

DeMarco v Town of Oyster Bay

2008 NY Slip Op 31055(U)

March 20, 2008

Supreme Court, Nassau County

Docket Number: 3782-07/

Judge: James P. McCormack

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 51 NASSAU COUNTY**

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

_____^x
**SAMUEL DEMARCO and JOSEPHINE
DEMARCO,**

Plaintiff,

Index No. 003782/07

-against-

**Motion Submitted: 11/19/07
Motion Sequence: 001**

**TOWN OF OYSTER BAY, COUNTY OF NASSAU,
HAMLET OF HICKSVILLE, MACK-
HEIFERMAN CO., CONNECTIONS-GENERAL
NASSAU GUIDANCE & COUNSELING
SERVICES, INC., and GENERAL NASSAU
GUIDANCE & COUNSELING SERVICES, INC.,**

Defendants.
_____^x

The following papers read on this motion:

- Notice of Motion.....XX
- Answering Papers.....XX
- Reply.....XX
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's Respondent's.....

The defendant Town of Oyster Bay (hereinafter "Town") moves this court for an order, pursuant to CPLR 3212 granting summary judgment to defendant Town and imposing costs, sanctions and attorney's fees against the plaintiff and their attorneys pursuant to CPLR 8106 and 8303-a and/or 22 N.Y.C.R.R. 103-1.1. Defendants Connections-General Nassau Guidance & Counseling Services, Inc., and General Nassau Guidance & Counseling

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Services, Inc., oppose defendant's motion.

The plaintiff brought this action to recover for personal injuries Mr. DeMarco sustained on March 13, 2006, when he tripped and fell on the sidewalk in front of 459 South Broadway, Hicksville, New York. According to the notice of claim served upon the Town on June 12, 2006, the accident occurred on March 13, 2006 at 10:15 a.m. "On the public sidewalk of South Broadway, in front of the premises known as and designated 459 South Broadway, Hicksville, N.Y." The plaintiff alleged in the notice of claim that the Town and/or the County were negligent in, inter alia, their ownership, operation, maintenance and control of the sidewalk.

Defendant Town argues in this motion that the Town Clerk's Office and the Department of Public Works, Division of Highways did not receive prior written notice of the alleged defective sidewalk condition, and therefore were not on notice of any defective sidewalk condition and could not, as a matter of law, be found liable for the plaintiff's injuries related to tripping on that sidewalk.

Section 160-1(a) of the Oyster Bay Town Code Provides:

No civil action shall be maintained against the Town of Oyster Bay for injuries or damages to persons or property sustained by reason of any street, highway, bridge, culvert, sidewalk, or crosswalk being defective, out-of-repair, dangerous or obstructed condition of such street, highway, bridge, culvert, sidewalk or crosswalk was actually served upon the Town Clerk, or the Superintendent of Highway, hereinafter designated as the "Deputy Commissioner of the Department of Public works, Division of Highway," and that there was a failure or neglect within a reasonable time after the giving of such notice to repair

or remove the defective, out-of-repair, unsafe, dangerous or obstructed condition complained of. Under no circumstances shall the Town of Oyster Bay be liable for injuries or damages caused to persons or property due to the defective, out-of-repair, unsafe, dangerous or obstructed conditions of Town streets, highways, bridges, culverts, sidewalks or crosswalks in the absence of prior written notice to the Town Clerk, or Deputy Commissioner of the Department of Public Works, Division of Highway, of the existence of such condition.

A municipality that has enacted a prior written notice law, such as Oyster Bay Town Code 160 -1(a), *supra*, is excused from liability absent proof of prior written notice or an exception thereto (*see Jacobs v. Village of Rockville Centre*, 41 A.d.3d 539; *Perrington v. City of Mount Vernon*, 37 A.D.3d 571). The Court of Appeals has recognized two exceptions to this rule, “where the locality created the defect or hazard through an affirmative act of negligence” and “where a ‘special use’ confers a special benefit upon a locality” (*Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474; *see Perrington v. City of Mount Vernon, supra* at 572; *Lopez v. G & J Rudolph, Inc.*, 20 A.D.3d 511, 512).

In support of their motion for summary judgment, the Town submitted two separate affidavits from Town officials with knowledge regarding whether Town had received notice of the alleged defect in the sidewalk. The Town first provided the affidavit of Steven Labriola, the Town Clerk of the Town of Oyster Bay, wherein he unequivocally stated:

“A search of the Town Clerk’s files for a period of five years prior to and including the date of the alleged accident, March

13, 2006, reveals that the Town's Clerk's office has no record of receiving any prior written notice relative to a defective sidewalk located in front of the aforesaid premises, as alleged by the plaintiffs".

In addition, the Town provided the affidavit of James Byrne, P.E., the Commissioner of Public Works, who also stated;

"A review of the books and records maintained by this department for a period of five years prior to and including the date of the alleged accident, March 13, 2006, reveals no record that the Department of Public Works received any prior written notice of a defective sidewalk located in front of the aforesaid premises. Further, a review of our records reveals that the Town did not perform any work and did not hire any contractor or subcontractor to perform work within the subject area".

The court finds the evidence submitted by the Town in proper form established that it lacked prior written notice of the alleged dangerous sidewalk condition that caused the plaintiff to trip and fall. (*see* Municipal Law 50-g; Town Law 65-a; *Patti v. Town of North Hempstead*, 23 A.D.3d 363; *Camenson v. Town of North Hempstead*, 298 A.D.2d 543; *Boscolo v. County of Nassau*, 229 A.D.2d 457).

The Town made a prima facie showing of entitlement to judgment as a matter of law since it was uncontroverted that the Town did not receive prior written notice of the alleged dangerous condition as is required under the Oyster Bay Town Code Section 160-1(a). (*see Gilmore v. Village of Hempstead*, 850 N.Y.S.2d 168; *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324).

In opposition to defendant Town's motion plaintiff raised an issue regarding the

period of time for which the records were kept and how far back each of the affiants had searched. Plaintiff argued that the Town's search of their records for a five year period prior to the date of the accident was insufficient and arbitrary. That argument is unavailing as General Municipal Law Section 50-g (2) and Town Law 65-a (4) both of which govern the way in which Municipalities and Towns record the notices of defects they receive, provide: "The record of each notice shall be preserved for a period of five years after the date it is received."

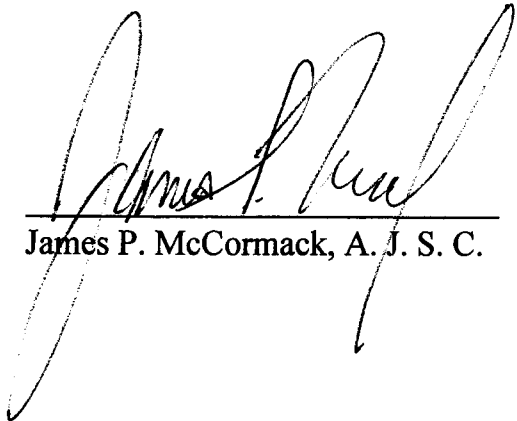
In addition plaintiff has advanced speculative and unsupported contentions that the defendant Town must have repaired the sidewalk where the accident occurred and therefore they created the alleged dangerous condition. (Plaintiff's Summons and Verified Complaint ¶¶ 43, 57 and 61). Such unsupported allegations are insufficient in light of the evidence, submitted in admissible form, by the Town that they did not repair the subject sidewalk, nor did they hire outside contractors to repair the subject sidewalk (Affidavit of James M. Bryne, P.E., ¶ 4 *supra*). The plaintiff's have failed to raise a triable issue of fact as to whether the Town was affirmatively negligent or whether the condition constituted a special use. (*see Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474; *Gilmore v. Village of Hempstead*, 850 N.Y.S.2d 168; *Boscolo v. County of Nassau, supra*; *Devine v. City of New York*, 300 A.D.2d 532, 533).

Accordingly, defendant Town's motion for summary judgment is granted as there appears to be no issue of fact concerning the absence of prior written notice to the Town regarding the alleged defective sidewalk condition. The defendant Town's motion for costs,

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sanctions and attorney's fees is denied.

The foregoing constitutes the decision and order of this court.

Dated: March 20, 2008
Mineola, N. Y.



James P. McCormack, A. J. S. C.

ENTERED

APR 10 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**