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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 20 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

x

HUGH PAHL AND BARBARA PAHL,

Plaintiff(s),

-against-

LLOYD BARDFELD, BARDKIS REALTY CORP., STEPHEN KISBERG, SOUTH SHORE PODIATRY ASSOCIATES P.C., and TOWN OF HEMPSTEAD,

Defendant(s).

x

Index No. 14311/07

Motion Submitted: 3/20/09
Motion Sequence: 001, 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....X
Reply.....XX

Defendants Lloyd Bardfeld, Bardkis Realty Corp., Stephen Kisberg and South Shore Podiatry Associates, P.C. (all referred to as "Bardfeld defendants") and the cross motion by co-defendant Town of Hempstead (the "Town"), cross moves for an order granting summary judgment in their favor dismissing the complaint. Plaintiff opposes the requested relief.

Plaintiff commenced this action for monetary damages due to injuries allegedly sustained by plaintiff Hugh Pahl (the "plaintiff") in a trip and fall that occurred on April 17, 2007 at 8:30 a.m. on the sidewalk that surrounds the building known as South Shore Podiatry located at 11 Franklin Place, Woodmere, N.Y. The co-plaintiff, Barbara Pahl, has a derivative cause of action. Plaintiff, an exterminator, went to 11 Franklin Place to spray the foundation. Plaintiff states he tripped and fell over uneven sidewalk slabs.

Stephen Kisberg is an individual defendant herein. He is a principal in the corporation, defendant Bardkis Realty Corp., that own South Shore Podiatry's building along with co-defendant Floyd Bardfeld. Kisberg stated there was not one complaint about the sidewalk in

issue. He also notes the building is surrounded on three sides by a Town parking lot.

The Bardfeld defendants allege they did not own or control the sidewalk where the incident occurred, they did not create the condition and they did not enjoy a "special use" of the sidewalk. Bardfeld defendants contend the Town owns the sidewalk. Based on the above, the Bardfeld defendants seek summary judgment.

The Bardfeld defendants have offered the deposition of Carlene Maxwell, an office administrator for South Shore Podiatry in support of its motion. Ms. Maxwell testified that the Town owns the sidewalk where the incident occurred. Ms. Maxwell knew of no work done on the sidewalk in the area where the incident occurred.

The Bardfeld defendants have also offered the notarized affidavit of Donald G. DeKenipp, a New York State licensed land surveyor. DeKenipp stated that the survey he prepared on September 23, 2008 indicates the sidewalk where the incident occurred is not part of the property of 11 Franklin Place, Woodmere, N.Y., Bardfeld defendants' property.

The Town, in its cross motion, contends it is not responsible for the sidewalk in issue and in any event never received prior written notice of the alleged problem with the sidewalk in issue. The Town offers the deposition of Pasquale Digesu in support of its motion. Digesu is a shift supervisor in the Town's Department of Highways. Digesu testified the Town was not responsible for the sidewalk in issue.

The Town also cites the deposition of Peter Rizzo. Rizzo is a highway inspector for the Town. Rizzo testified that the sidewalk where the plaintiff's incident occurred was not in the jurisdiction of the Town, and the abutting property owner (here the Bardfeld defendants) must maintain the sidewalk.

The Town also contends it never received the requisite prior written notice from the plaintiffs as to the alleged condition of the sidewalk. The Town offers the notarized affidavit of Andrew A. Brust, a Labor Crew Chief assigned to the Sidewalk Division, Department of Highways of the Town. Brust stated he searched the Town's records five (5) years prior to the April 17, 2007 incident and found no prior notices or written complaints as to the location at issue. Brust also indicated the records did not reveal any contracts with any municipality or contractor to maintain, repair or perform work on the sidewalk at the location of the incident.

In opposition, the plaintiffs raise the point that the Bardfeld defendants put trash out in the area ("trash receptacles and bags") and that constituted a "special use" for the Bardfeld defendants. Plaintiffs also contend the affidavit of the Bardfeld's expert DeKenipps is invalid since the Bardfeld defendants never identified him as such during pre-trial discovery.

Plaintiffs also allege the deposition of Carlene Maxwell, Peter Rizzo and Pasquale (Pat) Digesu are not valid for summary judgment purposes since the transcripts were not executed nor forwarded for revision. Plaintiffs do not refute lack of written notice to the Town as per the incident.

An owner of land does not, solely by reason of being an abutting owner, owe a duty to keep the public sidewalk in a safe condition (***Flores v. Baroudos***, 27 A.D.3d 517, 811 N.Y.S.2d 757 (2d Dept., 2006); ***Cannizzaro v. Simco Management Co.***, 26 A.D.3d 401, 809 N.Y.S.2d 196 [2d Dept., 2006]). This general rule is not applicable and the abutting landowner will be held liable where the sidewalk was constructed in a special manner for the benefit of the abutting owner, where the abutting owner affirmatively caused the defect, where the abutting landowner negligently constructed or repaired the sidewalk, and where a local ordinance or statute specifically changes the 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 N.Y.2d 449, 669 N.E.2d 470, 646 N.Y.S.2d 490 (1996); ***Nunez v. City of New York***, 41 A.D.3d 677, 838 N.Y.S.2d 619 [2d Dept., 2007]).

The Town notes it has a prior written notice requirement as to alleged defective sidewalk–Town Code § § 6-3, 6-4. Where a municipality establishes that it had not received written notice of a defect pursuant to the laws of the municipality, it is incumbent upon the plaintiff to submit competent evidence that the municipality affirmatively created the defect (***Gianna v. Town of Islip***, 230 A.D.2d 824, 646 N.Y.S.2d 707 [2d Dept., 1996]). A municipality that has enacted a prior written notice law is excused from liability absent proof of prior written notice or an exception thereto (***Jacobs v. Village of Rockville Centre***, 41 A.D.3d 539, 838 N.Y.S.2d 597 (2d Dept., 2007); two exceptions to this rule are 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***, 93 N.Y.2d 471, 715 N.E.2d 104, 693 N.Y.S.2d 77 [1999]). Here, there is no evidence of prior written notice; there is nothing in the record to indicate the Town created any defect through an affirmative act of negligence or the Town had a special use of the sidewalk where and when the incident occurred.

As noted, generally, liability for injuries sustained as a result of negligent maintenance of or the existence of a dangerous and defective condition to a public sidewalk is placed on the municipality and not the abutting owner (***Hausser v. Giunta, supra***; (***Biondi v. County of Nassau***, 49 A.D.3d 580, 853 N.Y.S.2d 381 (2d Dept., 2008) since the municipality has the responsibility for maintenance of the sidewalks so that they may be safely traveled upon by those who use them (***Montalvo v. Western Estates, Ltd.***, 240 A.D.2d 45, 669 N.Y.S.2d 562 [1st Dept., 1998]). Where a municipality does not own, maintain, operate or control the sidewalk, however, it has no duty to exercise reasonable care with respect to the area where a plaintiff fell. (***Gasis v. City of New York***, 35 A.D.3d 533, 828 N.Y.S.2d 407 [2d Dept.,

2006]). Thus, 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***).

The Court of appeals has recognized only two exceptions to the statutory rule requiring prior written notice where the locality created the defect or hazard through an affirmation out of negligence and where a special use confers a special benefit upon the locality (***Amabile v. City of Buffalo, supra***). In order for a municipality to be ultimately liable for a condition wherein no prior written notice was given, then 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 A.D.2d 823, 757 N.Y.S.2d 801 [2d Dept., 2003]). Plaintiffs have failed to do this as to the Town. Also, actual or constructive notice of the defect does not satisfy the statutory requirement that a municipality receive written notice of a sidewalk defect (***Reich v. Meltzer***, 21 A.D.3d 543, 800 N.Y.S.2d 593 [2d Dept., 2005]). Thus, the fact that the Town crews regularly visited the area to inspect the lot in issue is unavailing to plaintiffs.

The mere fact that an establishment used a sidewalk for deliveries does not constitute a special use (***Sampino v. Crescent Associates, LLC, supra***) nor does a common occurrence such as a line of visiting cars on a public thoroughfare outside a car wash, parking lot or other facility open to the public (***Portelli v. Garcia***, 8 A.D.3d 252, 777 N.Y.S.2d 674 [2d Dept., 2004]). Here, plaintiffs' contention that defendants' conduct in putting trash by the curb for collection constitute a special use of the sidewalk is totally without merit (see ***Ioffe v. Hampshire House Apartment Corp.***, 21 A.D.3d 930, 800 N.Y.S.2d 757 [2d Dept., 2005]).

Assuming, *arguendo*, that putting out garbage did constituted a special use of the sidewalk, the plaintiffs failed to set forth evidence to establish how the placement of garbage caused the injuries. (***Yee v. Chang Xin Food Market, Inc.***, 302 A.D.2d 518, 755 N.Y.S.2d 262 (2d Dept., 2003); ***Benenati v. City of New York***, 282 A.D.2d 418, 723 N.Y.S.2d 69 [2d Dept., 2001]).

Here, the Town of Hempstead and the Bardfeld defendants did not benefit from that portion of a sidewalk on which a pedestrian fell in a manner different from that of the general populace so as to "impute" liability based upon a theory of special use (***Gasis v. City of New York, supra***). Further, plaintiffs' claim that the Bardfeld defendants created the condition was based on mere speculation (***Frankie v. Glen Cove Housing Authority***, 276 A.D.2d 668, 714 N.Y.S.2d 749 [2d Dept., 2000]).

Plaintiffs allege the statement by Brust is not in proper form and must be excluded from the Town's request for summary judgment. As noted by the Town, it offered the

notarized statement of Andrew Brust, the Labor Crew Chief. Brust's notarized statement is acceptable for the Town to use in its summary judgment quest (see ***Estate of Naber by Naber v. Hannen***, 231 A.D.2d 849, 647 N.Y.S.2d 611 [4th Dept., 1996]).

Plaintiffs also allege the Bardfeld defendants' expert, Donald DeKenipp was not identified in pre-trial discovery. Plaintiffs contend his affidavit is not viable. The court must disagree. When opposing a motion for summary judgment and an expert affidavit is offered by the opposing party, the expert should be identified during pre-trial discovery (see ***Gerry v. Commack Union Free School District***, 52 A.D.3d 467, 860 N.Y.S.2d 133 (2d Dept., 2008); ***Soldano v. Bayport-Blue Point Union Free School Dist.***, 29 A.D.3d 891, 815 N.Y.S.2d 712 [2d Dept., 2006]). Here, the defendants did identify their expert Donald G. DeKenipp in pre-trial disclosure (see Exhibit B annexed to the Bardfeld defendants' reply affirmation).

Plaintiffs further argue that the deposition of Carlene Maxwell, Peter Rizzo and Pat Digesu cannot be utilized by defendants since the transcripts were not executed by Maxwell, Rizzo and Digesu and there is no indication the depositions were forwarded for review. As to unsigned depositions submitted to oppose a motion, the party so submitting must show the transcripts had been forwarded to the relevant witnesses for their review pursuant to CPLR § 3116(a) (see ***Pina v. Flik Intl. Corp.***, 25 A.D.3d 772, 808 N.Y.S.2d 752 [2d Dept., 2006]). Pursuant to CPLR § 3116(a), a deposition transcript is allowed into evidence if it is both signed by the deponent and certified by the witness. If the deponent fails to sign and return the deposition within sixty (60) days, it may be used as though it were signed. The key factor is that the deposition transcript be sent to the deponent (see ***Lalli v. Abe***, 234 A.D.2d 346, 650 N.Y.S.2d 313 [2d Dept., 1996]). The deponent can then either sign the transcript as accurate or default after a period of sixty (60) days when it has the same effect as if he or she signed it (***Thomas v. Hampton Express, Inc.***, 208 A.D.2d 824, 617 N.Y.S.2d 831 [2d Dept., 1994]).

As to Ms. Maxwell, the Bardfeld defendants have shown that the deposition was sent to Ms. Maxwell for review (see Exhibit A annexed to the Bardfeld defendants' reply affirmation; Exhibit F annexed to plaintiffs' affirmation in opposition). The deposition of Ms. Maxwell was held on April 15, 2008. The sixty (60) day period has expired. The deposition therefore may be used herein. As to Rizzo and Digesu, there is no indication that the depositions were sent for their respective reviews. Therefore even though sixty days has passed since the depositions (Rizzo's date is April 15, 2008; Digesu's date is September 15, 2008; see Exhibits G and I annexed to Bardfeld defendants' motion), this Court will not rely upon their depositions in rendering its decision.

The motions are granted and the complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: June 25, 2009
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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