SHORT FORM ORDER

INDEX No. 05-26607
CAL. No. 07-01600-OT

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 9-25-07
ADJ. DATE 12-10-07
Mot. Seq. # 001 - MD
002 - XMG

FILIZ TEKIROGLU and DURSUN TEKIROGLU, Plaintiffs, - against - COPIAGUE MEMORIAL PUBLIC LIBRARY and TOWN OF BABYLON, Defendants.	BRUCE M. SCHER, ESQ, Attorneys for Plaintiff 200 Willis Avenue Mineola, New York 11501 HAMMILL, O'BRIEN, CROUTIER, et al. Attorneys for Defendant Copiague Memorial 6851 Jericho Turnpike, Ste 250, P.O. Box 1306 Syosset, New York 11791 DENNIS M. COHEN, ESQ. Attorneys for Defendant Town of Babylon 200 East Sunrise Highway Lindenhurst, New York 11757

Upon the following papers numbered 1 to 33 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers 9 - 21 ; Answering Affidavits and supporting papers 22 - 32 ; Replying Affidavits and supporting papers 33 ; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Copiague Memorial Public Library for summary judgment dismissing the complaint against it, is denied; and it is further

ORDERED that the cross motion by defendant Town of Babylon for summary judgment dismissing the complaint against it is granted; and it is further

ORDERED that this action is severed and continued against defendant Copiague Memorial Public Library.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Filiz Tekiroglu when she tripped and fell in front of the Copiague Memorial Public Library (hereinafter "the Library") on February 1, 2005. Her husband, plaintiff Dursun Tekiroglu, seeks damages for loss of

services. The complaint alleges that plaintiff Filiz Tekiroglu fell due to a dangerous, unsafe, and defective condition of the walkway or sidewalk, and that the Library and defendant Town of Babylon (hereinafter "the Town") owned, operated, maintained, managed and controlled such walkway or sidewalk.

The Library now moves for summary judgment to dismiss the complaint on the grounds the plaintiff cannot identify a dangerous or defective condition that caused her to fall and has failed to establish that it had notice of a dangerous condition. It contends that there are no issues of fact that would support a finding of liability against it. In support of its motion, the Library submits, *inter alia*: the pleadings; portions of the deposition testimony of plaintiff Filiz Tekiroglu, which took place with the help of a Turkish interpreter; portions of the deposition testimony of Alicja Feitzinger, a former Library employee; and black and white copies of photographs of the area where the plaintiff claims to have fallen.

Initially, the Library points to the portion of the plaintiff's deposition testimony wherein she testified to the effect that she was walking towards the street to her car from the front entrance of the library when the accident occurred. The plaintiff stated that she was looking straight ahead and that she was not looking down. She also stated, "My left leg go into the place where the cement was, went down and then I fell onto my knees." When the plaintiff was asked if, after the accident, she looked at the place where the accident occurred, the plaintiff responded, "I didn't specifically turn and look there but when I fell, I couldn't stand up, so I saw where I fell." When asked what she saw, the plaintiff answered, "The pavement went down, there was a hole-like thing but not a hole...."

In addition, the Library raises certain portions Ms. Feitzinger's deposition testimony, wherein she testified that, apparently after she was called to the scene of the accident, a gentleman that was with the plaintiff pointed out to her the area where the plaintiff fell. Ms. Feitzinger stated that the gentleman pointed to the exact area where the large slabs of the walkway meet with the sidewalk. She maintained that she understood from the gentleman that the plaintiff fell along the line where two slabs of concrete meet. When Ms. Feitzinger was asked if she noticed anything with regard to the area where the slabs of the walkway met the sidewalk, she responded that they were not perfectly aligned. When asked if she saw a difference in the levels, Ms. Feitzinger answered that there was a slight difference, but that she did not measure it and she could not give an approximation. Ms. Feitzinger also testified that she never noticed the condition while she was working there before the day of the accident and that to her knowledge no one ever complained about the condition of the walkway. Additionally, Ms. Feitzinger testified to the effect that she used a back entrance for employees when she came to work, and not the front public entrance.

The Library further points to the submitted copies of photographs of the area, and states that such photographs clearly depict where the walkway meets the sidewalk as it existed topographically on the day of the accident. The Library argues that based upon these photographs, it is clear that the defect alleged by the plaintiff is trivial at best. The Library concludes that all the submitted evidence demonstrates that the plaintiff cannot identify a dangerous or defective condition that caused her to fall. In turn, argues the Library, it did not have actual or constructive notice of any dangerous or defective condition, as none existed. It maintains that the facts do not support a prima facie case of negligence against it.

The Town cross-moves for summary judgment in its favor alleging that the plaintiffs have failed to plead and prove that the Town had prior written notice of the sidewalk defect as required under Town Law §65-a(2) and Babylon Town Code §158-2. It contends that both of these statutes require that, as a condition precedent to maintaining an action for a sidewalk defect, written notice of the defect must have been given to the municipality. It also points out that a specific allegation, that the Town had prior written notice of the sidewalk defect, is conspicuously absent from the plaintiffs' complaint. In support of its motion, the Town submits, *inter alia*, the affidavit of its Deputy Town Clerk, Ronnise J. Miller and the affidavit of its Commissioner of the Department of Public Works, Philip A. Berdolt. These affidavits reveal that the Town records contained no prior written notice of a sidewalk defect for the purported location of the plaintiff's accident. In addition, the Town submits the deposition testimony of George Price, the Highway Coordinator for the Town, and points to the portion of Mr. Price's testimony wherein he stated that he personally conducted a search for prior complaints or notice to the Town concerning the difference in levels of the sidewalk area in front of the Library, and that no complaints were made. Lastly, the Town submits the plaintiff's testimony from a hearing held pursuant to §50-h of the General Municipal Law, wherein the plaintiff testified that she had never notified anyone concerning a defective condition of the sidewalk, and that she did not know of anyone else notifying the Town as to a defective condition.

The Town contends that all the documentary evidence and testimony gleaned throughout discovery proves that it did not have prior written notice of a defective condition with respect to the subject sidewalk. It claims, additionally, that all pre-trial discovery conducted has failed to reveal any evidence that the Town was affirmatively negligent or in any way caused or created the allegedly defective sidewalk/walkway condition, a recognized exception to the prior written notice requirement. The Town argues that it is, thus, entitled to summary judgment dismissing the complaint and all cross claims against it.

The plaintiffs oppose the motion made by the Library for summary judgment, but allege that in order to avoid unnecessary burdening of the Court's time, that they will not respond to the Town's cross motion for summary judgment. As to the Library's motion, the plaintiffs allege that plaintiff Filiz Tekiroglu's hearing testimony and deposition testimony are very clear as to how and where this accident happened. They point to plaintiff's deposition testimony wherein Ms. Tekiroglu stated that the accident occurred as she was walking toward the street in front of the library carrying her son. They also point to plaintiff's hearing testimony wherein Ms. Tekiroglu stated that her foot was caught on the broken portion of the walkway. The plaintiffs also submit photographs which they allege show the difference in level of the concrete slabs at the point where Ms. Tekiroglu was walking when she left the library and which cause her to trip and fall. The plaintiffs highlight that portion of Ms. Tekiroglu's hearing testimony wherein she indicated that the difference in the levels of the concrete slabs were approximately two to three inches. The plaintiffs allege that they have, therefore, provided the court with sufficient information to at least raise an issue as to the extent of the dangerous condition which existed where plaintiff Ms. Tekiroglu fell.

A defendant who moves for summary judgment to dismiss the complaint in a trip-and-fall case has the initial burden of making a prima facie showing that it neither created the defective condition nor had actual or constructive notice of its existence for a sufficient amount of time to discover and remedy it (*see*, ***Marino v Stop & Shop Supermarket Company***, 21 AD3d 531, 800 NYS2d 591 [2005]). Only

after the defendant has satisfied this threshold burden will a court examine the sufficiency of the plaintiff's opposition papers (***Britto v Great Atlantic & Pacific Tea Company, Inc.***, 21 AD3d 436, 799 NYS2d 828 [2005]).

In this case, the Library has failed to satisfy its initial burden. The Library's proof simply deals with its lack of actual notice, which alone is insufficient. It was also incumbent on the Library, as movant, to show lack of constructive notice, in that the condition which caused the plaintiff's fall was not visible or apparent for a sufficient length of time to permit the Library's employees to discover and remedy it (***Park v Caesar Chemists, Inc.***, 245 AD2d 425, 666 NYS2d 679 [1997]). Nor has the Library met its burden of establishing as a matter of law that it did not create the defect in the sidewalk (***Marino v Stop & Shop Supermarket Company***, *supra*; ***Schaaf v Pork Chop, Inc.***, 24 AD3d 1277, 807 NYS2d 773 [2005]).

Moreover, whether a particular height difference between sidewalk slabs constitutes a dangerous or defective condition depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997]; ***Wilson v Time Warner Cable, Inc.***, 6 AD3d 801, 774 NYS2d 584 [2004]). Defects of a trivial nature are not actionable, and in deciding whether a defect is trivial, a court must examine all the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstance of the injury (***Trincere v County of Suffolk***, *supra*; ***Corrado v City of New York***, 6 AD3d 380, 773 NYS2d 894 [2004]). In this case, it is unclear from the testimony submitted by the Library whether the difference in the level between concrete slabs is trivial or dangerous. The plaintiff described the pavement as going down and being hole-like, and although the Library's employee described the difference as slight, she also could not give an approximation of measurement. Furthermore, from the pictures submitted by the Library, it is difficult to determine what the difference is between the sidewalk slabs. Therefore, the Library has not demonstrated, as a matter of law, that the sidewalk condition was too trivial to be actionable (*see*, ***Corrado v City of New York***, *supra*).

As to the Library's claim that the plaintiff failed to identify the defective condition that caused her fall, the Court finds that Library's own proof raises an issue of fact. The plaintiff's deposition testimony, which was provided by the Library, clearly alleges that she fell where the pavement went down. In addition, Ms. Feitzinger testified that she understood that the fall occurred where the concrete slabs of the walkway met with the sidewalk, which were not perfectly aligned. Therefore, the Library's request for summary judgment must be denied.

Finally, with regard to the Town's cross motion for summary judgment, where, as here, a town has enacted a prior written notice statute, it may not be subjected to liability for personal injuries caused by a defective sidewalk, unless it has either received prior written notice of the defective condition, or an exception to the prior written notice requirement applies (***Lopez v G&J Rudolph Inc.***, 20 AD3d 511, 799 NYS2d 254 [2005]). There are only two recognized exceptions to the statutory rule requiring prior written notice, "namely, where the locality created the defect or hazard through an affirmative act of negligence ... and where a 'special use' confers a special benefit upon the locality" (***Amabile v City of Buffalo***, 93 NY2d 471, 474; 693 NYS2d 77, 79 [1999]).

In the case at hand, the Town has demonstrated its entitlement to summary judgment by demonstrating through the affidavits of it Deputy Town Clerk and the Commissioner of its Department of Public Works, as well as the deposition testimony of its Highway Coordinator, that it did not receive the requisite prior written notice of the alleged defective condition (*see*, ***Betzold v Town of Babylon***, 18 AD3d 787, 796 NYS2d 680 [2005]). The burden thus shifted to the plaintiffs to demonstrate that an exception to the notice requirement applies herein (*see*, ***Hendrickson v City of Kingston***, 291 AD2d 709, 738 NYS2d 433 [2002], *appeal dismissed and lv denied* 98 NY2d 662), which the plaintiff has failed to do. Accordingly, the Town's cross motion for summary judgment dismissing the complaint and all cross claims against it is granted.

Dated: FEB 0 6 2008

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**