Kohn v Town of Hempstead
2008 NY Slip Op 31489(U)
May 14, 2008
Supreme Court, Nassau County
Docket Number: 7817-06/
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

ALAN KOHN,

Plaintiff,

-against-

TOWN OF HEMPSTEAD,

Defendants.

Motion Sequence #3
Submitted April 4, 2008
XXX

INDEX NO: 17817/06

The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....2

Defendant, TOWN OF 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. The Court notes that in motion sequence #1 and #2, the Court granted summary judgment to THE VILLAGE OF ATLANTIC BEACH and to homeowner, SHEILA ROSS, and that the TOWN is the only remaining defendant. The plaintiff, ALAN KOHN, opposes the motion, which is determined as follows:

This action is to recover damages for personal injuries allegedly sustained by the plaintiff, ALAN KOHN, on January 12, 2006, when he tripped and fell on a public sidewalk located in front of 190 Scott Drive, Atlantic Beach, New York. Plaintiff commenced the

action with the filing of the summons and verified complaint, on October 31, 2006, and named various defendants, including the TOWN. Plaintiff alleged, in essence, that the TOWN was the owner of the sidewalk in front of the subject premises and controlled the lighting and sidewalk at said location, and was negligent in its management, control and maintenance of said sidewalk in causing, creating or allowing a dangerous trap like condition to exist at the subject location.

An affidavit of Andrew Brust, the Records Access Officer of the Sidewalk Division of the TOWN, states, after a personal search of the sidewalk log book and the Sidewalk Division computer for five (5) years prior to the incident, that he has found that the TOWN did not repair, inspect or construct the sidewalk at the subject location, nor did the TOWN contract with any municipality or contractor to repair, inspect or construct the sidewalk in the subject location. Additionally, Mr. Brust states that his search of the log book for tree complaints and of the Sidewalk Division records as to written complaints or notice regarding sidewalk conditions reflects that the TOWN had no records with respect to the subject location.

An affidavit of Sheila Dauscher, the Records Access Officer of the Highway Department of the TOWN, states that a computer search of the records and computer of the Highway Department revealed that no sidewalk work permits were issued for the subject location.

Counsel for the TOWN states that Chapter 6 of the Code of the Town of Hempstead, §6-3 and §65-2(2) of the Town Law of the State of New York, mandates receipt of prior written notice as a condition precedent to a civil action against the TOWN for injuries arising from a defective sidewalk. It is the TOWN's position that it is entitled to

summary judgment as the statutorily required notice was not received and there is no evidence that the TOWN created the alleged defective condition at the subject sidewalk location.

In opposition to the motion, counsel for plaintiff states that the motion should be denied because there are triable issues of fact. He contends that, while the TOWN employees searched the written records of the TOWN, they failed to indicate whether the TOWN has a procedure for telephonic complaints and whether the employees reviewed such records, and whether the TOWN affirmatively searched for sidewalk conditions and defects and the methods used for recording any such findings. Counsel for plaintiff urges that the motion be dismissed because questions of fact exist about whether the TOWN had notice of the dangerous condition at the subject location.

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).

After a careful reading of the submissions herein, the Court credits the analysis of the TOWN and finds that the TOWN has established its *prima facie* entitlement to judgment as a matter of law by submitting evidence that they had no prior written notice of the sidewalk defect that allegedly caused the plaintiff's fall. (*Augustine v Town of Islip*, 28 AD3d 503, 813 NYS2d 493 [2nd Dept. 2006]; *Filaski-Fitzgerald v Town of Huntington*, 18 AD3d 603, 795 NYS2d 614 [2nd Dept. 2005]). Although an exception to the prior written notice requirement exists when a municipality creates the subject defect through an affirmative act of negligence (*Lopez v G & J Rudolph Inc.*, 20 AD3d 511, 799 NYS2d 254 [2nd Dept. 2005]), the record is devoid of any evidence to support such a theory. Plaintiff has failed to submit any evidence sufficient to raise a triable issue of fact as to whether the TOWN affirmatively created the alleged defect. (*Katsoudas v City of New York*, 29 AD3d 740, 815 NYS2d 243 [2nd Dept. 2006]). Moreover, counsel for plaintiff's reference to telephonic notice of the defective condition is of no import as the statute requires written notice before an action can be maintained. In light of the above principles, the complaint must be dismissed against the TOWN. Accordingly, its is hereby

ORDERED, that the TOWN OF HEMPSTEAD's motion for summary judgment is granted and the complaint is dismissed.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court and concludes all proceedings under Index No. 017817/06.

Dated: May 14, 2008

WILLIAM R. LaMARCA, J.S.C.

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ENTERED
MAY 19 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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