

Cimino v County of Nassau

2008 NY Slip Op 31428(U)

May 9, 2008

Supreme Court, Nassau County

Docket Number: 0245-08/

Judge: Antonio I. Brandveen

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5

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

NICKOLAS P. CIMINO, JR., and SUSAN
CIMINO,

Plaintiffs,

- against -

THE COUNTY OF NASSAU, THE
INCORPORATED VILLAGE OF
MASSAPEQUA PARK, and THE TOWN OF
OYSTER BAY,

Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 245/08

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendant Incorporated Village of Massapequa Park moves for an order pursuant to CPLR 3212 granting summary judgment to it on the grounds the area of the roadway where the accident occurred is outside the jurisdiction of the defendant Incorporated Village of Massapequa Park, and the defendant Incorporated Village of Massapequa Park did not have prior written notice of the alleged defect. The plaintiff, through the plaintiff's attorney, opposes the motion, and contends summary judgment should be denied because discovery has yet to be conducted; the plaintiff is not required to demonstrate the defendant Incorporated Village of Massapequa Park had actual or

constructive notice of the condition which caused the plaintiff's accident; and the defendant Incorporated Village of Massapequa Park has failed to show evidentiary proof, in admissible form. The defendant Incorporated Village of Massapequa Park replies the plaintiff's counsel failed to dispute the area where the accident occurred is outside of the jurisdiction of the defendant Incorporated Village of Massapequa Park, or even allege the defendant Incorporated Village of Massapequa Park had any duty to maintain that area.

The plaintiff claims injury from a trip and fall on October 8, 2006, at 5:20 p.m., as a result of an unsafe condition, that is, defective, cracked, raised, broken, and uneven pavement in the right hand lane on eastbound Merrick Road, approximately 20 feet east of Bayview Avenue, Massapequa/Massapequa Park, Town of Oyster Bay, County of Nassau, that AB claims the defendant Incorporated Village of Massapequa Park should have repaired. The plaintiff alleges lawfully traveling there in an easterly direction, and forced to traverse the subject area which caused his motorcycle to become airborne, and upon impact with the pavement, the plaintiff sustained severe, serious and permanent personal injuries.

The Court has carefully reviewed and considered all of the parties' papers with respect to this motion. The law requires a municipality to maintain its streets and highways in reasonably safe condition for people who use them.

The defendant Incorporated Village of Massapequa Park asserts the area where the accident occurred is outside of its jurisdiction. The Clerk/Administrator for the defendant

Incorporated Village of Massapequa Park states, in a supporting affidavit dated February 19, 2008, her duties include conducting searches of records of the defendant Incorporated Village of Massapequa Park when notices of claims and summons and complaints come in, so as to determine whether the location of the alleged accident is located with the boundaries of the Village of Massapequa Park. The Clerk/Administrator states, at the request of the attorney for this defendant, the Clerk/Administrator conducted a search of this defendant's mapped boundaries to determine whether Merrick Road, approximately 20 feet east from the southeast corner of Bayview Avenue, Massapequa, New York is located within the boundaries of Incorporated Village of Massapequa Park. The Clerk/Administrator asserts the search revealed the subject portion of Merrick Road is outside of the jurisdiction of the Village of Massapequa Park, and this defendant has absolutely no maintenance duties with respect to that portion of the roadway.

The defendant Incorporated Village of Massapequa has a local law requiring prior written notice of the claimed unsafe condition, and there is no dispute about whether that requirement has been satisfied. In order to recover for injury, the plaintiff must first show that prior to October 8, 2006, the defendant Incorporated Village of Massapequa received written notice that condition at the location where the plaintiff claims to have been injured. The defendant Incorporated Village of Massapequa claims it did not receive any such notice. The Clerk/Administrator also avers, at the request of the attorney for this defendant, the Clerk/Administrator conducted a search of this defendant's prior written

notice books to determine whether this defendant ever received any prior written notice of a defect on the subject portion of Merrick Road. The Clerk/Administrator maintains, in the sworn statement, the search revealed this defendant never received any prior written notice of a defect there.

Under CPLR 3212(b), a motion for summary judgment “shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court’s role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*,

134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co.*, *supra*; *see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff'd* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co.*, *supra*).

So, the Second Department has held:

It is basic summary judgment law that the movant must establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (*Frank Corp. v Federal Ins. Co.*, 70 NY2d 966; *Alvarez v Prospect Hosp.*, 68 NY2d 320; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068). "The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Frank Corp. v Federal Ins. Co.*, *supra*, at 967; *GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*Frank Corp. v Federal Ins. Co.*, *supra*) *Daliendo v. Johnson*, 147 A.D.2d 312, 317, 543 N.Y.S.2d 987 [2nd Dept, 1989]. Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form (*e.g., Phillips v Kantor & Co.*, 31 NY2d 307; *Indig v Finkelstein*, 23 NY2d 728; also CPLR 3212, subd [f]). Whether the excuse offered will be acceptable must depend on the circumstances in the particular case *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067-1068, 416 N.Y.S.2d 790 [1979].

And, the Appellate Division has stated:

we reject defendants' argument that plaintiff's motion for summary judgment, which was made one month after issue was joined, was premature because the lack of discovery severely compromised their ability to demonstrate that plaintiff was, in fact, a permittee. It is settled that a

claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment (*see e.g. Cioe v Petrocelli Elec. Co., Inc.*, 33 AD3d 377 [2006]; *Bank of Am. v Tatham*, 305 AD2d 183 [2003]). Stated another way, the “mere chance that somehow, somewhere, on cross examination or otherwise plaintiffs will uncover something which might add to their case but obviously of which now they have no knowledge, is mere speculation and conjecture and is not sufficient” (*Trails W. v Wolff*, 32 NY2d 207, 221 [1973], *quoting Hurley v Northwest Pub.*, 273 F Supp 967, 974 [1967], *aff’d* 398 F2d 346 [1968]; *see also Bachrach v Farbenfabriken Bayer AG*, 36 NY2d 696, 697 [1975] [“Hope alone will not raise a triable issue”]).

However, while the plaintiff has tendered no evidentiary proof, but rather an affirmation of counsel stating discovery has yet to be conducted, the plaintiff has explained what additional facts are unavailable to them and are exclusively within this defendant’s control. CPLR 3212 (f) provides:

Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

“A court is authorized to deny a summary judgment motion or grant a continuance thereof pending discovery when ‘facts essential to justify opposition may exist but cannot then be stated’ [citations omitted]” (*Cassevah v. Mack*, --- N.Y.S.2d ----, 2008 WL 1902189 [3rd Dept, 2008]). This Court determines, while the defendant Incorporated Village of Massapequa Park has apparently made a showing which could warrant this Court to grant judgment in its favor as a matter of law, judgment should be stayed to permit discovery to continue.

Accordingly, the motion for summary judgment is denied with leave to renew upon the completion of discovery.

So ordered.

Dated: May 9, 2008

ENTER:


J. S. C.

JOSE ANTONIO L. BRANDVEEN

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED

MAY 14 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**