

Lazar v County of Nassau

2010 NY Slip Op 32684(U)

September 20, 2010

Sup Ct, Nassau County

Docket Number: 24805-09

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 21
NASSAU COUNTY

ADRIAN LAZAR AND HERBERT LAZAR,

Decision and Order

Plaintiffs,

MOTION SUBMITTED:

July 20, 2010

-against-

MOTION SEQUENCE:01, 02, 03

INDEX NO. 24805-09

**COUNTY OF NASSAU, TOWN OF HEMPSTEAD,
VILLAGE OF CEDARHURST, CEDARHURST
REALTY LTD., JERUSALEM MINI MARKET, INC.,
AHARON CHASSID, ORLIN & COHEN ORTHOPEDIC
ASSOCIATES LLP, WALTER RHO, M.D. AND
MITCHELL GOLDSTEIN, M.D.,**

Defendants.

The following papers and the attachments and exhibits thereto have been read on the motions:

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Background

On September 16, 2008, Adrian Lazar (the “injured Plaintiff”) was walking on the sidewalk located at 698 Cental Avenue, Cedarhurst, NY at which time she fell and sustained personal injuries. The injured Plaintiff and her husband¹ (collectively referred to as “Plaintiffs”) thereafter commenced the instant personal injury and medical malpractice action against the following Defendants: County of Nassau (“County”), Town of Hempstead (“Town”), Village of Cedarhurst (“Village”), Cedarhurst Realty Ltd., Jerusalem Mini Market, Inc., Aharon Chassid, Orlin & Cohen Orthopedic Associates, LLP., Walter Rho, M.D. and Mitchell Goldstein, M.D. (Ex. “B” to Plaintiff’s Motion).

The Defendants answered the complaint and asserted various cross claims and counterclaims, seeking, *inter alia*, contribution and indemnification (Ex. “B” to Plaintiffs’ Motion; Ex. “D” to County’s Motion; Ex. “A” to Village’s Motion).² Thereafter, the Plaintiffs discovered that it was Gourmet Cookies & Pastries, Inc. rather than Defendants Jerusalem Mini Market, Inc. and Aharon Chassid which were the tenants of the property abutting the sidewalk where the injured Plaintiff fell.³ On that basis, the Plaintiffs seek leave to add Gourmet Cookies & Pastries, Inc. as a Defendant and to amend their complaint accordingly (CPLR 1003; 3025).⁴ The County and Village Defendants also move this court for an order granting each of them judgment as a matter of law dismissing the Plaintiffs’ complaint and any cross claims asserted against them.

Nassau County’s Motion for Summary Judgment

The County maintains that it does not have jurisdiction over the sidewalk and that it did not receive written notice of any alleged defect and thus, cannot be held liable for the Plaintiff’s injuries. To support this contention, the County submitted the affidavits of John Dempsey and Veronica Cox. Dempsey, a Civil Engineer employed by the Nassau County Department of

¹ The injured Plaintiff’s husband, Herbert Lazar, asserts a derivative loss of services claim relating to his wife injuries.

² Defendants Jerusalem Mini Market, Inc. and Aharon Chassid did not answer the complaint or appear in the action.

³ Plaintiffs incorrectly named Jerusalem Mini Market, Inc. and Aharon Chassid (owner of the Jerusalem Mini Market) as Defendants because the name Jerusalem Mini Market still appears on the outside of the premises (Plaintiffs’ Motion at p 2).

⁴ There has been no opposition by any of the Defendants or proposed Defendants to the Plaintiffs’ motion.

Public Works, searched the County's records which revealed that the sidewalk where the fall occurred is not under the jurisdiction of the County. In addition, the County did not repair or maintain the sidewalk or receive written notice of any allegedly defective condition of the sidewalk (Dempsey Affidavit annexed to County's Motion at ¶¶ 5,6). Veronica Cox, an employee of the Claims Management Bureau of the County Attorney's Office, indicated in her affidavit that she similarly conducted a search of the County Attorney's Office looking for written notices and Notices of Claim regarding the sidewalk and that the search revealed no written notices or Notices of Claim on file with respect to the subject sidewalk (Cox Affidavit annexed to County's Motion).

In opposition to the County's motion, the Plaintiffs contend that a motion for summary judgment at this time is premature and that the Dempsey and Cox affidavits submitted with the County's motion "lack proper foundation, are speculative and unreliable and should be disregarded by the Court" and, as such, are an "insufficient basis on which to grant summary judgment." (Plaintiff's Opposition at pp 3-4).

Defendants Orthopedic Associates and Dr. Rho (collectively referred to as "Orthopedic Assoc.") and Defendant Dr. Goldstein oppose the County's motion for summary judgment on the basis that the motion is premature in the absence of any discovery as to who owned, controlled, or maintained the subject sidewalk (Goldstein Opposition at ¶¶ 5-6; Orthopedic Assoc. Opposition at ¶ 3). Also, like the Plaintiffs, Dr. Goldstein maintains that the affidavits submitted in support of the County's motion are "speculative, conclusory and unreliable" (Goldstein Opposition at ¶¶ 7-14).⁵

Village of Cedarhurst's Motion for Summary Judgment

The Village moves for an order dismissing the Plaintiffs' complaint on the ground that it did not receive prior written notice of the alleged defect, and, in the absence of such notice, a Village cannot be liable for an alleged defective condition on a sidewalk unless there is evidence that the Village created the condition through an affirmative act of negligence (Village's Motion at ¶¶ 4-5). In support of its motion, the Village submitted the affidavit of Salvatore Evola, the Village Clerk/Treasurer for the Village of Cedarhurst (the "Village Clerk"). In his affidavit, the Village Clerk indicated that he conducted a search of the Village's records and the search revealed that the Village was never provided with prior written notice of any defect regarding the subject sidewalk nor did the Village perform any construction or repair work, directly or indirectly, on the subject sidewalk (Ex. "B" to Village's Motion).

⁵ Defendants Town of Hempstead, Cedarhurst Realty Ltd, Jerusalem Mini Market and Aharon Chassid did not submit any opposition to the County's motion for summary judgment.

In opposition to the Village's motion, the Plaintiffs, as well as Defendants Cedarhurst Realty, Orthopedic Assoc., and Dr. Goldstein, argue that summary judgment should be denied because: issues of fact exist concerning the Village's negligence; that the motion is premature as discovery has not been conducted; and, lastly, that the affidavit of the Village Clerk in support of the Village's motion lacks proper foundation, is speculative and unreliable, and should be disregarded by the court (Plaintiffs' Opposition at pp 1-3; Cedarhurst Realty Opposition at ¶ 3; Orthopedic Assoc. Opposition at ¶ 3; Goldstein Opposition at ¶ 5).⁶

Analysis

To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof in admissible form sufficient to warrant judgment as a matter of law (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Davern v City of New York*, 287 AD2d 679 [2d Dept 2001]). More particularly, within the context of an action commenced against a municipality, to recover damages for personal injuries sustained as a result of a defective condition, the municipality may demonstrate its entitlement to judgment as a matter of law by adducing evidence that it did not have prior written notice of the defective condition (*Jason v Town of North Hempstead*, 61 AD3d 936 [2d Dept 2009]; *Trinidad v City of Mount Vernon*, 51 AD3d 661, 662 [2d Dept 2008]). If the municipality has made a *prima facie* showing that it did not have written notice of the condition, the burden shifts to the non-moving party to come forward with competent evidence to demonstrate that the municipality did have written notice or that an exception to the prior written notice requirement, namely, the municipality's creation of the allegedly defective condition or its special use of the property, existed (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *Kiszenik v Town of Huntington*, 70 AD3d 1007 [2d Dept 2010]; *Groninger v Village of Mamaroneck*, 67 AD3d 733 [2d Dept 2009]; *Jason v Town of North Hempstead*, 61 AD3d at 936-37, *supra*).

For the reasons that follow, both the County and Village have demonstrated their entitlement to judgment as a matter of law and the non-moving parties have failed to meet their burden in demonstrating, in anything other than conclusory and speculative fashion, that the County or Village had written notice of the condition or that they created the allegedly defective condition that caused the injured Plaintiff's fall.

The County's Motion for Summary Judgment

The Nassau County Administrative Code (the "County Code") provides, in relevant part,

⁶ Neither the Town of Hempstead, nor the Jerusalem Mini Market and Aharon Chassid submitted any opposition to the Village's motion for summary judgment.

as follows:

No civil action shall be maintained against the County for damages or injuries to person or property sustained by reason of any sidewalk, . . . unless written notice of such defective, unsafe, dangerous or obstructed condition of such sidewalk . . . was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of . . . to make the place otherwise reasonably safe.

(Ex. "G" to County's Motion). The notice required by the County Code must be in "writing by certified or registered mail directed to the Office of the County Attorney . . ." (Ex. "G" to County's Motion).

Here, the County demonstrated, by the affidavit of Veronica Cox, an employee of the County's Claim Management Bureau, the office which maintains the files containing prior written notices and Notices of Claim, that a search dating back five years prior to the injured Plaintiff's fall revealed that the County Attorney's Office received no written notices or Notices of Claim of a defective condition on the subject sidewalk (Cox Affidavit annexed to County's Motion at pp 1-2). The affidavit of John Dempsey, a civil engineer employed by the County, similarly evidences that the County did not receive any prior written notice of an alleged condition on the subject sidewalk (Dempsey Affidavit annexed to County's Motion at ¶ 6). Given the express language of the County Code, as well as the two affidavits submitted on behalf of the County, the County has made a *prima facie* showing of entitlement to judgment as a matter of law that it lacked prior written notice of the allegedly dangerous condition.

The opposition of the Plaintiffs and Defendants Orthopedic Assoc and Dr. Goldstein failed to rebut the County's *prima facie* showing. Initially, their contentions that the affidavits submitted on behalf of the County are conclusory, speculative and without proper foundation are without merit inasmuch as the affidavits and the averments contained therein are each predicated upon the individual affiants' personal knowledge and review of the relevant documentation.

Moreover, the Plaintiffs failed to raise a triable issue of fact as to whether the County received prior written notice (*Kiszenik v Town of Huntington*, 70 AD3d 1007 [2d Dept 2010] [telephone complaints, internal records, and letters do not constitute the requisite prior written notice]; *Groninger v Village of Mamaroneck*, 67 AD3d 733 [2d Dept 2009] [neither actual nor constructive notice of a condition is sufficient to satisfy the requirement of prior written notice]).

Similarly, the Plaintiffs, Orthopedic Assoc. and Dr. Goldstein failed to meet their burden of establishing that one of the exceptions to the written notice requirement applies. In this regard,

the Court notes that the special use exception to the notice requirement has not been asserted. With respect to the second exception to the notice requirement based upon an affirmative act of negligence on the part of the County, the County Code provides that the Village has sole jurisdiction over the sidewalk area of County streets (Ex. "G" to County's Motion). In addition, the Dempsey affidavit demonstrated that a search of the County's records revealed that the sidewalk area where the injured Plaintiff fell is not within the County's jurisdiction nor does the County repair or maintain that area (Dempsey Affidavit annexed to County's Motion at ¶¶ 4-6).

Based on the County Code as well as the Dempsey and Cox affidavits, this Court concludes that Plaintiffs, Orthopedic Assoc. and Dr. Goldstein have failed to rebut the County's showing that it did not have prior written notice of the condition or that the County had created the allegedly defective condition. Accordingly, the complaint and all cross claims asserted against the County are dismissed.

The Village's Motion for Summary Judgment

The Village seeks dismissal of the complaint and all cross claims asserted against it on the basis that it was never given prior written notice of any alleged dangerous or defective condition. CPLR 9804 provides, in relevant part, as follows:

No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any . . . sidewalk . . . being defective, out of repair, unsafe, dangerous or obstructed . . . unless written notice of the defective unsafe, dangerous or obstructive condition . . . 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

Here, the Village made a *prima facie* showing of entitlement to judgment as a matter of law by the submission of the affidavit of Salvatore Evola, the Village Clerk/Treasurer of the Village of Cedarhurst whose duties and responsibilities include the maintenance of all prior written complaints regarding sidewalk defects in the Village. Contrary to Plaintiffs' assertions, the affidavit of the Village Clerk was not without foundation, unreliable or conclusory. Rather, Evola's affidavit demonstrated that a search of the Village records revealed that the requisite notice set forth in CPLR 9802 was never provided to the Village with respect to any defect in the subject sidewalk (*Pagano v Town of Smithtown*, 74 AD3d 1304 [2d Dept 2010] [town established its *prima facie* entitlement to judgment as matter of law by submitting affidavit of town clerk wherein he stated that his search of the town's records revealed no prior written notice of a condition of the sidewalk where the fall occurred]; *LiFrieri v Town of Smithtown*, 72 AD3d 750 [2d Dept 2010] [town established *prima facie* entitlement to judgment as matter of law where town clerk's affidavit demonstrated that a search of the town records revealed no prior

written notice of any hazardous condition where accident occurred]; *Gilmore v Village of Hempstead*, 47 AD3d 676 [2d Dept 2008]; *Healy v Village of Patchogue*, 28 AD3d 519 [2d Dept 2006] [village established its entitlement to judgment as a matter of law by affidavit of village clerk demonstrating that village did not receive prior written notice of the allegedly dangerous condition]).

Inasmuch as the Plaintiffs, Cedarhurst Paper, Orthopedic Assoc. and Dr. Goldstein have failed to rebut the Village's *prima facie* showing or allege and prove that the Village created the allegedly defective condition, the Village is entitled to summary judgment dismissing the complaint and any cross claims asserted against it (*see LiFrieri v Town of Smithtown*, 72 AD3d at 750, *supra*; *Gilmore v Village of Hempstead*, 47 AD3d at 676, *supra*; *Betzold v Town of Babylon*, 18 AD2d 787 [2d Dept 2005]).

Accordingly, it is hereby ordered that the motions of the County of Nassau and the Village of Cedarhurst are granted and the complaint and any cross claims asserted against them are dismissed.

It is further ordered that the Plaintiffs' motion seeking to add Gourmet Cookies & Pastries, Inc. as a party and to amend their complaint is granted and Gourmet Cookies & Pastries, Inc. shall be added to the caption.

This constitutes the decision and order of the court.

Dated: September 20, 2010



Hon. Vito M. DeStefano, J.S.C.

ENTERED

SEP 23 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE