

**Toohar v North Bellmore Union Free School Dist.**

2010 NY Slip Op 32095(U)

July 28, 2010

Supreme Court, Nassau County

Docket Number: 014926/08

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**  
**JUSTICE**

TRIAL/IAS PART 20

\_\_\_\_\_ X

DOREEN TOOHER,

Plaintiff,

Index No.: 014926/08  
Motion Sequence...01, 02  
Motion Date... 02/01/10

-against-

**XXX**

NORTH BELLMORE UNION FREE SCHOOL  
DISTRICT and THE COUNTY OF NASSAU,

Defendants.

\_\_\_\_\_ X

**Papers Submitted:**

- Notice of Motion (Mot. Seq. 01).....x
- Affirmation in Opposition.....x
- Reply Affirmation.....x
- Memorandum of Law.....x
- Notice of Motion (Mot. Seq. 02).....x
- Affirmation in Opposition.....x
- Affirmation in Partial Opposition.....x
- Reply Affirmation.....x

The motion submitted by the Defendant, THE COUNTY OF NASSAU (“COUNTY”) (Mot. Seq. 01) and the motion submitted by the Defendant, NORTH BELLMORE UNION FREE SCHOOL DISTRICT (“DISTRICT”) (Mot. Seq. 02) for an order pursuant to CPLR § 3212, granting summary judgment against the Plaintiff and dismissing all cross-claims, is determined as hereinafter provided.

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff on September 12, 2007. The Plaintiff alleges that she was caused to trip and fall on a raised, broken, missing, deteriorating and uneven sidewalk located on the south sidewalk of North Jerusalem Road, North Bellmore, New York. *See* Plaintiff's Notice of Claim attached to the Defendant COUNTY's Notice of Motion as Exhibit "1". On or about August 12, 2008, the Plaintiff served a summons and complaint on the Defendant, COUNTY and the Defendant, DISTRICT. The Defendant COUNTY served its Verified Answer and Cross-Claims on or about August 19, 2008. The Defendant, DISTRICT served its Verified Answer and Cross-Claims on or about September 8, 2008.

The Defendant, COUNTY now moves for summary judgment seeking to dismiss the Plaintiff's Complaint and the DISTRICT's cross-claims on the grounds that it did not have prior written notice of the alleged defective condition as required pursuant to the Nassau County Administrative Code Section 12-4.0 (e). The Defendant, DISTRICT also moves for summary judgment to dismiss the Plaintiff's Complaint and the COUNTY's cross-claims.

In support of its motion, the COUNTY submits the transcript of the Examination Before Trial of John Dempsey, Civil Engineer II employed by the Nassau County Department of Public Works. Mr. Dempsey testified at his deposition that he conducted a search for records of any prior written notice of the alleged defective and dangerous condition at the subject location indicated in the Plaintiff's Notice of Claim. *See* Transcript of Examination Before Trial of John Dempsey attached to the COUNTY's Notice

of Motion as Exhibit "5". Mr. Dempsey testified that the results of the search established that there was no file or other written complaint for the subject location.

In addition to the sworn testimony of Mr. Dempsey, the Defendant, COUNTY also submits the sworn affidavit of Veronica Cox who works in the Bureau of Claims and Investigations in the Office of the County Attorney of Nassau County. Ms. Cox states in her Affidavit that she maintains a file containing records of all prior written notice of complaints stemming from the defective conditions of sidewalks in the County received by the Office of the County Attorney. Ms. Cox further states that, in her capacity at the Bureau of Claims, she personally conducted a search of the file maintained by the Office of the County Attorney for any and all records of prior written notice of the alleged defective and dangerous condition at the subject location. Her search revealed no written complaints or notices of claim or other prior written notice of the alleged defective sidewalk where the Plaintiff claims to have sustained her injuries.

Additionally, the Defendant, COUNTY set forth in its motion papers the following relevant portion of the Nassau County Administrative Code:

No civil action shall be maintained against the County for damages or injuries to person...sustained by reason of any sidewalk, street...or highway...being defective, out of repair, unsafe, dangerous...or in consequence of the existence of snow or ice thereon...unless written notice to repair...such defective, out of repair, unsafe dangerous condition of such sidewalk, street...or highway...or the existence of snow or ice thereon...was a failure or neglect within a reasonable time after the giving of such notice...to cause such snow or ice to be removed...was given...in writing...to the Office of the County Attorney, 1 West

[\* 4]  
Street, Mineola, New York.

The Defendant, DISTRICT, in partial opposition to the COUNTY's motion for summary judgment, states that the COUNTY failed to adequately address the DISTRICT's cross-claims anywhere in its papers. The DISTRICT also contends that absent from the COUNTY's moving papers is an affirmative denial that the COUNTY created the alleged defect. In that regard, the DISTRICT claims that the COUNTY failed to meet its burden due to its failure to put forth evidence in admissible form establishing that it did not create the alleged defect through its own negligence.

The Plaintiff contends in opposition to the Defendant, COUNTY's motion that the COUNTY failed to come forward and eliminate the existence of every material issue of fact regarding the Plaintiff's claims. In essence, the Plaintiff adopts the DISTRICT's position by arguing that the COUNTY failed to negate that it caused and created the defective sidewalk condition. Notably, the Plaintiff concedes in her papers that the COUNTY has established a prima facie case that it did not have prior written notice of the sidewalk condition as of the accident date, September 12, 2007. However, the Plaintiff states that the COUNTY's failure to negate every issue of material fact requires the denial of its motion. Specifically, the Plaintiff contends that the COUNTY failed to negate that it caused and/or created the defective sidewalk condition.

It is well settled that the Plaintiff, not the Defendant, must establish that the Defendant either received written notice of the alleged defect or that an exception to the

general rule is applicable. *Griesbeck v. County of Suffolk*, 44 A.D.3d 618 (2nd Dept. 2007).

While the Plaintiff contends that the Defendant failed to eliminate any issue of fact with respect to the exception that the Defendant created the defective condition, the Plaintiff also failed to present any evidence that the Defendant, in fact, created same.

The Plaintiff's reliance on the cases cited in her opposition papers is misplaced.

For instance, in *Boland v. Dig America, Inc.*, the court found that there was no need to consider whether the non-movant's papers were sufficient to raise a triable issue of fact due to the movant's failure to establish its prima facie case for judgment as a matter of law.

*Boland v. Dig America, Inc.*, 277 A.D.2d 337 (2nd Dept. 2000). To the contrary, here, the Plaintiff concedes that the Defendant, COUNTY sufficiently established that it did not receive prior written notice regarding the alleged defect. As to the exceptions to the general rule, it is incumbent upon the Plaintiff to come forward with some evidence in admissible form that tends to prove the applicability of one of the exceptions.

“Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained [sidewalk] unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies. *Griesbeck v. County of Suffolk, supra* at 619. The prior written notice requirement will be obviated only if the plaintiff establishes that a special use resulted in a special benefit to the locality or that the municipality affirmatively created the defect by performing work that *immediately* resulted in the existence of a dangerous

condition. *See Yarborough v. City of New York*, 10 N.Y.3d 726, 728 (2008); *Oboler v. City of New York*, 8 N.Y.3d 888 (2007); *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474 (1999). The affirmative negligence exception is limited to work by the [defendant] that immediately results in the existence of a dangerous condition. *Oboler v. City of New York*, *supra* at 889 (internal quotation marks omitted); *see Yarborough v. City of New York*, *supra* at 728; *Marshall v. City of New York*, 52 A.D.3d 586 (2008); *Bielecki v. City of New York*, 14 A.D.3d 301 (2005); *Schleif v. City of New York*, 60 A.D.3d 926 (2nd Dept. 2009), quoting *Diaz v. City of New York*, 56 A.D.3d 599, 600-601 (2nd Dept. 2008).

Accordingly, an injured plaintiff must establish that the [County] received prior written notice of an alleged defective or dangerous condition or that the [County] affirmatively created in order to impose liability on the [County]. *Jacobs v. Village of Rockville Centre*, 41 A.D.3d 539 (2nd Dept. 2007); *Kravalz v. County of Suffolk*, 41 A.D.3d 1042 (2nd Dept. 2007). In the instant case, the Plaintiff concedes that the Defendant, COUNTY did not receive prior written notice of the allegedly defective condition as required by the County Code. Nor has the Plaintiff demonstrated that the COUNTY affirmatively created the defect or that a special use resulted in a special benefit to the locality. *See Yarborough v. City of New York*, *supra* at 728; *Oboler v. City of New York*, *supra* at 890.

The Defendant, COUNTY has submitted sufficient proof that no notice of any defect or unsafe condition existed with regard to the sidewalk located adjacent to the west curb of Virginia Avenue, North Bellmore, New York on September 12, 2007. The Plaintiff's

conclusory statement that the Defendant COUNTY created the defective condition without submitting any proof thereof is insufficient to warrant an exception to the requirement of having prior written notice of the sidewalk defect.


Because the Plaintiff provided no competent evidence that the COUNTY affirmatively created the defect which caused the accident nor received prior written notice of such defect, the Defendant, COUNTY's motion for summary judgment pursuant to CPLR § 3212 (Mot. Seq. 01), is **GRANTED**.

For the reasons set forth above, the Co-Defendant, DISTRICT's cross-claims against the Defendant, COUNTY, are also dismissed. In light of the Court's decision in granting the Defendant, COUNTY's motion for summary judgment, the Co-Defendant's cross-claims against the COUNTY are rendered moot.

The Plaintiff does not oppose the DISTRICT's motion for summary judgment. As such, the DISTRICT's motion for summary judgment seeking to dismiss the Plaintiff's complaint and the COUNTY's cross-claims against it (Mot. Seq. 02), is **GRANTED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York  
July 28, 2010

  
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Hon. Randy Sue Marber, J.S.C.  
XXX

**ENTERED**  
JUL 30 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE