

Dooling v Town of Babylon

2010 NY Slip Op 31621(U)

July 1, 2010

Supreme Court, Suffolk County

Docket Number: 06-26087

Judge: Jeffrey Arlen Spinner

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This opinion is uncorrected and not selected for official
publication.

ORDERED that the motion (# 004) by defendant East Farmingdale Water District pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint is granted, and it is further

ORDERED that the cross motion (# 005) by the defendant Town of Babylon pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint is granted, and it is further

ORDERED that the unopposed cross motion (# 006) by defendant Long Island Power Authority pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint and all cross claims against it, is granted., and it is further

ORDERED that this motion (# 007) by defendant East Farmingdale Water District pursuant to CPLR 3213(b) for an order permitting it to withdraw admissions of fact is granted.

This is an action sounding in negligence to recover damages for personal injuries sustained by plaintiff on September 21, 2005, when she tripped and fell in the roadway at the intersection of Walnut Avenue East with North Crescent Drive, in the Hamlet of Farmingdale, Town of Babylon, New York. Plaintiff alleges she was caused to fall due to uneven pavement on the roadway, and that the roadway was owned by the Town of Babylon. In her Verified Bill of Particulars she claims that she was caused to fall “due to a large area of patchwork asphalt” on the roadway.

At her deposition, the plaintiff testified that on the date of her accident she was going for a walk, pushing a double stroller. She stopped at her sister-in-law’s house, left the stroller on the sidewalk, and went to the front door. While she was on the front stoop speaking with her sister-in-law, the sister-in-law’s dog ran out of the house and into the street to chase a dog being walked by a neighbor. Her sister-in-law asked the plaintiff to retrieve her dog and the plaintiff walked into the subject intersection. She grabbed the dog by the collar and directed it towards her sister-in-law’s house. After letting go of the dog, she walked “two to five feet” and “stepped down,” and “tumbled.” The plaintiff further testified that she knows that the ground where she fell was uneven “because when I stepped I lost footing,” and that she “believes” that she stepped in that dip in the pavement. After she fell, she noticed a patch in the roadway approximately two to five feet long and two to three feet wide. She stated that she never saw the condition in the roadway prior to her accident and that she drove through, or walked by, the subject intersection two to four times per day prior to her accident. She also indicated that, during the four years that she lived in the neighborhood prior to her accident, she saw one occasion when some work was done at the intersection, but that she did not know who did the work, or when it was done.

George Vielson (Vielson), Superintendent of the defendant East Farmingdale Water District (East Farmingdale), was deposed on June 12, 2008. He testified that he oversees the entire water district and that the subject intersection is within the district’s jurisdiction. He indicated that he personally checked East Farmingdale’s business records, and that he could find no record of the district’s doing any work, or subcontracting for any work, at that location. Vielson further testified that he would have been personally involved in overseeing any work done by East Farmingdale at the intersection, or he would have personally inspected any work done by a subcontractor at the location, and that he did not know how the road patch was created. He stated that he recalled being told by the Town of Babylon, prior to September 21, 2005, that the intersection was being “resurfaced.” He further stated that the water main in the area runs parallel to the curb on Walnut Avenue East, with service to individual homes by copper piping which

runs under the roadway, and that the water main was not near the asphalt patch. From his visits to the intersection and his experience with the water distribution system, he indicated that the copper piping in the area was approximately 50 feet from the accident location. He also stated that the copper piping could have been re-routed when a sewer system was installed in the area in the 1970's, and that East Farmingdale does not maintain any records regarding the new routes of the copper piping.

The defendant East Farmingdale Water District now moves for summary judgment on the grounds that it does not owe a duty to the plaintiff, and that the action is without merit as the plaintiff has failed to establish a prima facie case of negligence. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [1991]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]; *Rebecchi v Whitmore, supra*).

It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Engelhart v County of Orange*, 16 AD3d 369, 790 NYS2d 704 [2005]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see Ruffino v New York City Tr. Auth.*, 55 AD3d 817, 865 NYS2d 667 [2008]; *Dugue v 1818 Newkirk Mgt. Corp.*, 301 AD2d 561, 756 NYS2d 51 [2003]; *Millman v Citibank, N.A.*, 216 AD2d 278, 627 NYS2d 451 [1995]; *see also, Butler v Rafferty*, 100 NY2d 265, 762 NYS2d 567 [2003]). Where these elements are not present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property (*Ruffino v New York City Tr. Auth., supra; Noia v Maselli*, 45 AD3d 746, 846 NYS2d 326 [2007]; *Minott v City of New York*, 230 AD2d 719, 645 NYS2d 879 [1996]). The plaintiff has failed to submit any evidence that East Farmingdale is the owner of the subject premises, or that it occupies, controls, or makes special use of the premises.

In addition, East Farmingdale has demonstrated its entitlement to summary judgment by demonstrating that it neither retained control of the area where the accident occurred, nor launched a force or instrument of harm by exacerbating an existing dangerous condition (*see, Espinal v Melville Snow Contrs., supra; Killeen v Our Lady of Mercy Med. Ctr.*, 35 AD3d 205, 827 NYS2d 19 [2006]; *Manning v Americold Logistics, LLC*, 33 AD3d 427, 822 NYS2d 279 [2006]; *John v Tishman Constr. Corp. Of N.Y.*, 32 AD3d 458, 819 NYS2d 475 [2006]). Here the evidence indicates that East Farmingdale did not have notice of the alleged defect, did not excavate or repave the area where the plaintiff fell and did not assume control of the area in such a way to displace the owner's duty to maintain its property. The plaintiff's assertion that East Farmingdale either had notice of the condition or created/exacerbated the

condition because it might have excavated in the area of the accident is conclusory and speculative (*see, Manning v Americold Logistics, LLC, supra; John v Tishman Constr. Corp. Of N.Y., supra*).

The defendant has established its prima facie entitlement to summary judgment and it was incumbent upon the plaintiff to produce evidence in admissible form sufficient to require a trial of the material issues of fact (*Rebecchi v Whitmore, supra; Roth v Barreto, supra; O'Neill v Fishkill, supra*). The plaintiff has failed to submit any evidence that East Farmingdale had notice of the condition, created the condition, or exacerbated the condition.

Despite the Court's findings herein, it remains the fact that East Farmingdale previously admitted to performing work at the intersection in its response to the plaintiff's Notice to Admit dated July 24, 2007. The relevant admissions were made in response to the two items set forth herein:

6. That on September 21, 2005, or prior thereto, the East Farmingdale Water District, its agents, servants, or employees, performed work at the intersection of Walnut Avenue East and North Crescent Drive, in Farmingdale.
7. That on September 21, 2005, or prior thereto, the East Farmingdale Water District, its agents, servants, or employees, performed work under the ground at the intersection of Walnut Avenue East and North Crescent Drive, in Farmingdale.

However, in addition to its motion for summary judgment, East Farmingdale has moved pursuant to CPLR 3123 (b) for an order permitting it to withdraw the admissions of fact made in its Response to Notice to Admit dated August 6, 2007. The attorney for East Farmingdale has submitted his affirmation stating that "the admissions I made were not accurate and do not correctly set forth the facts ..." He points out that prior to the service of his Response to Notice to Admit, East Farmingdale's Superintendent, Vielson, had submitted an affidavit in support of an earlier motion, which the plaintiff opposed, wherein Vielson swore that East Farmingdale "did not perform any asphalt or repair of the subject intersection." He also points out that Vielson was deposed on June 1, 2008, to like effect. The attorney goes on to affirm that the admissions were inadvertent, that they were made prior to a sufficient examination of the records or witnesses, and that they were made without the intent to deceive or otherwise misstate the facts. He states that he had forgotten that the admissions were made until he was reminded by the plaintiff's opposition to his client's current motion for summary judgment. He contends that the plaintiff has not been prejudiced by the allegedly erroneous admissions because Vielson's affidavit and his deposition, which was held after the admissions were made, clearly contradict those admissions.

CPLR 3123(b) provides, in part, that "Any admission made, or deemed to be made ... is for the purpose of the pending action only ... and the court, at any time, may allow a party to amend or withdraw any admission on such terms as may be just." It has been held that the movant must establish that the notice or answers were improper or that the admission was inadvertent and contrary to the party's pleadings (*Webb v Tire and Brake Distributor, Inc.*, 13 AD3d 835, 786 NYS2d 636 [2004]; *Riner v Texaco, Inc.*, 222 AD2d 571, 635 NYS2d 658 [1995]; *Langdon v WEN Management Company*, 147 AD2d 450, 537 NYS2d 603 [1989]). Courts have exercised their discretion to deem answers improper where the attorney admitted certain facts but the party's affidavit unequivocally denied the admissions

(*Webb v Tire and Brake Distributor, Inc., supra*). In addition, when there is an inadvertent error and the admission is at the heart of the controversy and contrary to a party's pleadings, courts have permitted the withdrawal of an admission in the interest of justice (see, *Riner v Texaco, Inc., supra; Cazenovia Coll. v Patterson*, 45 AD2d 501, 360 NYS2d 84 [1974]). A review of the pleadings herein reveals that East Farmingdale denied any allegation that it created the alleged defective condition in this action.

In opposition to East Farmingdale's motion to withdraw its admissions, the plaintiff submits the affirmation of her attorney who contends that the plaintiff would be prejudiced thereby. He points out that a note of issue has been filed in this action and that discovery is now foreclosed. However, the record reveals that the plaintiff commenced this action against five putative defendants and that she had the opportunity to conduct discovery as she saw fit. In addition, the attorney's affirmation fails to set forth the specific prejudice to the plaintiff, how additional discovery would eliminate the alleged prejudice, or what facts additional discovery might yield in enabling the plaintiff to maintain her action. Accordingly, East Farmingdale's motion seeking to withdraw its admissions to items number six and seven of the Notice to Admit dated July 24, 2007, is granted.

Based on the Court's finding herein, East Farmingdale's motion for summary judgment dismissing the complaint against it is granted.

The defendant Town of Babylon (Town) has cross-moved for summary judgment on the ground that it cannot be held liable unless the plaintiff establishes that the Town received prior written notice of the alleged defective condition. The Town's Answer pleads, as its Fourth Affirmative Defense, Town Law § 65-a, and as its Fifth Affirmative Defense, Town of Babylon Code § 158-1. The latter statute provides that "no civil action shall be maintained against the Town ... unless written notice of such defective, unsafe dangerous or obstructed condition ... was actually given to the Town Clerk or the Commissioner of the Department of Public Works of the Town." In essence, Town Law § 65-a provides for the same procedure before a municipality can be found liable for a defective condition.

Where, as here, a municipality has enacted a prior written notice statute pursuant to Town Law, Article 65, 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 [2006], citing *Amabile v City of Buffalo*, 93 NY2d 471, 474, 693 NYS2d 77; *Lopez v G&J Rudolph*, 20 AD3d 511, 512, 799 NYS2d 254 [2005]; *Gazemuller v Incorporated Vil. of Port Jefferson*, 18 AD3d 703, 704, 795 NYS2d 744[2005]). Actual or constructive notice of a defect does not satisfy this requirement (*Wilkie v Town of Huntington, supra*).

In support of its cross motion, the Town has submitted an affidavit from Jennifer Taus, who is employed as a clerk typist in the Babylon Town Clerk's office. She swears therein that the Town Clerk is responsible for keeping records of all written notices of defects received by the Town, that she conducted a search of the records for written notices regarding the alleged location of this occurrence, and that the records contain no prior written notice(s) regarding the asphalt patchwork at the relevant intersection.

In addition, the Town has submitted an affidavit from Philip A. Berdolt, the Commissioner of the Department of Public Works for the Town. He swears therein that his office is responsible, pursuant to

the law, for keeping records of all written notices of defects received, that in his official capacity he caused a search of the records for written notices regarding the alleged condition at the alleged location of this occurrence, and that the records contain no prior written notice(s) regarding the alleged defective condition at the location prior to September 21, 2005.

The Town has established its prima facie entitlement to summary judgment regarding liability in this action. Therefore, it is the plaintiff's burden to demonstrate that there are material issues of fact. However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]; *Rebecchi v Whitmore, supra*). In opposition to the Town's cross motion, the plaintiff submits the affirmation of her attorney which contends that Town of Babylon Code § 158-1 must be construed in light of the requirements set forth in Town Law § 65-a, which permits a plaintiff to maintain a cause of action against a town based on constructive notice. However, it has been held that a town may enact a local law which contains a more restrictive notice provision than Town Law 65-a, and which exclusively requires written notice (*Bacon v Arden*, 244 AD2d 940, 665 NYS2d 154 [1997]; *Wilkie v Town of Huntington, supra*). Accordingly, the Town's cross motion for summary judgment is granted.

Irrespective of the Court's findings above, the Court finds that the plaintiff's causes of action against East Farmingdale and the Town should be dismissed for her failure to establish liability against the defendants. The Court finds that the defendants established their prima facie entitlement to summary judgment as a matter of law by making evident that the plaintiff is unable to identify the cause of her fall (*see Arbusto v Amerada Hess Corp.*, 16 AD3d 527, 790 NYS2d 892 [2005]; *Garvin v Rosenberg*, 204 AD2d 388, 614 NYS2d 190 [1994]). The plaintiff, in opposition, failed to raise a triable issue of fact as to proximate cause. Although the plaintiff attempted to establish that there was a difference in height, or a "dip" as she stated in her testimony, she could not identify the actual cause of her fall. Mere speculation about causation is not adequate to sustain a cause of action (*Acunia v New York City Bd. of Educ.*, 68 AD3d 631, 891 NYS2d 70 [2009]; *Acevedo v York Intl. Corp.*, 31 AD3d 255, 818 NYS2d 83 [2006]). In addition, where a height differential constitutes an open and obvious condition, readily observable by the reasonable use of one's senses, which is not inherently dangerous, the landowner owes no duty to protect or to warn of such conditions (*see Ramos v Cooper Investors, Inc.*, 49 AD3d 623, 854 NYS2d 149 [2008]; *Meagher-Cox v Winarski*, 32 AD3d 379, 820 NYS2d 98 [2006]; *Pirie v Krasinski*, 18 AD3d 848, 796 NYS2d 671 [2005]).

The defendant Long Island Power Authority (LIPA) has cross-moved for summary judgment on the grounds that it cannot be held liable as it does not own, control or maintain the location where the plaintiff alleges that she fell. As set forth above, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*Ruffino v New York City Tr. Auth., supra*; *Dugue v 1818 Newkirk Mgt. Corp., supra*; *Millman v Citibank, N.A., supra*; *Butler v Rafferty, supra*). The plaintiff has not alleged that LIPA is the owner of the property where this occurrence allegedly took place, or that it occupied, controlled or made special use of the property. Therefore, it can only be found liable if it created the allegedly defective condition herein.

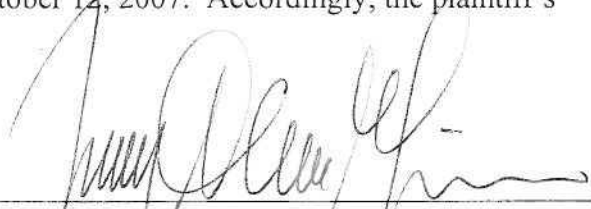
In support of its cross motion, LIPA has submitted the affidavit of James Luckie, who is employed as a Senior Supervisor with National Grid Electric Services. He swears therein that, based on his

employment, he is fully familiar with the location of LIPA facilities and the records maintained by LIPA. He further states that he personally conducted a site inspection of the location of the alleged defective condition, that LIPA does not maintain any underground facilities at the location, that he has reviewed photos of the site, that he conducted a map search of the site, and that he has searched LIPA's records for any excavations performed by LIPA at the site. Based on the foregoing, he states definitively that LIPA did not create the alleged defective condition which caused the plaintiff's alleged injuries.

LIPA has established its prima facie entitlement to summary judgment regarding liability in this action and its cross motion is unopposed. Accordingly, the cross motion is granted.

The Court's computer reveals that a stipulation of discontinuance in favor of the defendant Suffolk County Water Authority was filed with the Court on October 12, 2007. Accordingly, the plaintiff's complaint is dismissed in its entirety.

Dated: JUL 01 2010



J.S.C.
HON. JEFFREY ARLEN SPINNER

X FINAL DISPOSITION _____ NON-FINAL DISPOSITION