

Goldman v Town of Smithtown

2010 NY Slip Op 33035(U)

October 25, 2010

Supreme Court, Suffolk County

Docket Number: 07-39505

Judge: Joseph C. Pastoressa

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INDEX No. 07-39505
CAL. No. 09-01936-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY



PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

Mot. Seq. # 001 - MG; CASEDISP

-----X		
LENORE GOLDMAN,	:	FOSTER & GARBUS
	:	Attorneys for Plaintiff
Plaintiff,	:	10 Grace Avenue, Suite 4
	:	Great Neck, New York 11021
- against -	:	
	:	DEVITT SPELLMAN BARRETT, LLP
THE TOWN OF SMITHTOWN,	:	Attorneys for Defendant
	:	50 Route 111
Defendant.	:	Smithtown, New York 11787
-----X		

Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 11; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 12-16; Replying Affidavits and supporting papers 17-19; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendant, Town of Smithtown, pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint against it is granted and the complaint is dismissed with prejudice.

The complaint of this action asserts that on January 30, 2007, the plaintiff, Lenore Goldman, while walking on a sidewalk located at 85 Ashland Drive, Kings Park, Town of Smithtown, New York, was caused to fall due to the allegedly dangerous and defective unlevel condition of the sidewalk. A cause of action asserting negligence against the Town of Smithtown has been set forth.

The defendant Town of Smithtown seeks summary judgment dismissing the complaint on the basis that it did not receive prior written notice of the condition complained of as required by Town Law Section 65-a of the State of New York and Code of the Town of Smithtown §245-13 which provides that written notice of a claimed defect of a sidewalk shall be filed with the Town Clerk 15 calendar days prior to the event giving rise to the alleged claim.

The plaintiff opposes this motion on the basis that notice of the claimed defect was provided to the Parks Department of the Town of Smithtown by Town Council Woman Joanne Gray on August 28, 2006. It is further opposed on the basis that the Code of the Town of Smithtown §245-13 is unconstitutional in that it does not provide that notice may be given to the Town Superintendent of Highways as provided by Town Law Section 65-a of the State of New York.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented, (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form, (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

In support of this motion the defendant has submitted, inter alia, an attorney’s affirmation; copies of the complaint and answer; plaintiff’s verified and amended verified bill of particulars; a copy of the transcript of the examination before trial of Lenore Goldman dated November 20, 2008; the affidavit of Vincent Puleo, Town Clerk for the Town of Smithtown; and photographs. In opposing this motion, the plaintiff has submitted, inter alia, an attorney’s affirmation; plaintiff’s affidavit; a copy of a letter from Joanne Gray dated August 30, 2006; and copies of photographs.

The adduced testimony establishes that Lenore Goldman, on January 30, 2007 at about 5:30 p.m., was walking from her home of thirty six years located at 70 Ashland Drive, Kings Park to her neighbor’s house about seven houses down the block at 85 Ashland Drive, Kings Park, on the opposite side of the street, for the purpose of having pizza for dinner. She drove her car, backed out of her driveway, traveled north, and parked in front of her friend’s home before she reached her friend’s driveway. The driver’s side of her vehicle was closest to the street. Upon exiting her vehicle, she walked around the back of it, stepped onto the curb onto the grass and then onto the sidewalk. In front of 85 Ashland Drive was a sidewalk with a grassy medium between the curb and the sidewalk. She walked about half a car’s length on the sidewalk when the right toe of her sneaker clipped a raised area of the sidewalk, causing her to fall. The sidewalk was made of individual slabs of concrete and was raised and uneven where she tripped. She had never noticed the condition before and did not know how long it was there. Lighting was not a factor and she had no difficulty seeing as she walked. She never made any complaints about the sidewalk before. After she fell, her friend, Ms. Damsky, told her that she had complained about the sidewalk to the town advising them there was a problem. There was no snow or ice on the sidewalk and the weather was clear.

A letter from Joanne Gray of the Town of Smithtown, Town Hall, dated August 30, 2006, sets forth that “The Town has been notified that your sidewalk is in need of repair. Please see the enclosed memo.” The memo annexed thereto, dated August 28, 2006, directed to the attention of William Murphy and Chuck Barrett, of the Parks Department, sets forth that the following sidewalks in Kings Park pose a hazard to pedestrian traffic that may result in physical injury. Among the sidewalks listed was Ashland Drive #85.

Vincent Puleo has set forth in his supporting affidavit that he is the Town Clerk for the Town of Smithtown and has been so employed since 2006. He has responsibility to maintain the files with respect to written notice of all sidewalk defects within the Town and every written notice of defect received by the Town of Smithtown. He maintains an indexed record for all written notices of defects, including sidewalk defects, and also maintains an indexed book regarding claims made against the Town which also includes any allegations of sidewalk defects. He caused a search to be made of those indexed records and book and concludes that the Town Clerk's Office of the Town of Smithtown never received prior written notice of any defective conditions or sidewalk defects in front of the premises designated as #85 Ashland Avenue, Kings Park for the five years preceding January 30, 2007.

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, plaintiff must show that defendant's negligence was a substantial factor in bringing about the injury. If, defendant's negligence were a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (*Spiegel v Fine Paint Co.* 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]). Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (see, *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]; *Darby v Compagnie Natl. Air France*, 96 NY2d 343 [2001]).

Where, as here, a municipality has enacted a prior written notice statute pursuant to Town Law, Article 65, it may not be subjected to liability for personal injuries caused by an improperly maintained sidewalk or walkway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (*Wilkie v Town of Huntington*, 29 AD3d 898 [2nd Dept 2006], citing to *Amabile v City of Buffalo*, (citations omitted); *Lopez v G&J Rudolph*, (citations omitted); *Gazenmuller v Incorporated Vil. of Port Jefferson* (citations omitted). Actual or constructive notice of a defect does not satisfy this requirement, *Wilkie v Town of Huntington*, supra). To prove a prima facie case of negligence in a slip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*Stumacher v Waldbaum*, 274 AD2d 572 [2d Dept 2000]). Such has not been demonstrated here.

The Code of the Town of Smithtown §245-13 provides that written notice of a claimed defect of a sidewalk shall be filed with the Town Clerk 15 calendar days prior to the event giving rise to the alleged claim.

Based upon the foregoing, it is determined that the defendant Town of Smithtown has established prima facie that its Town Clerk did not receive prior written notice of the claimed sidewalk defect at 85 Ashland Drive and therefore the plaintiff failed to comply with the requirement set forth in the Code of the Town of Smithtown §245-13.

In opposing this motion, the plaintiff has not raised a factual issue to preclude summary judgment dismissing the complaint as a matter of law. Counsel for the plaintiff sets forth in his affirmation that he is well aware of the case law which says that notification to other town officials of defects is not sufficient where there is a Town statute providing who must be notified. Counsel claims when he placed a telephone

call to the defendant Town of Smithtown, he was told that the only way to report the sidewalk defect is through the Parks Department. However, counsel's argument is without merit as the statute at issue requires prior written notice and does not provide for a telephonic complaint about an alleged condition which is not the equivalent of prior written notice of the condition (see, *Gorman v Town of Huntington*, 12 NY3d 275 [2009]; *Kiszenik v Town of Huntington*, 2010 NY Slip Op 1621 [Supreme Court of New York, Appellate Division 2nd Dept 2010]). Therefore, that counsel was referred to the Parks Department when he called the Town of Smithtown is not dispositive.

“Not every written complaint to a municipal agency necessarily satisfies the strict requirements of prior written notice; any agency responsible for fixing the defect that keeps a record of such complaints does not, ipso facto, qualify as a proper recipient of such notice. Simply put, whereas a written notice of defect is a condition precedent to suit, a written request to any municipal agent other than a statutory designee that a defect be repaired is not” (*Gorman v Town of Huntington*, supra). The Code of the Town of Smithtown §245-13 provides that written notice of a claimed defect of a sidewalk shall be filed with the Town Clerk 15 calendar days prior to the event giving rise to the alleged claim. Prior written notice statutes must be strictly construed, and the written notice of a defect has to be to the statutory designee rather than to any municipal agent (see, *Gorman v Town of Huntington*, supra). Here the plaintiff does not claim that the Town Clerk was notified in writing at any time of the claimed defect, and the plaintiff has not submitted as evidentiary proof a copy of written notice to the Town Clerk of the Town of Smithtown prior to the accident, and the Code does not provide that notice may be provided to anyone but the Town Clerk.

Counsel for the plaintiff alternatively argues that the Code of the Town of Smithtown §245-13 is unconstitutional. However, that argument must also fail.

Local governments, including counties, are authorized by our state Constitution to adopt and amend local laws relating to the presentation, ascertainment, and discharge of claims against it or the acquisition, care, management, and use of its highways, roads, streets, avenues and property (see, New York State Constitution Article IX, Section 2(c)(ii)). This constitutional authority is implemented by identical provisions in Section 10(1) of the Municipal Home Rule Law (see, *Holt v County of Tioga*, 56 NY2d 414[1982]). New York Municipal Home Rule Law §10(1)(ii)(d)(3) confers express authority on towns to amend or supersede provisions of the New York Town Law in relation to matters as to which they are otherwise authorized to adopt local legislation under the N.Y. Mun. Home Rule Law, unless the legislature expressly shall have prohibited the adoption of such local law. The general authority to enact notice of defect provisions falls under a local government's power to legislate relating to the presentation, ascertainment, disposition, and discharge of claims against it, and the acquisition, care, management, and use of its highways, roads, streets, avenues and property (see, *Walker et al v Town of Hempstead*, 84 NY2d 360 [1994]). Here, the Town of Smithtown has enacted a prior written notice law similar in effect to New York State Town Law Section 65-a(2) which requires in relevant part that prior written notice for a defective sidewalk be provided to the Town Clerk or Highway Superintendent.

Although the Town of Smithtown requires prior written notice of a claimed defect be given to the Town Clerk of the Town of Smithtown, and although it does not provide for notice to be given to the Highway Superintendent, it is not inconsistent with the provisions of the New York State Constitution Article IX, Section 2(c)(ii) and New York Municipal Home Rule Law §10(1)(ii)(d)(3) as the Town of Smithtown is not requiring notice to someone or a department other than enumerated in Town Law 65-a(2)


(see, *Walker v Town of Hempstead*, supra). Where a statute creates provisos or exceptions as to certain matters, the inclusion of such provisos or exceptions is generally considered to deny the existence of others not mentioned (*Walker v Town of Hempstead*, supra). The Town of Smithtown Legislature provided for notice to the Town Clerk and did not expressly require notice to the Highway Superintendent. By not designating the Highway Superintendent as a person required to receive prior written notice, the Superintendent is therefore excluded.

When a locality exercises the legislative power delegated to it by the New York State Constitution, there is an exceedingly strong presumption that the local law enacted is constitutional. In order to defeat that presumption of validity, a party must show that the local law in question is inconsistent with either provisions of the New York Constitution or with a general law enacted by the state legislature (*Holt v County of Tioga*, 56 NY2d 414 [1982]). While the presumption of constitutionality is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt, and only as a last resort should courts strike down legislation on the ground of unconstitutionality (*Lighthouse Shores, Inc. v Town of Islip et al*, 41 NY2d 7 [1976]).

Here it is determined that the Town of Smithtown notice statute is not inconsistent with, and is not precluded by, Town Law 65-a(2). It is further determined that the Code of the Town of Smithtown §245-13 is more restrictive than Town Law 65-a(2) in that notice may only be provided to the Town Clerk in writing and does not provide for notice to be given to the Town Highway Superintendent. However, this Court does not find an express prohibition in Town Law 65-a(2) against the local law's adoption to preclude the supersession with the Code of the Town of Smithtown §245-13 as written and which does not provide for written notice to be served upon the Highway Superintendent (see, *White v Incorporated Village of Hempstead*, 13 Misc3d 471 [Supreme Court of New York, Nassau County 2006]; *Walker v Town of Hempstead*, supra). A local law inconsistent with the Town Law is permissible as the Town is not required to copy the statutory language of Town Law 65-a and may enact a more restrictive notice requirement which provides the Town with greater insulation from liability (see, *Wall v Town of Niskayuna*, 14 AD3d 988 [3rd Dept 2005]; *Fulgum et al v Town of Cortland et al*, 1 AD3d 775 [2nd Dept 2003]). In *Costa v Town of Babylon*, 6 Misc3d 7 [Supreme Court of New York, Appellate Term, 2nd Dept 2004], the court held that a municipality may impose a more restrictive notice requirement than that contained in the Town Law. Here it is determined that the Code of the Town of Smithtown §245-13 has a more restrictive notice requirement to insulate its liability, but such restriction, by not naming the Highway Superintendent as a person who may receive prior written notice of a claimed defect, is not prohibited by Town Law 65-a(2).

Based upon the foregoing, it is determined as a matter of law that the Code of the Town of Smithtown §245-13 is constitutional. The plaintiff has not defeated the presumption that the statute is valid and has not demonstrated that the Code of the Town of Smithtown §245-13 is impermissibly inconsistent with either provisions of the New York Constitution or the New York Town Code 65-a(2) (see *Holt v County of Tioga*, 56 NY2d 414[1982]). It is further determined that the plaintiff has failed to demonstrate that prior written notice was given to the Town Clerk as required by the Code of the Town of Smithtown §245-13.

Accordingly, motion (001) by the Town of Smithtown for summary judgment dismissing the complaint is granted and the complaint is dismissed with prejudice.
Dated: October 25, 2010


HON. JOSEPH C. PASTORESSA

X FINAL DISPOSITION NON-FINAL DISPOSITION