Castro v Incorporated Vil. of Hempstead
2010 NY Slip Op 32479(U)
September 7, 2010
Supreme Court, Nassau County
Docket Number: 017073/08
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

MIRIAM CASTRO,

Plaintiff,

-against-

INCORPORATED VILLAGE OF HEMPSTEAD,
271-273 FULTON AVENUE HOLDING CORP.
and EL DORADO RESTAURANT CORP.,

Defendants.

---X

Index No. 017073/08
Motion Sequence...03
Motion Date... 07/01/10

Papers Submitted:
Notice of Motion..x
Affirmation in Opposition...........................x
Reply Affirmation.......................................x

The motion submitted by the Defendant, INCORPORATED VILLAGE OF HEMPSTEAD ("VILLAGE"), seeking an order pursuant to CPLR § 3212 granting it summary judgment dismissing the Plaintiff's complaint, is determined as hereinafter provided.

By previous Order of this Court (Marber, J., 5/13/10), a default judgment was granted in favor of the Plaintiff as against the Defendants, 271-273 FULTON AVENUE HOLDING CORP.

and EL DORADO RESTAURANT CORP.

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff on February 24, 2008. The Plaintiff alleges that she was caused to trip and fall on a defective alleyway at 275 Fulton Avenue, Hempstead, New York. Specifically, the Plaintiff alleges that she was caused to slip and fall due to a hole in the defective alleyway which was located between two business establishments, El Dorado Café and Mi Ranchito.

The Defendant, VILLAGE now moves for summary judgment, pursuant to General Municpal Law § 50-e (4), CPLR § 9804, Village Law § 6-628 (incorrectly stated as Village Law § 6-629 in the Defendant's moving papers), and the Incorporated Village of Hempstead Code § 39-1 (C), contending that it cannot be held liable for the Plaintiff's personal injuries as the VILLAGE received no prior written notice of the existence of the defective condition in the alleyway that allegedly caused the injuries.

Village Law § 6-628 states, in pertinent part:

> "No civil action shall be maintained against the village for damages or injuries to person ... sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed ... unless *written notice* of the defective, unsafe, dangerous or obstructed condition ..., relating to the particular place, was *actually given* to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect...complained of..."

(Emphasis added).

Further, General Municipal Law § 50-e (4) states that nothing in this section

setting forth the Notice of Claim requirements,

> "shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, ... where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice."

In support of its motion, the VILLAGE submitted the affidavit of the Village Clerk, Maryellen Hillmann, who conducted a search of the Village's "Sidewalk Book". According to Ms. Hillmann, the Sidewalk Book is the official depository index of all prior written notices received by the VILLAGE regarding defects on any of its streets, highways, bridges, culverts, crosswalks, sidewalks, traffic signs, parking fields/parking lots, walkways, foot paths, or bicycle paths, pursuant to Section 39-1 (C) of the Hempstead Village Code. Ms. Hillmann stated that she was requested to investigate and conduct a search of the Plaintiff's accident site for a period of five (5) years prior to and including February 24, 2008 (the date of the Plaintiff's accident) to determine whether the VILLAGE received any prior written notice of any defect at that location. *See* Affidavit of Maryellen Hillmann, dated April 2, 2010, attached to the Defendant's Notice of Motion as Exhibit "C". The search conducted by Ms. Hillmann revealed that the VILLAGE did not receive any prior written notice of the existence of a defective condition in the alleyway at or near the Plaintiff's alleged accident site for a period of five (5) years prior to and including February 24, 2008.

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 [walkway/footpath] 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*, 44 A.D.3d 618, 619 (2nd Dept. 2007). 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. *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 (2nd Dept. 2008).

Therefore, an injured plaintiff must establish that the municipality received prior written notice of an alleged defective or dangerous condition in order to impose liability on it. *Jacobs v. Village of Rockville Centre*, 41 A.D.3d 539 (2nd Dept. 2007); *Kravolz v. County of Suffolk*, 41 A.D.3d 1042 (2nd Dept. 2007).

The Plaintiff notes in opposition to the Defendant's motion for summary judgment that some other statutes, local laws and charter provisions expressly permit proof of factual or constructive notice of a defective condition as sufficient evidence to satisfy the

prior written notice requirement, thereby defeating summary judgment. While those statutes, laws and charters may be relevant in other municipalities, it is of no moment here. The VILLAGE law unequivocally states that prior *written* notice is required in order to maintain an action against the VILLAGE for a defective [walkway/footpath] condition. The Plaintiff's reliance on other statutes, laws, charter provisions or codes is irrelevant and misplaced and will not be considered here.

The Plaintiff, relying on *Khemraj v. City of New York*, 37 A.D.3d 419 (2nd Dept. 2007), also contends that the affirmative negligence exception may be applicable in the instant matter. In *Khemraj*, there was an affirmative work order which confirmed that the City had repaired, or attempted to repair, a pothole that allegedly caused the plaintiff's accident. To the contrary here, as indicated in the Village Clerk's affidavit, no such work order exists.

In support of the Plaintiff's contention that the affirmative negligence exception is applicable, the Plaintiff argues that the existence of an orange barrel, depicted in the photographs taken shortly after the accident, establishes that repair work was attempted in the area where the accident occurred. In further support of this argument, the Plaintiff submits an engineer's professional report, accompanied by a sworn affidavit attesting to its contents, which states that the purported attempted repair work was conducted in a poor, shoddy and unworkmanlike manner. *See* Report of Robert L. Schwartzberg, P.E., dated June 10, 2009, attached to the Plaintiff's Affirmation in Opposition as Exhibit "I". The question

of whether or not the orange barrel was present during the time and at the location of the Plaintiff's accident is a fact in dispute. The Plaintiff submits that this issue of fact is sufficient to defeat summary judgment. Inquiry must now be made as to whether the mere existence of the barrel would, under any circumstances, obviate the Plaintiff's burden of coming forth with evidence that the VILLAGE actually received prior written notice of the defect. This Court finds it does not.

First, the Plaintiff's engineer is merely speculating that work was performed by the VILLAGE at the accident site. "Mere speculation regarding causation is inadequate to sustain a cause of action." *Segretti v. The Shorenstein Co.*, 256 A.D.2d 234 (1st Dept. 1998); see also, *Zabaliyeva v. Fone Management Enterprises, Inc.*, 300 A.D.2d 581, 751 (2nd Dept. 2002). Second, adopting the Plaintiff's argument would necessarily result in the Court creating an exception where none presently exists, to wit, a constructive notice exception. There is no evidence submitted by the Plaintiff establishing that the VILLAGE received prior written notice, or in its absence, actually performed work in the subject area which immediately resulted in a defective condition. In essence, the Plaintiff is asking the Court to recognize a constructive notice exception while masking the argument as the affirmative negligence exception. In that regard, the Plaintiff states that because the municipality placed the orange barrel over a defect for a period of time and failed to repair same, that the VILLAGE knew or should have known of the existence of a defect. As stated by the Court of Appeals, "judicial recognition of a constructive notice exception would

contravene the plain language of the statute and serve only to undermine the rule". *Amabile v. Buffalo, supra,* at 476.

The Plaintiff relies on *Blake v. Niagara Mohawk Power Corp., supra*, to support the contention that constructive notice of a dangerous condition is sufficient. In that case, on the date of the accident it was undisputed that there was ongoing construction at the accident site and sworn testimony confirmed that a city inspector checked the construction site "practically every day" to ensure that the street was safe for the passage of the general public. *Blake*, *supra* at 1076. The Appellate Division, Third Department, found that under those circumstances "it [was] obvious that the city's inspectors should have discovered the defect long before plaintiff's mishap, and, accordingly, the jury was justified in concluding that the city had, at minimum, constructive notice of the dangerous condition." *Id.* The Court of Appeals affirmed the Appellate Division's holding on appeal. In so affirming, the Court stated, "of pivotal importance was the fact that, on the argument of the appeal, the City withdrew any reliance on the prior written notice law ... as an impediment to recovery by the plaintiff. Thus, this Court was presented with only a common-law negligence action." *Amabile*, *supra*, at 475. Based on this clear distinction between the case at bar and *Blake*, this Court declines to recognize a constructive notice exception to the statutory prior written notice requirement, where, under these facts, none has been recognized before.

Prior notification laws are a valid exercise of legislative authority. Such laws reflect a legislative judgment to modify the duty of care owed by a locality in order to address

the vexing problem of municipal street and sidewalk liability. General Municipal Law, § 50-e (4), the authorizing statutory provision, specifically allows for the enactment of prior notification statutes and requires compliance with such laws. Thus, a locality may avoid liability for injuries sustained as a result of defects or hazardous conditions on its sidewalks if it has not been notified in writing of the existence of the defect or hazard at a specific location. Neither actual nor constructive notice may override the statutory requirement of prior written notice of a sidewalk defect. The legislature has made plain its judgment that a municipality should be protected from liability in these circumstances until it has received written notice of the defect or obstruction. *Id.* at 475.

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

Accordingly, it is hereby

ORDERED, that the Defendant, VILLAGE's motion for summary judgment is **GRANTED**, and it is further

ORDERED, that in light of the previous Order of this Court (Marber, J., 5/13/10), with the Note of Issue having been filed on July 21, 2010, the Plaintiff and the Defendants, 271-273 FULTON AVENUE HOLDING CORP. and EL DORADO RESTAURANT CORP. are directed to appear for an inquest on damages on **October 28,**

[* 9]

2010, at 9:30 A.M. in the Calendar Control Part; and it is further

ORDERED, that the Plaintiff's counsel shall serve a copy of this Order upon the Defendants, 271-273 FULTON AVENUE HOLDING CORP. and EL DORADO RESTAURANT CORP., by certified mail, return receipt requested and by regular mail with proof of mailing (issued by the USPS) within ten (10) days of the date this Order is entered. **PROOF OF SERVICE MUST BE FILED WITH THE COURT**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
September 7, 2010

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

ENTERED
SEP 09 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE