

**Estabrook v Town of Huntington**

2007 NY Slip Op 32900(U)

September 4, 2007

Supreme Court, Suffolk County

Docket Number: 0006723/2005

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 4-20-07  
Mot. Seq. # 002 - MG

-----X  
KENNETE A. ESTABROOK, :  
 :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 TOWN OF HUNTINGTON, COUNTY OF :  
 SUFFOLK, ROBERTA McINTYRE, :  
 :  
 Defendants. :  
-----X

DOMINICK W. LAVELLE, ESQ.  
Attorney for Plaintiff  
38 Willis Avenue  
Mineola, New York 11501  
  
JOHN J. LEO, ESQ. Town Attorney  
By: Margaret L. Pezzino, Esq.  
Attorneys for Deft Town of Huntington  
100 Main Street  
Huntington, New York 11743  
  
ROBERTA McINTYRE, Pro Se  
213 School Street  
Westbury, New York 11590

Upon the following papers numbered 1 to 18 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 15 - 16; Replying Affidavits and supporting papers 17 - 18; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion (#002) by the defendant Town of Huntington for summary judgment dismissing the complaint, pursuant to CPLR 3212, is granted.

The summons and verified complaint in this action were filed on or about April 9, 2005 and issue was joined by the filing of defendant Town of Huntington's answer on or about May 2, 2005. Co-defendant Roberta McIntyre is in default and the parties stipulated to discontinue the action against co-defendant County of Suffolk on January 9, 2007. Discovery has been completed, and the note of issue was filed on or about February 1, 2007.

This is an action for personal injuries allegedly sustained by plaintiff Kenneth A. Estabrook (Estabrook) on or about February 18, 2004 at 6:30 a.m., when he alleges that he slipped and fell while walking on the public roadway located in front of 74 Columbia Street, Huntington Station, Suffolk County, New York. Plaintiff alleges in his verified complaint that defendant Town of Huntington (Huntington) failed to properly remove the accumulation of snow and ice from the roadway and

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negligently failed to maintain and repair said street resulting in a broken, cracked, and depressed area of the roadway surface allowing the accumulation of snow and ice which caused plaintiff to slip and fall and sustain permanent bodily injuries

Defendant Huntington now moves for summary judgment dismissing the complaint, pursuant to CPLR 3212, on the grounds that plaintiff has failed to establish that Huntington had prior written notice of the defect as required by the Huntington Town Code section 174-3 and New York State Town Law § 65-a or, alternatively, that Huntington created the alleged defective condition. In support of its motion Huntington submits, *inter alia*, an affirmation of counsel, an affidavit from Audrey Jaramillo, employee in the Huntington Town Clerk's Office and Derek Baiz, employee in the Huntington Superintendent of Highways Office, a copy of the pleadings and verified bill of particulars, a copy of the deposition transcript of plaintiff's 50-h hearing, the deposition transcript of the examination before trial of Derek Baiz, Highway Project Assistant and photocopies of photographs depicting the area of plaintiff's accident.

Plaintiff opposes the motion on the grounds that defendant negligently removed snow from the roadway and negligently maintained the roadway. Plaintiff argues that there is a question of fact whether a prior complaint regarding the sidewalk area adjacent to the defective roadway constitutes notice and further, whether Huntington negligently repaired the sidewalk creating the defect in the roadway. Plaintiff submits in opposition an affirmation of counsel.

New York State Town Law §65-a requires that "[n]o civil action shall be maintained against any town . . . unless written notice of such defective . . . condition . . . was actually given to the town clerk or town superintendent of highways . . . ." In addition, Section 174-3 of the Huntington Town Code, enacted pursuant to its authority under the New York Municipal Home Rule Law and General Municipal Law, requires that prior written notice of a defective or unsafe sidewalk or street condition be given to the Huntington Town Clerk or Superintendent of Highways before a civil action may be maintained against the Town of Huntington to recover damages for personal injuries (*see, Filaski-Fitzgerald v Town of Huntington*, 18 AD3d 603, 795 NYS2d 614 [2005]; *Ganzenmuller v Incorp. Village of Port Jefferson*, 18 AD3d 703, 795 NYS2d 744 [2005]). Prior written notice statutes, enacted in derogation of common law, are to be strictly construed and refer to a physical condition or defect which does not immediately come to the attention of the municipality unless it is given actual notice of the defect or condition (*see, Poirier v City of Schenectady*, 85 NY2d 310, 624 NYS2d 555 [1995]; *Monteleone v Incorp. Village of Floral Park*, 74 NY2d 917, 550 NYS2d 257 [1989]). In addition, where 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 it received 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.*). In this case neither of the exceptions is applicable.

In opposition, plaintiff argues that there is a triable issue of fact concerning whether Huntington caused and/or created the defective condition. Plaintiff argues that the complaint, on October 19, 2000,

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concerning an uplifted sidewalk in the subject area could constitute notice to the municipality and further that work done to repair the sidewalk in October, 2000 may have caused the defect in the roadway and allowed water to accumulate which created the snow and ice condition. Although an exception to prior written notice requirements is recognized when a municipality has or should have knowledge of a defective condition because it either inspected or performed work upon the subject area shortly before the accident (*see, Jackson v City of Mount Vernon*, 213 AD2d 892, 892-893, 623 NYS2d 658 [1995], *lv denied* 85 NY2d 812; *Giganti v Town of Hempstead*, 186 AD2d 627, 628, 588 NYS2d 413, 414 [1992]), that exception does not apply in the instant case since Huntington was notified of a sidewalk defect in 2000, three (3) years prior to plaintiff's accident, and at that time it repaired the defective sidewalk. Plaintiff's reasoning, therefore, is not persuasive, since it is pure conjecture and speculation.

To obtain summary judgment, the movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law, which Huntington has done. The party opposing the motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions, as were submitted herein, are insufficient (*Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [1991]; *Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793 [1988]). Further, to satisfy the notice requirements, the alleged complaint must specifically refer to the defect which it is alleged caused plaintiff to slip and fall. The notice alleged herein concerned the sidewalk and not the roadway and is therefore insufficient, as a matter of law (*see generally, Acheson v City of Mount Vernon*, 6 AD3d 468; 774 NYS2d 432 [2004] [complaint concerning poor condition of roadway did not constitute prior written notice of the particular defect]; *Curci v City of New York*, 209 AD2d 574, 619 NYS2d 98 [1994][noticed defects were isolated from and not part of the defective condition which allegedly caused the accident in question]; *O'Rourke v Town of Smithtown*, 129 AD2d 570, 514 NYS2d 68 [1987][reported areas did not create an awareness of the defect which is at the center of this controversy]; *Holt v County of Tioga*, 95 AD2d 934, 464 NYS2d 278 [1983][notice at the very least should bring the defective condition to the attention of the authorities]; *Galassi v County of Nassau*, 6 Misc3d 136A, 800 NYS2d 346 [2005] [a generalized complaint about the condition of the roadway is insufficient to constitute prior written notice of a specific defect]).

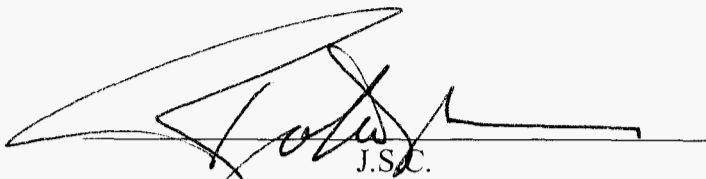
Defendant Huntington submitted admissible evidence establishing that a review of the town records, for the subject area located in front of 74 Columbia Street, did not reveal any complaints or notifications to Huntington concerning the roadway defect which plaintiff alleges caused him to slip and fall and plaintiff concedes that he did not notify Huntington of the existence of the defect prior to his accident. Huntington therefore has made a prima facie showing of entitlement to judgment as a matter of law through the submission of affidavits to the effect that it had no prior written notice of the defective sidewalk as required by the state statute and the Huntington Town Code (Town Law § 65-a; Huntington Town Code § 174-3)(*see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). In opposition, plaintiff herein failed to raise a triable issue of fact with respect to whether the Town created the allegedly defective condition through an affirmative act in order to overcome the lack of actual notice (*see, Amabile v City of Buffalo, supra; Goldburt v County of Nassau*, 307 AD2d 1019, 763 NYS2d 776 [2003]; *Bang v Town of Smithtown*, 291 AD2d 516, 738

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NYS2d 72 (2002)).

Accordingly, Huntington's motion for summary judgment is granted (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1985]; *Zuckerman v City of New York*, 49 NY2d 557; 427 NYS2d 595 [1980]).

Dated: SEP 04 2007

  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION