

**Chirco v City of Long Beach**

2010 NY Slip Op 33405(U)

November 9, 2010

Supreme Court, Nassau County

Docket Number: 4551/09

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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ROBERTA CHIRCO,  <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- against -</p> CITY OF LONG BEACH,  <p style="text-align: center;">Defendant.</p>	TRIAL/IAS PART 32 NASSAU COUNTY  Index No.: 4551/09 Motion Seq. No.: 01 Motion Date: 07/29/10 <p style="text-align: center;"><b>XXX</b></p>
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**The following papers have been read on this motion:**

<u></u>	<u>Papers Numbered</u>
<u>Notice of Motion for Summary Judgment, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>2</u>
<u>Reply Affirmation and Exhibits</u>	<u>3</u>

Defendant moves, pursuant to CPLR § 3212, for an order granting summary judgment and dismissing plaintiff's complaint. Plaintiff opposes defendant's motion.

This personal injury action arises from a slip and fall accident that took place on May 11, 2008, at approximately 12:00 p.m. On said date, it is alleged that plaintiff was caused to fall due to a broken, cracked, uneven board on the boardwalk between Laurelton and Lafayette Boulevards within the confines of the City of Long Beach, New York. On or about February 3, 2009, plaintiff commenced the action by service of a Summons and Verified Complaint. Issue was joined on March 17, 2009.

In its motion for summary judgment, defendant claims that it is entitled to summary

judgment and an order dismissing plaintiff's complaint as a matter of law based upon the ground that no prior written notice was received pursuant to Section 256A(1) of the City of Long Beach Charter. Section 256A(1) of the City of Long Beach Charter provides that no civil action based upon a defective/dangerous/obstructive condition on its boardwalk may be maintained against the City unless the City of Long Beach had written notice of the defective/dangerous/obstructed condition at least forty-eight (48) hours prior to the accrual of the claim. Defendant submits that, in the present matter, the City of Long Beach Commissioner of Public Works searched his records for prior written notice with respect to the alleged incident at issue. The Commissioner states that a search of his records revealed that there was no such prior written notice of the condition which allegedly caused plaintiff's injuries. Defendant argues that plaintiff must plead and prove compliance with the written notice requirement as a condition precedent to the suit and that plaintiff's failure to do so entitles the municipality to dismissal of the complaint. Defendant contends that a municipality which has enacted a prior written notice statute may not be subject to liability unless it either received actual written notice of the dangerous condition, its affirmative act of negligence caused the accident or where special use contains a special benefit on the municipality. Defendant argues that there is no evidence in this case that it had prior notice of the condition that caused the plaintiff's injury, nor is there evidence of any of the recognized exception to the provisions of the prior written notice statute.

In opposition to defendant's motion, plaintiff argues that defendant's claim that Commissioner of Public Works, Kevin Mulligan, searched his records for prior written notice and that the City did not have prior written notice of the defect is patently false. Plaintiff's attorney claims that her search of defendant's books and records revealed six Notices of Claim

relating to the location on the Boardwalk where plaintiff's accident occurred which were filed with the City of Long Beach prior to plaintiff's date of accident. Plaintiff also argues that in addition to the aforementioned Notices of Claim filed prior to plaintiff's accident, there are also several pages in defendant's Log Book which reflect examinations of the boardwalk and repairs being performed at or near the location of plaintiff's accident prior to the date of accident.

Plaintiff submits that a FOIL request submitted to the Long Beach Police Department revealed six accidents resulting in injuries requiring police aid, which occurred in the same location as plaintiff's accident, prior to the date of plaintiff's accident. Plaintiff also submits articles from the Long Beach Herald regarding the ongoing, dangerous condition of the boardwalk and claims that said articles indicate that the defendant was aware of the boardwalk's state of disrepair at least as far back as 2006. Finally, plaintiff argues that defendant's motion is premature despite the fact that plaintiff filed a Note of Issue in the case. Plaintiff claims that further examination of the Defendant's books and records in accordance with plaintiff's Supplemental Notice for Discovery and Inspection, as well as further deposition of the defendant in order to explain the abovementioned records and any other records that might be discovered in plaintiff's further examination of defendant's books and records, must still be conducted.

In reply to plaintiff's opposition, defendant submits that "[p]laintiff's arguments are, in essence, that the prior written notice statute was satisfied by: a) notices of boardwalk defects that happen to have been on the same block the Plaintiff had her accident in prior years; b) the Beach Maintenance Department's log book that shows that they did work on that block at various times; c ) Police Department records that indicate that the police were at times called to respond to incidents on that block; and d) newspaper articles wherein certain individuals allege

that the boardwalk is in a general state of disrepair. Not a single one of these arguments withstands scrutiny.” Defendant argues that each of the Notices of Claim that plaintiff references is too remote in time and/or distance to ever qualify as prior written notice of the specific alleged condition plaintiff claims caused her accident. Defendant asserts that the law is settled that, while prior written notice need not be specific right down to the inch, it must be specific enough to show that the City was actually notified that a defect exists at a specified location. Defendant submits that the other documents plaintiff claims require a denial of the instant motion, the maintenance logs and police logs, are legally irrelevant as they do not show written notice of anything. Further, actual notice does not obviate the need to comply with the prior written notice requirement and notice given to the wrong municipal agency also does not satisfy the prior written notice requirement. Defendant also argues that plaintiff obtained all discovery that she actually sought.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant’s favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney’s affirmation. *See*

CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Summary judgment is a drastic remedy which should not be granted when there is any doubt about the existence of a triable issue of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, *supra*. It is nevertheless an appropriate tool to weed out meritless claims. *See Lewis v. Desmond*, 187 A.D.2d 797, 589 N.Y.S.2d 678 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N.A.*, 82 A.D.2d 168, 442 N.Y.S.2d 610 (3d Dept. 1981).

Based on the record before it, the Court finds that defendant has made a *prima facie* showing that it is entitled to judgment as a matter of law. It has demonstrated that no prior written notice was received pursuant to Section 256A(1) of the City of Long Beach Charter and

therefore, pursuant to Section 256A(1), no civil action based on a defective/dangerous/obstructive condition on defendant's boardwalk may be maintained against defendant unless the City of Long Beach had written notice of the defective/dangerous/obstructive condition at least forty-eight (48) hours prior to the accrual of the claim. As argued by defendant, plaintiff must plead and prove compliance with the written notice requirement as a condition precedent to the suit and failure to do so entitles defendant to dismissal of the complaint. *See Katz v. City of New York*, 87 N.Y.2d 241, 638 N.Y.S.2d 593 (1995); *Hyland v. City of New York*, 32 A.D.3d 822, 821 N.Y.S.2d 138 (2d Dept. 2006); *Estrada v. City of New York*, 273 A.D.2d 194, 709 N.Y.S.2d 105 (2d Dept. 2000); *Colon v. City of New York*, 29 A.D.3d 724, 815 N.Y.S.2d 244 (2d Dept. 2006). Through the affidavit of Commissioner of Public Works, Kevin Mulligan, defendant has demonstrated that no such written notice was received in this matter. Based upon the evidence and legal argument presented by defendant, the Court finds that defendant has established a *prima facie* showing that they had no prior written notice of the condition alleged to have caused plaintiff's fall.

As previously stated, if a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, *supra*. The Court concludes that plaintiff's proof is insufficient to raise a triable issue of fact. The evidence submitted by plaintiff for the Court's consideration in support of her argument that defendant had prior written notice of the alleged defect that caused plaintiff's injury that was both remote in time and distance to the date and location of plaintiff's accident. Said evidence does not satisfy the requirements set forth in Section 256A(1) of the City of Long

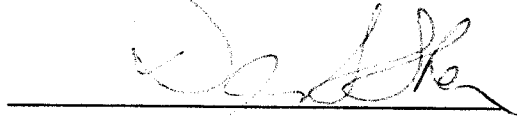
Beach Charter.

Moreover, the motion for summary judgment was not premature, since plaintiff failed to offer an evidentiary basis to suggest that the discovery may lead to relevant evidence. Plaintiff's "hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery was an insufficient basis for denying the motion." *Conte v. Frelen Assoc., LLC, supra.* See also *Lopez v. WS Distrib., Inc.*, 34 A.D.3d 759, 825 N.Y.S.2d 516 (2d Dept. 2006).

Accordingly, defendant's motion, pursuant to CPLR § 3212, for an order granting summary judgment and dismissing plaintiff's complaint is hereby granted.

This constitutes the decision and order of this Court.

ENTER:



DENISE L. SHER  
A.J.S.C.  
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Dated: Mineola, New York  
November 9, 2010

**ENTERED**  
NOV 19 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE