Sachs v County of Nassau
2007 NY Slip Op 34149(U)
December 12, 2007
Supreme Court, Nassau County
Docket Number: 2637-05/
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

ROLF SACHS, Individually and as Administrator of the Estate of MARC SACHS, Deceased,

Plaintiff(s),

INDEX No. 2637/05

-against-

MOTION DATE: 8/24/07

THE COUNTY OF NASSAU and PETRINA M. DELUCA,

Defendant(s).

MOTION SEQ. No. 6-MD
7-MG

THE COUNTY OF NASSAU,

Third-Party Plaintiff(s),

-against-

DOREEN SACHS,

Third-Party Defendant(s).

The following papers read on this motion:
Notice of Motion/Affirmation/Exhibits
Notice of Cross Motion/Affirmation/Exhibits
Affirmation in Opposition/Affidavit/Exhibits
Reply
Reply

Both defendants COUNTY OF NASSAU and PETRINA DELUCA seek Orders granting them summary judgment pursuant to CPLR § 3212, dismissing the Complaint. Plaintiff opposes.

In this action plaintiff seeks damages for injuries and the wrongful death of MARC SACHS. Plaintiffs allege that on November 23, 2003 at approximately 7:00 p.m., the decedent sustained serious physical injuries as a result of falling out of his wheelchair when it rolled over a sidewalk defect near the intersection of South Oyster Bay Road and Dove Street, Hicksville New York. The plaintiffs claim that the defect in the sidewalk caused the wheelchair to tip over and resulted in plaintiff's falling onto the sidewalk and allegedly suffering head injuries, a fractured left femur resulting in fat emboli and a cerebral vascular accident, or stroke, with brain damage. Plaintiffs allege that this fall ultimately resulted in his death on February 13, 2006.

It is uncontested that Marc Sachs was in a wheelchair at the time of the incident due to his suffering from muscular dystrophy. He was being pushed by his mother, along with his grandmother and two sisters. He was not wearing the seatbelt attached to the chair when the accident occurred.

According to his mother the wheelchair hit a raised portion of the sidewalk. She testified that she never let go of the chair handles, but Marc fell out due to the bump and jolt. After the accident his family put Marc back into the chair and went home and subsequently took him to the hospital.

The COUNTY seeks summary judgment. It contends that the claims against it must be dismissed as it had no prior written notice of a defective condition. The COUNTY argues that there is no evidence that it caused the defect and any claim that it had actual notice is insufficient to defeat its application for summary judgment. *Cenname v. Town of Smithtown*, 303 AD2d 351 (2nd Dept. 2003); *Anderson v. Town of Smithtown*, 292 AD2d 406 (2nd Dept. 2002); *Roth v. Town of North Hempstead*, 273 AD2d 215 (2nd Dept. 2000).

The COUNTY notes that even a visual inspection by its employee is insufficient to satisfy the statutory notice requirements of prior written notice. *Amabile v. City of Buffalo*, 93 NY2d 471 (1999). It argues that the Nassau County Administrative Code 12-4.0(e) requires prior written notice made by certified or registered mail directed to the Office of the County Attorney. The Deputy County attorney argues that the notice provided to the Office of Public Works in this instance is insufficient.

Defendant PETRINA DELUCA, the owner of the residence at 1 Dove Street, also seeks an Order dismissing the claims asserted against her. DE LUCA offers evidence that prior to the accident she provided the COUNTY with prior written notice of raised sidewalk due to tree roots. She provides a copy of a letter

she sent to the COUNTY Department of Public Works, dated May 25, 2002 seeking the removal of two trees. (Motion, Exh. L) DeLUCA also provides a response from the County, dated April 20, 2004, wherein the Department of Public Works states that its "office in receipt of a notice alleging a defect in the sidewalk fronting your property". The letter writer, the Commissioner of Public Works informed DeLUCA that it was the homeowners responsibility to keep the sidewalk safe, and notes repairs she should make, warning her that a failure to do so ". . . may require the COUNTY to proceed with the work and assess you for the total cost . . . ." (DeLuca Exh. K) Nowhere in the letter does the Commissioner state that DeLUCA should advise a different County office of the problem.

DeLUCA nor the plaintiffs offer any proof that a written notice was sent to the County Attorney's Office as required by the County Administrative Code.

DeLUCA also notes that there is no evidence that she made any repairs to the sidewalk in the area of the plaintiff's fall, but only several feet away, when replacing a driveway. (Motion, Exh. H). DeLUCA argues that based on the applicable case law she, as an abutting landowner, is not liable for the injuries sustained by Marc Sachs, as there is no evidence that she created the defective condition. *Giunta v. Hausser*, 88 NY2d 449 (1996); *Pinn v. Baker's Variety*, 32 AD3d 463 (2nd Dept.2006); *Jeanty v. Benin*, 1 AD3d 566 (2nd Dept. 2003).

DeLUCA claims she is entitled to a dismissal of the claims against her as she, did not create the defective condition or cause it to occur due to some special use. She argues that there is no local ordinance or statute imposing any duty upon her to maintain and or repair the sidewalk in question. *Giunta v. Hausser*, 88 NY2d 449 (1996). DeLUCA argues that it was the COUNTY's responsibility to maintain the sidewalk. She contends that the Town of Oyster Bay provisions which impose a duty on her to repair the sidewalk, does not specifically impose a tort liability upon her for failing to do so.

The COUNTY argues that the private homeowner is responsible for the sidewalk in this instance due to the Code of the Town of Oyster Bay, Section 205-2, which shifts the burden from the municipality to the adjacent landowner on properties, such as this, within the Town. Such burden shifting Code provisions are permitted.

The Code of the Town of Oyster Bay § 205-2 specifically imposes liability on abutting homeowner for any injury or damage by reason of omission, failure or negligence to make, maintain or repair the sidewalk. Thus, the motion of DeLUCA must be denied.

The plaintiffs oppose the COUNTY's motion for summary judgment. They argue that the COUNTY had prior written notice, contending that the prior written notice was sent to, and acknowledged by the Commissioner of Public Works should be considered sufficient.

The plaintiffs argue that the COUNTY's representative, a civil engineer, appeared for deposition and acknowledged that there was a history and records in the COUNTY's possession relating to the general area.

These included a Complaint form, dated "4/22/03" from DeLUCA, a complaint from another individual, dated "5/18/03" noting a sidewalk problem, seeking tree removal in front of 1 Dover Street. (Opposition, Exh. D, E, G, H) Another Complaint dated "7/30/03"noted by R. Bartha, a traffic engineer, undated, notes a sidewalk problem due to trees with requests for tree removal (Opposition, Exh. F). There are also letters to the COUNTY from the Town of Oyster Bay, dated April 16, 2002, requesting that the COUNTY take action due to a hazardous tree and sidewalk at the location. (Opposition, Exh. I)

The plaintiffs argue that these notices satisfy any prior written notice requirement to the COUNTY. Counsel for the plaintiff argues that since "prior notice" requirements are in derogation of the common law, Court have strictly construed such statutes as to their scope of coverage . *Doremus v. Lynbrook*, 18 NY2d 362 (1966). He argues that this proof demonstrates actual knowledge by the COUNTY.

The plaintiff also claims that the COUNTY had actual knowledge of the defective condition. The affidavit of Doreen Sachs avers that the Defendant COUNTY had written notice of the defect four weeks prior to the accident.

The plaintiffs note that there is no question that the subject area is under the jurisdiction of the COUNTY as it abuts a COUNTY road. The plaintiffs note that the COUNTY has conceded that it is responsible for the maintenance of the sidewalk. (DeLUCA Motion, Exh. I, K) They note that a municipality has a non- delegable duty to maintain its sidewalks in a reasonably safe condition. *Lopes v. Rostad*, 45 NY2d 617 (1978); *Combs v. Village of Freeport*, 139 AD2d 688 (2nd Dept. 1988). The plaintiffs also note that prior

notice may be a non-issue as it is undisputed that the COUNTY inspected the subject area before the accident. *Giganti v. Town of Hempstead*, 186 AD2d 627 (2nd Dept. 1992).

Plaintiffs also argue that there is a question of whether the defendant COUNTY created the defective condition. Plaintiffs provide an affidavit from an engineer who opines that the sidewalk as constructed is defective. The engineer does not state whether the sidewalk in question was created with a vertical difference in elevation between the concrete sidewalk and abutting sidewalk of 1 3/4 inches. He opines that the base material, otherwise unspecified, caused the slab to move over time.

The expert does not opine that the sidewalk was originally built with the height differential between slabs. Thus, it is insufficient to demonstrate a viable cause of action that the COUNTY created the defect, which he concedes developed over a period of time. *Bielicki v. City of New York*, 14 AD3d 301 (1st Dept. 2005); *Daniels v. City of New York*, 29 AD3d 514 (2nd Dept. 2006); *Obolur et al. v. City of New York*, 8 NY3d 888 (2007).

The COUNTY notes that the failure of a municipality or owner of a tree to control tree roots is not affirmative negligence but a matter of non-feasance which is not actionable. *Lowenthal v. Heidrich Realty et al*, 304 AD2d 725 (2nd Dept 2003). This is true even where the municipality planted the tree. *Claudio v. Village of Patchogue*, 235 AD2d (2nd Dept 1997).

A municipality cannot be held responsible for the conditions created on a sidewalk by the upward pressure of tree roots. This is not affirmative negligence. *Monteleone v. Incorporated Village of Floral Park* 74 NY2d 917 (1989). There is no actual proof that the COUNTY caused the defect by removing nearby trees. In fact, the defendant homeowner testified that the raised concrete slab became worse over time, dating back several years prior to the incident, and continued to worsen. There is no testimony or evidence that the workers damaged the slab. Thus, the Court agrees with the COUNTY that there is no actual evidence that the COUNTY created the alleged defect.

Counsel for the plaintiffs argues that there is evidence that the COUNTY had employees inspect the subject property are due to the Complaints, and even remove the trees apparently causing the sidewalk problems. He argues that since there is evidence that the COUNTY performed repair work in the vicinity and at the area of the incident, no prior written notice is necessary. *Cruz v. City of New York*, 218 AD2d 546 (1st

Dept. 1995). Counsel argues that an exception to the prior written notice requirement exists where there is evidence that the municipality performed an affirmative act of negligence resulting in the defect or derived a special use. He argues that there is a limited exception to the written notice requirement where the area of defect is inspected by the municipality for the purpose of discovering defects and the alleged defect is one whose existence is so patent it should have been obvious upon such inspection. *Ferris v. County of Suffolk*, 174 AD2d 70 (2nd Dept. 1992); *Blake v. City of Albany*, 63 AD2d 1075 (3rd Dept. 1978).

In this instance there is no proof that COUNTY employees were at the location of this accident any time shortly before the plaintiff's accident. *Giganti v. Town of Hempstead*, 186 AD2d 627 (2nd Dept. 1999); *Klimek v. Town of Ghent*, 114 AD2d 614 (3rd Dept. 1985).

Actual notice to the municipality of a defective condition cannot override a municipality's prior written notice requirement. *Quinn v. City of New York*, 305 AD2d 570 (2nd Dept. 2003) Constructive notice of such a condition is equally insufficient. *Amabile v. City of Buffalo*, 93 NY2d 471 (1999). Even where a town employee recently inspected an area, it does not obviate the need for prior written notice. *Roth v. Town of No. Hempstead,* 273 AD2d 215 (2nd Dept. 2000).

The proof presented establishes that no proper prior written notice had been afforded the COUNTY with regard to the allegedly defective sidewalk as required. *Nannon v. Town of East Hampton*, 238AD2d 489 (2nd Dept. 1997). It also demonstrates that there is no evidence that the COUNTY created the defect.

On a motion for summary judgment the moving party must demonstrate, by evidentiary facts, that he is entitled to judgment as a matter of law, whereupon the burden is shifted to the opponent to show that an issue of fact exists. *Piccolo v. De Carlo*, 90 AD2d 609 (3rd Dept. 1982). It is incumbent on the party opposing summary judgment to reveal all of its proof to demonstrate that there is a triable issue of fact in dispute. Mere speculation or hopes of demonstrating such an issue at trial are insufficient*Nel Taxi Corp. v. Eppinger*, 203 AD2d 438 (2nd Dept. 1994); *Sarabia v. Hilaire Farm Nursing Home,* 250 AD2d 586 (2nd Dept. 1998).

Based on the evidence presented the Court finds that the records search conducted by the COUNTY is sufficient. *Federico v. City of Mechanicville*, 141 AD2d 1002 (3rd Dept. 1988); *Bohan v. Town of Southampton,* 227 712 (1962).

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As there is no showing that this municipality created the condition or received the requisite prior written notice of the defective condition of the street at this location prior to the incident, the COUNTY's motion for summary judgment should be Granted. *Akeclik v. Town of Islip*, 2007 Slip Op 01821 (2nd Dept. 2007). Verbal complaints or complaints written down by a County Department do not satisfy the specific prior written notice requirement. *Anderson v. Town of Smithtown*, 292 AD2d 406 (2000). Plaintiff's claim of defendant's general knowledge of the defect is not sufficient. There is no evidence of the required notice to the defendants in the required manner of any ongoing dangerous condition in the area of plaintiff's fall. Thus, 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).

Bricks, mortar, concrete, wood as well as rubber, are not indestructible materials. All that is required of a property owner, is to reasonably maintain such materials and surfaces to prevent hazards. *Bryant v. City of Newburgh*, 193 AD2d 773 (2nd Dept 1993); *Miller v. City of New York*, 217 AD2d 537 (2nd Dept. 1995). There is no evidence the COUNTY had proper prior notice that any deteriorating condition existed, which was left uncorrected. *Vise v. County of Suffolk*, 207 AD2d 341 (2nd Dept. 1994). Such notice is necessary to establish that there was a duty breached by the TOWN. *Rapino v. City of New York*, 299 AD2d 470 (2nd Dept. 2002).

Based on the proof presented the motion of the COUNTY granting it summary judgment dismissing all claims and cross claims asserted against it, is Granted. The motion of DeLUCA is Denied.

It is, SO ORDERED.

Dated: Dec 12, 2007

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

ENTERED

DEC 19 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE