

**Froman v Ford Coyle Props., Inc.**

2010 NY Slip Op 31960(U)

July 15, 2010

Supreme Court, Nassau County

Docket Number: 1948/09

Judge: Roy S. Mahon

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.

SCA

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON  
Justice

JUDITH FROMAN,

TRIAL/IAS PART 7

Plaintiff(s),

INDEX NO. 19480/09

- against -

MOTION SEQUENCE  
NO. 2 & 3 & 4 & 5 & 6

FORD COYLE PROPERTIES, INC., COUNTY OF  
NASSAU, INCORPORATED VILLAGE OF EAST  
ROCKAWAY and TOWN OF HEMPSTEAD,

MOTION SUBMISSION  
DATE: June 8, 2010

Defendant(s).

The following papers read on this motion:

- Notice of Motion X
- Notice of Cross Motion XXXX
- Affidavit XX
- Affirmation X
- Reply Affirmation X
- Affirmation in Opposition X
- Affirmation in Reply XXX

This motion by the defendant County of Nassau for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint against it, is granted.

This cross-motion by the defendant Ford Coyle Properties, Inc., for an order pursuant to CPLR 3126, 3042(c), (d) striking the plaintiff's complaint and co-defendants' Answers and precluding them from introducing evidence at trial or, in the alternative, an order pursuant to CPLR 3124 compelling those parties to provide outstanding discovery, is denied as moot.

This cross-motion by the defendant Incorporated Village of East Rockaway ("Village") for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint against it, is granted.

This cross-motion by the defendant Ford Coyle Properties, Inc., for an order pursuant to CPLR 3126, 3212 granting it summary judgment dismissing the plaintiff's complaint and any and all cross-claims against it, is denied.

[\* 2]

This cross-motion by the defendant Town of Hempstead for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint against it, is **granted**.

The plaintiff in this action seeks to recover damages for personal injuries she sustained on October 8, 2008 when she tripped and fell on a raised concrete flag in the sidewalk in front of Alfredo's Tailoring Dry Cleaner at 459 Atlantic Avenue in East Rockaway. She has advanced claims against the adjacent property owner Ford Coyle Properties as well as the County of Nassau, the Town of Hempstead and the Incorporated Village of East Rockaway. The defendant Ford Coyle Properties has cross-claimed against all of the other defendants. All of the defendants presently seek summary judgment dismissing the complaint against them.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd, as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990). "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 . . . In the absence of duty, there is no breach and without a breach there is no liability.'" Dugue v 1818 Newkirk Management Corp., 301 AD2d 561, 562 (2<sup>nd</sup> Dept. 2003) quoting Pulka v Edelman, 40 NY2d 781, 782 (1976). "Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk is placed on the municipality, and not on the owner of the abutting land." James v Blackman, 58 AD3d 808 (2<sup>nd</sup> Dept. 2009), citing Hausser v Giunta, 88 NY2d 449, 452-453 (1996). "However, liability may be imposed on the abutting landowner where the landowner either affirmatively created the dangerous condition, voluntarily but negligently made repairs to the sidewalk, created the dangerous condition through a special use of the sidewalk, or violated a statute or ordinance expressly imposing liability on the abutting landowner for a failure to maintain the sidewalk." James v Blackman, supra, at p. 808; citing Ellman v Village of Rhinebeck, 41 AD3d 635, 637 (2007), lv den., 9 NY3d 812 (2007); see also, Smirnova v City of New York, 64 AD3d 641 (2<sup>nd</sup> Dept. 2009); Sverdlin v Gruber, 289 AD2d 475, 476 (2<sup>nd</sup> Dept. 2001).

Furthermore "[a] prior written notice law adopted by a municipality bars a claim for personal injury caused by a defect in a sidewalk, or other specifically designated area [absent compliance therewith] unless the claimant can establish that the municipality created the defect in question through an affirmative act of negligence." Galante v Village of Sea Cliff, 13 AD3d 577 (2<sup>nd</sup> Dept. 2004), citing Amabile v City of Buffalo, 93 NY2d 471 (1999); Berner v Town of Huntington, 304 AD2d 513 (2<sup>nd</sup> Dept. 2003); Walker v Incorporated Village of Northport, 304 AD2d 823 (2<sup>nd</sup> Dept. 2003).

Through the affidavit of John Dempsey, a Civil Engineer employed by the defendant Nassau County Department of Public Works, the County has established that the sidewalk where the plaintiff fell is not under its jurisdiction and that it did not repair it or contract to have work performed there. It has also established through Dempsey's affidavit as well as the affidavit of Veronica Cox, an employee of the Claims Management Bureau of the Nassau County Attorney's office, that it did not receive prior written notice of any defective condition at the subject site. The defendant County has accordingly established its entitlement to

[ 3 ]  
summary judgment shifting the burden to the plaintiff to establish the existence of a material issue of fact. Sachs v County of Nassau, 60 AD3d 1032 (2<sup>nd</sup> Dept. 2009).

East Rockaway's Village Code obligates owners and/or occupants of homes, buildings, structures and vacant land to keep the sidewalk in front of their premises in good and safe repair and free from dirt, filth, weeds, rubbish, encumbrances or obstructions of any kind or character. The Village's Building Inspector Mr. Rusnak attests that upon receipt of the plaintiff's Notice of Claim, he investigated the area where she fell and discovered that a repair had in fact been made where she had fallen, which Mr. Rusnak determined was neither made nor authorized by the Village. As a result of this finding, a Notice of Violation was issued to the adjacent property owner, the defendant Ford Coyle Properties, Inc. The Village accordingly maintains that the complaint must be dismissed against it based upon the Village Code which makes the adjacent landowner responsible for the sidewalk's condition. While the Code imposes responsibility for the sidewalk's condition and maintenance on the adjacent property owner, it does not expressly impose tort liability on him. Compare, Sachs v County of Nassau, supra. Absent such a delegation, dismissal of the complaint against the Village predicated on the Code's imposition of responsibility for the sidewalk on the adjacent property owner does not lie. Compare, Gangemi v City of New York, 13 Misc3d 1112 (Supreme Court Kings County 2006) (City Administrative Code imposes both responsibility for sidewalk maintenance as well as liability on adjacent property owner so case against City dismissed).

Nevertheless, through the affidavit of Stephen Rusnak, the Village has established that as a prerequisite to suit, the Village Code requires that the Village's Board of Trustees have been given prior written notice of the defective condition which gave rise to the suit. Via Mr. Rusnak's affidavit, the Village has established that written notice of a defective condition on the sidewalk was not received by it prior to the plaintiff's fall. Coupled with the fact that the Village did not create the defective condition, the lack of prior written notice requires dismissal of the plaintiff's complaint as against the Village, thereby shifting the balance to the plaintiff to establish the existence of a material issue of fact.

The Town of Hempstead has established via the affidavit of its Records Access Officer of the Sidewalk Division of the Town's Highway Department that it does not and did not own the sidewalk where the plaintiff fell nor did it do any work there. It is not under the Town's jurisdiction but is under the jurisdiction of the Village of East Rockaway. The Town has also established its entitlement to summary judgment thereby shifting the burden to the plaintiff to establish the existence of a material issue of fact. Monteleone v Incorporated Village of Floral Park, 123 AD2d 312 (2<sup>nd</sup> Dept. 1986).

While the plaintiff opposes the Town of Hempstead's, the County's and the Village's motion pursuant to CPLR 3212(f), she has failed to demonstrate a bona fide need for discovery from any of those parties. Both the Town and the County have unequivocally and irrefutably established their lack of responsibility for the site where the plaintiff fell as well as the fact that they did not receive prior written notice of the condition or create it. The Village has also unequivocally and irrefutably established that it did not have prior written notice of the defective condition and that none of the exceptions to that requirement have been met.

While Ford Coyle Properties acknowledges that it owns the adjacent property, it maintains that it cannot be held liable because it did not own the sidewalk, as is confirmed by both its president Mr. Weingarten's affidavit and the Village's land survey of the property. It also maintains that there is no evidence that it caused the defect or made a special use of the sidewalk and that it is not disputed that the repair for which it was issued a violation was performed after the plaintiff's fall. It also notes that the Village Code does not expressly impose liability on it for defects in the sidewalk. In support of Ford Coyle Properties' motion, its president Mr. Weingarten himself personally attests that Ford does not own the sidewalk and that it did not use "that portion of the sidewalk for any particular purpose." While Ford Coyle Properties is correct that it may not be held liable for its failure to maintain the sidewalk since the Code does not impose liability

[\* 4]  
on it (Schwint v Bank Street Commons, LLC, \_\_ AD2d \_\_\_, 2010 WL 2605820 (2<sup>nd</sup> Dept. 2010), citing Smalley v Bemben, 12 NY3d 751, 752 [2009]; Bi Chan Lin v Po Ying Yam, 62 AD3d 740, 741 [2<sup>nd</sup> Dept. 2009]; Martin v City of New York, 59 AD3d 501 [2<sup>nd</sup> Dept. 2009]) it has not established its entitlement to summary judgment. Relying on a dearth of plaintiff's evidence hardly suffices to establish a party's entitlement to summary judgment: It is the moving party's obligation to establish that none of the exceptions for holding it responsible as the adjacent landowner for a defective sidewalk condition apply. Ford has not met that burden: It has not demonstrated that it did not create the defective condition.

In any event, the plaintiff has established issues of fact as to Ford Coyle Properties' liability. While Ford disavows ownership of the sidewalk, "[t]he evidence of subsequent repair by [Ford] raises a factual issue as to whether [Ford] assumed responsibility for maintaining the sidewalk." Diaz ex rel. Martinez v Eminent Associates, LLC, 31 AD3d 296 (1<sup>st</sup> Dept. 2006), citing Esteva v Catsimatidis, 4 AD3d 210 (1<sup>st</sup> Dept. 2004); Deroche v Methodist Hosp. of Brooklyn, 249 AD2d 438 (2<sup>nd</sup> Dept. 1998); O'Callaghan v Walsh, 211 AD2d 531, 532 (1<sup>st</sup> Dept. 1995).

SO ORDERED.

DATED: 7/15/2010

  
.....  
J.S.C.

**ENTERED**

JUL 19 2010

NASSAU COUNTY  
COUNTY CLERK'S OFFICE