Colleary v Swanchak
2007 NY Slip Op 34150(U)
December 13, 2007
Supreme Court, Nassau County
Docket Number: 6599-05/
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

MARYBETH S. COLLEARY,

Plaintiff(s),

-against-

GEORGINA SWANCHAK and BETH HAUGETO as C-trustees of the Georgina Swanchak Revocable Trust, and THE CITY OF GLEN COVE,

Defendant(s).

INDEX No. 16599/05

MOTION DATE: 10/26/07

MOTION SEQ. No. 2-MG
3-MG
XXX

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

Defendant CITY OF GLEN COVE seeks an Order granting it summary judgment dismissing the Complaint. Defendants GEORGINA SWANCHAK and BETH HAUGETO also move for summary judgment.

In this action plaintiff seeks damages for personal injury arising from a trip and fall accident. On the evening of July 24, 2004, at approximately 7:00 p.m., plaintiff MARYBETH COLLEARY, then 69-years old, allegedly tripped and fell while taking an after-dinner walk with her daughter. Plaintiff claims she tripped on a raised section of the sidewalk on Rellim Drive in Glen Cove. Plaintiff fell to the ground and landed on her elbow, sustaining injuries which included a displaced fracture. According to plaintiff, the flag on which

she tripped was raised two to three inches above the adjoining section of the sidewalk. Plaintiff alleges that the flag became displaced because of tree roots which were growing underneath the sidewalk. The portion of the sidewalk where the accident occurred is in front of a single-family home which is owned by defendants GEORGINA SWANCHAK and BETH HAUGETO, as co-Trustees of the Georgina Swanchak Revocable Trust ("Trustees"). It appears that SWANCHAK established a Revocable Trust for her own benefit and transferred her home to the Trust in 1992.

Plaintiff served a Notice of Claim on GLEN COVE on September 3, 2004. The action was commenced by filing a Summons and Complaint on October 18, 2005. Plaintiff alleges that defendants were negligent in, among other things, failing to correct the dangerous condition in the sidewalk. The City and the Trustees cross claim against each other for contribution or indemnity.

GLEN COVE moves for summary judgment dismissing the Complaint on the ground that it never received prior written notice of the sidewalk defect. The defendants SWANCHAK and HAUGETO also seek summary judgment claiming they do not own the sidewalk and did not create the condition which caused plaintiff's accident.

Plaintiff opposes GLEN COVE's motion on the ground that GEORGINA SWANCHAK testified at her deposition that she orally reported the condition of the sidewalk to GLEN COVE in 1995. SWANCHAK testified that in August 1995, she informed a City employee that tree roots were lifting up the sidewalk and requested GLEN COVE to repair it. SWANCHAK further testified that the City employee with whom she spoke made a written memorandum concerning the condition of the sidewalk.

A municipality may enact a statute, requiring prior written notice of a defective, unsafe or dangerous condition of a sidewalk, and certain other areas, as a condition precedent to liability for injuries to person or property caused by such condition. General Municipal Law § 50-e(4); *Walker v. Town of Hempstead*, 84 NY2d 360 (1994). The only exceptions to this rule are where the municipality affirmatively created the defect, or where a special use confers a special benefit upon the municipality *Ferreira v. Orange*, 34 AD3d 724 (2d Dep't 2006). The municipality's actual notice of the defective condition does not satisfy the prior written notice requirement. *Berner v. Huntington*, 304 AD2d 513 (2d Dep't 2003).

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Glen Cove City Charter § C4-4(c) provides, "No civil action shall be maintained against the CITY OF GLEN COVE for injuries or damages to persons or property sustained by reason of any defect or obstruction whatsoever in its . . . sidewalks . . . unless written notice of . . . said defect or obstruction causing the injuries or damages was actually served upon the City Clerk or Director of Public Works in accordance with Subsection D . . . ." Subsection D of the Charter provides that notice of defect shall be accomplished by personal service or registered mail actually received by a GLEN COVE official to whom the letter is addressed.

In support of its motion for summary judgment, GLEN COVE submits the affidavit of Elizabeth Mestres, a clerk for it's Director of Public Works. In her affidavit, Ms. Mestres states that she conducted a record search and determined that there were no written complaints regarding the condition of the sidewalk in the area where plaintiff fell prior to the date of the incident. Additionally, Kevin Monahan, the heavy equipment coordinator for the City's Department of Public Works, testified that there were no records as to whether the homeowner or GLEN COVE installed the sidewalk at the location of the accident. Monahan further testified that GLEN COVE retained a contractor to repair the sidewalk in November 2006 but no notice to repair had been sent to the owner of the abutting property prior to the date of the incident.

On a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *MD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 (2005). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers. If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial. *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 (1986).

Based upon the proof presented, the Court finds that GLEN COVE established prima facie that it did not receive prior written notice of the defect. The deposition testimony of Monahan that no notice to repair was sent before the incident established prima facie that GLEN COVE did not create the defect in the

sidewalk by attempting to repair it in a negligent manner. Furthermore, the lack of records as to which party installed the sidewalk suggests that there was no special use of the sidewalk by the municipality. Thus, the burden shifts to plaintiff to show a triable issue as to whether the CITY received prior written notice of the defect or whether any exceptions to the prior notice rule apply. SWANCHAK's testimony that she made an oral Complaint to the CITY in 1995 is insufficient. Accordingly, defendant CITY OF GLEN COVE's motion for summary judgment dismissing the Complaint as against GLEN COVE, is Granted.

"Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner. There are, however, circumstances under which this general rule is inapplicable and the abutting landowner will be held liable. Liability to abutting landowners will generally be imposed where the sidewalk was constructed in a special manner for the benefit of the abutting owner, where the abutting owner affirmatively caused the defect, where the abutting landowner negligently constructed or repaired the sidewalk and where a local ordinance or statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalks and imposes liability for injuries resulting from the breach of that duty" *Hausser v. Giunta*, 88 NY2d 449, 452-53 (1996).

As to the Trustees' motion seeking summary judgment, plaintiff opposes on the ground that the deed conveying the property to the Trustees also grants them "all right, title, and interest, if any, . . . to any streets and roads abutting the . . . premises to the center lines thereof . . . ." Thus, plaintiff argues that the Trustees were in fact the owner of the sidewalk.

The deposition testimony of SWANCHAK establishes prima facie that the property owners did not create the defect in the sidewalk or make any attempt to repair it. Furthermore, the lack of evidence as to which party installed the sidewalk establishes prima facie that it was not constructed in a special manner for the benefit of the abutting landowner. Although Chapter 239, Article II of the Glen Cove Code addresses sidewalks, it does not specifically charge abutting landowners with a duty to maintain and repair the sidewalk or impose any liability on the abutting landowner. Thus, the Trustees have established prima facie that they are entitled to judgment dismissing the Complaint, and the burden shifts to plaintiff to establish that one of the exceptions to the general rule of non-liability applies.

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When property abuts a public street, the owner has an appurtenant easement of access to and from the street. *Regan v. Lanze*, 40 NY2d 475, 482 (1976). While this easement includes the right to cross the sidewalk, it does not create liability for a sidewalk defect.

Accordingly, the portion of defendants SWANCHAK and HAUGETO's motion seeking summary judgment dismissing the Complaint is also Granted. That portion of their motion to dismiss the cross claims for contribution or indemnity are Denied as moot.

It is, SO ORDERED.

Dated: Dec 13, 2007

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

ENTERED
DEC 19 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE