Symbouras v County of Nassau
2007 NY Slip Op 32906(U)
September 12, 2007
Supreme Court, New York County
Docket Number: 1754-05/
Judge: Geoffrey J. O'Connell
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

STEVEN N. SYMBOURAS,

Plaintiff(s),

INDEX No. 1754/05

-against-

MOTION DATE: 7/26/07

COUNTY OF NASSAU,

Defendant(s).

MOTION SEQ. No. 1-MG
XXX

The following papers read on this motion:

County Notice of Motion/Affirmation/Exhibits
Affirmation in Opposition/Exhibits A-J
Reply

The defendant COUNTY OF NASSAU seeks an Order granting it summary judgment, dismissing the Complaint pursuant to CPLR § 3212. In the alternative it seeks an Order compelling plaintiff to provide previously requested authorizations for records. Plaintiff opposes the application in its entirety.

This action arises out of an incident occurring on December 22, 2003. Plaintiff alleges that he tripped and fell in the roadway in front of the premise known as 126 Glenwood Road, Glenwood, New York. The plaintiff alleges that the road at this location contained a "basin inlet" to collect roadway water, which was surrounded by cracked and broken asphalt. The plaintiff claims that at approximately 11:00 p.m. he tripped and fell on the uneven broken pavement.

At his deposition plaintiff testified that he has resided at the adjacent premises since September of 2000 with his wife and son. He testified that he had left his house to walk to the post office, approximately one block away. He testified that he walked down his driveway and stepped off the curb when the accident took place. The plaintiff testified that he was looking to his left for traffic in order to safely cross the street

when he fell. He testified that he had noticed the uneven surface of the road prior to his fall, but could not recall if it was within the month prior to his accident. (Motion, Exh. E)

The plaintiff testified that neither he nor his wife had complained to the COUNTY regarding the surface of the road, nor did he know of anyone who complained. (Motion Exh. E)

The COUNTY seeks summary judgment arguing that since there is no evidence that it received prior written notice of any alleged defect, in order to demonstrate that the COUNTY is liable for plaintiff's injuries, she must submit competent evidence that the COUNTY affirmatively created the defect. *Gianna v. Town of Islip, et al.*, 646 NYS2d 707 (2nd Dept. 1996); *Block v. Potter, et al.*, 612 NYS2d 236 (2nd Dept. 1994). Counsel argues that the burden of proof is on the plaintiff to establish that the COUNTY created the defect. She argues that the plaintiff has not offered any competent evidence to support such a claim, and therefore the COUNTY is entitled to summary judgment pursuant to CPLR § 3212.

Plaintiff seeks a Denial of the motion on procedural grounds, correctly noting that the portion of the motion seeking summary judgment is untimely. Based on the proof presented, including the fact that at the time the applications were made the matter did not appear on a trial calendar, and there is no demonstration of prejudice to the plaintiff, the motion will not be Denied as unreasonably untimely pursuant to CPLR § 3212(a); *Brill v. City of New York*, 2004 N.Y. Lexis 1526 (2004). The Court agrees with the defendant that it is in the interest of justice to decide the matter on the merits. Any delay in this instance is not only not unreasonable, but also is insignificant. The delay is excused.

On the merits, counsel for the plaintiff opposes summary judgment arguing that there is evidence supporting plaintiff's claim that the COUNTY created the dangerous condition. Counsel argues that the motion of the COUNTY must be denied as the COUNTY has not offered any proof that it did not create a dangerous condition.

Counsel for the plaintiff notes that the COUNTY's records indicate that repair work was performed on Glenwood Road on January 6, 2003, March 13, 2003, March 26, 2003, June 5, 24 and 29, 2003 August 7, 2003 and December 16, 2003. (Opposition, Exh. J) A review of these records does not indicate any repair noted in the vicinity of plaintiff's residence. The repair records for this road notes the days of repairs, notes

numerous various locations. None of the records indicate that any repairs were made in front of plaintiff's residence. The COUNTY produced a supervisor for deposition who testified that he traveled through a specific area of the COUNTY every day to note if any road repairs needed to be performed. He testified that he drove on Glenwood Road in Glenwood Landing every day. He testified that if he personally viewed broken concrete or asphalt, he would have it repaired. He testified that he did not recall personally seeing any problems in front of plaintiff's residence prior to the date of incident. (Opposition, Exh. I) He also testified that he was not informed that there was a prior complaint about that location. (Opposition, Exh. I)

Counsel for the plaintiff argues that due to this proof the defendant cannot demonstrate that they did not have actual knowledge of the pot hole nor can it demonstrate that it did not create a defective condition.

The Court disagrees. This is not the standard of review.

In a trip and fall case, such as this, it is the plaintiff's burden to set forth evidence demonstrating that the defendant was negligent, in creating a defective condition, or failing to correct a defect after becoming aware that it exists. The defendant does not have to demonstrate that its actions were not negligent until the plaintiff has demonstrated that there is an issue that its actions were negligent.

Plaintiff had not offered proof to demonstrate that the COUNTY paved or repaired this area of roadway, or that the road, with construction of a curb and water basin, were created by the COUNTY. (Opposition, Exh. I, J) Plaintiff provides no affidavit from an engineer to state that the water basin design at the curb was defective in design.

The Court notes that the plaintiff fails to state any rule, regulation or law requiring the repairs or creating municipal liability contradicting that which requires a prior written notice of defect.

Significantly, the plaintiff's expert fails to state any codified or written standards he is referring to, in that he references no regulation, rule, requirement safety code, law, architectural or construction standard which was violated by the design of the roadway, water basin and adjacent curb.

The Court finds plaintiff's arguments are purely speculative and lacking probative value, as it is unsupported by necessary germane foundational facts and data or industry regulations. *Pigliavento v. Tyler Equipment Corp.*, 669 NYS2d (3rd Dept. 1998). It is insufficient to raise an issue of fact as to the design

sufficiency. *Cornwell v. Otis Elevator Co.*, 275 AD2d 649 (1st Dept. 2000); *Longo v. Woodlawn Veterans Mutual Housing Company, Inc.*, 225 AD2d 458 (1st Dept. 1996).

Based on the conclusions of counsel that the COUNTY must have caused or created the pothole, as well as his stated basis for same, or lack thereof, the Court finds this opinion speculative, and without merit to raise a triable issue of fact that the COUNTY created a hazardous condition by using this filler material. *Wasserman v. Genovese Drug Stores, Inc.*, 282 AD2d 447 (2nd Dept. 2001).

In order to set forth a prima facie case of negligence, plaintiff must establish the existence of a duty of a defendant to plaintiff, a breach of such duty, and that the breach was a substantial cause of the resulting foreseeable injury. *Merino v. New York City Transit Authority,* 218 A.D.2d 451 (1st Dept 1996); *Gordon v. City of New York,* 70 N.Y.2d 839 (1987).

Contrary to plaintiff's assertions, there is no duty to warn against a condition which is readily observable by reasonable use of the senses. *Pepic v. Joco Realty, Inc.* , 216 A.D.2d 95 (1st Dept. 1995); *Olsen v. State of New York* , 25 N.Y.2d 665 (1969). The COUNTY's duty is to protect a plaintiff from an unassumed, concealed or unreasonably increased risk. *Benitez v. New York City Bd. of Educ.* , 73 N.Y.2d 650 (1989). There being no evidence that the defendant had a continuing duty to repair the roadway without prior written notice, or that it was negligent in filling the pothole, or not filling the pothole, or that there were prior complaints regarding the road, the Court cannot find any duty to this plaintiff was breached by the defendant. The remaining contentions that there are triable issues of fact in dispute are not supported by any actual evidence, and thus are found to be without merit.

Summary judgment is a drastic remedy which otherwise deprives a litigant of his or her day in Court, it is to be granted where it is clear that there is no triable issue of fact.

The Court finds that plaintiff has failed to come forward in proof, in evidentiary form, establishing that an issue of fact exists as to any alleged negligence on the part of defendant with respect to a defect in the lot. In reviewing a defendant's motion for summary judgment the Court must view the evidence in the

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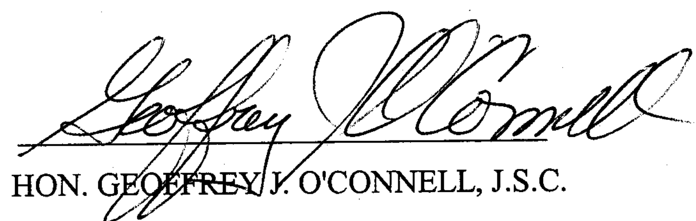
light most favorable to the plaintiff and draw all inferences in her favor. To defeat the defendant's motion the plaintiff must demonstrate that there is a triable issue of fact in dispute regarding defendant's breach of its duty to her. The proof presented does not raise a triable issue of fact on this issue. *Roussos v. Cicotta*, 2005 NY App. Div. Lexis 1988 (2nd Dept. 2005).

Based on the proof and arguments presented, that portion of the COUNTY's motion seeking summary judgment is Granted. The remainder of the application is Denied as moot.

It is, SO ORDERED.

Dated: Sept 12, 2007



HON. GEOFFREY J. O'CONNELL, J.S.C.

ENTERED

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