

Colavita v MTA Long Is. R.R.

2008 NY Slip Op 31596(U)

May 30, 2008

Supreme Court, Nassau County

Docket Number: 8012-06/

Judge: Michele M. Woodard

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----x
MARIE COLAVITA,

Plaintiff,

-against-

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 16
Index No.: 18012/06
Motion Seq. Nos.: 01, 02 & 03

MTA LONG ISLAND RAILROAD, TOWN OF NORTH
HEMPSTEAD AND THE VILLAGE OF EAST WILLISTON,

Defendants.

DECISION AND ORDER

-----x
Papers Read on this Motion:

Defendant Village of East Williston's Notice of Motion	01
Defendant Town of North Hempstead's Notice of Motion	02
Defendant MTA Long Island Railroad's Notice of Cross-Motion	03
Plaintiff's Affirmation in Opposition	xx
Plaintiff's Affirmation in Opposition	xx
Defendant MTA Long Island Railroad's Reply Affirmation	xx

-----x

This case involves a personal injury claim brought by plaintiff, Marie Colavita.

The motion pursuant to CPLR §3212 by the Defendant Village of East Williston for Summary Judgment dismissing the complaint insofar as asserted against it, is **granted**.

The motion pursuant to CPLR §3212 by the Defendant The Town of North Hempstead for Summary Judgment dismissing the complaint insofar as asserted against it, is **granted**.

The cross motion pursuant to CPLR §3212 by the Defendant MTA Long Island Rail Road for Summary Judgment dismissing the complaint insofar as asserted against it, is **denied**.

The Plaintiff Marie Colavita was allegedly injured when she slipped and fell on sand which she claims was accumulated near a "cobblestone" road median which divides Sagamore Avenue on the south side of East Williston Avenue, in the Village of East Williston (Colavita 50H at 12-17, 19-21; Dep., 17-19, 27-30; Bailey Dep., 8-9, 26; Cmplt., ¶ 14). The Plaintiff did not know how long the

sand had been in the road or how it came to be there (Colavita Dep., 31). The cobblestone area is located in close proximity to the East Williston, Long Island Rail Road and is owned by the Defendant Long Island Rail Road (Franco Dep., 18, 30-34; Constable Aff., at 4; Bailey Dep., 10).

Although the Railroad owned the area where the cobblestone divider was located, employees of the Defendant Village of East Williston would periodically sweep the accident location on an “as needed basis,” *i.e.*, if there was a “heavy accumulation” of winter sand put down by a road sander or if a complaint was registered (Bailey Dep., 12-14; 26-27).

The Plaintiff subsequently filed notices of claim and commenced an action for personal injuries arising out of the accident as against the Defendants Long Island Rail Road, the Town of North Hempstead and the Village of East Williston.

The complaint alleges, *inter alia*, that the Defendant possessed actual and constructive notice of the alleged defect in that it was created by the Defendants and negligently allowed to exist for a substantial period of time without being remedied (Cmplt., ¶¶ 15-17). Neither the notices of claim nor the complaint alleges that prior written notice of the alleged defect was provided to co-Defendants East Williston or the Town of North Hempstead (*see*, Village Law, § 6-628, CPLR §9804; Code of the Village of East Williston § 93-2[A]; Code of the Town of North Hempstead § 26-1).

Discovery has been conducted and all three Defendants now move for summary judgment to dismiss the complaint.

It is settled that where, as here, “[a] municipality * * * has enacted a prior written notice law [it] is excused from liability absent proof of prior written notice or an exception thereto” (*Smith v Town of Brookhaven*, 45 AD3d 567 *see*, *Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]; *Poirier v City of Schenectady*, 85 NY2d 310 [1995]; *Perrington v City of Mount Vernon*, 37 AD3d 571).

The Court of Appeals has recognized two exceptions to this rule, “namely, where the locality created the defect or hazard through an affirmative act of negligence” and “where a ‘special use’ confers a special benefit upon the locality” (*Amabile v City of Buffalo*, *supra*, at 474 *see also*, *Delgado v County of Suffolk*, 40 AD3d 575).

The Village of East Williston

The Defendant Village of East Williston established its *prima facie* entitlement to judgment as a matter of law by submitting, *inter alia*, an affidavit from the Village Clerk stating that her search of the Village’s records revealed no prior written or verbal notice of the alleged sand accumulation on Sagamore Avenue (Kimlikca Aff., ¶¶ 3-4) (*Bogorova v Incorporated Vil. of Atl. Beach*, ___ AD3d ___ [2d Dept 2008]; *Smith v Town of Brookhaven*, *supra*; *Shannon v Village of Rockville Centre*, 39 AD3d 528, 529; *Gianna v Town of Islip*, 230 AD2d 824, 825). Significantly, the Plaintiff does not argue that prior written notice was provided to the Defendant Village.

Courts have held that “[s]ince there was no prior written notice of any defect in the sidewalk where the Plaintiff fell, the Plaintiff’s claim must be dismissed unless the Plaintiff is able to demonstrate that the Town created the alleged defective condition” (*Sollowen v Town of Brookhaven*, 43 AD3d 816, 817; *Shannon v Village of Rockville Centre*, 39 AD3d 528; *Katsoudas v City of New York*, 29 AD3d 740; *Bang v Town of Smithtown*, 291 AD2d 516, 517 *Gianna v Town of Islip*, *supra*). The Plaintiff has failed to do so in this case.

The Plaintiff’s claim that issues of fact exist as to whether the Village created the alleged dangerous condition, is predicated upon speculation and conjecture (*e.g.*, *Lawler v City of Yonkers*, 45 AD3d 813; *Sollowen v Town of Brookhaven*, *supra*, 43 AD3d 816; *Quiroz v Incorporated Village of Cedarhurst*, 31 AD3d 624). More particularly, and while a Village employee testified stated in general terms, that the Village would perform “as needed” street sweeping at the accident location and that the village would sand the area in the winter, there is nothing in the record establishing that the Village actually sanded the accident location prior to the occurrence of the accident – or at any given time – or that the alleged accumulation of dirt and sand was otherwise affirmatively created by the Village.

It is well settled that “[a]verments merely stating conclusions, of fact or of law, are insufficient” to “defeat summary judgment” (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004], *quoting from, Mallad Constr. Corp. v County Fed. Sav & Loan Assn.*, 32 NY2d 285 290 [1973] *see also, Herman v Village of Kiryas Joel*, 19 AD3d 544).

Town of North Hempstead

The Court notes that the Plaintiff has failed to oppose the *prima facie* showing made by the Defendant Town of North Hempstead and, accordingly, the Town’s motion is granted as unopposed.

Long Island Railroad

With respect to the cross motion by the Defendant Long Island Rail Road, the record indicates that by Preliminary Conference Order dated March 10, 2007, the parties were advised that any dispositive motions were to be made no later than 90 days after the filing of the note of issue (LIRR Mot., Exh., “C”). That time period was subsequently modified and shortened to 60 days after the filing of the note of issue, as set forth in this Court’s October 23, 2007 certification order.

It is undisputed that the Plaintiff filed her note of issue in mid- November 2007 and that the LIRR’s motion was not made until February 2008 – after the Court’s 60 day deadline had passed (Constable Aff., ¶¶ 6-9, I) (*see, CPLR §3212[a] Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648 [2004]).

As an excuse for the delay, counsel for the LIRR advises that, “[f]or some reason” the LIRR’s Law Department “failed to note the new 60 day deadline” (Constable Aff., at I). The foregoing claim is not an acceptable excuse – or an excuse at all – for the failure to timely notice the instant summary

judgment motion.

Moreover, and “[c]ontrary to the Defendants’ contentions, *Brill v City of New York*, 2 NY3d 648, applies to cases such as the present one, where a movant makes a motion for summary judgment after the expiration of a court-ordered deadline which is shorter than the 120-day deadline set forth in CPLR §3212[a]” (*Mizell v Eastman & Bixby Redevelopment Co., LLC*, 34 AD3d 770, 771 *see*, *Glasser v Abramovitz*, 37 AD3d 194; *Cabibel v XYZ Associates, L.P.*, 36 AD3d 498; *Brooks v Ross*, 24 AD3d 589 *see also*, *McNally v Beva Cab Corp.*, 45 AD3d 820; *Buckner v City of New York*, 9 Misc.3d 510, 515 [Supreme Court, New York County 2005]).

The Rail Road – in a one sentence assertion with no case authorities cited – further argues that no prejudice will result from entertaining its application since the two co-Defendants’ motions mirror its own (Constable Aff., at I).

It is true that “an untimely motion or cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made” – *provided* that the timely motion is based on “nearly identical” grounds (*Grande v Peteroy*, 39 AD3d 590, 591-592; *Fahrenheit v Security Mut. Ins. Co.*, 32 AD3d 1326, 1328 *see also*, *Tray Wrap, Inc. v Pacific Tomato Growers Ltd.*, 18 Misc.3d 1122[A], 2008 WL 222495 at 9 [Supreme Court, Bronx County 2008]). This is because “the nearly identical nature of the grounds may provide the requisite good cause to review the untimely motion or cross motion on the merits” (*Ellman v Village of Rhinebeck*, 41 AD3d 635, 636, *quoting from*, *Grande v Peteroy, supra*, at 591-592). Mere similarity, however, while not suffice (*Bickelman v Herrill Bowling Corp.*, 49 AD3d 578; *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 497; *Podlaski v Long Island Paneling Center of Centereach*, ___ AD3d ___ 2007 WL 4846208 at 4 [Supreme Court, Suffolk County 2007] *cf.*, *Lofstad v S & R Fisheries, Inc.*, 45 AD3d 739, 742).

Here, the pending motions of the two co-Defendants are not “nearly identical” in substantive import (*Bickelman v Herrill Bowling Corp.*, *supra*; *Bressingham v Jamaica Hosp. Med. Ctr.*, *supra*). The determinative issues considered on the Co-Defendants’ motions involve distinct questions of “prior written notice” and, alternatively, the factually based claim that the Village “affirmatively” created the purported defect.

As evidenced from its own papers, the motion made by the Long Island Rail Road is predicated on distinct and different land owner concepts, *i.e.*, claims to the effect that, *inter alia*, the Rail Road is essentially an “out of possession” landlord; that it did not control, maintain or repair the property (*Chianese v Meier*, 98 NY2d 270, 278 [2002]; *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]) (Constable Aff., at II; Constable Reply Aff., ¶¶ 12-13).

Under the circumstances, the Rail Road’s belated motion for summary judgment should be denied.

Accordingly, it is,

ORDERED that the motion pursuant to CPLR §3212 by the Defendant the Town of North Hempstead for summary judgment dismissing the complaint, **Motion Sequence No. 02**, insofar as asserted against it, is **granted** without opposition and it is further;

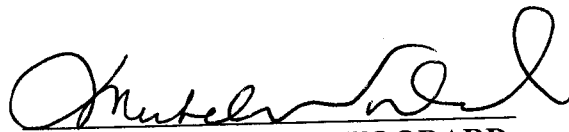
ORDERED that the motion pursuant to CPLR §3212 by the Defendant Village of East Williston for summary judgment dismissing the complaint, **Motion Sequence No. 01**, insofar as asserted against it, is **granted**, and it is further;

ORDERED that the cross motion pursuant to CPLR §3212 by the Defendant MTA Long Island Rail Road for summary judgment dismissing the complaint, **Motion Sequence No. 03**, insofar as asserted against it, is **denied**.

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

DATED: May 30, 2008
Mineola, N.Y.

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

ENTERED

JUN 04 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE