Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 25 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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SUSAN ROSENZWEIG and BRUCE ROSENZWEIG,

Plaintiffs,

-against-

PATRICIA MAUDE, MICHAEL DEVLIN, TOWN OF HEMPSTEAD and COUNTY OF NASSAU,

Defendants.

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Index No. 6729/2006

Motion Dated: 6/08/07
Motion Submitted: 9/17/07
Motion Sequence: 002, 003
005

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XXX
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....X

The motion and cross motion by County of Nassau (hereinafter " the County") and Town of Hempstead (hereinafter "the Town") for summary judgment are granted without opposition. The cross motion by defendant Patricia Maude (hereinafter "Ms. Maude") seeking an order of summary judgment is denied for the reasons set forth herein.

Plaintiffs commenced this action for injuries allegedly sustained by plaintiff Susan Rosenzweig (the "plaintiff") when she fell on the sidewalk adjacent to 2743 Court Street, North Bellmore, Town of Hempstead, N.Y. (the "premises"). The incident occurred on August 12, 2005, at approximately 9:30 a.m. Ms. Maude is the owner of the premises. It is

located on the corner of Court Street and King Street. Michael Devlin is the upstairs tenant in Ms. Maude's premises.

While there is no opposition to the County's motion or the Town's cross motion, the requested relief is appropriate and this Court finds that the necessary parties have been served with the instant motions. The County has established that the road where the incident occurred, and thus the sidewalk, was not under its jurisdiction.

As noted by the Town, for liability to attach, prior written notice of a defective sidewalk is required pursuant to Town Law § 65-a subd. 2 and § 6-3 of the Code of the Town of Hempstead. (See ***Meekins v. Town of Riverhead***, 20 A.D.3d 399, 798 N.Y.S.2d 133 [2d Dept., 2005])). The Town has offered the sworn affidavit of Felice M. Guarnieri, a Deputy Town Clerk, Town of Hempstead, which establishes that the Town never received the requisite notice as to the 2743 Court Street sidewalk. The affidavit of George Brush, Compliance Coordinator, Sidewalk Division, Town of Hempstead further establishes that the Town did not perform any affirmative acts and did not repair, construct, contract out, or inspect the sidewalk for three years prior to the date of plaintiff's incident.

Under an ordinance limiting a municipality's duty of care over its streets and sidewalks, liability may be imposed only for those defects or hazardous conditions for which the municipality has been notified to exist at a specified location. (***Poirier v. City of Schenectady***, 85 N.Y.2d 310, 648 N.E.2d 1318, 624 N.Y.S.2d 555 (1995); ***David v. City of New York***, 267 A.D.2d 419, 700 N.Y.S.2d 235 [2d Dept., 1999]).

A municipality that has enacted a prior written notice statute may not be subject to liability for personal injuries unless it either received actual written notice of the alleged dangerous condition, its affirmative act of negligence proximately caused the accident, or where a special use confers a special benefit on the municipality. (***Lopez v. G&J Rudolph Inc.***, 20 A.D.3d 511, 799 N.Y.S.2d 254 (2d Dept., 2005); ***Estrada v. City of New York***, 273 A.D.2d 194, 709 N.Y.S.2d 105 (2d Dept., 2000), *lv to app den.* 95 N.Y.2d 764, 739 N.E.2d 294, 716 N.Y.S.2d 38 [2000]).

Generally, prior notice of a defect in a municipal street or sidewalk is a condition precedent that plaintiff is required to plead and prove to maintain an action against the municipality. (***Katz v. City of New York***, 87 N.Y.2d 241, 661 N.E.2d 1374, 638 N.Y.S.2d 593 [1995]). The prior written notice provision is a limited waiver of sovereign immunity in derogation of common law, and it is strictly construed. (***Poirier v. City of Schenectady, supra; Laing v. City of New York***, 71 N.Y.2d 912, 523 N.E.2d 816, 528 N.Y.S.2d 530 [1988]).

The affidavit of an official charged with the responsibility of keeping an indexed

record of the notices of defective conditions received by a municipality is sufficient to establish that no prior written notice was filed. The affidavit need only indicate that the official had caused a search of a department's records to be made and that no written notice of the defective condition was filed. (***Cruz v. City of New York***, 218 A.D.2d 546, 630 N.Y.S.2d 523 [1st Dept., 1995]).

The Town has met its burden to show that it received no prior written notice of the condition of the sidewalk and to show that it did not cause the condition. The County has established it did not have jurisdiction over the area where the incident occurred. Their motions to dismiss are therefore granted.

Ms. Maude contends she was an absentee landlord of the premises before and when the accident occurred and therefore should not be liable. As noted, Mr. Devlin was a tenant in the premises when the incident occurred.

An out-of-possession owner is not liable for injuries that occur to third parties on the premises unless that entity retained control of the premises or is contractually obligated to repair the unsafe condition. (***Jackson v. United States Tennis Assn.***, 294 A.D.2d 470, 742 N.Y.S.374 [2d Dept., 2002]). An owner is not liable in negligence for conditions on the land after transfer of possession and control when the lease specifically imposed repairs and maintenance on the tenant in exclusive possession of the premises. (***Lynch v. Lom-Sur Co.***, 161 A.D.2d 885, 555 N.Y.S.2d 930 [3d Dept., 1990]).

There is no such formal owner/tenant relationship on the record before the court. Pursuant to her deposition, Ms. Maude gave directions to Mr. Devlin on how to proceed as to the King Street sidewalk. However, there is no lease indicating that the tenant, Michael Devlin, is responsible for repairs and maintenance on the property or that the owner, Ms. Maude, did not retain control over the property to make or order repairs.

Ms. Maude testified at her deposition that she never inspected the premises prior to August 12, 2005 but Mr. Devlin did contact Ms. Maude with respect to uneven sidewalk flags on the sidewalk abutting the premises on either Court or King Street. According to her testimony, Ms. Maude's tenants, prior to August 12, 2005, did not complaint about the condition of the sidewalk abutting the property and neither Ms. Maude nor anyone on her behalf made repairs to any portion of the sidewalk abutting her property prior to August 12, 2005.

Mr. Devlin testified he noticed, while cutting the grass on the premises that the sidewalk flags on section adjacent to 2743 Court Street had a "slight" difference in height Mr. Devlin further testified that no one had issued notices or violations as to the Court Street sidewalk and no one reported any incidents on the Court Street portion of the sidewalk prior

to August 12, 2005.

While trivial defects are not actionable, in determining whether a defect is trivial, a court must examine all the facts presented concluding width depth, elevation, irregularity, and appearances of the defect, along with the time, place and circumstances of the injury (***Trincere v. County of Suffolk***, 90 N.Y.2d 976, 688 N.E.2d 489, 665 N.Y.S.2d 615 [1997]). As a general rule, whether a dangerous condition exists on real property so as to create liability depends on the particular facts and circumstances of each case and presents a question of fact for the jury (***Corrado v. City of New York***, 6 A.D.3d 380, 773 N.Y.S.2d 894 [2d Dept., 2004]).

A landowner owes a duty to a person coming upon the land to help it in a reasonably safe condition (***Gustin v. Association of Camps Farthest Out***, 267 A.D.2d 1001, 700 N.Y.S.2d 327 [4th Dept., 1999]). A reasonably safe condition takes in all circumstances including the purpose of the person's presence on the property, the likelihood of injury (***Macey v. Truman***, 70 N.Y.2d 918, 519 N.E.2d 304, 524 N.Y.S.2d 393 [1987]), the seriousness of the injury, and the burden of avoiding the risk. (***Peralta v. Henriquez***, 100 N.Y.2d 139, 790 N.E.2d 1170, 760 N.Y.S.2d 741 [2003]). For a landowner to be liable in tort for an injury resulting from an allegedly defective condition upon his property, the existence of a defective condition must be established. (***Sadowsky v. 2175 Wantagh Ave. Corp.***, 281 A.D.2d 407, 721 N.Y.S.2d 665 [2d Dept., 2001]).

In order for a premises owner/possessor to have constructive notice of a defective condition on the premises, the defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident to discover and remedy it. (***Negri v. Stop & Shop***, 65 N.Y.2d 625, 480 N.E.2d 740, 491 N.Y.S.2d 151 (1985); ***Britto v. Great Atl. & Pac. Tea Co., Inc.***, 21 A.D.3d 436, 799 N.Y.S.2d 828 [2d Dept., 2005]).

A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. (***Curtis v. Dayton Beach Park No. 1 Corp.***, 23 A.D.3d 511, 806 N.Y.S.2d 664 (2d Dept., 2005); ***Rapini v. New Plan Excel Realty Trust, Inc.***, 11 A.D.3d 890, 782 N.Y.S.2d 324 [4th Dept., 2004]).

Here, the plaintiffs have raised an issue of fact as to whether the Ms. Maude had constructive notice of the alleged dangerous condition. (***Adams v. Autumn Thoughts***, 298 A.D.2d 945, 747 N.Y.S.2d 651 (4th Dept., 2002); ***Lobsenzer v. Mintz***, 283 A.D.2d 556, 725 N.Y.S.2d 212 (2d Dept., 2001); ***Baillet v. Auerbach***, 277 A.D.2d 335, 717 N.Y.S.2d 215 [2d Dept., 2000]).

A question of fact exists as to whether the condition, the raised sidewalks, was such that knowledge thereof should have been acquired by Ms. Maude in the exercise of reasonable care. (***Leventhal v. Forest Hills Gardens Corp.***, 308 A..D.2d 434, 764 N.Y.S.2d 125 [2d Dept., 2003]). In order to constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the incident to permit defendants and/or defendants' employees to discover and remedy it. (***Gordon v. American Museum of Natural History***, 67 N.Y.2d 836, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]).

Photographs of an alleged offending condition taken shortly after the incident, if accurate, such as those submitted to the Court with the instant motion, can create an issue of fact as to the landlord/possessor's notice and knowledge of the condition. (See ***Batton v. Elghanayan***, 43 N.Y.2d 898, 374 N.E.2d 611, 403 N.Y.S.2d 717 [1978]). A negligent failure to discover a condition that should have been discovered can be no less of a breach of due care than a failure to respond to the actual notice of such a condition. (***Blake v. City of Albany***, 48 N.Y.2d 875, 400 N.E.2d 300, 424 N.Y.S.2d 358 [1979]). Ms. Maude's motion for summary judgment is denied.

The foregoing constitutes the Order of this Court.

Dated: December 31, 2007
Mineola, N.Y.

Karen V. Murphy
J. S. C.