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SHORT FORM ORDER

INDEX No. 07-17904
CAL. No. 09-02615-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 28 - SUFFOLK COUNTY

PRESENT:

Hon. MARK D. COHEN
Justice of the Supreme Court

MOTION DATE 5-18-10
ADJOURN DATE 6-1-10
Mot. Seq. # 004 - MG; CASEDISP

PATRICIA M. SPOHN-KONEN,

Plaintiff,

- against -

TOWN OF BROOKHAVEN,

Defendant.

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Upon the following papers numbered 1 to 22 read on this motion to vacate prior order ; Notice of Motion/ Order to Show Cause and supporting papers (004) 1 - 17; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 18-22 ; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (004) by the plaintiff, Patricia M. Spohn-Konen, for an order vacating the prior decision and order of this court dated April 7, 2010 (Cohen, J,) is granted, and upon consideration of the submissions on the prior motion (003) pursuant to CPLR 3212 for summary judgment dismissing the complaint, and the plaintiff's opposing papers, summary judgment is granted to the defendant Town of Brookhaven and the complaint is dismissed with prejudice.

Counsel for the plaintiff affirms that on February 5, 2010, the Town of Brookhaven filed a motion for summary judgment and the parties agreed to an initial adjournment of that motion until April 6, 2010. On March 23, 2010, the plaintiff filed an Order to Show Cause staying all further proceedings in this action, including the Town of Brookhaven's motion for summary judgment pending resolution of an appeal relating to a prior order dated October 22, 2009. On April 8, 2010, the Appellate Division, Second Department, denied the plaintiff's application for the stay. Counsel for the plaintiff affirms that his office inadvertently failed to provide this Court with a copy of the Order to Show Cause or to request further adjournment of the pending motion for summary judgment (motion #003), and thus the motion for summary judgment was determined by order dated April 7, 2010 without opposition being submitted. Counsel for the plaintiff now seeks to vacate the prior decision and order of April on the basis of law office failure and a meritorious cause of action.

A motion to open a default requires (1) an excuse for the default and (2) a meritorious cause of action (***Dominquez v Carioscia et al,*** 1 AD3d 396, 766 NYS2d 685 [2nd Dept 2003]). Counsel for the plaintiff asserts law office failure as an excuse for the default and offers the plaintiff's verified complaint as and for demonstrating a meritorious cause of action.

Accordingly, in the interests of justice, the prior decision and order of this court dated April 7, 2010 is vacated and the prior motion papers and the plaintiff's submissions and opposing papers are now considered for summary judgment.

This action arises out of a trip and fall incident which occurred on April 6, 2006 on the sidewalk located adjacent to Neighborhood Road approximately 100 feet east of Diana Drive, Mastic Beach, Town of Brookhaven, County of Suffolk, State of New York, when the plaintiff, Patricia Spohn-Konen was caused to trip and fall over the broken, jagged remains of a metal sign post which measured approximately 2.5 inches in height by 3.5 inches in width by 2 inches in depth, located in the sidewalk. It is claimed, inter alia, that the defendant Town of Brookhaven negligently maintained, inspected, operated and controlled the sidewalk and that the Town of Brookhaven had actual and constructive notice of the defect and failed to warn of the same.

In motion (003), the defendant Town of Brookhaven (Brookhaven) seeks summary judgment dismissing the complaint on the basis that it had no prior written notice of the defective condition pursuant to section 84-1 of the Code of the Town of Brookhaven which requires prior written notice to the Town before an action may be commenced. The Town of Brookhaven further contends that it did not create the defect complained of. In support of this motion, the defendant has submitted, and the plaintiff resubmits, inter alia, an attorney's affirmation; copies of the summons and complaint and answer, and plaintiff's bill of particulars; and copies of the examinations before trial of Patricia Spohn-Konen dated December 12, 2007 and Kenneth Davis on behalf of the Town of Brookhaven dated April 16, 2008; and the affidavits of Suzanne Mauro and Linda Sullivan.

In opposing this motion, the plaintiff submits, inter alia, a copy of the Order to Show Cause; an attorney's affirmation; a copy of the prior motion (003); a copy of the prior order dated April 7, 2010 (Cohen, J.); a partial, unsigned copy of the transcript of Kenneth Davis from the Town of Brookhaven; copies of photographs; letter dated March 19, 2008 from Robert W. Shinnick, Director Transportation Operation, Suffolk County Department of Public Works with annexed pages; and two pages of the deposition transcript of Patricia M. Spohn-Konen.

Where, as here, a municipality has enacted a prior written notice statute pursuant to Town Law section 65-a, it may not be subjected to liability for personal injuries caused by an improperly maintained roadway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (***Wilkie v Town of Huntington***, 816 NYS2d 148, 29 AD3d 898 [2nd Dept 2006], citing to ***Amabile v City of Buffalo,*** 93 NY2d 471, 474, 693 NYS2d 77 [1999]; ***Lopez v G&J Rudolph***, 20 AD3d 511, 512, 799 NYS2d 254 [2nd Dept 2005]; ***Gazenmuller v Incorporated Vil. of Port Jefferson,*** 18 AD3d 703, 704, 795 NYS2d 744 [2nd Dept 2005]). Actual or constructive notice of a defect does not satisfy this requirement (***Wilkie v Town of Huntington,*** supra). Town Law section 65-a (2) provides in pertinent part that "No civil action shall be maintained against any town or town superintendent of highways for damages or injuries to person or property sustained by reason of any defect in its sidewalks..., unless such sidewalks have been constructed or are maintained by the town or the superintendent of highways of the town pursuant to statute, nor shall any action be maintained for damages or injuries to person or property sustained by reason of such defect..., unless written notice thereof, specifying the particular place, was actually given to the town clerk or to the town superintendent of highways, and there was a failure or neglect to cause such defect to be remedied..., or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice."

In order to establish a prima facie case of negligence, a plaintiff has to demonstrate either that the defendants created the dangerous or defective condition which caused the accident, or that they have actual or constructive notice of the condition (***Dima v Breslin Realty, Inc.***, 240 AD2d 359, 658 NYS2d 115 [2nd Dept 1997]). While, to prove a prima facie case of negligence in a slip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see,* ***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [2nd Dept 1995]), the defendant, on a motion for summary judgment dismissing the complaint, is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (*see*, ***Kucera v Waldbaums Supermarkets***, 304 AD2d 531, 758 NYS2d 133 [2nd Dept 2003]; ***Dwoskin v Burger King Corp.***, 249 AD2d 358, 671 NYS2d 494 [2nd Dept 1998]).

Liability can be predicated only upon failure of the defendant to remedy the danger after actual or constructive notice of the condition (***Piacquadio v Recine Realty Corp.*** 84 NY2d 967, 622 NYS2d 493 [1994]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it (*see*, ***Stumacher v Waldbaum, Inc.***, 274 AD2d 572, 716 NYS2d 573 [2nd Dept 2000]; ***Moons v Wade Lupe Construction Company, Inc.*** 24 AD3d 1005, 805 NYS2d 204 [3rd Dept 2005]).

Patricia Spohn-Konen testified at her examination before trial to the effect that she has been disabled since 1986 due to a back injury which caused her to experience difficulty walking. She also had problems with her neck. On the date of the accident, described as a nice, sunny day, she had walked from her home at Diana Drive to the Handy Pantry located on the corner of Neighborhood Road and Cranberry Drive. She did some shopping and after leaving Handy Pantry was walking back to Diana Drive on a cement sidewalk adjacent to Neighborhood Road. Her friend, Katherine, who was walking with her, was walking on Neighborhood Road pushing the shopping cart. While the plaintiff was still on the sidewalk on Neighborhood Road, Katherine asked the plaintiff to push the shopping cart, so the plaintiff started to cross into the street to her right looking at her friend as she was talking to her. There was a brick area between the sidewalk and the road she was walking towards. As she was stepping from the sidewalk to cross over the brick area, a metal piece caught her sneaker and she fell. At no time prior to turning to walk toward her friend did she observe the surface of the area she was about to walk onto and she did not know what she tripped on as she was falling. Upon being shown some photographs, she indicated that she fell in the area between a planter and a tree, and identified a protrusion upon which she states she fell. She stated that she first observed the metal protrusion after she fell when she stood up and was leaning against the tree. She described the protrusion as being a gray color from a metal sign. She further stated that about four years prior someone had cut the signs down when Mastic Beach was being re-done, but she did not know who was involved with the signs.

Kenneth Davis testified to the effect that he has been employed by the Town of Brookhaven for thirty-two years and is currently the highway maintenance crew leader and is responsible for maintaining all signs and pavement markings in the Town of Brookhaven. He testified that he went to the site of the accident on Neighborhood Road and physically looked at the sign and determined that the post that was stuck in the ground did not belong to the Town of Brookhaven and believed it was a bus stop sign belonging to Suffolk Transit. He stated that when the Town of Brookhaven installs their rails or sign posts, the posts are one piece, twelve feet long, and are bound in the ground. He further testified that Suffolk Transit uses a system called the Franklin Rail wherein a short, three-foot post is driven down into the ground, and then another section is bolted onto it so it would then be about seven feet high. He identified the post that was in the ground as being a short, three-foot base with a section broken off leaving an irregular break between the two wings on the post. The area to the right was not broken, so this post, he opines, must have been the shorter, three-foot post which is not used by the Town of Brookhaven. He did not know, however, if there was a "process" which Suffolk Transit had to complete to install the signs and did not know if Suffolk Transit needed a permit from the Town of Brookhaven to install a sign. He was unable to determine from looking at the photographs whether or not there had been a bus stop at the site. He further testified that when the Town of Brookhaven installs a sign, a work order would have been made for the installation of the sign as well as a maintenance order to maintain the sign. He made a search of the work, maintenance and work orders and found no order of any kind for the area of the accident.

Suzanne Mauro set forth in her affidavit that she is a principal clerk with the Town of Brookhaven and conducted a search for three years prior to April 6, 2006 of all records maintained by the Town of Brookhaven Highway Department concerning the sidewalk area at or near Neighborhood Road and Diana Drive, Mastic Beach, and that no prior written notice of any road defect at the location of the accident was given to the Town of Brookhaven.

In her affidavit, Linda Sullivan avers that she is employed by the Town of Brookhaven with the Town Clerk's Office as a clerk typist and her duties include the logging of litigation pleadings, which includes Notices of Claim and Summons and Complaints received by the Town Clerk's Office. She avers she made a diligent search of the index record book and files maintained by the Town Clerk of the Town of Brookhaven for three years prior to April 6, 2006 in regards to the location of Neighborhood Road and Diana Drive, Mastic Beach, New York and the search did not reveal any written complaints made to the Town of Brookhaven for the location.

Based upon the foregoing, it is determined that the defendant Town of Brookhaven has demonstrated prima facie entitlement to summary judgment dismissing the complaint on the basis it received no prior notice of the condition complained of herein, and that the broken post was not a post installed by the Town of Brookhaven, but was, instead, installed by Suffolk Transit. As set forth in ***Sollowen v Town of Brookhaven,*** 43 AD3d 816, 841 NYS2d 351 (2nd Dept 2007), the "Town may not be held liable for an allegedly defective condition in a sidewalk unless it received prior written notice of the condition.... Since there was no prior written notice of any defect in the sidewalk where the plaintiff fell, the plaintiff's claim must be dismissed [citations omitted], unless the plaintiff is able to demonstrate that the Town created the alleged defective condition."

In opposing this motion, the plaintiff argues the sign post constituted an obstruction under Article 84-1 of the Town Code and that the Town of Brookhaven relies on Article 84-1 in requiring that either the Town Clerk or the Town Superintendent of Highways must receive prior written notice of the complained of defect before a civil action may be maintained against it. Counsel argues that the sworn affidavit of Suzanne Mauro, the Town's principal clerk, is deficient as it states that she searched the records maintained by the Town's Highway Department. He argues that she never searched the Town Clerk's records for prior written notice and did not search all records rather than just for a three year period prior to the date of loss.

It is noted, however, that Linda Sullivan has searched the records of the Town of Brookhaven for three years prior to April 6, 2006 and the search did not reveal any written complaints made to the Town of Brookhaven about the location and the complained of defect.

Counsel for the plaintiff also argues that there are triable issues of fact as to whether the Town owned the truncated sign or created the complained of defect. Counsel states Mr. Davis testified that the sign rail stump at issue "was not one of ours," in making his argument, but submits no evidentiary submissions to raise a triable issue of fact in response thereto. The submission referred to as Exhibit M is not in admissible form as the plaintiff cannot certify records from the County of Suffolk. The letter from Robert W. Shinnick sets forth "please find our records which describe the bus stop locations along with a graphic depiction of the installed bus stop signs you requested for Neighborhood Road." However, this submission does not provide any evidence controverting or denying lack of written notice of the claimed defect or evidentiary proof that the Town of Brookhaven caused or created the condition or that the post was owned by the Town of Brookhaven.

Counsel further asserts that the plaintiff testified that she recalled the Town cutting down signs and installed new "no parking signs" when they were redoing Mastic Beach approximately four years before. However, the plaintiff clearly set forth in her testimony that about four years prior someone had cut the signs down when Mastic Beach was being re-done, but she did not know who was involved with the signs. Therefore, counsel's assertions are without basis as the plaintiff had no knowledge as to who cut the posts and no evidentiary submissions have been provided to demonstrate that the Town of Brookhaven owned the posts or caused or created the condition complained of.

In the absence of any evidentiary submissions to raise a factual issue, and only the assertions by counsel for the plaintiff, who is not a party with knowledge, it is determined that plaintiff has failed to raise a factual issue to preclude summary judgment in this matter. Mere speculation and unsubstantiated allegations are not sufficient to raise a factual issue to defeat a motion for summary judgment (***Krich v Wall Industries,*** 118 AD2d 627, 499 NYS2d 779 [2nd Dept 1986; ***Campbell v Tiberi, et al,*** 23 Misc3d 1107A, 885 NYS2d 710 [Supreme Court of New York, Richmond County 2009]).

Accordingly, summary judgment is granted and the complaint is dismissed with prejudice.

Dated: June 11, 2010

J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION