

Kelley v New Park Paint and Wallpaper, Inc.
2010 NY Slip Op 32877(U)
October 1, 2010
Supreme Court, Nassau County
Docket Number: 1587/09
Judge: Roy S. Mahon
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SCAW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

DANIEL KELLEY,

TRIAL/IAS PART 7

Plaintiff(s),

INDEX NO. 1587/09

- against -

MOTION SEQUENCE
NO. 3 & 4 & 5 & 6

NEW PARK PAINT AND WALLPAPER, INC.,
COUNTY OF NASSAU, TOWN OF NORTH
HEMPSTEAD, VILLAGE OF NEW HYDE PARK,
ELI NISSAN, BENJAMIN Y, NISSAN, GEORGE Y.
NISSAN and INTERCOUNTRY PAVING
ASSOCIATES, LLC,

MOTION SUBMISSION
DATE: July 30, 2010

Defendant(s).

The following papers read on this motion:

- | | |
|-----------------------------------|-------|
| Notice of Motion | XX |
| Notice of Cross Motion | XX |
| Affirmation in Opposition | XXXXX |
| Affirmation in Partial Opposition | X |
| Reply Affirmation | XXXX |

Upon the foregoing papers, the motion by the defendant Intercountry Paving Associates LLC (hereinafter referred to as Intercountry), for an Order pursuant to CPLR §3212 granting summary judgment and dismissing the above entitled action of the plaintiff, Daniel Kelley, as well as dismissing all cross claims on the grounds that the action is without merit in that plaintiff cannot make out a prima facie case of negligence against the aforesaid defendant, Intercountry Paving Associates, LLC; the motion by the defendants Eli Nissan, Benjamin Y. Nissan and George Y. Nissan (hereinafter collectively referred to as Nissan) for an Order pursuant to CPLR Rule 3212 granting summary judgment in favor of defendants Eli Nissan, Benjamin Y. Nissan and George Y. Nissan dismissing the plaintiff's complaint and all cross-claims on the grounds that there are no material issues of fact that require a trial of this action and the motion by the Defendant/Third Party Plaintiff New Park Paint and Wallpaper Inc. (hereinafter referred to as New Park Paint) for an Order granting summary judgment as to defendant New Park Paint and Wall Paper, Inc. and dismissing the plaintiff's Claims and all Cross-Claims in its entirety and the cross motion by the defendant County of Nassau for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendant County of Nassau and dismissing the cross claims of defendants New Hyde Park Paint and Wallpaper, Eli

Nissan and Benjamin Nissan, are all determined as hereinafter provided:

This personal injury action arises out of an alleged trip and fall accident that occurred on August 30, 2007 at approximately 3:30 pm at or near the front entrance to the premises located at 1601 Hillside Avenue, New Hyde Park, New York.

The Court initially observes that the defendant County of Nassau's cross motion is brought subsequent to the 120 day period for applications for relief pursuant to CPLR §3212. Based upon a review of the respective submissions and in light of the fact that the defendant County of Nassau's application is brought upon grounds that are similar to the other moving defendants' applications and that the plaintiff through counsel sets forth that the plaintiff has signed a Stipulation of Discontinuance as to County that certain other parties have not entered into, the Court determines that the defendant County has made a showing of good cause to substantiate the County's otherwise untimely submission (see, **Grande v Peteroy**, 39 AD3d 590, 833 NYS2d 615 (Second Dept., 2007)).

In support of the defendant, County of Nassau submits an affidavit of John F. Dempsey and Diane S. Palser. The respective affidavits set forth:

"JOHN F. DEMPSEY, being duly sworn, deposes and says:

1. I am a Civil Engineer II with the Nassau County Department of Public Works in the Construction Management nit with an office located at 1194 Prospect Avenue, Westbury, New York.
2. In my capacity as Civil Engineer II and by way of work experience and records maintained by the Nassau County Department of Public Works, I am familiar with appurtenances, roadways, and sidewalks under the jurisdiction of the County of Nassau County Government.
3. I was asked to conduct an investigation by the Office of the County Attorney about this claim alleging an injury which occurred on August 30, 2007 at approximately 3:30 pm on the cement sidewalk located in front of 1601 Hillside Avenue, New Hyde Park, New York (hereinafter referred to as the "SUBJECT LOCATION").
4. In response to this request from the County Attorney's Office, I attest that I personally searched the records of the Nassau County Department of Public Works, which include contracts, sidewalk complaints, and repair records, that are kept at Department offices located at 1194 Prospect Avenue, Westbury, New York.
5. As a result of this search, as well as my personal knowledge as Civil Engineer II, I attest that the Subject Location is not under the jurisdiction of the County of Nassau.
6. In addition, I searched prior written notice records maintained by the Department of Public Works for the Subject Location for five years prior to August 30, 2008. I attest that I found no prior written notice for the Subject Location for said period of time."

"DIANE S. PALSER, being duly sworn, deposes and says:

1. I am employed by the County of Nassau and assigned to the Claims an Investigation Division in the Office of the Nassau County Attorney. As part of my job duties, I maintain the files containing prior written notice received by the Office of the Nassau County Attorney.
2. I have been advised by the Office of the County Attorney that Plaintiff, Daniel Kelley, has alleged in his Notice of Claim that on August 30, 2007, he sustained personal injury when he allegedly tripped and/or fell over and along a broken, cracked, raised and defective sidewalk while walking in front of the premises known as 1601 Hillside Avenue, Village of New Hyde Park, located within the Town of North Hempstead, County of Nassau, State of New York, hereinafter referred to as the "Subject Location".
3. I was asked to conduct a search to determine whether the Office of the Nassau County Attorney received prior written notice of the alleged defective condition at the Subject Location.
4. In response to this request I attest that I personally searched the Nassau County files which contain notices of claims and notices of defects for records of prior written notice, which are located at the Office of the Nassau County Attorney located at One West Street, Mineola, New York 11501, for a period of five (5) years prior to, up to and including August 30, 2007.
5. As a result of this search, I attest that there were no records of any prior notices of claims and/or prior written complaints involving any defective condition, including the alleged defective condition, present at the Subject Location. Accordingly, the County of Nassau had no prior written notice of the alleged defect at the Subject Location for five years prior to Plaintiff's alleged accident."

In opposition to the defendant County of Nassau's requested relief, there is no submission from any of the respective parties that would raise an issue of fact as to the County's contention as to the lack of jurisdiction of the area in issue and the absence of notice. As such, the defendant County of Nassau's motion for an Order pursuant to CPLR §3212 granting summary judgment in favor of defendant County of Nassau and dismissing the cross claims of defendants New Hyde Park Paint and Wallpaper, Eli Nissan and Benjamin Nissan, is **granted**.

The respective moving defendants contend, individually, amongst other things, that the alleged defect in issue was a trivial defect. In examining such an issue, the Court in **Shohet v Shaaya**, 43 AD3d 816, 844 NYS2d 317 (Second Dept., 2007), stated:

"The Supreme Court properly granted the defendant's motion for summary judgment dismissing the complaint. The defendant met his burden of establishing, prima facie, his entitlement to such relief (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572). Upon

scrutiny of the photograph circled by the plaintiff and the other evidence in the record, we agree with the Supreme Court that the alleged defect did not constitute a trap or nuisance and was merely a trivial defect which was not actionable as a matter of law (see *Trincere v County of Suffolk*, 90 NY2d 976, 977, 665 NYS2d 615, 688 NE2d 489; *Outlaw v Citibank*, 35 AD3d 564, 565, 826 NYS2d 642, *Taussig v Luxury Cars of Smithtown, Inc.*, 31 AD3d 533, 534, 818 NYS2d 593; *D'Arco v Pagano*, 21 AD3d 1050, 1051, 801 NYS2d 158; *Mendez v DeMilo*, 17 AD3d 328, 792 NYS2d 600; *Hargrove v Baltic Estates*, 278 AD2d 278, 717 NYS2d 320). In opposition, the plaintiffs failed to raise a triable issue of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718)."

Shohet v Shaaya, supra at 317

Upon review of the photographs annexed to the Nissan defendants' application as Exhibit P, together with the respective deposition transcripts the respective defendants have established that the defect in issue was a trivial defect. While the Court observes that the plaintiff offers an affidavit of Daniel W. Haines, PE as to the nature of the alleged defect, this expert was not identified by the plaintiff prior to the filing of the plaintiff's Note of Issue on February 9, 2010. As such, the Court has not considered said commission (see, **Gerardi v Verizon New York, Inc.**, 66 Ad3d 960, 888 YS2d 136 (Second Dept., 2009). In the absence of same, the plaintiff's opposition does not controvert the respective defendants' submissions as to a trivial defect.

Based upon the foregoing, the defendant Intercounty's application for an Order pursuant to CPLR §3212 granting summary judgment and dismissing the above entitled action of the plaintiff, Daniel Kelley, as well as dismissing all cross claims on the grounds that the action is without merit in that plaintiff cannot make out a prima facie case of negligence against the aforesaid defendant, Intercounty Paving Associates, LLC; the Nissan defendants' motion for an Order pursuant to CPLR Rule 3212 granting summary judgment in favor of defendants Eli Nissan, Benjamin Y. Nissan and George Y. Nissan dismissing the plaintiff's complaint and all cross-claims on the grounds that there are no material issues of fact that require a trial of this action and the Defendant/Third party Plaintiff New Park Paint's application for an Order granting summary judgment as to defendant New Park Paint and Wall Paper, Inc. and dismissing the plaintiff's Claims and all Cross-Claims in its entirety, are all respectively **granted**.

SO ORDERED.

DATED: 10/1/2010

.....
Ray S. Wachman
.....
J.S.C.

ENTERED

OCT 08 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE