

Warren v County of Nassau

2009 NY Slip Op 33132(U)

December 18, 2009

Supreme Court, Nassau County

Docket Number: 5386/09

Judge: William R. LaMarca

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA
Justice**

MICAH WARREN,

Plaintiff,

-against-

**THE COUNTY OF NASSAU, THE VILLAGE OF
MINEOLA, TOWN OF HEMPSTEAD and NANDA D.
RAMSAROOP,**

Defendant.

**Motion Sequence #1, #2, #3
Submitted October 6, 2009**

INDEX NO: 5386/09

The following papers were read on these motions:

VILLAGE Notice of Motion.....1
COUNTY Notice of Cross-Motion.....2
TOWN Notice of Motion.....3
Plaintiff Affirmation in Opposition.....4
VILLAGE Reply Affirmation.....5
COUNTY Reply Affirmation.....6

Defendant, VILLAGE OF MINEOLA (hereinafter referred to as the "VILLAGE"), moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing the complaint and all cross claims against it, on the ground that the VILLAGE never received prior written notice of the alleged defect. Subsequently, defendant, THE

COUNTY OF NASSAU, cross-moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing the complaint on the ground that the COUNTY does not have jurisdiction over the alleged accident location and never received prior written notice of the alleged defect. Thereafter, defendant, the TOWN OF HEMPSTEAD (hereinafter referred to as the "TOWN"), moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing the complaint and all cross-claims against it on the ground that the subject accident site is not under the jurisdiction of the TOWN, but is, rather, located within the INCORPORATED VILLAGE OF MINEOLA, in the Town of North Hempstead. The plaintiff partially opposes the motions, which are determined as follows:

Initially, the Court notes that plaintiff, MICAH WARREN, has discontinued the action against the TOWN and, therefore, motion sequence #3 is denied as moot. With respect to the remaining motions, the record reflects that this action is to recover damages for personal injuries allegedly sustained by the plaintiff on October 26, 2008, when he tripped and fell on a raised sidewalk flag traversing the sidewalk in front of the premises located at 211 Horton Highway, Mineola, New York. Plaintiff alleges that the VILLAGE and the COUNTY owned, operated, maintained and repaired the sidewalk at the accident site and were negligent, reckless and careless in their ownership, maintenance and control of said public sidewalk where plaintiff fell, and that said defendants had actual and/or constructive and written notice of the dangerous and defective condition at the subject site.

An affidavit of the VILLAGE'S witness, Joseph R. Scalero, the Clerk for the VILLAGE, establishes that he conducted a search of the VILLAGE records which revealed that the VILLAGE was not provided with prior written notice of any defect regarding the sidewalk adjacent to 211 Horton Highway in the VILLAGE OF MINEOLA, prior to October

26, 2008, and that the VILLAGE did not perform construction work or repair work, nor retain any parties to perform such work at the subject location. Counsel for the VILLAGE urges that it cannot be held liable as it never received prior written notice of the alleged defect, and that it has made a *prima facie* showing of entitlement to judgment, as a matter of law, citing *Lowenthal v Theodore H. Heidrich Realy Corp.*, 304 AD2d 724, 759 NYS2d 497 (2nd Dept. 2003); *Eidlis v Village of Kiryas Joel*, 302 AD2d 558, 755 NYS2d 422 (2nd Dept. 2003); *Bigit v Incorporated Village of Freeport*, 253 AD2d 509, 676 NYS2d 871 (2nd Dept. 1998).

As to the COUNTY, the affidavit of John F. Dempsey, a Civil Engineer II with the COUNTY Department of Public Works, establishes that he personally conducted a search of the COUNTY records maintained with respect to jurisdiction of sidewalks, and he confirms that on the date of the accident, October 26, 2008, the subject location was not under the jurisdiction of the COUNTY. Nor did he find any record of prior written notice of the alleged defective condition for five (5) years prior to the accident date. Counsel for the COUNTY asserts that it has no duty to the plaintiff because the municipality did not have jurisdiction over the location of plaintiff's accident, citing *Schulman v Wolff*, 190 AD2d 663, 593 NYS2d 286 (2nd Dept 1993); *Soloman v City of New York*, 66 NY2d 1026, 499 NYS2d 392, 489 NE2d 1294 (C.A. 1985), and urges that the action against the COUNTY be dismissed.

In opposition to the motion, counsel for plaintiff states that the motion is premature because discovery has not been completed, and there exists questions of fact as to who caused or created the dangerous condition at the subject location. It is plaintiff's position

that there was repair of the subject sidewalk that was done in a negligent fashion. Counsel claims that defendant homeowner, NANDA D. RAMSAROOP, in reply to a Notice to Admit, has denied that she performed any repairs to the sidewalk and, therefore, a question of fact exists as to who did the negligent repair. Counsel for plaintiff urges that the motions for summary judgment be denied because discovery may uncover that defendants had written notice of the defect or caused or created the defect.

The summary judgment standards are well settled. The movant must establish the cause of action or defense by submitting evidentiary proof in admissible form “sufficiently to warrant the court as a matter of law in directing judgment” (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980] [citation omitted]). Failure to do so “requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642 [C.A.1985]). When such a showing has been made by the movant, then to defeat summary judgment “the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212, subd [b])” (*Zuckerman v City of New York, supra* at 562). On a summary judgment motion, the evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 834 NYS2d 503, 866 NE2d 448 [C.A.2007]).

Generally, liability for injuries sustained as a result of a dangerous and defective condition on public sidewalks is placed on the municipality and not the abutting landowner. (*Cordova v City of New York*, 22 AD3d 784, 803 NYS2d 698 [2nd Dept. 2005]). Where a municipality has enacted a prior written notice statute, however, it cannot be held liable for

injuries caused by an improperly maintained sidewalk unless it has either received prior written notice of the defect or an exception to the prior written notice requirement applies. (*Gazenmuller v Incorporated Village of Port Jefferson*, 18 AD3d 703, 795 NYS2d 744 [2nd Dept. 2005]). Actual or constructive notice of a defect does not satisfy this requirement. (*Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77, 715 NE2d 104 [C.A. 1999]).

After a careful reading of the submissions herein, the Court credits the analysis of the VILLAGE and finds that the VILLAGE has established its *prima facie* entitlement to judgment as a matter of law by submitting evidence that they had no prior written notice of the sidewalk defect that allegedly caused the plaintiff's fall. (*Augustine v Town of Islip*, 28 AD3d 503, 813 NYS2d 493 [2nd Dept. 2006]; *Filaski-Fitzgerald v Town of Huntington*, 18 AD3d 603, 795 NYS2d 614 [2nd Dept. 2005]). Although an exception to the prior written notice requirement exists when a municipality creates the subject defect through an affirmative act of negligence (*Lopez v G & J Rudolph Inc.*, 20 AD3d 511, 799 NYS2d 254 [2nd Dept. 2005]), the record is devoid of any evidence to support such a theory. Plaintiff has failed to submit any evidence sufficient to raise a triable issue of fact as to whether the VILLAGE affirmatively created the alleged defect. (*Katsoudas v City of New York*, 29 AD3d 740, 815 NYS2d 243 [2nd Dept. 2006]). Mere speculation that something might be uncovered to establish that a municipal defendant created an allegedly defective condition is an insufficient basis for denying the municipality's motion for summary judgment. (*Nahles v County of Nassau*, 180 AD2d 671, 580 NYS2d 58 [2nd Dept. 1992]; *Dabbs v City of Peekskill*, 178 AD2d 577, 577 NYS2d 658 [2nd Dept. 1991]). In light of the above principles, the complaint must be dismissed against the VILLAGE.

As to the COUNTY, the Court finds that it has submitted proof in admissible form which clearly demonstrates that it had no prior jurisdiction over the accident site and no prior written notice of any condition in the area of the alleged accident. The plaintiff fails to address the COUNTY's arguments and, therefore, has failed to raise a triable issue of fact. The Court finds that the COUNTY is entitled to summary judgment and the complaint must be dismissed against the COUNTY. Based on the foregoing, it is hereby

ORDERED, that the TOWN's motion for summary judgment is denied as moot; and it is further

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

ORDERED, that the COUNTY's motion for summary judgment is granted and the complaint against it is dismissed; and it is further

ORDERED, that the caption shall henceforth read as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

MICAH WARREN,

Plaintiff,

-against-

INDEX NO: 5386/09

NANDA D. RAMSAROOP,

Defendant.


and it is further

ORDERED, that counsel for the parties shall appear for a previously scheduled Certification Conference to be held before January 21, 2010 at 9:30 A.M.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: December 18, 2009



WILLIAM R. LaMARCA, J.S.C.

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ENTERED
DEC 23 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE