

Kola v Town of N. Hempstead

2010 NY Slip Op 31002(U)

March 31, 2010

Supreme Court, Nassau County

Docket Number: 5055/08

Judge: F. Dana Winslow

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TOME KOLA and JULIANNA KOLA,

**TRIAL/IAS, PART 5
NASSAU COUNTY**

Plaintiffs,

-against-

**MOTION SEQ. NO.: 001
MOTION DATE: 1/7/10**

**THE TOWN OF NORTH HEMPSTEAD,
THE TOWN OF NORTH HEMPSTEAD
DEPARTMENT OF PARKS AND RECREATION
and KEYSpan ENERGY CORPORATIONS,**

INDEX NO.: 5055/08

Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
Reply Affirmation.....2
Affirmation in Opposition.....3

The motion by defendants Town of North Hempstead and the Town of North Hempstead Department of Parks and Recreation ("Town") for an order granting summary judgment as to the plaintiffs' complaint is **granted** for the reasons set forth herein.

Plaintiff Tome Kola (the "plaintiff") commenced this action for personal injuries allegedly sustained when, he contends, on June 8, 2007, he slipped and fell on a paved area of the park at Town's Bar Beach located at Shore Drive, Port Washington, N.Y. The incident occurred between 8 PM and 9 PM.

Co-plaintiff Julianna Kola has a derivative cause of action as to defendants.

Plaintiff alleges he slipped and fell while fishing on a paved pier-like area. Plaintiff was sitting, waiting for a fish to bite. Plaintiff saw his line move, he got up and fell at the edge of a "hole" in the pier pavement (see Exhibit E, pgs. 16-17 annexed to Town's motion). Town contends it never received prior notice of the

hole or depression in the pier pavement as required to commence an action against Town pursuant to Town Code § 26-1 (see Exhibit I annexed to Town's motion).

Town has offered the affidavit of Thomas Tiernan, the Superintendent of Highways of Town (see Exhibit J annexed to Town's motion). Tiernan states that his office is authorized to accept service of written notice of defects as per Town Code § 26-1. Tiernan states that a search of the records of his office covering a period of five years prior to the incident reveals no such written notice was received as to the alleged defect on Town's fishing pier at the Bar Beach location and no repairs were made by Town at the fishing pier at the location in issue. To the same effect, Town also offered the affidavit of Leslie Gross, Town's Clerk (see Exhibit K annexed to Town's motion).

Plaintiffs contend that in November, 1980, Town had agreed to take over the maintenance, operation, repair and control of the pier formerly owned by LILCO (see Exhibit D, Sub-exhibit A annexed to plaintiffs' affirmation in opposition). Plaintiffs contend Pasquale Catapano, Town's Parks Supervisor, knew of the pavement issue since January, 2006 (see Exhibit F pg. 29 annexed to Town's motion). Plaintiffs also offer the theory that the fishing pier, the area of the injury, is not a highway or a sidewalk and thus not covered by the written notice provision of Town's Code § 26-1.

A municipality owes the public the absolute duty of keeping its highways in a reasonably safe condition (*Friedman v State of New York*, 67 NY2d 271).

General Municipal Law § 50-e(4) permits localities to require prior notice of defective, unsafe, dangerous or obstructed condition at any street, highway, bridge, culvert, sidewalk or cross walk as a condition to the commencement of an action to recover damages (see *Walker v Town of Hempstead*, 84 NY2d 360).

The statute does omit a grant of authority to localities to require a written notice of defect at locations beyond the six (6) specified (see *Kamhi v Town of Yorktown*, 74 NY2d 423). Thus, there is a prohibition of any written notice of defect enactment pertaining to locations beyond the six (6) specified (*Walker v*

[* 3]
Town of Hempstead, supra).

While legislative enactments requiring prior written notification cannot be expansively read (*Doremus v Inc. Village of Lynbrook*, 18 NY2d 362), the rule does not require that the words used be given an artificial, forced or construed meaning (*Stratton v City of Beacon*, 91 AD2d 1018).

When a municipality has enacted a prior written notice statute, neither actual notice nor constructive notice of the defective sidewalk removed the requirement to comply with the prior written notice requirement (*McCarthy v City of White Plains*, 54 AD3d 828). Thus, the fact that Catapano was aware of the alleged problem as noted herein does not negate the requirement for prior notice.

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 (*Brooks v Village of Babylon*, 251 AD2d 526).

As noted, neither actual nor constructive notice of a given defect is sufficient to overcome the requirement of prior written notice (*Caramanica v City of New Rochelle*, 268 AD2d 496).

The plaintiff has failed to argue or demonstrate the applicability of either of the two recognized exception to the prior written notice requirement—that Town created the alleged defect through an affirmative act of negligence or that a “special use” conferred a special benefit upon the Town (*Amabile v City of Buffalo*, 93 NY2d 471; *Lauer v Great South Bay Seafood Co., Ltd.*, 299 AD2d 325).

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*).

An unpaved dirt path was held not to be a “sidewalk” within the meaning of the town’s prior written notice statute (*Iannuzzi v Town of Wallkill*, 54 AD3d 812).

Town’s ordinance requiring prior written notification includes walkways

[* 4]
and footpaths which would include a boardwalk (*Goldstein v City of Long Beach*, 28 AD2d 558).

Bike paths have been included in the definition of “sidewalks” so as to require a plaintiff to plead and prove compliance with the prior written notice requirement (*see Scovill v Town of Amhurst*, 277 AD2d 1038).

A boardwalk over which the public has a general right of passage falls within the meaning of “highway” (*see People v County of Westchester*, 282 NY 224).

The Appellate Division, Second Department, recently recited the fact that it, the Second Department, has long held that a “boardwalk” constitutes a “sidewalk” within the meaning of Gen. Municipal Law § 50-3(4) (*see Guiliano v Town of Brookhaven*, 34 AD3d 734). Therefore, prior written notice of a defect in the boardwalk is required (*Guiliano v Town of Brookhaven, supra*).

A “boardwalk” is generally for pedestrian use and is thus similar in nature to a sidewalk and prior written notice requirements apply (*Ferris v County of Suffolk*, 174 AD2d 70, *app den.* 72 NY2d 808).

An injury on a paved pathway or walkway requires the individual to comply with a prior written notice statute (*see Arias v City of New York*, 284 AD2d 354).

The area where the plaintiff fell based on the photographs submitted (see Exhibit A annexed to Town’s motion) clearly show that the location of the incident fills the same purpose (*Woodson v City of New York*, 93 NY2d 936, 938) as a “pedestrian walk or path” or sidewalk (*see Santiago v City of New York*, 23 Misc3d 1111[A], 2009 WL 1018808).

The structure here could be classified as a promenade. It is an elevated paved path that juts out over a little bit of water that allows pedestrians to walk, sit, fish, observe the water from an elevated and “up close” view. It is not a structure for the docking of vessels. It is an elevated sidewalk near and a little bit above the water to capture sea breezes.

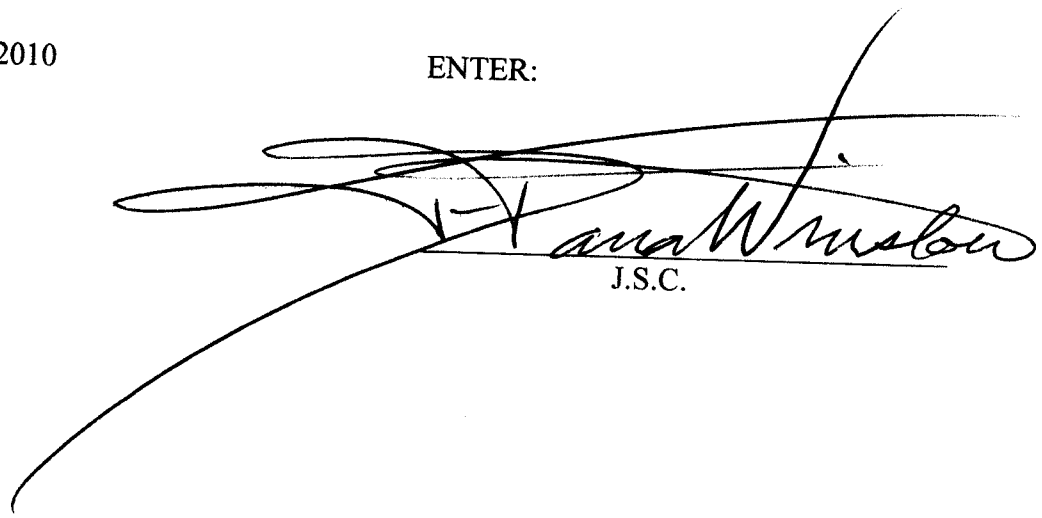
Prior written notice was required herein for the alleged conditions or the

path/boardwalk/pier and none was given.

ORDERED, that the defendant, Town of North Hempstead motion for summary judgment pursuant to CPLR § 3212 is **granted** and the instant matter is dismissed. This Constitutes the Order of the Court.

Dated: March 31, 2010

ENTER:

A large, stylized handwritten signature in black ink, appearing to read 'Hana W. ...', is written over the 'ENTER:' text and extends across the page.

J.S.C.