

<b>Flederbach v Fayman</b>
2008 NY Slip Op 31189(U)
April 21, 2008
Supreme Court, Suffolk County
Docket Number: 0027369/2003
Judge: Elizabeth H. Emerson
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SUPREME COURT - STATE OF NEW YORK  
**TRIAL TERM, PART 8 SUFFOLK COUNTY**

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 1-29-08  
SUBMITTED: 2-28-08  
MOTION NO: 002-MOT D

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WENDY FLEDERBACH and CHARLES  
FLEDERBACH,

Plaintiffs,

-against-

YVACHESLAV FAYMAN, IRINA FAYMAN, SUFFOLK  
COUNTY DEPARTMENT OF PUBLIC WORKS,  
SUFFOLK COUNTY POLICE DEPARTMENT and THE  
COUNTY OF SUFFOLK,

Defendants.

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion and supporting papers 1-17; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 18-24; Replying Affidavits and supporting papers    ; it is,

**ORDERED** that this motion (002) by the defendants, Suffolk County Department of Public Works, Suffolk County Police Department and the County of Suffolk, pursuant to CPLR 3212 for summary judgment dismissing the complaint, is decided as follows:

This is an negligence action to recover damages for injuries allegedly sustained by the plaintiff pedestrian, Wendy Flederbach, on January 27, 2003, on Vanderbilt Parkway, Dix Hills, Town of Huntington, County of Suffolk, State of New York, when she was struck by a vehicle operated by Yvacheslav Fayman and owned by Irina Fayman. The plaintiffs claim that the vehicle was operated in a negligent, careless, reckless, hazardous and dangerous manner, and that the County of Suffolk, Suffolk County Department of Public Works, and the Suffolk County Police Department (herein collectively "the County of Suffolk"), were jointly and severally negligent, careless and reckless in that they failed, inter alia, to keep and maintain Vanderbilt Parkway clear

and free of accumulating ice, failed to spread salt, sand or other substances; failed to inspect the roadway where water and ice would remain, and failed to warn of the condition. In addition, plaintiff alleges that defendant County of Suffolk had actual notice of the subject icy, hazardous condition and failed to timely and properly act thus breaching its duty to maintain the roadway in a reasonably safe condition.

The County of Suffolk seeks summary judgment dismissing the complaint against it on the basis that the County was afforded no prior written notice of the alleged defective or dangerous roadway so as to comply with the mandates of Suffolk County Charter C8-2A as a condition precedent to this action and that the Suffolk County Police Department owed no special duty to the plaintiffs.

In support of this application, the County has submitted, inter alia, an attorney's affirmation; the affidavit of John Donovan; a copy of the Notice of Claim dated March 25, 2003; a copy of the pleadings and answer of the defendant County with its cross claim asserted against the co-defendants; answer of co-defendants; a copy of the summons and complaint and verified answer for the action entitled **Wendy Flederbach and Chris Flederbach v. Jack C. Lennett**, Index No. 06-00621; a copy of the verified bill of particulars; uncertified copies of the MV 104 Police Accident Reports for both accidents; and copies of the transcripts of the examinations before trial of Perry Smith and Carmella Balbus.

Plaintiff opposes defendants' motion for summary judgment and in support has submitted, inter alia, an attorney's affirmation; the affidavit of Wendy Flederbach; a copy of a police field report; and copies of the transcripts of the examinations before trial of Jack Lennett, Cathy Pugh, and Barbara Williams.

On January 27, 2003, at approximately 5 a.m. Barbara Williams left her home, enroute to work, and was operating her motor vehicle on Vanderbilt Parkway near Commack Middle School. She stated it was snowing very lightly and the roads were dusty with snow. She testified at her examination before trial that while driving in that vicinity and approached the top of the slight hill, the roadway was icy and dangerous and her car slid sideways off the roadway. She said her vehicle was almost not moving and was slipping, and so was the vehicle in back of her. When she arrived at her place of employment at 6:15 a.m., she called 911 and informed the operator of the existence and location of the defective condition and begged the operator to do something. She testified that the operator assured her that the police would go to the scene. About 7:15 a.m. she learned from one of her students that there had been an accident by the Commack Middle School and her student's mother thought some woman was killed. Thereafter, she call 911 again at 7:15 a.m. and told the operator that "you assured me you were going to send a policeman there." and that the operator said there was a police officer there at 6:23 and the sander was called. Ms. Williams stated she was told by the operator that if you have any other problems to call the Second Precinct. At 7:20 a.m., she called the Huntington sanders who advised her they do not sand Vanderbilt Parkway, and gave her the number for Suffolk County sander. She stated she then called the Suffolk County sanders, and a woman answered and she asked her why she didn't send a sander down to Vanderbilt Parkway in front of Commack Road. She stated the woman told her to "Wait a minute", and about 20 minutes later she got back on the phone and said, "There was no call

made to us this morning.” Ms. Williams testified that she then call the Second Precinct at 7:30 a.m. asking to speak to a supervisor and was told that there were no supervisors there as they were at a very terrible accident on Vanderbilt Parkway. She said the woman was abrupt with her and said she would have someone call her back later. Ms. Williams then testified that she went back to the scene of the accident and spoke to the officer in the car and asked him if he was the policeman that was there this morning and left, and that he said “Yes, I called the sander.” She testified that she was very upset with him, but he kept on writing. She stated another officer came up to her and told her “Lady, have a nice day.”

The plaintiff, Wendy Flederbach, stated in her affidavit that when she turned onto Vanderbilt Parkway from McLane Drive, traveling in a westbound direction, she noticed the Lennett vehicle ahead of her traveling in the same direction. It traveled down the short hill when it suddenly spun, went into the eastbound lane of Vanderbilt Parkway and struck the D’Alessandro vehicle traveling in the eastbound lane. She drove past the two vehicles and parked her car to give assistance to Mr. Lennett who was unable to get out of his car. She walked to the rear of his vehicle and spoke to him through the rear window which was smashed out, when suddenly she was struck by a vehicle traveling westbound and operated by Yvacheslav Fayman, pinning her left leg in the rear wheel well of the passenger side of the Lennett vehicle.

Perry Smith testified that he is a police officer with the Suffolk County Police Department since 1989 and on January 27, 2003, he was assigned to the Dix Hills sector, including Vanderbilt Parkway. He testified that it was cold and had snowed, and he had crossed over Vanderbilt Parkway via Route 231 early in the morning prior to the two accidents happening and noted that the roadway was covered with about an inch of snow, but he did not feel any ice while he was driving. About 6:15 a.m. he received a call from the dispatcher to check out a report of ice or snow on the roadway by the Commack school but he stated he did not go to the location as he had driven about two or three miles from that section of the roadway a couple hours earlier and knew the roadway condition, but he was unsure if the roadway had been sanded. He stated that instead of going to the area, he used the police radio and requested sand or salt for Vanderbilt Parkway. He stated Vanderbilt Parkway is a County Road so the second precinct would then call the County to request a sand truck for the roadway. When he received the call about the accidents on the roadway about forty five minutes later, he went to the scene and learned from Barbara Williams that she had made the earlier complaint by way of a 911 call about the snow and ice on the roadway. He stated she told him that they should put flares out to warn people that there was snow or ice on the roadway. He stated that this was not done in response to her call, but at the scene of the accident, they shut down the roadway by blocking it with a police car and he thought there were probably cones or flares to shut the roadway down at that point. At the scene he observed that there was approximately an inch of snow and ice, a slushy mix, the same condition that he had observed earlier in his tour. He said the road was sanded because it had that dirty, sandy look to it, but he did not know when it had last been sanded before the accident. He spoke to Mr. D’Alessandro who reported to him that the other car (operated by Jack Lennett) skid on snow and ice into his lane and struck his vehicle. Officer Smith testified that he checked off code 66 (slippery road) as a contributing factor on the MV 104 Police Accident Report and stated Mr. Lennett told him he slid on ice. Officer Smith also testified that Wendy Flederbach was struck by a SUV at the scene of the first accident.

Carmella R. Balbus testified that she is employed by the Suffolk County Department of Public Works Highway Engineering Division as an assistant civil engineer for about four years, has had no formal education in engineering, and researches claims against the County. She testified that Vanderbilt Parkway near the Commack Middle School in the Town of Huntington is within the jurisdiction of the County of Suffolk, and is owned and maintained by the County, inclusive of snowplowing and sanding and salting, but sometimes outside contractors are hired. She testified that the County last plowed or sanded or salted the roadway at issue on January 27, 2003, using County vehicles, but she could not tell which was done, or the precise location. She further testified that she did not have any records or complaint forms which recorded any complaints for January 26, 2003 or January 27, 2003 for the location, whether from the Suffolk County Police Department by radio or phone. She further testified that based upon her review of the radio room logs, that no radio call was received by the Highway Department from the police on January 27, 2003 requesting salting or sanding of Vanderbilt Parkway by the Commack Middle School.

John Donovan testified he is an Investigator with the County of Suffolk in the Office of the County Attorney and searched the records maintained by the County Attorney's Office of all written complaints received by the County Attorney's office concerning alleged defects on the streets, roads and sidewalks of the County of Suffolk (Suffolk County Charter §8-2A) with regard to snow/ice conditions on County Road 67 Vanderbilt Motor Parkway, near the intersection of McLane Drive, Commack on or before January 27, 2003, and that his search revealed the County of Suffolk was not in receipt of any written notice or complaints concerning snow or ice at the location set forth.

Jack Lennett testified at his examination before trial that he was traveling westbound on Vanderbilt Parkway for about a mile, and did not notice any snow, ice, sand or salt on the roadway. He stated he was looking straight ahead, his foot was on the accelerator and suddenly his vehicle began to skid to the left in an eastbound direction, so he took his foot off the accelerator and tried to turn back into the westbound lane, but collided with the oncoming vehicle in the eastbound lane. There were no police cars, cones or signs warning of ice as he approached the place where the accident happened. Several minutes after the accident and after some EMT's from Dix Hills Fire Department arrived, there was a second impact to his vehicle while his vehicle was at a full stop in the eastbound lane, and at which time Wendy Flederbach was injured. The police arrived after the second accident and Mr. Lennett testified that he told them he skidded on black ice and lost control of his vehicle.

Cathy Pugh, a nonparty witness, testified at her examination before trial that on January 27, 2003, it was cold and there was a fresh layer of a little bit of snow on the ground, but it was not snowing at the time. She stated she runs the intramural program at the Commack Middle School and was enroute to the school, traveling westbound on Vanderbilt Parkway, and was driving more slowly than normally because Vanderbilt has a tendency to ice up. She pulled into the parking lot at the school, and while she was parking her vehicle, the first accident occurred about 7 a.m. She heard the impact and looked in her rearview mirror and saw smoke. She said she sent her son into the school to call 911. She then went down the hill to see if anyone needed help and saw a gold colored sedan. She went to the back end of the car with Wendy Flederbach, who was already there, to open up the driver's side door to get to the driver because the front seat was broken and he

was laying down in the car. She stated that two men had also stopped. They were talking to the driver through his broken rear window, when suddenly one of the men pulled her by her coat into Vanderbilt Parkway out of the way as an SUV traveling fast westbound on Vanderbilt Parkway, going down the hill, came towards the stopped car. She testified that not only did that vehicle hit Ms. Flederbach into the car, but it then ricocheted off the gold car and came back at them hitting the other gentleman. She stated Wendy was stuck in the other vehicle, attached, as the Linnett car made a perfect tourniquet around her leg. The police arrived about five or six minutes later. She stated she filled out a police report and indicated the roadway was wet and slippery, black ice, shiny and you couldn't see it. She stated that prior to the accident, she did not see any snowplows on Vanderbilt Parkway. She also stated that the buses have a difficult time getting up and down the hill when it is icy.

Here the County has established that Suffolk County Charter C8-2A as a condition precedent to a lawsuit requires that the County be afforded prior written notice of the alleged defective or dangerous roadway. It is well settled that a locality which has enacted a prior written notice statute may not be subject to liability for personal injuries sustained solely as a consequence of the existence of snow or ice upon a street or public highway, or improper maintenance of the roadway, or a defect or hazard on the roadway, unless it either received actual written notice of the dangerous condition, or an exception to the prior written notice requirement applies, that is, its affirmative act of negligence proximately caused the accident, or a special use confers a special benefit on the locality (*see, Amabile v City of Buffalo*, 93 NY2d 471 [1999]; *Wilkie v Town of Huntington*, 29 AD3d 898 [2d Dept 2006]; *Peloso v County of Putnam*, 6 AD3d 411 [2d Dept 2004]). "Failure to remove ice from the road or to salt and sand it as well as failure to warn of a dangerous condition are acts of omission. They are not acts of affirmative negligence which would exempt the case from the prior written notice requirement" (*Buccellato v County of Nassau*, 158 AD2d 440 [2d Dept 1990], *appeal denied* 76 NY2d 703 [1990]).

In *Buccellato v County of Nassau, supra*, the court set forth that it was incumbent upon the plaintiffs, in opposing the defendants' motions for summary judgment, to establish by evidentiary proof in admissible form, either affirmative negligence by the defendants or that they had constructive notice of the dangerous condition. The court further stated the purpose of the prior written notice provision is to insure that a municipality has a reasonable opportunity to cure defective conditions, the existence of which it could not be expected to know absent some sort of positive appraisal, and that where dangerous conditions are easily visible, apparent upon visual inspection, or inspection of the site has been made for the purpose of discovering just such defects, and the defects have existed for a sufficient length of time prior to the accident to allow the municipality to discover and remedy the defects, the need for written notice has been abrogated (*Ferris v County of Suffolk*, 174 AD2d 70 [2<sup>nd</sup> Dept 1992]).

Here, the evidence submitted by the moving defendants indicates that at the time of the accident there was a slippery, snowy, icy area in the vicinity of Commack Middle School on Vanderbilt Parkway. Police Officer Perry Smith testified, and also had written in his note book, that prior to the accidents on Vanderbilt Parkway he called in by radio to the police department to have the County send out a truck to sand the area where the accident occurred due to the snow and ice on the roadway. Carmella Balbus testified that the Suffolk County Department of Public Works

Highway Engineering Division did not receive any calls concerning snow or ice conditions on Vanderbilt Parkway, and yet she said that the County trucks either plowed, sanded or salted the subject roadway on January 27, 2003, but she did not establish in her testimony what time that was done, the location of the work, or how the County determined that such work was indicated. Consequently, the defendants' moving papers raise factual issues which preclude summary judgment on the issue of notice.

Additionally, testimony establishes that the Suffolk County Police Department 911 operator received a 911 call from Barbara Williams prior to the accidents complaining about the snow and ice on Vanderbilt Parkway by the Commack Middle School. Officer Smith, despite having been notified of this call testified that he did not respond to the location following his notification of that call. Specifically, the County has not established that it did not have notice of the dangerous condition created by the icy, snowy roadway (*see, Schleider v State*, 5 AD3d 1052 [4<sup>th</sup> Dept 2004], *lv denied* 3 NY3d 607 [2004]), and whether, once it did have notice of the condition of the roadway, whether it acted in a non-negligent manner to timely address the condition of the roadway.

Accordingly, that part of the County's motion which seeks dismissal of the complaint on the issue of notice is denied.

The County also seeks dismissal of the complaint on the issue that the Suffolk County Police Department owed no special duty to the plaintiffs. In **Cuffy v City of New York**, 69 NY2d 255, [1987] the court held that there exists a narrow class of cases in which the court has recognized an exception to the general rule that a municipality may not be held liable for injuries resulting from the failure to provide police protection, and have upheld tort claims based upon a "special relationship" between the municipality and the claimant. The court continued that the elements of this "special relationship" are" (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking. The court also stated that the injured party's reliance is as critical in establishing the existence of "special relationship" as is the municipality's voluntary affirmative undertaking of a duty to act. That element provides the essential causative link between the "special duty" assumed by the municipality and the alleged injury.

In **Mullins v Town of Clarkstown**, 183 AD2d 1073 [1992], the court stated that "in examining plaintiff's claims against the County, we note that, in accordance with the provisions of Highway Law §139, the County enacted a prior notice statute...which states that no civil action can be maintained against the County for damages sustained solely in consequence of the existence of snow and ice on any highway unless written notice specifying the exact spot was actually given to the County and there was a failure or neglect to remedy the situation within a reasonable time thereafter." In **Mullins v Town of Clarkson**, *supra*, the plaintiff alleged, inter alia, that the County was negligent in failing to warn the plaintiff of the presence of the ice patch by remaining at the scene, closing the highway, or setting up flares. *Citing Cuffy v City of New York, supra*, the

