

**Starling v Suffolk County Water Auth.**

2008 NY Slip Op 30066(U)

January 10, 2008

Supreme Court, Suffolk County

Docket Number: 0017366/2003

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 8-20-07  
ADJ. DATE 10-3-07  
Mot. Seq. # 001 - MG  
              # 002 - XMG

-----X			ALAN POLSKY, ESQ.
MOLLIE STARLING and CHARLES	:		Attorney for Plaintiffs
STARLING,	:		630 Johnson Avenue, Suite 006, P.O. Box 170
	:		Bohemia, New York 11716
	:	Plaintiffs,	
	:		O'CONNOR, O'CONNOR, HINTZ, et al.
- against -	:		Attys for Deft Suffolk Cty Water Authority
	:		One Huntington Quadrangle, Suite 3C01
THE SUFFOLK COUNTY WATER	:		Melville, New York 11747
AUTHORITY and THE TOWN OF BABYLON,	:		
	:		DENNIS M. COHEN, ESQ.
	:		Attys for Deft Town of Babylon
	:	Defendants.	200 E. Sunrise Highway
-----X			Lindenhurst, New York 11757

Upon the following papers numbered 1 to 39 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers 17 - 29; Answering Affidavits and supporting papers 30 - 38; Replying Affidavits and supporting papers 39; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by the Suffolk County Water Authority for summary judgment dismissing the complaint and all cross claims against it, is granted; and it is further

**ORDERED** that this unopposed cross motion by the Town of Babylon for summary judgment dismissing the complaint and all cross claims against it, is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Mollie Starling, when on May 7, 2002, at approximately 9:30 a.m., she tripped and fell over a water meter cover, which was located just outside of the fence in front of her home at 87 S. 28<sup>th</sup> Street, in Wyandanch, New York. The verified bill of particulars alleges that the dangerous condition was created by employees of defendant Suffolk County Water Authority (hereinafter "SCWA") when, after reading the meter, the employee failed to properly secure the cover. The complaint alleges that the water meter

was located on property owned by defendant Town of Babylon (hereinafter “the Town”). Plaintiff Charles Starling, Mollie Starling’s husband, sues derivatively.

Defendant SCWA now moves for summary judgment dismissing the complaint and all cross claims against it. In support of its motion, SCWA submits, *inter alia*: the pleadings; the deposition testimony of the plaintiffs; the deposition testimony and affidavit of Salvatore Olivotti, a SCWA employee; the deposition testimony of Clifford Foy, another SCWA employee; and a SCWA “Meter Reader Time Ticket.”

At her deposition, plaintiff Mollie Starling testified in pertinent part that she was taking out the garbage and she noticed a piece of paper outside of her fence. She stated that she walked to where the piece of paper was, and as she stepped down to pick up the paper, her foot made contact with the water meter cap, the cap flipped up toward her, hit her knee, and she fell down. She testified that she knew that there was a water meter cap somewhere outside the fence, but she was not sure just where it was located. Mrs. Starling also testified that she and her husband maintained the grassy area where the water cap was located. She stated that, besides herself and her husband, they had a landscaper who also cut the lawn prior to the accident, and that she thought he also did “weed whacking.” In addition, Mrs. Starling testified that within a month of her accident she saw a SCWA employee read her water meter, and that she saw the employee remove the cap. Finally, she stated that other than this SCWA employee, she never saw anyone else touch or open the water cap before her accident; she never made complaints to anyone about the condition of the cap or asked anyone to repair it; she never noticed anything wrong with the cap prior to her accident; she knows of no one else who was injured by the water cap; and she never tried to read her own meter.

Plaintiff Charles Starling testified at his deposition that the last time he had seen the water meter cap prior to his wife’s accident was about two months before, when he was cutting the grass, and at that time the cap seemed to be level with the ground. He testified to the effect that sometimes children like to play in that grassy area where the water meter cap was located, but since he did not want them playing in that area, he would, “get them out of there.” He also testified that he never noticed any problems with the water cap prior to his wife’s accident, and he never notified anyone as to any problems.

Salvatore Olivotti testified at his deposition that he is a meter reader for SCWA and at the time of the accident he had approximately two years experience as a meter reader. He stated that when he is out in the field he uses a handheld device called an “Itron” that he puts information into, and which information later gets printed and used for billing. Mr. Olivotti testified that he did not recall specifically doing the meter readings on March 28, 2002, but after reviewing several documents, he was able to testify that he was the meter reader at the plaintiff’s premises on March 28, 2002. From one of the documents he examined, entitled “Meter Reader Time Ticket,” he was also able to testify that on March 28, 2002, in a seven hour period, he read 200 meters. He stated that all the water meters are held in the same type of housing, that they have cover and a lid which fits into the cover, and that the lid is secured with a hex nut. He explained that he has a vault key that opens the hex nut. When asked if the vault can be opened with an ordinary hex wrench, Mr. Olivotti answered, “It’s possible.” He further explained that to read a meter, he loosens the nut, lifts the lid up, looks at the meter, puts the information he gets from the meter into the “Itron,” replaces the lid, and tightens the nut, turning it to the right until its snug.

In a supporting affidavit, Mr. Olivotti reiterates that after reading a meter, "Specifically, I place the lid back into the cover and tighten the nut by turning it to the right until the lid is snug into the cover." He states that it is the custom and practice of SCWA, that all meter readers must place the lid back into the cover and tighten the nut until it is snug in the cover following the reading of all water meters. He avers that, "Based on my custom and practice, I can state that on March 28, 2002, I closed and secured the lid and cover of the meter located at 87-28 South 28<sup>th</sup> Street, Wyandanch, New York, after I read the meter." Mr. Olivotti also states that SCWA did not make any repairs nor read the plaintiffs' meter again after March 28, 2002, and before plaintiff Mollie Starling's accident on May 7, 2002. Nor, alleges Mr. Olivotti, did he receive or is he aware of anyone at SCWA receiving complaints about the subject water meter, cover, or lid, between March 28, 2002, and the accident.

Clifford Foy, a regional manager for SCWA, testified at his deposition that the subject water meter is owned and maintained by SCWA. He also testified to the effect that although SCWA employees have a wrench vault key, anyone can open a meter vault with a wrench or imagination.

Defendant SCWA alleges that all of this evidence establishes that it used reasonable care in maintaining and reading the plaintiffs' water meter and that it did not create the alleged condition which caused plaintiff to fall. It argues that immediately after every meter reading, Mr. Olivotti places the lid back into the cover and tightens the nut until the lid is snug. It contends that the evidence demonstrates that Mr. Olivotti followed the usual custom business practice of SCWA when he read the water meter at the subject premises on March 28, 2002, approximately five and a half weeks prior to the subject accident. It maintains, additionally, that it has demonstrated that SCWA did not have actual or constructive notice of the alleged defective condition prior to the accident. As such, claims SCWA, there are no triable issues of fact and summary judgment is warranted.

The plaintiffs oppose defendant SCWA's motion and submit in opposition, *inter alia*: their affidavits; their son's affidavit; and photographs of the water meter lid. In her affidavit, plaintiff Mollie Starling reiterates that a month before her accident, she saw a SCWA employee open her meter. She alleges that she and her husband are retired and spend most of their time in and about their home. Mrs. Starling asserts that if someone would have attempted to open the water meter she probably would have seen or heard something. She maintains that she did not hear or see any activity at the water meter after the last reading up until her accident. She alleges that since the meter cap was loose on the day of her accident, she presumes that the meter reader did not properly secure it after he read the meter. She further contends that after her fall she called SCWA and told SCWA that the cap had flipped, and that later that day, after she had returned from the doctor, the meter was fixed.

In his affidavit in opposition, plaintiff Charles Starling alleges that SCWA has exclusively maintained and read the water meter since the meter has been installed. He contends that cars never park in the area where the meter is located, since they have Belgian blocks to prevent cars from coming on the grass. He also alleges that as far as he knows, only SCWA employees have the tool to open and close the meters.

The affidavit in opposition submitted by plaintiffs' son, Charles Starling, Jr., alleges that he has been employed by Keith Machinery for 28 years, 15 of those years as foreman. He claims that as a result of his work, he is familiar with all types of machines and tools. He states that after his mother's

accident, he examined the water meter cap. He alleges that the cap is secured with a five sided nut which is located in a round depression which is only slightly larger than the nut. Mr. Starling avers that the nut could only be loosened with a tool that would grip it securely and vertically. He states, "It would therefore be nearly impossible to loosen the nut without the special tool made for that purpose." Mr. Starling then states, "It might be possible to loosen the nut with a hammer and chisel." However, he claims that if this were done it would leave physical marks on the nut and surrounding area, and would create a loud noise. In addition, Mr. Starling submits photographs of the meter cap which he took in August, 2007. He explains that in some of the photographs, he used a wrench to demonstrate the inadequate grip that a wrench would place on the five sided nut which holds down the cap.

The plaintiffs contend that based upon these affidavits, as well as the deposition testimony submitted by the defendants, there are several factual issues which bear on the issue of liability. The plaintiffs contend that SCWA is asking the court to grant it summary judgment based upon two assumptions: the first, is that its meter reader properly secured the meter cover; and the second, is that the meter cover was subsequently loosened by an unknown third party. The plaintiffs maintain that although there is some basis for the first assumption, there is none for the second. The plaintiffs specifically deny that they themselves loosened the cover. They also claim that there is absolutely no evidence to support the possibility that it was loosened by an unknown third person. The plaintiffs argue that if some third person wanted to loosen the plaintiffs' meter cover, he would have great difficulty doing so without a proper tool. They further argue, that other than SCWA's statement that the meter reader was supposed to secure the lid and that the lid was secured at other times, there is no evidence that the lid was properly secured. Additionally, the plaintiffs contend that SCWA's motion should be denied based upon the doctrine of *res ipsa loquitur*. They claim that the water meter cover would not flip up but for a negligent act and that the water meter, including the cover, is exclusively maintained and controlled by SCWA. They also claim that the accident was not due to any voluntary action or contribution on the part of the plaintiff.

It is well settled that in order for a plaintiff in a trip and fall case to establish a *prima facie* case of negligence, the plaintiff is required to prove that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of such condition (*see, Golding v Powell & Dempsey, Inc.*, 247 AD2d 510, 669 NYS2d 323 [1998]). Here, while plaintiffs theorize that SCWA negligently created a dangerous condition by failing to properly secure the water meter cover during its last meter reading prior to the accident, the record is devoid of any evidence that the defendant failed to properly secure the cover (*see, Knight v Certified Oils, Inc.*, 239 AD2d 391, 658 NYS2d 337 [1997]). SCWA's meter reader Salvatore Olivotti specifically provided a step-by-step description of the procedure he uses when reading a water meter. He attests that it is his custom and practice after reading the meter to "place the lid back into the cover and tighten the nut by turning it to the right until the lid is snug into the cover." Evidence of habit is generally admissible to prove conformity on specified occasions, since a person who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again (*Rivera v Anilesh*, 8 NY3d 627, 838 NYS2d 478 [2007]). Even by a conservative estimate, the record would indicate that Mr. Olivotti performed this procedure in the same manner thousands of times (*Rivera v Anilesh, supra*). Therefore, SCWA's evidence of Mr. Olivotti's habit is sufficient to shift the burden to the plaintiffs to provide evidence creating an issue of fact as to SCWA's negligence.

In response, the plaintiffs have failed to raise a triable issue of fact. The affidavit of their expert, Charles Starling, Jr., is inconsistent, and conclusory (*see, Kane v Ausubel*, 44 AD3d 717, 843 NYS2d 656 [2007]). As to the nut holding the cover secure, Mr. Starling first states that it is “nearly” impossible to loosen the nut, and then later states that it might be possible to loosen the nut. In addition, Mr. Starling’s opinion that the plaintiffs or their neighbors would have heard a noise if someone tried to loosen the nut with a hammer, is speculative. Moreover, contrary to the plaintiffs’ assertion, the doctrine of *res ipsa loquitur* is not applicable to the case at hand. In order to invoke this doctrine, the plaintiffs must demonstrate: “(1) the event must be of a kind which ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff” (*Scott v First Stop, Inc.*, 3 AD3d 528, 529; 770 NYS2d 733; 734 [2004]; quoting *Corcoran v Banner Super Mkt.*, 19 NY2d 425, 430). Here, the water meter cover was located in a grassy, open area adjacent to South 28<sup>th</sup> Street. In addition to SCWA having access to the water meter cover, this cover is in an area continuously open to the public. As such, the plaintiffs have failed to show that SCWA had control of sufficient exclusivity to fairly rule out the possibility that the dangerous condition was caused by some agency other than the defendant’s negligence (*see, Dulgov v City of New York*, 33 AD3d 584, 822 NYS2d 298 [2006]; *Scott v First Stop, Inc.*, *supra*). Accordingly, SCWA’s motion for summary judgment dismissing the complaint and the cross claims against it, is granted.

The Town cross-moves for summary judgment dismissing the plaintiffs’ complaint and all cross claims against it. In support of its motion, it submits, *inter alia*: the pleadings; the deposition testimony of plaintiff Mollie Starling; and the affidavit of Ronnise J. Miller, the Town’s Deputy Town Clerk.

Initially, the Town points to that portion of plaintiff Mollie Starling’s testimony wherein she stated that she never saw any Town employees performing work in the area where the meter cap is located prior to her accident. The Town then points out that both Town Law §65-a and Babylon Town Code §158-1 require that, as a condition precedent to maintaining an action for a defective roadway condition, written notice of the defect must be given to the Town. The Town highlights the affidavit of Ms. Miller, who alleges that her office is responsible for keeping records of all written notices of street and sidewalk defects received by the Town. Ms. Miller alleges that she conducted a search and that the Town records contain no prior written notices of a street or highway defect for the roadway in front of premises known as 87 South 28<sup>th</sup> Street, Wyandanch, New York, for any of the years prior to May 7, 2002. She further alleges that Town records contain no prior written notices of a defect pertaining to a water meter in front of such premises. The Town contends that absent prior written notice of the purported defective instrumentality involved in the accident, the Town may not be held liable for the plaintiff’s alleged injuries.

The Town established its prima facie entitlement to summary judgment by demonstrating that it had no prior written notice of the defective condition of the water meter cover, as required by Town Law §65-a(2), which applies to defects in the sidewalk (*Malone v Town of Southold*, 303 AD2d 651, 757 NYS2d 85 [2003]; VTL §144). Laws requiring prior written notice insulate the Town from liability for defective conditions which are the result of nonfeasance (*Landau v Town of Ramapo*, 207 AD2d 384, 615 NYS2d 705 [1994]). Only two exceptions to the statutory rule requiring prior written notice have been recognized, namely, where the locality created the defective condition through an affirmative

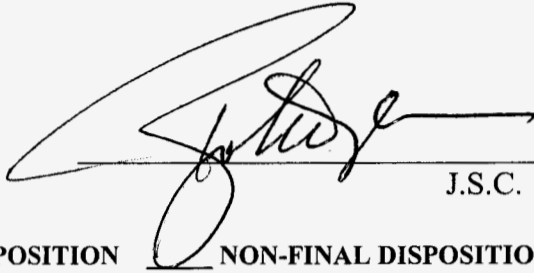
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act of negligence, and where a "special use" confers a special benefit upon the locality (*Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d77 [1999]; see also *Price v County of Suffolk*, 303 AD2d 571, 756 NYS2d 758 [2003]). As there has been no showing that the Town committed any affirmative acts of negligence or that a special use existed for the Town's benefit, the Town's unopposed motion for summary judgment dismissing the complaint and all cross claims against it is granted.

Dated: JAN 10 2008

  
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J.S.C.

X  FINAL DISPOSITION        NON-FINAL DISPOSITION