

DeMarco v County of Nassau

2008 NY Slip Op 31238(U)

April 18, 2008

Supreme Court, Nassau County

Docket Number: 2245-07/

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
AMALIA DEMARCO,

Plaintiff,

-against-

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 16
Index No.: 2245/07
Motion Seq. Nos.: 01 & 02**

COUNTY OF NASSAU and TOWN OF HEMPSTEAD,

Defendants.

DECISION AND ORDER

-----X
Papers Read on this Motion:

Defendant Nassau County's Notice of Motion	01
Defendant Town of Hempstead's Notice of Cross-Motion	02
Plaintiff's Opposition	xx
Defendant County's Reply	xx

The Defendant Nassau County moves by Notice of Motion for an Order pursuant to CPLR§3212 granting Summary Judgment dismissing the Plaintiff's Complaint against them. Defendant Town of Hempstead cross-moves for an order granting Summary Judgment on their behalf.

The Plaintiff opposes both applications, claiming that there are triable issues of fact regarding the alleged negligence of the moving Defendants. Specifically, the Plaintiff claims that the Defendants may have created the condition that caused Plaintiff's accident, which would preclude Summary Judgment.

On November 14, 2005, the Plaintiff had an accident wherein she stepped on a broken sign post protruding above the sidewalk located adjacent to 307 Courthouse Road, Franklin Square, NY. The Plaintiff claims that the Town of Hempstead and Nassau County negligently owned, operated and maintained the aforesaid sidewalk. As a result of the fall, the Plaintiff suffered a fracture to her sixth rib, right knee contusion and has pain in her left shoulder.

Nassau County, hereinafter referred to as County denied all allegations in its Verified Answer and raised among its Affirmative Defenses that the County neither had jurisdiction over the alleged accident site, nor had any prior written notice of the alleged condition as required by Nassau County Administrative Code §12-4(e). Nassau County administrative Code §12-4(e) provides the following:

No civil action shall be maintained against the County for damages or

injuries to person or property sustained by reason of any sidewalk, street, highway, parking field, stairway, walkway, ramp, driveway, bridge, culvert, curb or gutter being defective, out of repair, unsafe, dangerous, or obstructed or in consequence of the existence of snow or ice thereon, regardless of whether such facility be one as defined by this title or one constructed pursuant to the provisions of article six of the highway law or one constructed by the State and maintained by the County, unless such sidewalk, street, highway, parking field, stairway, walkway, ramp, driveway, bridge, culvert, curb or gutter was constructed by the County or by the State or under a permit issued by the County or by the State, and unless written notice of such defective, unsafe, dangerous or obstructed condition of such sidewalk, highway, parking field, stairway, walkway, ramp, driveway, bridge, culvert, curb or gutter or the existence of snow or ice thereon was failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of or to cause such snow or ice to be removed or to make the place otherwise reasonably safe. Such written notice shall specify the particular place and nature of such defective, unsafe, dangerous or obstructed condition or the particular location of such snow or ice. Notice required to be given as herein provided shall be made in writing by certified or registered mail directed to the Office of the County Attorney, One West Street, Mineola, New York, 11501. (emphasis added).

The Town claims that the Plaintiff's assertions are conclusory and unsupported by evidentiary facts sufficient to raise a triable issue. In order for the Town of North Hempstead to be liable, prior written notice of the defective condition was required pursuant to Section 6-3 of Chapter 6 of the Code of the Town of Hempstead. Section 6-3 reads as follows:

No civil action shall be maintained against the Town of Hempstead for injuries or damages to persons or property sustained by reason of any defect or obstruction whatsoever in its traffic signs, sidewalks, walkways, footpaths or bicycle pathways or for injuries or damages to persons or property sustained by reason of any defect or obstruction in its traffic signs, sidewalks, walkways, footpaths or bicycle pathways or in consequence of the existence of snow or ice upon any of its traffic signs, sidewalks, walkways, footpaths or bicycle pathways unless said traffic signs, sidewalks, walkways, footpaths or bicycle pathways, no matter where situated, have been constructed or are maintained by the Town of Hempstead or the Commissioner of Highways pursuant to statute and written notice of, by the witness to, said defect or obstruction causing the injuries or damages was actually served upon the Town Clerk or Town Commissioner of Highways in accordance with §6-4 hereof, nor shall any action be maintained for injuries or damages to persons or property sustained by reason of any defect

or obstruction or in consequence of the existence of snow or ice unless such written notice thereof was actually served upon the Town Clerk or Town Commissioner of Highways in accordance with §6-4 hereof and there was a failure or neglect to cause the particular defect to be remedied or the obstruction of the snow or ice to be removed or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice.

The Plaintiff argues that notice is not required where the locality created the defect or hazard through an affirmative act of negligence. See *Amdrile v City of Buffalo*, 93 NY 2d 471 (1999). The Plaintiff has submitted photographs of the subject location taken shortly after the accident, which show the location of Plaintiff's accident and the broken street sign. Town of Hempstead employee John Morrison, Jr. testified at his deposition that the Town was responsible for the sidewalk and repair of the sign post where Plaintiff's accident occurred. Morrison further testified that the Town repaired a broken sign on October 20, 2005 less than a month before the subject accident. The Town has not submitted sufficient evidence to establish that they did not have notice of the defective condition and that they didn't create said condition. The Town does not deny that it owns the property where the accident occurred or refute the County's position that the site is not under Nassau County's jurisdiction. There exists a triable issue of fact regarding whether the Town created the defective condition or had knowledge of said defect where the Plaintiff fell. As such, the Town's application for Summary Judgment is **denied**.

The County has made out a *prima facie* case for their entitlement to Summary Judgment. By sworn affidavits, they have proven that they did not own or operate the site where the accident occurred. The County has also established that they did not have notice of the dangerous condition at the site. The Plaintiff has failed to prove that the County has jurisdiction or prior written notice of the alleged defect and has offered absolutely no evidence that the County created the defective condition alleged. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat the instant motion. *Zuckerman v City of New York, et al*, 49 NY 2d 557 (1980). As such, the County's motion for Summary Judgment is **granted**.

ORDERED, the parties are directed to appear for a Certification Conference on May 15, 2008 at 9:30 a.m. before the undersigned.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: April 18, 2008
Mineola, N.Y.

ENTER:


HON. MICHELE M. WOODARD

J.S.C.

ENTERED

APR 22 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE