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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Present: HON. WILLIAM R. LaMARCA
Justice

ALAN KOHN,

Plaintiff,

-against-

TOWN OF HEMPSTEAD and SHEILA ROSS,

Defendants.

Motion Sequence #2
Submitted September 10, 2007

INDEX NO: 17817/06

The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Requested Relief

Defendant, SHEILA ROSS, moves for an order, pursuant to CPLR §3212, granting summary judgment dismissing the complaint and all cross-claims against her on the ground that she did not own the property where plaintiff fell, did not create the condition and had no duty to correct it. An Affidavit of Service reflects that counsel for all other parties were served with the instant motion on July 12, 2007, but only counsel for plaintiff, ALAN KOHN, opposes the motion, which is determined as follows:

Background

Plaintiff commenced this action to recover for injuries from an alleged trip and fall accident that occurred on November 2, 2005, at approximately:8:50 P.M., on a raised public sidewalk in front of 190 Scott Drive, Atlantic Beach, Town of Hempstead, New York. The verified complaint with respect to SHEILA ROSS alleges that she owned the home and abutting sidewalks at the subject location and was responsible for the maintenance of the sidewalk which was under her control. The complaint further alleges that plaintiff tripped and fell at said location as a result of ROSS' or her agents' negligence in the ownership, maintenance and control of the sidewalk and in permitting a tree root to cause a section of the sidewalk to become raised, defective and dangerous for an unreasonable length of time, of which she had actual and constructive notice. It appears that SHEILA ROSS admitted that she planted a tree beside the public sidewalk thirty-nine (39) years before the accident.

In support of its motion to dismiss, counsel for ROSS argues that the law is well settled that an abutting landowner has no duty to maintain the public sidewalk and can only be held liable when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places an obligation on an owner to maintain the sidewalk and expressly makes the owner liable in tort for the injuries caused by the breach of that duty. Counsel for ROSS contends that ROSS derived no special use from the sidewalk, neither constructed nor repaired the sidewalk where plaintiff fell, and is not responsible for the damage to a public sidewalk caused by the root of a tree, citing *Gitterman v. City of New York*, 300 AD2d 157, 751 NYS2d 478 (1st Dept 2002),

Simmons v Guthrie, 304 AD2d 819, 757 NYS2d 873 (2nd Dept. 2003) and *Zawacki v Town of North Hempstead,* 184 AD2d 697, 585 NYS2d 93 (2nd Dept. 1992). It is ROSS' position that there was no ordinance in effect on the date of the accident that imposed tort liability on defendant for failure to replace and repair the sidewalk and property owners are not negligent in planting trees beside sidewalks even if the are aware that a tree root from the planted tree caused the sidewalk defect. *Zawacki v Town of North Hempstead, supra.* Counsel urges that SHEILA ROSS is entitled to summary judgment dismissing the complaint and all cross claims against her.

In opposition to the motion, counsel for plaintiff highlights the Hempstead Town Code, §184-5 and §184-6, effective October 26, 1998, that directs that "[n]o tree shall be planted within the sidewalk area in front of or adjacent to any private premises except trees whose roots (sic) systems normally will not cause damage to sidewalk, curb or utility installations". Counsel argues that, therefore, ROSS, who admits to planting the tree thirty-nine (39) years ago, created the condition and can be held liable. Moreover, counsel points out that the Town Code imposes a duty on the property owner to maintain the sidewalks and trees in front of or adjacent to the premises. Counsel for ROSS states that, although he is unclear whether the Code can be applied retroactively, defendants motion should be denied as there is significant evidence to establish plaintiff's *prima facie* case of negligence against SHEILA ROSS. The Court disagrees.

The Law

"It is well settled that a landowner will not be liable to a pedestrian injured by a defect in a public sidewalk abutting the landowners' premises unless 'the landowner

created the defective condition or caused the defect to occur because of some special use, or unless a statute or ordinance placed the obligation to maintain the sidewalk upon him' [and imposes] tort liability upon the landowner for injuries caused by a violation of that duty" (*Block v Potter*, 204 AD2d 672, 612 NYS2d 236 [2nd Dept. 1994], quoting *Surowiec v City of New York*, 139 AD2d 727, 527 NYS2d 478 [2nd Dept. 1988]). In essence, a landowner may be held liable for a condition upon the sidewalk if a local ordinance or statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalk and imposes liability for injuries resulting from the breach of that duty. (*Hausser v Giunta*, 88 NY2d 449, 646 NYS2d 490, 669 NE2d 470 [C.A. 1996]). On a motion for summary judgment, when a defendant has established that it did not repair or make special use of the sidewalk, the burden shifts to the plaintiff to "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which would require a trial of the action. (*Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [C.A. 1986]). There is no evidence that SHEILA ROSS made any repairs to the allegedly defective sidewalk prior to the accident, made special use of the sidewalk or otherwise caused the defective condition. No evidence is presented that the tree root caused the defective condition and the Court credits the defendant's analysis that the adjacent landowner is not responsible for the damage to a public sidewalk caused by the root of a tree. See, *Gitterman v City of New York, supra; Simmons v Guthrie*, *supra*; and *Zawacki v Town of North Hempstead, supra.* And, while the Town Code mandated the abutting landowner to maintain the sidewalk and trees, none of the cited provisions specifically impose tort liability for failure to comply with the statutes. (*Hausser v Giunta*,

supra).

Conclusion

It is well settled on a motion for summary judgment that, after movant has made a *prima facie* showing that they are entitled to judgment as a matter of law, the other party must establish the existence of material facts of sufficient import to create a triable issue of fact. Bare allegations are insufficient to create a genuine issue of fact. *Shaw v Time-Life Records,* 38 NY2d 201, 379 NYS2d 390, 341 NE2d 817 (C.A. 1975). After a careful reading of the submission herein, it is the Court's judgment that SHEILA ROSS has made a *prima facie* showing that it is entitled to judgment as a matter of law and that plaintiff's submission is insufficient to defeat the instant motion. It is therefore

ORDERED, that SHEILA ROSS' motion for summary judgment is granted and the complaint and all cross-claims against her are dismissed; and it is further

ORDERED, that the caption shall henceforth read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

ALAN KOHN,

Plaintiff,

-against- **INDEX NO: 17817/06**

TOWN OF HEMPSTEAD,

Defendant.

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and it is further

ORDERED, that the parties shall appear for a previously schedule conference to be held before the undersigned on December 6, 2007 at 9:30 A.M.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: December 3, 2007

WILLIAM R. LaMARCA, J.S.C.

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