

Loughlin v Town of Hempstead

2009 NY Slip Op 33005(U)

December 9, 2009

Supreme Court, Nassau County

Docket Number: 19841/07

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

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

MARY LOUGHLIN,
Plaintiff,

- against -

TOWN OF HEMPSTEAD,
Defendant.

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 19841/07

Motion Sequence No. 001

The following papers having been read on this motion:

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

The defendant Town of North Hempstead moves pursuant to CPLR 3212 for summary judgment, and dismissal of the complaint and all cross claims upon the ground the Town of North Hempstead did not receive prior written notice of the alleged defect. The plaintiff opposes the motion.

The plaintiff alleges she fell on May 30, 2007, on the sidewalk on Park Circle abutting 37 Park West, New Hyde Park, New York. The Town of North Hempstead responded with an affirmative defense asserting a lack of prior written notice to the verified complaint. On October 23, 2007, the plaintiff testified pursuant to General Municipal Law § 50-h, and testified on May 1, 2008, at an examination before trial. On May 1, 2008, Nuncio Vetrano, a construction supervisor I for the Town of North Hempstead, testified at

an examination before trial. On March 31, 2009, Corey Falls, a laborer employed by the Town of North Hempstead for sidewalk repair, testified at an examination before trial.

The defense attorney points, in a supporting affirmation dated July 27, 2009, to all of that testimony, and photographs of the accident site. The defense attorney contends the evidence shows the Town of North Hempstead never received prior written notice of the alleged defect. The defense attorney asserts the Code of the Town of North Hempstead § 26-1 provides no civil action may be maintained against it for personal injuries sustained as the result of a defective highway or sidewalk unless written notice of that defect was given to the Superintendent of Highways or the Clerk of the Town of North Hempstead. The defense attorney also points out the affidavits dated July 27, 2009, July 24, 2009, and July 24, 2009, respectively of Thomas P. Tiernan, the Superintendent of Highways, Leslie C. Gross, the Clerk, and Jillian Guiney, the Acting Commissioner of Public Works, indicate they did not receive prior written notice of the alleged defect. The defense attorney avers speed letters, to wit work orders to the employees of a municipality do not constitute prior written notice, as a matter of law. The defense attorney argues, since no prior written notice of a defect was received, the Town of North Hempstead has established its *prima facie* entitlement to summary judgment as a matter of law. The defense attorney submits there is no evidence the Town of North Hempstead created the alleged defect, to wit there is no showing of an affirmative act of negligence by the Town of North Hempstead to create a defect, rather the evidence shows there was a tree near that sidewalk, and its roots raised the sidewalk. The defense attorney states, while there is evidence of a prior repair at the subject location, that circumstance standing alone is insufficient to meet the creation exception,

rather there must be some evidence the work immediately resulted in the existence of a dangerous condition, and there is no such evidence here. The defense attorney states there is no evidence to indicate the Town of North Hempstead had a specific use at the premises, so there must be a municipal use or function inuring to the benefit of the Town of North Hempstead, and there is no such evidence here.

The plaintiff's attorney states, in an opposing affirmation dated August 18, 2009, the Town of North Hempstead caused and created the defective and dangerous sidewalk condition through its negligent repair. The plaintiff's attorney points to the affirmation dated August 17, 2009, by Stanley Fein, the plaintiff's expert, to wit a professional engineer, who states, with reasonable engineering safety, the defendant's failures, caused and created a dangerous sidewalk area and condition, and was a substantial factor in causing the plaintiff to fall, and be injured. The plaintiff's attorney notes the defendant failed to submit a sworn statement by an expert to support the contentions of the Town of North Hempstead. The plaintiff's attorney points out the defense fails to address the plaintiff's theory of liability the cause of the defective condition and special use.

This Court has carefully reviewed and considered all of the parties' papers with respect to this motion. Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic

remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325; *Andre v. Pomeroy*, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v. United Rubber Supply Co.*, 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff'd* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*). The Court finds the Town of North Hempstead met its initial burden of establishing prima facie entitlement to summary judgment based upon the evidence it presented. The burden then shifted to the plaintiff to tender evidence in admissible form sufficient to raise a question of fact requiring trial. This Court finds no triable issue of fact has been raised here.

The Court of Appeals holds:

Prior notification laws are a valid exercise of legislative authority (*Fullerton v City of Schenectady*, 285 App Div 545, *aff'd* 309 NY 701, appeal dismissed

350 US 980; *Holt v County of Tioga*, 56 NY2d 414). 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” (*Barry v Niagara Frontier Tr. Sys.*, 35 NY2d 629, 633). Indeed, 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 [and] ... it must be read to apply alike to all laws enacted by any legislative body in this State” (*Holt v County of Tioga*, 56 NY2d, *supra*, at 419). Thus, in derogation of the common law, 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 (*see, Doremus v Incorporated Vil. of Lynbrook*, 18 NY2d 362, 366).

Amabile v. City of Buffalo, 93 N.Y.2d 471, 473-474, 693 N.Y.S.2d 77 [1999].

Moreover, the Second Department holds:

The City established its entitlement to judgment as a matter of law by proffering the deposition testimony of a municipal code enforcement officer, in which he stated that he had searched the City's prior written notice logbook and had found no records indicating that the City had received prior written notice of the alleged defective sidewalk condition (*see Akcelik v. Town of Islip*, 38 A.D.3d 483, 484, 831 N.Y.S.2d 491; *Hyland v. City of New York*, 32 A.D.3d 822, 823, 821 N.Y.S.2d 138; *Granderson v. City of White Plains*, 29 A.D.3d 739, 815 N.Y.S.2d 246). In response, the plaintiff failed to raise a triable issue of fact as to whether there was such prior written notice (*see Marshall v. City of New York*, 52 A.D.3d 586, 861 N.Y.S.2d 77; *Akcelik v. Town of Islip*, 38 A.D.3d at 484, 831 N.Y.S.2d 491)...even though the Department of Public Works generated the 2004 notice in response to a telephonic complaint, a telephonic complaint reduced to writing does not satisfy the requirement of prior written notice (*see White Plains Municipal Code § 277; Akcelik v. Town of Islip*, 38 A.D.3d at 484, 831 N.Y.S.2d 491; *Dalton v. City of Saratoga Springs*, 12 A.D.3d 899, 901, 784 N.Y.S.2d 702; *Cename v. Town of Smithtown*, 303 A.D.2d 351, 351-352, 755 N.Y.S.2d 651).

McCarthy v. City of White Plains, 54 A.D.3d 828, 829-830, 863 N.Y.S.2d 500 [2nd Dept., 2008].

“[N]either actual notice (*see Granderson v. City of White Plains*, 29 A.D.3d at 740, 815 N.Y.S.2d 246; *Cename v. Town of Smithtown*, 303 A.D.2d 351, 352, 755 N.Y.S.2d 651)

nor constructive notice (*see Amabile v. City of Buffalo*, 93 N.Y.2d 471, 475-476, 693 N.Y.S.2d 77, 715 N.E.2d 104) obviate the need to comply with the prior written notice statute” (*McCarthy v. City of White Plains*, 54 A.D.3d 828, *supra*, at 830). Here, there has been no showing of a prior written notice of the alleged defect or dangerous condition, and any work orders generated by the Town of North Hempstead do not meet the statutory requirement of prior written notice.

The plaintiff contends the two recognized exceptions to the prior written notice requirement, to wit the Town of North Hempstead created the alleged defect through an affirmative act of negligence and a “special use” conferred a special benefit upon the Town of North Hempstead. There is no showing of any evidence to indicate an affirmative act of negligence by the Town of North Hempstead creating this alleged defect or dangerous condition. Rather, the plaintiff conceded there was a tree near the sidewalk where the plaintiff fell, and photographs depict a tree near that location. The defense points out the person who made the oral complaint concerning the sidewalk indicated the sidewalk was raised by tree roots. Even assuming the Town of North Hempstead planted the tree in question, such an act, in addition to the failure of the Town of North Hempstead to control the r tree roots, would at most constitute nonfeasance, not affirmative negligence (*see Lowenthal v. Theodore H. Heidrich Realty Corp.*, 304 A.D.2d 725, 759 N.Y.S.2d 497 [2nd Dept., 2003]). Also, the Court of Appeals has held:

We have recognized only two exceptions to prior written notice laws--“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 NY2d 471, 474 [1999] [citations omitted]). Further, “the affirmative negligence exception . . . [is] limited to

work by the City that immediately results in the existence of a dangerous condition” (*Bielecki v City of New York*, 14 AD3d 301 [1st Dept 2005] [emphasis added])

Oboler v. City of New York, 8 N.Y.3d 888, 889-890, 832 N.Y.S.2d 871 [2007].

The Second Department following the *Oboler* precedent holds:

The affirmative negligence exception “is limited to work by the [defendant] that immediately results in the existence of a dangerous condition” (*Oboler v. City of New York*, 8 N.Y.3d 888, 889, 832 N.Y.S.2d 871, 864 N.E.2d 1270; *see Yarborough v. City of New York*, 10 N.Y.3d at 728, 853 N.Y.S.2d 261, 882 N.E.2d 873; *Marshall v. City of New York*, 52 A.D.3d 586, 861 N.Y.S.2d 77; *Bielecki v. City of New York*, 14 A.D.3d 301, 788 N.Y.S.2d 67). Even if a municipality performs negligent pothole repair, where the defect develops over time with environmental wear and tear, the affirmative negligence exception is inapplicable (*see Yarborough v. City of New York*, 10 N.Y.3d at 728, 853 N.Y.S.2d 261, 882 N.E.2d 873)

Diaz v. City of New York, 56 A.D.3d 599, 600-601, 868 N.Y.S.2d 229 [2 Dept., 2008].

So, while there is some evidence here of a prior repair at the alleged accident site, that is insufficient, standing alone, to meet the creation of the defect or dangerous condition exception. With respect to special use, the Second Department holds:

The principle of special use, a narrow exception to the general rule, imposes an obligation on the abutting landowner, where he puts part of a public way to a special use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others” (*Balsam v Delma Eng’g Corp.*, *supra*, at 298; *see also, Granville v City of New York*, 211 AD2d 195, 197; *Curtis v City of New York*, 179 AD2d 432). Special use cases generally involve the installation of an object in the street or on the sidewalk, such as an oil cap or a runway, for the benefit of a private landowner (*see, Balsam v Delma Eng’g Corp.*, *supra*, at 298). “The common thread in each of these cases was an installation 'exclusively for the accommodation of the owner of the premises which he was 'bound to repair in consideration of private advantage “ ' ” (*Balsam v Delma Eng’g Corp.*, *supra*, at 298, *quoting Nickelsburg v City of New York*, 263 App Div 625, 626; *see, Granville v City of New York*, *supra*, at 197). The special use is a use different from the normal intended use of the public way, and thus, “[t]he special use exception is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use” (*Poirier v City of Schenectady*, 85

NY2d 310, 315)
Minott v. City of New York, 230 A.D.2d 719, 720, 645 N.Y.S.2d 879 [2nd Dept., 1996].

Here, there is no evidence presented to indicate the Town of North Hempstead had a special use at the alleged accident site.

Accordingly, the motion is granted.

So ordered.

Dated: **December 9, 2009**

ENTER:



J. S. C.

FINAL DISPOSITION XXX

NON FINAL DISPOSITION

ENTERED

DEC 14 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**