

Raftery v Town of Hempstead

2009 NY Slip Op 30777(U)

March 30, 2009

Supreme Court, Nassau County

Docket Number: 21404/06

Judge: William R. LaMarca

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART15

Present: HON. WILLIAM R. LaMARCA
Justice

DIANE RAFTERY,

Plaintiff,

-against-

TOWN OF HEMPSTEAD and DEMOTT-CARMAN
POST, NO. 536, INC.,

Defendants.

Motion Sequence #2,#3
Submitted January 7, 2009

INDEX NO: 21404/06

The following papers were read on this motion:

Notice of Motion.....	1
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Requested Relief

Defendant, DEMOTT-CARMAN POST, NO. 536, INC., an American Legion Post located at 151 Irving Place, Woodmere, New York (hereinafter referred to as the "POST"), moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing plaintiff's complaint and all cross-claims against it on the ground that plaintiff cannot establish a *prima facie* case against defendant. Subsequently, defendant, TOWN OF HEMPSTEAD (hereinafter referred to as the "TOWN"), cross-moves for the same relief.

Plaintiff, DIANE RAFTERY, opposes the motion and cross-motion, which are determined as follows:

Background

Plaintiff commenced this action to recover for injuries from an alleged trip and fall accident that occurred on June 15, 2006, at approximately 9:40 P.M., on a raised sidewalk/handicapped ramp in front of the POST, at the corner of Irving Place and Cedar Lane. It is alleged that the TOWN is the owner of the sidewalk/ handicapped ramp and that the POST is the abutting property owner at said location. Plaintiff alleges that, on the evening of the accident, while walking her dog, she was caused to trip and fall due to the dangerous and defective condition at said corner, as a result of the negligence of the defendants and their agents, in the ownership, repair, maintenance, and control of said sidewalk/handicapped ramp. Plaintiff claims that she sustained serious injuries including, *inter alia*, fractures to her wrists, swelling and strain to her elbows and hands, head trauma, pain to her lower back, hip and neck, restriction of movement and loss of enjoyment of life.

In support of its motion to dismiss, the POST annexes the transcript of its deposition witness, Paul Roth, the Commander of the POST for the past five (5) years, who testified that the POST owned the property for twenty (20) years and that he had been a member of the POST for twenty (20) years as well. He stated that he frequently attended meetings at the POST but that he did not know when the handicapped ramp had been installed at the corner. He testified that the POST had a caretaker who took care of the garden and lawn, but not the sidewalk, and that no repairs to the sidewalk had been undertaken by the POST and no money had been authorized for any such repairs. He stated that he had

walked on the subject sidewalk many times but never noticed a difference in height, that he was unaware of ever receiving any complaints prior to the subject accident, or of any other falls at the location. He testified that the POST did not receive any notification from the TOWN about the corner and that he was unaware of the POST ever contracting with anyone to make repairs to the sidewalk or of any construction work being performed at the corner.

Counsel for the POST points out that the TOWN, through its witness Joseph Perrone, testified that in order for an entity to install a handicapped ramp, they would need permission of the TOWN. Counsel to the POST states that demands for Discovery and Inspection of the TOWN records with respect to the handicapped ramp and permits reveals no such records. It is the POST's position that since the TOWN imposes no liability on abutting landowners for injuries caused by the landowner's negligence, there can be no liability imposed on the POST and summary judgment should be granted to it dismissing the complaint and all cross-claims against it.

In support of its cross-motion, the TOWN adopts the facts set forth by the POST, and states that plaintiff's assertion that the TOWN negligently owned, maintained, inspected and repaired the subject sidewalk are conclusory and unsupported by evidentiary facts sufficient to raise a triable issue of fact. Counsel for the TOWN states that §65-2, subd.2, of the TOWN Law of the State of New York directs that receipt of prior written notice is a condition precedent to the maintenance of a civil action against the TOWN for injuries arising from a defective sidewalk. Counsel for the TOWN claims that plaintiff has failed to submit proof of prior written notice, and that a search of the TOWN Records for a period of five (5) years prior to the subject accident, by Andrew A. Brust, the

Labor Crew Chief I assigned to the Sidewalk Division of the Department of Highways of the TOWN, indicated there were no prior notices or complaints regarding the subject location. In his affidavit, Mr. Brust states that the records reveal no contracts involving the TOWN for the repair, maintenance or affirmative acts to the subject sidewalk for the last five (5) years. Counsel for the TOWN urges that plaintiff has failed to submit any proof in admissible form that the TOWN had the required prior written notice as to the specific sidewalk or that the TOWN created the alleged defect and, therefore, its motion for summary judgment should be granted.

In opposition to the motion and cross-motion, counsel for the plaintiff argues that the TOWN has not made a proper search of its records because, as testified to by the Joseph Perrone, the TOWN's witness, although anybody could put in such a "sidewalk handicap apron", they would require the permission of the TOWN. Counsel contends that Mr. Perrone, the sidewalk inspector, employed by the TOWN for twenty-five (25) years, did not personally perform the search of the TOWN records and, in fact, stated that he "might have been to the location of the intersection of Irving Place and Cedar Lane in the village of Woodmere, Town of Hempstead, to do a sketch". Counsel for plaintiff argues that the Court should disregard the affidavit of Labor Chief Andrew Brust because plaintiff has not had an opportunity to cross-examine him, and that the motion to dismiss should be denied because the TOWN has not made a *prima facie* showing of entitlement to judgment as a matter of law. The plaintiff does not address the arguments presented by the POST in support of its motion for summary judgment.

The Law

“It is well settled that a landowner will not be liable to a pedestrian injured by a defect in a public sidewalk abutting the landowners’ premises unless ‘the landowner created the defective condition or caused the defect to occur because of some special use, or unless a statute or ordinance placed the obligation to maintain the sidewalk upon him’ [and imposes] tort liability upon the landowner for injuries caused by a violation of that duty” (*Block v Potter*, 204 AD2d 672, 612 NYS2d 236 [2nd Dept. 1994], quoting *Surowiec v City of New York*, 139 AD2d 727, 527 NYS2d 478 [2nd Dept. 1988]). In essence, a landowner may be held liable for a condition upon the sidewalk if a local ordinance or statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalk and imposes liability for injuries resulting from the breach of that duty. (*Hausser v Giunta*, 88 NY2d 449, 646 NYS2d 490, 669 NE2d 470 [C.A. 1996]). On a motion for summary judgment, when a defendant has established that it did not repair or make special use of the sidewalk, the burden shifts to the plaintiff to “produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which would require a trial of the action. (*Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [C.A. 1986]). Herein, there is no evidence that the POST made any repairs to the allegedly defective sidewalk prior to the accident, made special use of the sidewalk or otherwise caused the defective condition. And, while the Town Code mandated the abutting landowner to maintain the sidewalk and trees, none of the cited provisions specifically imposed tort liability for failure to comply with the statutes. (*Hausser v Giunta*, *supra*).

Prior written notice of an alleged defect is a necessary prerequisite to imposing liability upon a municipality for an allegedly defective and/or dangerous sidewalk condition (*Frullo v Incorporated Village of Rockville Centre*, 274 AD2d 499, 711 NYS2d 185 (2nd Dept 2000); *Brooks v Village of Babylon*, 251 AD2d 526, 674 NYS2d 726 [2nd Dept. 1998]). 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. General Municipal Law § 50-e(4), the authorizing statutory provision, 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*. 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*).

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. Bare allegations are insufficient to create a genuine issue of fact. *Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390, 341 NE2d 817 (C.A. 1975).

Conclusion

After a careful reading of the submission herein, it is the Court's judgment that the POST has made a *prima facie* showing that it is entitled to judgment as a matter of law and that plaintiff's submission is insufficient to defeat the motion in chief. However, with respect to the TOWN, the evidence presented reflects that a public improvement in the form of a "sidewalk handicap apron" has recently appeared on the corner of Irving Place and Cedar Lane, a section of sidewalk owned by the TOWN, about which the TOWN denies both knowledge or responsibility. Assuming *arguendo* that said sidewalk was negligently installed, should the Court non-suit the plaintiff because the TOWN cannot find records or permits for this public improvement, which the TOWN acknowledges requires its permission to install. The Court answers this question in the negative and finds that questions of fact remain about whether the TOWN created the subject sidewalk handicap apron which precludes the granting of its cross-motion for summary judgment. It is therefore

ORDERED, that the POST's motion for summary judgment dismissing the complaint and all cross-claims against it is granted; and it is further


ORDERED, that the TOWN's motion for summary judgment dismissing the complaint and all cross-claims against it is denied; and it is further

ORDERED, that the action against the TOWN OF HEMPSTEAD is severed and continued.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: March 30, 2009



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ENTERED

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COUNTY CLERK'S OFFICE**