De La Rosa v Incorporated Vil. of Mineola
2008 NY Slip Op 31485(U)
May 13, 2008
Supreme Court, Nassau County
Docket Number: 6999-06/
Judge: William R. LaMarca
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

PATRICIA DE LA ROSA,

Plaintiff,

-against-

THE INCORPORATED VILLAGE OF MINEOLA, THE TOWN OF NORTH HEMPSTEAD, KEYSPAN CORPORATION, KEYSPAN ENERGY DELIVERY LONG ISLAND, WINTHROP UNIVERSITY HOSPITAL ASSOCIATION d/b/a WINTHROP UNIVERSITY HOSPITAL and WINTHROP SOUTH NASSAU UNIVERSITY HEALTH SYSTEM, INC.,

Defendants.

Motion Sequence #007, #6
Submitted March 18 and March 31, 2008, respectively

INDEX NO: 6999/06

The following papers were read on these motions:

Notice of Motion and Amended Notice of Motion(#007) 1
Notice of Motion (#6)..2

Defendant, THE TOWN OF NORTH HEMPSTEAD (hereinafter referred to as the "TOWN"), moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing the complaint and all cross claims against it, upon the grounds that it has no jurisdiction or control of the location of the alleged accident and that the TOWN did not receive prior written notice of the alleged defect. An Affidavit of Service reflects service

upon counsel for all parties, but no papers are submitted in connection with the motion. In a companion motion, KEYSPAN CORPORATION and KEYSPAN ENERGY DELIVERY LONG ISLAND (hereinafter referred to as "KEYSPAN"), moves for the same relief, on the ground that there are no issues of law or fact requiring a trial. An Affidavit of Service reflects service upon counsel for all parties, but no papers are submitted in connection with the motion. The motions are determined as follows:

This action is to recover damages for personal injuries allegedly sustained by the plaintiff, on April 15, 2005, when she tripped and fell in the cross-walk located at Third Avenue and Second Street, Mineola, New York. Plaintiff commenced the action with the filing of the summons and verified complaint, on June 29, 2006, and named various defendants, including the TOWN and KEYSPAN. Plaintiff alleged, in essence, that the TOWN was the owner of the public street, roadway and intersection where the accident took place, and was negligent in its management, control and maintenance of said intersection and in the work and repairs performed to the subject roadway. Additionally, plaintiff alleged that the TOWN and KEYSPAN, performed road work on the subject roadway and had an affirmative duty to repair and maintain the subject roadway in a safe and suitable condition, free from dangerous or defective conditions. Plaintiff alleged that she was injured as a result of the negligence, carelessness and recklessness of the defendants. Plaintiff also alleged that the TOWN was given written notice of the alleged defective condition of the roadway prior to the incident herein.

Stephen Anker, a Civil Engineer with the Nassau County Department of Public Works, testified at a deposition that the subject roadway was not in the jurisdiction of Nassau County but was in the jurisdiction of THE INCORPORATED VILLAGE OF

MINEOLA (hereinafter referred to as the "VILLAGE"). Similarly, Donald Every, the Highway Maintenance Supervisor for the TOWN, testified at his deposition that the subject roadway is not within the jurisdiction of the TOWN, but falls within the jurisdiction of the VILLAGE. Counsel for the TOWN asserts that the TOWN neither owns, controls or has authority over the subject location, which is located outside of its jurisdiction. Additionally, counsel for the TOWN states that no prior written notice of the defect was ever given to the TOWN and the incident does not fall within either of the two (2) exceptions to the prior written notice rule as the TOWN neither created the defect nor had a special use of the location. Counsel urges that the TOWN is entitled to summary judgment dismissing the complaint and all cross-claims against it.

With respect to KEYSPAN, various witnesses for the VILLAGE and KEYSPAN testified at their depositions that, although a building permit to excavate Third Avenue and install a gas main was issued by the VILLAGE to KEYSPAN, all of the work performed was on the east side of the street and the location of the accident was on the west side of Third Avenue and not at the location where KEYSPAN conducted its work. The deposition of Daniel R. McGarry, the field supervisor of the crews that performed the work to replace the gas main, reflects that all of KEYSPAN's facilities are on the east side of Third Avenue within the sidewalk or two (2) feet from the curb, and that all work was performed in accordance with the permit on the east side of Third Avenue and did not cross to the west side of Third Avenue. Counsel for KEYSPAN argues that the location of the accident identified by the plaintiff is within the jurisdiction of the VILLAGE which is responsible for the maintenance and repair of the subject location, and that KEYSPAN has no obligation to maintain said location and no duty to the plaintiff. It is KEYSPAN's position that the

[* 4]

evidence establishes that the area described in the permit is not the area of the roadway where the plaintiff fell and that summary judgment is appropriate as KEYSPAN did not create the condition about which plaintiff complains.

Prior written notice of an alleged defect is a necessary prerequisite to imposing liability upon a municipality for an allegedly defective and/or dangerous road condition. *Ferris v County of Suffolk*, 174 AD2d 70, 579 NYS2d 436 (2nd Dept. 1992); *White v Incorporated Village of Hempstead,* 13 Misc.3d 471, 819 NYS2d 463 (Sup. Nassau Co. 2006). General Municipal Law (GML) §50-e(4) provides that liability may not be imposed against a municipality by an individual due to a dangerous condition on municipal streets, highways, bridges, culverts, sidewalks or cross-walks, unless the municipality previously received written notice of those defects.

Prior notification laws are a valid exercise of legislative authority. Such laws reflect a legislative judgment to modify the duty of care owed by a locality in order to address the vexing problem of municipal street and sidewalk liability. GML§ 50-e(4), specifically allows for the enactment of prior notification statutes and requires compliance with such laws. Thus a locality may avoid liability for injuries sustained as a result of defects or hazardous conditions on its sidewalks if it has not been notified in writing of the existence of the defect or hazard at a specific location. Neither actual nor constructive notice may override the statutory requirement of prior written notice of a side walk defect. The legislature has made plain its judgment that a municipality should be protected from liability in these circumstances until it has received written notice of the defect or obstruction. *Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77, 715 NE2d 104 (C.A. 1999). There are only

two exceptions to the statutory rule requiring prior written notice, namely where the locality created the defect or hazard through an affirmative act of negligence or where a "special use" confers a special benefit upon the locality. *Amabile v City of Buffalo, supra.*

In sum, neither actual nor constructive notice of a given defect is sufficient to overcome the requirement of prior written notice (*Amabile v City of Buffalo, supra*; *Caramanica v City of New Rochelle*, 268 AD2d 496, 702 NYS2d 351 [2nd Dept. 2000]). In order for a municipality to be liable for a condition where no prior written notice was given, a plaintiff must set forth competent evidence that the municipality affirmatively created the alleged offending condition in issue (*Walker v Incorporated Village of Northport*, 304 AD2d 823, 757 NYS2d 801 [2nd Dept. 2003]; *Monteleone v Incorporated Village of Floral Park*, 74 NY2d 917, 550 NYS2d 257, 549 NE2d 459 [C.A. 1989]). A municipality makes a *prima facie* showing of its entitlement to judgment as a matter of law by establishing that it neither received the requisite prior written notice of the alleged defect, nor bore responsibility for the creation of the alleged defect (*Amabile v City of Buffalo, supra*). When a municipal employee states by affidavit that a thorough search was conducted and that no prior written notice of the defect was found, there is a *prima facie* showing of entitlement to judgment, as a matter of law. *Dabbs v City of Peekskill*, 178 AD2d 577, 577 NYS2d 658 (2nd Dept. 1991).

It is a fundamental principle of law that before a party may be held liable in negligence, it must be shown that the party owed a duty of care to the plaintiff. *Strauss v Belle Realty Company*, 65 NY2d 399, 492 NYS2d 555, 482 NE2d 24 (C.A. 1985). In the absence of a duty, there is no breach and without a breach there is no liability. *Pulka v*

Edelman, 40 NY2d 781, 390 NYS2d 393, 358 NE2d 1019 (C.A. 1976). To establish a claim sounding in negligence, it is incumbent upon the plaintiff to demonstrate that the defendants breached a legal duty owed to it and that this breach was a substantial factor in occasioning the plaintiffs injuries (*Pulka v Edelman, supra; Derdiarian v Felix Contracting Corp.,* 51 NY2d 308, 434 NYS2d 166, 414 NE2d 666 [C.A. 1980]).

It is well settled on a motion for summary judgment that, after movant has made a *prima facie* showing that they are entitled to judgment as a matter of law, the other party must establish the existence of material facts of sufficient import to create a triable issue of fact. *See, Hellinger v Law Capital, Inc.,* 124 AD2d 182, 509 NYS2d 50 (2nd Dept. 1986); *Shaw v Time-Life Records,* 38 NY2d 201, 379 NYS2d 390, 341 NE2d 817 (C.A. 1975).

After a careful reading of the submissions herein, it is the judgment of the Court that the TOWN has established its *prima facie* entitlement to judgment as a matter of law by submitting evidence that it had no prior written notice of the alleged road defect and that the subject location was not within its jurisdiction or under its control. KEYSPAN has also established its *prima facie* entitlement to judgment as a matter of law by showing that it did not own or maintain any gas facilities or perform any work at the accident location on the west side of the street. Plaintiff has failed to submit any evidence sufficient to raise a triable issue of fact sufficient to defeat the TOWN's and KEYSPAN's motions. Based on the foregoing, and there being no opposition, the complaint and all cross-claims must be dismissed against the TOWN and KEYSPAN. Accordingly, its is hereby

. **ORDERED**, that the TOWN OF NORTH HEMPSTEAD's motion for summary judgment is granted and the complaint and all cross-claims against it are dismissed; and

[* 7]

it is further

ORDERED, that KEYSPAN's motion for summary judgment is granted and the complaint and all cross-claims against it are dismissed;

ORDERED, that the caption shall hereafter read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PATRICIA DE LA ROSA,

Plaintiff,

-against- **INDEX NO: 6999/06**

THE INCORPORATED VILLAGE OF MINEOLA, WINTHROP UNIVERSITY HOSPITAL ASSOCIATION d/b/a WINTHROP UNIVERSITY HOSPITAL and WINTHROP SOUTH NASSAU UNIVERSITY HEALTH SYSTEM, INC.,

Defendants.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: May 13, 2008

WILLIAM R. LaMARCA, J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE

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