

Rosario v Laroma Constr. Corp.

2009 NY Slip Op 30687(U)

March 18, 2009

Supreme Court, Nassau County

Docket Number: 8520/07

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

mg,mg

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

LUCY ROSARIO,

Plaintiff(s),

MOTION DATE: 2/10/09

INDEX No.: 8520/07

-against-

MOTION SEQUENCE NO: 2,3

X X X

CAL. NO.: 2008H3900

LAROMA CONSTRUCTION CORP. and INCORPORATED
VILLAGE OF FLORAL PARK,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-4
Notice of Cross Motion.....	5-7
Answering Affidavits.....	8-10
Replying Affidavits.....	11-14
Briefs:	

Upon the foregoing papers, it is ordered that this motion by defendant Incorporated Village of Floral Park (Floral Park) and cross motion by defendant La Roma Construction Corp. (La Roma) for an order pursuant to CPLR 3212, granting summary judgment in their favor dismissing plaintiff's complaint are granted.

This is an action to recover money damages for personal injuries allegedly sustained by plaintiff when she tripped and fell on an allegedly raised sidewalk adjacent to the north side of Jericho Turnpike, between Whitney Avenue and North Tyson Avenue in Floral Park, New York.

Plaintiff contends that on March 9, 2006, she crossed Jericho Turnpike and stepped onto the subject sidewalk when her left foot caught on a raised portion of the sidewalk adjacent to a tree well. She claims that the sidewalk was raised and uneven due to the growth of tree roots.

Upon the instant motion and cross motion, defendants Floral

Park and La Roma each move for summary judgment dismissing plaintiff's complaint. This court will address each defendant's motion, in turn. Presently, all claims against the County of Nassau have been discontinued.

Defendant Floral Park herein moves for summary judgment claiming that it did not receive prior written notice of the sidewalk defect as required by Village Law §6-628 and in addition asserts that plaintiff failed to establish an affirmative act of negligence on the part of Floral Park. In support of its motion, Floral Park submits the deposition testimony of Kenneth Tymecki, of the Department of Public Works of Floral Park. Mr. Tymecki stated that the Department of Public Works is responsible for the maintenance and repair of sidewalks in Floral Park. He further stated that a routine inspection was conducted in 2002 and this particular sidewalk area had been found defective in that it was raised and uneven. However, following said inspection a purchase order was issued on July 30, 2002 for La Roma to repair the sidewalk. According to Mr. Tymecki, the repairs were completed in September 2003 and a follow-up inspection was done to ensure that the repairs were adequately performed by La Roma. He also testified that he was not aware of any complaints regarding the subject sidewalk. Floral Park also submitted the sworn affidavit of Susan Walsh, deputy clerk of Floral Park, who conducted a search of the village records and found that there were no prior complaints, written or otherwise, received by Floral Park regarding the subject sidewalk.

Plaintiff, in opposition, argues that no written notice is required as defendant created a dangerous and hazardous condition by performing affirmative acts of negligence. Specifically, plaintiff contends that La Roma negligently performed the repairs and that Floral Park failed to take proper measures to insure that the sidewalk was properly repaired and restored. Plaintiff also argues that defendant had constructive notice as tree roots grow continually thereby creating a recurring problem of an uneven sidewalk.

In deciding a motion seeking summary judgment the "court must ascertain whether there are any triable issues of fact in the proof laid bare by the parties submissions of affidavits based on personal knowledge and documented evidence, rather than in speculative affidavits. The opponent of a summary judgment motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his

claim" (Baly v Chrysler Credit Corp., 94 AD2d 781). "This drastic remedy should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'" (Esteve v Aved, 271 App.Div. 725, 727; see also Sillman v Twentieth Century-Fox Corp., 3 NY2d 395).

It is well settled that as to the liability of Floral Park, "[w]here, as here, a municipality has enacted a prior written notice statute, it may not be subject to liability for personal injuries from an improperly maintained sidewalk unless it received written notice of the dangerous condition, its affirmative negligence proximately caused the accident, or a special use conferred a special benefit on it" (Price v County of Suffolk, 303 AD2d 571; see also Hansen v City of Long Beach, 16 AD3d 625).

Applying that law here, Floral Park has demonstrated that there was no prior written notice given to them as required by § 6-628 of the Village Law. Thus, Floral Park has established its prima facie entitlement to summary judgment with sufficient evidence that the prior written notice requirement as prescribed by statute has not been satisfied.

Plaintiff's argument that defendant Floral Park created a dangerous and hazardous condition by performing affirmative acts of negligence lacks merit. Floral Park established through the deposition testimony of Mr. Tymecki that the subject sidewalk had been found in disrepair by Joseph Pratt, the former village code inspector. As a result, a purchase order dated July 30, 2002 was issued for La Roma to perform the repairs. Mr. Tymecki stated that Mr. Pratt was responsible for reinspecting the area to insure that the repairs were completed properly and that a contractor is paid only after the reinspection. In support of this, the approved invoice generated by La Roma is annexed indicating that the work was approved by Mr. Pratt on October 2, 2003. Thus, even though there is evidence that Floral Park repaired the subject sidewalk approximately five and a half years ago, the plaintiff was unable to demonstrate that the defective condition existed immediately upon the completion of the repair work, or that the deterioration of the sidewalk was caused by the repair instead of developing over a period of time (Scavuzzo v City of New York, 47 AD3d 793; see also Daniels v City of New York, 29 AD3d 514).

With regard to plaintiff's argument that Floral Park had constructive notice of a recurring condition based on the presence of residual tree roots, it is well settled that "the allegation of a subsequent recurrence of a condition does not abrogate the need

for prior written notice" (Capobianco v Mari, 272 AD2d 497; see also McCarthy v City of White Plains, 54 AD3d 828; Lopez v Gonzalez, 44 AD3d 1012). Moreover, in order "to establish constructive notice, the plaintiff must show that the dangerous condition was visible and apparent and had existed for a sufficient time before the accident to permit the defendants' employees to discover and remedy it" (Welles v N.Y. City Hous. Auth., 284 AD2d 327). Here, plaintiff has failed to raise a triable issue of fact as to whether the condition was visible and apparent for a sufficient period of time to permit Floral Park to discover and remedy it.

La Roma, in support of its cross motion, argues that plaintiff lacks standing to maintain a cause of action. La Roma maintains that there was no detrimental reliance by plaintiff on the services provided by La Roma to Floral Park, there was no contractual obligation imposing upon La Roma a duty to inspect and maintain the sidewalk and that La Roma did not perform negligent repairs causing the alleged defective sidewalk. In support of this, La Roma submitted the deposition testimony of Mr. Tymecki to establish that Floral Park was responsible for repairs and that La Roma was the contractor, as per the annual contract between Floral Park and La Roma, to perform the repairs. La Roma also submitted the deposition testimony of Joseph Pratt, the former village code inspector. Mr. Pratt stated he had inspected the subject sidewalk in 2002 and found that it in disrepair. As a result, a purchase order was issued and upon completion of the work he reinspected the subject sidewalk to insure that the repairs were adequately performed by La Roma.

Plaintiff, in opposition, argues that defendant La Roma's repairs departed from reasonable engineering and construction standards. In support of this, plaintiff submitted the affidavit of Richard L. Heimer, an expert professional engineer. Mr. Heimer opines that the subject sidewalk lifted both before and after plaintiff's accident due to growing tree roots from the adjacent tree well. He further states that the offending roots should have been cut and removed before the sidewalk was repaired and that a reinforced barrier should have been installed between the two areas. Mr. Heimer bases his opinion upon the photographs of the subject sidewalk, plaintiff's bill of particulars, EBT transcripts, and an inspection of the site on April 30, 2007.

Based on the record, plaintiff has failed to make a prima facie showing of entitlement to judgment demonstrating that La Roma

