

Thornton v Village of Freeport

2010 NY Slip Op 33165(U)

November 4, 2010

Supreme Court, Nassau County

Docket Number: 002950/10

Judge: Ute W. Lally

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SHORT FORM ORDER

**SUPREME COURT – STATE OF NEW YORK
COUNTY OF NASSAU – PART 4**

**Present: HON. UTE WOLFF LALLY
Justice**

MG MG MG

LUE R. THORNTON,

**Motion Sequence #1, #2, #3
Submitted September 7, 2010**

Plaintiff,

-against-

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**THE VILLAGE OF FREEPORT, THE TOWN
OF HEMPSTEAD, FRANKLIN A. VASQUEZ,
JULIANA PEREZ and ROSALINA MARTINEZ,**

Defendants.

The following papers were read on this motion for summary judgment:

Notice of Motion and Affs.....	1-3
Notice of Cross Motion and Affs.....	4-8
Second Notice of Cross Motion and Affs.....	9-11
Affs in Reply.....	12&13

Upon the foregoing papers, it is ordered that this motion by defendant, the Village of Freeport, for an order pursuant CPLR 3212 granting summary judgment in their favor and dismissing plaintiff's complaint as against said defendant, is granted.

Plaintiff commenced this action to recover money damages for injuries allegedly sustained as a result of a trip and fall that occurred on an uneven and broken sidewalk, in an area that was not properly lit, in front of 102 Grand Avenue, Village of Freeport, State of New York on November 17, 2008. A Notice of Claim was served upon the

Village of Freeport which served a Notice of a General Municipal Law § 50-h hearing scheduling said hearing for March 31, 2009. The 50-h hearing was adjourned to April 29, 2009, but was not held on that date, as plaintiff was unable to attend the hearing on the date scheduled. The 50-h hearing was never rescheduled. Defendant alleges plaintiff's counsel stated that his client would no longer be pursuing her claim against the Village of Freeport in this matter. Conversely, plaintiff alleges that he requested an adjournment of the hearing and defendant made no further attempts to schedule the hearing.

A motion for summary judgment should be granted where no material or triable issues of fact requiring a trial exist. (*Sillman v Twentieth Century-Fox Films Corp.*, 3 NY2d 395). The court's task on a motion for summary judgment is issue finding, not issue determination. (*Id.*). The party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by demonstrating the absence of any material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320; *Zuckerman v City of New York*, 49 NY2d 557). In opposition to the motion for summary judgment, the non-moving party must produce evidence sufficient to demonstrate the existence of and to require a trial of material questions of fact. (*Zuckerman v City of New York, supra*).

A plaintiff who fails to comply with General Municipal Law §50-h is precluded, in the absence of "exceptional circumstances," from commencing an action against a municipality. (*Zapata v County of Suffolk*, 23 AD3d 553; *Patterson v Ford*, 255 AD2d 373; *Arcila v Incorporated Village of Freeport*, 231 AD2d 660). A court may dismiss the complaint when the General Municipal Law §50-h hearing is adjourned at the plaintiff's

request, and the plaintiff commences the action without rescheduling the hearing date. (*Bernoudy v County of Westchester*, 40 AD3d 896). Dismissal of the action, for failure to appear for the 50-h hearing, is required “only if a claimant fails to appear for a hearing, or adjourns a scheduled examination to a time more than ninety days after service” upon him of the demand for the hearing. (*McCormack v Port Washington Union Free School Dist.*, 214 AD2d 546). Upon the evidence provided by both defendant the Village of Freeport and plaintiff, there is inadequate proof that the 50-h hearing scheduled for April 29, 2009 was adjourned. Rather, it appears that plaintiff did not attend the hearing on that date and failed to provide an exceptional circumstance for his absence. Defendant’s letter to plaintiff’s attorney, dated February 18, 2010, sets forth the only reason provided to this court for plaintiff’s absence from the scheduled 50-h hearing, “you advised our office that you would not be producing your client for the 50-h Hearing as your claim was to be simply against the adjacent landowners in this matter.” (Defendant’s Exhibit E).

Further, the cross-motion of defendant, the Town of Hempstead, for an order pursuant to CPLR 3212 for summary judgment dismissing plaintiff’s complaint and any cross-claims against them is granted.

Defendant, Town of Hempstead, has met its burden of proof by showing a *prima facie* entitlement to summary judgment. Unsupported conclusory statements are insufficient to raise a material issue of fact requiring a trial, “mere general averments will not suffice,” and the party opposing the motion for summary judgment must make an evidentiary showing. (*Rosenberg v Del-Mar Division*, 56 AD2d 576, 577).

The argument that summary judgment is premature upon mere hope that evidence sufficient to defeat the motion may be uncovered during discovery is insufficient. (*Associates Commercial Corp. v Nationwide Mut. Ins. Co.*, 298 AD2d 537). The party opposing the motion for summary judgment must “produce evidentiary proof in admissible form sufficient to require a trial of material questions of facts.” (*Papadopoulos v Gardner’s Village, Inc.*, 198 AD2d 216, 217; see also, *Zuckerman v City of New York*, 49 NY2d 557). Defendant’s submission of an affidavit of a Deputy Commissioner of Road Maintenance of its Department of Public Works and Engineering, denying any ownership, control, or affirmative acts by the Town of Hempstead to the area where plaintiff was injured was sufficient for purposes of summary judgment where plaintiff’s argument in opposition was merely the need for discovery to reveal potential issues of fact. (*Monteleone v Incorporated Village of Floral Park*, 123 AD2d 312).

Defendant, Town of Hempstead, also makes this cross-motion on the grounds that it did not have prior written notice of the alleged defective condition as required by Chapter 6 of the Code of the Town of Hempstead. Prior written notice may not be necessary where the Town’s affirmative negligence may have created the defect or if the Town had a special use for or derived a benefit from the defective portion of the sidewalk. (*Doherty v Town of Orangetown*, 221 AD2d 310; *Meyer v Town of Brookhaven*, 204 AD2d 699; see *Kaufman v Silver*, 90 NY2d 204; *Smith v City of Corning*, 14AD2d 27; *Filsno v City of Rochester*, 10 AD2d 663). However, prior written notice is a condition precedent to the imposition of liability upon a municipality. (*Mohil v Town of Hempstead*, 152 AD2d 687; *Mollohan v Village of Port Washington*, 153 AD2d

881). The affidavit of a Town employee, who is responsible for keeping record of notices of defective conditions and who has searched the records and has found no prior written notice, is sufficient to establish that no prior written notice was received (*Camenson v Town of North Hempstead*, 298 AD2d 543; *Cruz v City of New York*, 218 AD3d 546).

Defendant, the Town of Hempstead, has demonstrated through the affidavit of John Bonner, the Assistant Superintendent of Street Lighting of the Traffic Control Division of the Department of General Services of the Town of Hempstead, and the affidavit of Andrew Brust, the Records Access Officer of the Sidewalk Division of the Highway Department of the Town of Hempstead, that no material or triable issues of fact exist, the Town of Hempstead did not own, operate, maintain, inspect, repair, or perform construction work on the sidewalk or any street lights at the location of plaintiff's trip and fall in front of 102 Grand Street, Village of Freeport, State of New York, nor did they cause the dangerous condition through an affirmative act, derive a benefit from the portion of sidewalk, or receive prior written notice of the condition. Plaintiff, in opposition, has failed to provide anything other than conclusory statements unsupported by evidence sufficient to create a triable issue of fact. Furthermore, plaintiff's asserting the need for discovery to uncover support for the allegations against defendant is also insufficient to defeat the motion for summary judgment.

Finally, the cross motion of plaintiff for an order pursuant to CPRL 3215 granting default judgment against defendants Franklin A. Vasquez, Juliana Perez, and Rosalina Martinez and setting this matter down for an assessment of damages trial is granted.

Therefore, defendant, the Village of Freeport's motion for summary judgment is granted and plaintiff's complaint is hereby dismissed. Costs pursuant to CPLR 8202 are denied. The cross-motion of defendant, the Town of Hempstead, for an order pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint and any cross-claims against them is granted. Further, the cross motion of plaintiff for an order pursuant to CPLR 3215 granting a default judgment against defendants, Franklin A. Vasquez, Juliana Perez, and Rosalina Martinez, for their failure to appear and defend this matter, is granted.

This matter is specifically referred to the Calendar Control Part (CCP) for Inquest and Assessment of Damages against the defendants, and shall appear on the calendar of CCP on January 11, 2011 at 9:30 A.M. subject to the approval of the Justice there presiding. Further, plaintiff shall serve a Notice of Inquest, together with a copy of this order and the Note of Issue upon the defendants by certified mail, return receipt requested, at their last known addresses, and shall serve copies of same together with receipt of payment, upon the Calendar Clerk of this Court, no later than ten (10) days prior to the date of Inquest.

The directive with respect to an Inquest is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee as he or she deems appropriate. The failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the Inquest.

Dated: November 4, 2010



UTE WOLFF LALLY, J.S.C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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