, cracked, uneven and irregular portion of the roadway. Plaintiff further alleges that portion of the roadway constitutes a dangerous and defective condition. As a result of this fall, plaintiff claims to have sustained a laceration to her nose requiring plastic repair with resultant scarring and disfigurement, laceration of the upper lip requiring plastic repair with resultant scarring and disfigurement, fracture of tooth #7, and multiple facial abrasions.

The Town of Huntington seeks summary judgment asserting plaintiff cannot prove that the Town received prior written notice of the alleged sidewalk defect. Such prior written notice is set forth in Article V of the Town of Huntington Code. It is undisputed, however, that plaintiff fell on a roadway, not a sidewalk.

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 roadway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (*Wilkie v Town of Huntington*, 816 NYS2d 148, 29 AD3d 898 [2nd Dept 2006], citing to *Amabile v City of Buffalo*, 93 NY2d 471, 474, 693 NYS2d 77; *Lopez v G&J Rudolph*, 20 AD3d 511, 512, 799 NYS2d 254 [2nd Dept 2005]; *Gazemuller v Incorporated Vil. of Port Jefferson*, 18 AD3d 703, 704, 795 NYS2d 744[2nd Dept 2005]) Actual or constructive notice of a defect does not satisfy this requirement (*Wilkie v Town of Huntington*, supra).

In support of this motion, the Town has submitted, inter alia, the affidavit of Audrey Jaramillo, a Clerk Typist employed by the Town of Huntington Town Clerk's Office, who sets forth that she conducted a search of the records filed in the Town Clerk's Office in the Town of Huntington for any written notice or complaint received regarding the roadway located in front of 5 Weathervane Way, Dix Hills, for a period of three years from September 13, 2000 through September 13, 2003. As a result of that search, she stated no record of the Town Clerk having received any written notice or a complaint regarding the roadway at that location was found.

The Town has further submitted the affidavit of Derek Baiz, employed by the Town of Huntington as a Highway Project Assistant within the Office of the Superintendent of Highways for the Town of Huntington from August 1, 1001 through June, 2006. Part of his job duties were to maintain and search for records regarding complaints and/or notices for defects received by the Office of the Superintendent of Highways. Upon searching those records covering a three year period, he did not locate a record of any written notice for the roadway in front of 5 Weathervane Way, Dix Hills, Huntington.

At his examination before trial, Mr. Baiz testified about a report, number 01-3224, wherein Crew 122 filled a pothole at the corner of Village Drive West and Weathervane Way. He testified that 5 Weathervane Way, Dix Hills is under the jurisdiction of the Town of Huntington and is maintained by the Town of Huntington. He also testified he came across a road opening permit dated March 19, 1998 granted to Bell Atlantic for the area of 5 Weathervane Way, Dix Hills, on the south side, three hundred twenty five feet west of Millet Street wherein a four by four foot opening was made in the roadway. He did not have a scaled map to determine if any of it was located at 5 Weathervan Way.

Mr. Baiz also testified that pursuant to a time and material report, number 02-2069, holes were patched on Weathervane Way, but the report did not indicate where on the roadway this was done, and he had no way of determining. He was not sure why this repair was done and stated sometimes the foremen themselves drive the areas and observe, they report it, or sometimes there is a call from the dispatcher, and sometimes it is an area they are told to drive through in specific neighborhoods and fill out potholes and road defects as necessary.

Mr. Baiz further testified that if there was a call-in that was not directed to the highway hotline, no record is made. He stated the highway hotline has computerized record keeping, but there is no record keeping for other phone calls that come in.

There was testimony concerning plaintiff's exhibit 4, which indicates foreman Carmen and two helpers, Waddell and Sileo, picked up asphalt and patched on Weathervane Way on July 15, 2002. Some of the locations they patched had house numbers, and some did not. Mr. Baiz testified that he interpreted that as meaning they patched many locations throughout the entire length of the road.

Mr. Baiz also stated he photographed the location of plaintiff's fall on April 6, 2004 and noted a defect within a trench area that appeared to have been repaved, but he did not know who opened the trench. He testified he did a search to find out but could not determine who opened it. He thought the defect may have been from water or weather, but when asked if he searched for water main breaks, was advised he could only search the records that he was requested to search by the Town Attorney's office. He was not aware of any drainage problems in the area, and did not know the location of the nearest sewer or catch basin to this area. He was unaware how long this defect existed and was not aware of anyone from the Town of Huntington who would know how long that defect existed in front of 5 Weathervane Way.

He further testified he would need to do a title search to determine if the Town of Huntington opened Weathervane Way as that would tell the actual ownership of that piece of property, and that no title search was done. He again stated that he believes that sometimes there's work done on the road where there's no paperwork done for it, and it could possibly include a water main break. To his knowledge, there was no water main break in the area as he came up with no documents for the same. He did not know if the Town of Huntington was responsible for the water mains or if it would be a separate water district. He could only answer as to the highway department.

At the hearing conducted pursuant to GML §50-h, Beatrice Levy testified that the incident occurred on Saturday at three o'clock in the afternoon while she was leisurely walking her Maltese dog on Weathervane Street, Dix Hills. The toes of her right foot fell into a hole and she fell forward. Her face hit the ground first, then both knees. She did not see the hole before the fall, and described it about eight to ten inches wide and two and a half inches deep. She noticed a lot of patch work in the area, but saw no holes. There were a number of rectangular cutouts throughout the entire street that she could see. The hole on which she fell was within a rectangular cutout in front of a house at number 5 Weathervane Way.

She testified that prior to the accident, she did not complain to the Town of Huntington about the defect on Weathervane Way, and knew of no one else who had.

In the case at hand, the defendant Town of Huntington has demonstrated prima facie entitlement to summary judgment as they have demonstrated that they had no prior written notice of the roadway defect.

In motion (002), the Long Island Power Authority (hereinafter LIPA) seeks summary judgment asserting they did not own, maintain, or operate any underground electrical facilities at the site where plaintiff fell and that the nearest service connection is 51 feet from the accident location. In support of this motion, defendant LIPA has submitted, inter alia, the affidavit of Richard Inserra.

Richard Inserra states he has reviewed the records maintained by Keyspan Electric Service, LLC, the manager for LIPA. He is presently employed by Keyspan as a design engineer and is familiar with the records maintained by Keyspan regarding the ownership of LIPA's equipment and facilities as well as any work performed within LIPA's service territory. He states he reviewed the historical drawing and easement map for the subject location and the underground electric facilities map for the subject location, and went to the location of the accident, plotting the location from the measurements that plaintiff provided in the notice of claim.

Mr. Inserra states that the underground electrical cables are located on the south side of Weathervane Way, approximately one foot north of the south curb, which is the opposite side of the road from where the plaintiff claims she fell. He further stated there are also limited service connections that run underground from the north side to the south side of Weathervane Way, and the nearest underground service connection to the accident location is located between homes number 3 and 5 Weathervane Way and that the accident location was found to be 51 feet away. The only work performed on Weathervane Way prior to plaintiff's accident was performed on the opposite side of the road from where plaintiff fell approximately 353 feet away.

Based upon the foregoing, defendant LIPA has demonstrated prima facie entitlement to summary judgment as they have demonstrated that they the area where they performed work was 353 feet from the location of the accident and the nearest underground service connection to the accident location was 51 feet from the accident location.

The burden has thus shifted to the plaintiff to demonstrate issues of fact as to defendant LIPA and the availability of an exception to the notice requirement (*Hendrickson v City of Kingston*, 98 NY2d 662, 746 NYS2d 277 [2002]) as to the Town of Huntington.

Plaintiff opposes both motions and has submitted, inter alia, the affidavit of plaintiff's expert, Robert L. Schwartzberg who states he is a licensed and registered Professional Engineer in the State of New York. He states that the defect identified by Ms. Levy as the place where she fell is located within a section of roadway which had been previously removed and then repaved. He described the defect as a rut approximately 6 1/4 inches in length and width, and about 1 3/8 inches in depth and in the shape of an arc.

Mr. Schwartzberg also stated that the work at the roadway disturbed the roadway bed and the repaved section of roadway was accomplished with a softer blend of asphalt than the original roadway. The cut lines between the reworked area and the undisturbed portion of the roadway was irregular and the surface of the repaved area was uneven with some undulation and the work was performed in a poor,

shoddy and unworkmanlike manner and was evidently present for some time prior to this accident.

Plaintiff has also submitted a document (plaintiff's exhibit D) which indicates the Town of Huntington issued permit # 30711 to Bell Atlantic on March 19, 1998 for excavation work to be done on Weathervane Way s/s 325 feet w/o Millet Street. At his examination before trial, Mr. Baiz was unable to determine whether that location was in front of 5 Weathervane Way. Mr. Baiz also stated when he photographed the location of plaintiff's fall on April 6, 2004 he noted the defect within a trench area that appeared to have been repaved, but he did not know who opened the trench. He testified he did a search to find out, but could not determine who opened it. Accordingly, this creates factual issues concerning the location of the excavation which the Town of Huntington issued a permit for, who opened the trench at the area Mr. Baiz noted the trench, and who repaved the trench area.

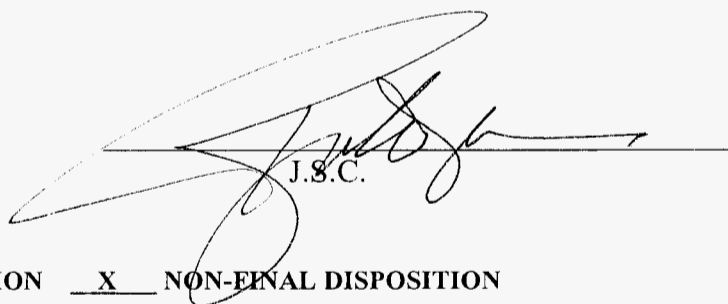
An exception exists to the prior written notice requirement when a municipality creates the subject defect through an affirmative act of negligence (*see, Amabile v City of Buffalo*, supra). In *Corey v Town of Huntington*, 9 AD3d 345, 780 NYS2d 156 [2nd Dept 2004], plaintiff was required to demonstrate that the locality did something more than stand by while the curb settled in relation to the abutting sidewalk over a period of years, and that gradual settlement over a period of years did not establish that the Town created a defect or obviate the requirement of prior written notice. However, the adduced evidence demonstrates in the within action that additional paving was performed at the site where plaintiff fell. Therefore, there are factual issues concerning whether defendant Town of Huntington caused a defect to occur at the location, and whether the Town was negligent in its repair of the defect in front of 5 Weathervane Way. Dix Hills, thus precluding summary judgment to the Town of Huntington on the issue of notice.

Accordingly, motion (001) by the Town of Huntington for summary judgment is denied.

It is further determined that plaintiff has not come forward with admissible evidence to rebut LIPA's demonstration of prima facie entitlement to summary judgment.

Accordingly, motion (002) by defendant LIPA for summary judgment is granted and the complaint and cross claims asserted against LIPA by co-defendant Town of Huntington are dismissed.

Dated: AUG 06 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION