

Powell v County of Nassau

2010 NY Slip Op 31422(U)

May 24, 2010

Supreme Court, Nassau County

Docket Number: 17131/08

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

PRESTON L. POWELL,

Plaintiff,

- against -

THE COUNTY OF NASSAU and TOWN OF
HEMPSTEAD,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 17131/08
Motion Seq. No.: 01
Motion Date: 04/05/10

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit and Exhibits	1
Affirmation in Opposition	2
Reply Affirmation and Exhibit	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant County of Nassau's (the "County") motion for an order, pursuant to CPLR 3212, granting the County summary judgment dismissing the complaint is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on August 10, 2007.

In the complaint, plaintiff alleges that he was caused to trip and fall due to a defective condition in front of the premises located at 132 Nassau Road, Roosevelt, New York. In his bill of particulars, plaintiff alleges that he tripped and fell over a "metal rod protruding from the sidewalk curb."

The County moves for summary judgment dismissing the complaint on the grounds that it did not receive prior written notice of the defective condition as required by Nassau County

Administrative Code § 12-4.0(e) and none of the exceptions to the written notice statute apply here. In support thereof, the County relies upon the deposition testimony of John Dempsey, a Civil Engineer II, employed by the County Department of Public Works, and an affidavit of Veronica Cox, a County employee assigned to the Claims and Investigation Division in the Office of the Nassau County Attorney.

In opposition, plaintiff does not deny that the County did not have prior written notice of the alleged defect. Instead, plaintiff argues that § 12-4.0(e) of the Nassau County Administrative Code should be construed in accord with Highway Law § 139(2) and tort recovery should be allowed here since the County had constructive notice of the alleged defect.

“Where, as here, a municipality has enacted a prior written notice statute, it may not be subject to liability for personal injuries caused by a defective street or sidewalk condition unless it has received prior written notice of the defect or an exception to the notice requirement applies. *See Despositio v. City of New York*, 55 A.D.3d 659, 866 N.Y.S.2d 248 (2d Dept. 2008); *Sollowen v. Town of Brookhaven*, 43 A.D.3d 816, 841 N.Y.S.2d 351 (2d Dept. 2007); *Katsoudas v. City of New York*, 29 A.D.3d 740, 815 N.Y.S.2d 243 (2d Dept. 2006). *See also Poirier v. City of Schenectady*, 85 N.Y.2d 310, 624 N.Y.S.2d 555 (1995). There are two recognized exceptions to this rule, “namely, 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.” *See Amabile v. City of Buffalo*, 93 N.Y.2d 471, 693 N.Y.S.2d 77 (1999). *See also Lopez v. G & J Randolph Inc.*, 20 A.D.3d 511, 799 N.Y.S.2d 254 (2d Dept. 2005); *Filaski-Fitzgerald v. Town of Huntington*, 18 A.D.3d 603, 795 N.Y.S.2d 614 (2d Dept. 2005).

Nassau County Administrative Code § 12-4. 0(e) provides as follows:

“No civil action shall be maintained against the County for damages or injuries to person or property sustained by reason of any sidewalk, street, highway, parking field, stairway, walkway, ramp, driveway, bridge, culvert, curb or gutter being defective, out of repair, unsafe, dangerous, or obstructed or in consequence of the existence of snow or ice thereon, regardless of whether such facility be one as defined by this title or one constructed pursuant to the provisions of article six of the highway law or one constructed by the State and maintained by the County, unless such sidewalk, street, highway, parking field, stairway, walkway,

ramp, driveway, bridge, culvert, curb or gutter was constructed by the County or by the State or under a permit issued by the County or by the State, and unless written notice of such defective, unsafe, dangerous or obstructed condition of such sidewalk, street, highway, parking field, stairway, walkway, ramp, driveway, bridge, culvert, curb or gutter or the existence of snow or ice thereon was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of or to cause such snow or ice to be removed or to make the place otherwise reasonably safe.”

Under Highway Law § 139(2), “a county can enact a prior written notice statute that provides that it may not be subjected to liability for injuries caused by an improperly maintained highway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies.” *See Napolitano v. Suffolk County Department of Public Works*, 65 A.D.3d 676, 884 N.Y.S.2d 484 (2d Dept. 2009). *See also Gold v. County of Westchester*, 15 A.D.3d 439, 790 N.Y.S.2d 675 (2d Dept. 2005). *See generally Cendales v. City of New York*, 25 A.D.3d 579, 807 N.Y.S.2d 414 (2d Dept. 2006). The statute further provides that “as a matter of law, constructive notice of a highway defect, except in the case of snow and ice, is an exception to any such prior written notice requirement, irrespective of whether or not the local statute provides for such an exception.” *See Moxey v. County of Westchester*, 63 A.D.3d 1124, 883 N.Y.S.2d 80 (2d Dept. 2009); *Phillips v. County of Nassau*, 50 A.D.3d 755, 856 N.Y.S.2d 172 (2d Dept. 2008).

Nassau County Administrative Code § 12.4.0(e) should be construed in accord with Highway Law § 139(2), which allows for tort recovery based on constructive notice where written notice is lacking. *See Phillips v. County of Nassau, supra*. Thus, “liability may be imposed upon a county, even in the absence of prior written notice, for dangerous *highway conditions* of which the county had constructive notice” (emphasis added). *See id.; Moxey v. County of Westchester, supra*.

Highway Law § 139(2) makes no express reference to “sidewalks.” “The Legislature could have specifically included sidewalks within the classes for which the constructive notice requirement was applicable. It did not.” *See Zash v. County of Nassau*, 171 A.D.2d 743, 567 N.Y.S.2d 299 (2d Dept. 1991). Accordingly, Nassau County Administrative Code §12-4.0(e)

governs the instant matter as plaintiff claims he fell as a result of a defect in the sidewalk. *See Zash v. County of Nassau, supra; Shapiro v. County of Nassau*, 26 Misc.3d 1238(A) (N.Y. Sup. 2010).

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See CPLR § 3212 (b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).


On this record, the County has made a *prima facie* showing of entitlement to summary judgment by demonstrating that the County did not receive prior written notice of the alleged

defect on the sidewalk. Plaintiff, in opposition, has failed to raise a triable issue of fact warranting the denial of this summary judgment motion.

In view of the foregoing, defendant County's motion, pursuant to CPLR § 3212, for an order granting summary judgment and dismissing plaintiff's complaint against it is hereby granted.

This constitutes the decision and order of this Court.

ENTER:



DENISE L. SHER
A.J.S.C.

Dated: Mineola, New York
May 24, 2010

ENTERED
JUN 02 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE