

Kagan v Town of N. Dempstead

2008 NY Slip Op 31617(U)

June 2, 2008

Supreme Court, Nassau County

Docket Number: 6384-05/

Judge: Antonio I. Brandveen

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.

S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

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

SPENCER KAGAN and DEBORAH KAGAN,

Plaintiffs,

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 6384/05

- against -

Motion Sequence No. 003

TOWN OF NORTH HEMPSTEAD, PORT
WASHINGTON PARKING DISTRICT and
COUNTY OF NASSAU,

Defendants.

The following papers having been read on this motion:

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

The defendants Town of North Hempstead and the Port Washington Parking District move for an order granting summary judgment pursuant to CPLR 3212 dismissing all allegations contained in the complaint. The plaintiffs oppose the motion. The underlying personal injury action involves an alleged accident on February 4, 2004, at approximately 9:10 p.m., at the parking lot at South Bayles Avenue, Port Washington, County of Nassau, in the State of New York. The plaintiffs claim the injured plaintiff was caused to slip and fall upon an icy portion of the pavement in the parking lot which was under a pool of water created by melt-off from snow which was piled on the median as a result of snow removal efforts. The injured plaintiff, currently a managing director at Lehman Brothers, concedes

[* 2]

there were no witnesses to the accident.

The attorney for the defendants Town of North Hempstead and the Port Washington Parking District states, in a supporting affirmation dated March 11, 2008, the plaintiffs have failed to establish liability for a defective condition in this publicly owned municipal parking lot because the plaintiffs have not shown prior written notice for the defective condition. The attorney for the defendants Town of North Hempstead and the Port Washington Parking District states the plaintiff served a notice of claim on the defendant Town of North Hempstead just prior to the commencement of the underlying action, and the injured plaintiff admitted he was unaware of any prior written notice during testimony pursuant to General Municipal Law § 50-h. The attorney for the defendants Town of North Hempstead and the Port Washington Parking District points to the supporting affidavits of the Superintendent of Highways of the Town of North Hempstead and the Town Clerk of the Town of North Hempstead, dated respectively March 12, 2008, and March 11, 2008. Both Town representatives state they have authority to accept service of written notices of any defect as described in the Code of the Town of North Hempstead § 26-1, and a thorough search of the offices, they supervise for the Town of North Hempstead covering a year prior to the date of this accident, does not disclose any prior written notice as required by law. The attorney for the defendants Town of North Hempstead and the Port Washington Parking District states, while the plaintiffs may argue a log entry of the defendants indicating salting all walks and black ice establishes the necessary prior written notice, the snowstorms in the New York metropolitan area in that winter were the most

severe in recent memory coupled with the injured plaintiff's testimony concerning that weather, and it is important to understand those weather conditions in connection with the plaintiffs' claim actual notice exists in the log book entry by the defendants' employees. The attorney for the defendants Town of North Hempstead and the Port Washington Parking District notes the subject seven municipal parking lots in the downtown area of the unincorporated area of the hamlet of Port Washington are meant to serve as Long Island Railroad commuter parking for the local residents and the customers of local downtown businesses. The attorney for the defendants Town of North Hempstead and the Port Washington Parking District asserts the log book entry is too general to be legally sufficient as prior written notice of any specific dangerous or defective condition, and the location of the plaintiff's accident.

The attorney for the plaintiffs states, in an opposing affirmation dated April 22, 2008, the plaintiffs have demonstrated an affirmative act of negligence by the defendants which proximately caused the accident. The attorney for the plaintiffs points to the plaintiff's testimony at the 50H hearing and the examination before trial which establish the plaintiff slipped on ice covered by water created by run-off from snow piled on a median in the parking lot adjacent to the accident site. The attorney for the plaintiffs refers to a copy of the official "log book" for the Port Washington Parking District utilized during the deposition testimony of the District's supervisor responsible for overseeing the parking district, and an internet weather report for February 4, 2004, to contend these defendants affirmatively created the condition leading to the plaintiff's accident. The attorney for the

*4

plaintiffs avers these defendants have not made a *prima facie* showing of a lack of prior written notice based upon the log book entry regarding salting all of the walks and black ice, and the injured plaintiff's testimony that he fell on the surface of the travel lanes of the parking lot. The attorney for the plaintiffs asserts there is no speculation here about whether these defendants created or contributed to this accident.

The attorney for the defendants Town of North Hempstead and the Port Washington Parking District states, in a reply affirmation dated May 14, 2008, the case law on improper snow removal operations cited by the plaintiffs is different from the law applicable to here. The attorney for the defendants Town of North Hempstead and the Port Washington Parking District states the plaintiffs offer no proof in support of their claim the defendants created the dangerous condition alleged here. The attorney for the defendants Town of North Hempstead and the Port Washington Parking District notes the plaintiffs's assertions are not supported by an affidavit from an expert or a person with requisite knowledge, so their contentions have no probative value. The attorney for the defendants Town of North Hempstead and the Port Washington Parking District contends the plaintiffs' reliance on a log book entry to overcome their burden of showing prior written notice lacks specificity as required by law.

This Court has carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. The plaintiff commenced this action against the defendants and, following the completion of discovery, these defendants moved for summary judgment dismissing the complaint on the ground that it had not received prior

written notice of the ice. On January 10, 1978 by the Town of North Hempstead enacted a prior written notice law, which was amended on August 14, 1984, and again amended on June 14, 2005 (*see* Code of the Town of North Hempstead § 26-1), which provides:

No civil action shall be maintained against the Town of North Hempstead or the Town Superintendent of Highways for damages or injuries to person or property sustained in consequence of any highway, bridge, culvert, sidewalk or crosswalk being defective, out-of-repair, unsafe, dangerous or obstructed or for damages or injuries to person or property sustained solely in consequence of the existence of snow or ice upon any highway, bridge, culvert, sidewalk or crosswalk unless written notice, manually subscribed by the complainant, of the defective, unsafe, dangerous or obstructed condition, or the existence of the snow or ice, relating to the particular place was actually given to the Town Superintendent of Highways or the Town Clerk and there was a failure or neglect, within a reasonable time after the receipt of such notice, to repair or remove the defect, danger or obstruction complained of or to cause the snow or ice to be removed or the place otherwise made reasonably safe.

The Second Department holds:

“Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained roadway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies” (*Griesbeck v County of Suffolk*, 44 AD3d 618, 619). The only recognized exceptions to the prior written notice requirement involve situations in which either the municipality created the defect through an affirmative act of negligence, or a “special use” confers a special benefit upon the municipality (*Yarborough v City of New York*, 10 NY3d 726, 728; *see Amabile v City of Buffalo*, 93 NY2d 471, 474)

Bogorova v. Incorporated Village of Atlantic Beach, --- N.Y.S.2d ----, 2008 WL 2132809 [2nd Dept. 2008].

Here, the Town of North Hempstead and the Port Washington Parking District established prima facie entitlement to judgment as a matter of law by presenting evidence (1) a prior written notice law was in effect, (2) neither defendant received prior written notice of the

ice that allegedly caused the plaintiff's injuries (*see Rochford v City of Yonkers*, 12 AD3d 433), (3) neither defendant created the defect through an affirmative act of negligence nor did the area confer a special benefit upon these defendants (*see Mallory v City of New Rochelle*, 41 AD3d 556, 557). In opposition, the plaintiff failed to raise a triable issue of fact.

The defendants made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that they neither created nor had actual or constructive notice of the patch of "black ice" on which the plaintiff...allegedly slipped and fell (*see Robinson v Trade Link Am.*, 39 AD3d 616, 616-617; *Makaron v Luna Park Hous. Corp.*, 25 AD3d 770; *Murphy v 136 N. Blvd. Assoc.*, 304 AD2d 540). In response, the plaintiffs failed to raise a triable issue of fact as to whether the ice was the result of improper snow removal (*see Robinson v Trade Link Am.*, 39 AD3d at 617; *Zabbia v Westwood, LLC*, 18 AD3d 542, 544; *Ravina v Incorporated Town of Greenburgh*, 6 AD3d 688, 689). Additionally, the plaintiffs presented no evidence that the defendants had received any complaints about the ice patch, or that it was visible and apparent and had existed for a sufficient length of time before the accident for the defendants to discover and remedy it (*see Gjoni v 108 Rego Dev. Corp.*, 48 AD3d 514; *Murphy v 136 N. Blvd. Assoc.*, 304 AD2d at 540-541).

Christal v. Ramapo Cirque Homeowners Ass'n, --- N.Y.S.2d ----, 2008 WL 2132673 [2nd Dept. 2008].

Accordingly, the motion is granted.

So ordered.

Dated: **June 2, 2008**

ENTERED
ENTER:
JUN 06 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE


J. S. C.

FINAL DISPOSITION xxx NON FINAL DISPOSITION