

Milack v Janlis Realty Equities, Ltd.

2011 NY Slip Op 30663(U)

March 4, 2011

Sup Ct, Nassau County

Docket Number: 006416/10

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 18

STEVEN MILACK, X

Plaintiff,

Index No.: 006416/10
Motion Sequence...01, 02
Motion Date...11/09/10

-against-

XXX

JANLIS REALTY EQUITIES, LTD., FRANK M.
O'ROURKE, CITY OF LONG BEACH,
COUNTY OF NASSAU and NASSAU COUNTY
COMMISSIONER OF PUBLIC WORKS,

Defendants.

X

- Papers Submitted:
- Notice of Motion.....X
- Notice of Cross-Motion.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X
- Reply Affirmation.....X

Upon the foregoing papers, the motion by the Defendant, FRANK M. O'ROURKE (hereinafter referred to as "O'ROURKE") seeking an order granting summary judgment pursuant to CPLR §3212 as well as the imposition of sanctions against the Plaintiff and the Cross-Motion by the Defendant, CITY OF LONG BEACH, (hereinafter referred to as "CITY") seeking an order granting summary judgment pursuant to CPLR §3212, are determined as hereinafter provided.

In the instant action, the Plaintiff alleges that he fell in a pothole on July 18, 2009, while he was making a bread delivery to the Associated Supermarket located at 471 Roosevelt Boulevard, a/k/a 669 East Park Avenue, in the City of Long Beach, State of New York. Specifically, the Plaintiff alleges that after he loaded the bread delivery from his truck onto a hand truck, he stepped backwards into a pothole in the roadway on Roosevelt Boulevard and fell sustaining injuries.

The Defendant, O'ROURKE is the owner of the premises located at 471 Roosevelt Boulevard, a/k/a 669 East Park Avenue. 471 Roosevelt Boulevard, a/k/a 669 East Park Avenue is located within the jurisdiction of the City of Long Beach.

The Defendant, O'ROURKE alleges that he was under no duty to maintain the roadway in a safe condition, made no special use of the area of the roadway where the Plaintiff's accident occurred and did not create the condition that allegedly caused the Plaintiff's accident. The Defendant, O'ROURKE's counsel also seeks sanctions against the Plaintiff's counsel alleging that the Plaintiff's counsel continued to maintain this action even after being advised that the Plaintiff's action should be discontinued.

The Plaintiff opposes the Defendant, O'ROURKE's motion, primarily arguing that summary judgment is premature as discovery has not yet been conducted. Additionally, the Plaintiff alleges that there exists disputed facts as to who was responsible for the inspection, maintenance and repair of the roadway while the pothole existed which caused the Plaintiff to fall and sustain his injuries. The discovery the Plaintiff claims is yet to have been obtained is information necessary to determine if the Defendant, O'ROURKE

performed any maintenance or repairs to the subject area or made any special use of the area involving the subject pothole prior to the Plaintiff's accident.

The City cross-moves for summary judgment and opposes the Defendant, O'ROURKE's summary judgment motion citing Section 256 of the Charter of the City of Long Beach. The City contends that Section 256 of the City Charter provides that "the owner or occupant of lands fronting or abutting on any street, highway, traveled road, public lane, alley or square, shall make maintain and repair the sidewalk, curbstone and gutters adjoining his lands and shall keep such sidewalk, curbstone and gutter free and clear of and from snow, ice and other obstructions." Specifically, the City alleges that any defect that may have caused the Plaintiff to fall would have been the responsibility of the abutting landowner to repair. As such, the City contends that the Defendant, O'ROURKE, as the abutting landowner is responsible for repairing any pothole in the roadway fronting or abutting his property. The City contends that the word "gutter" as used in Section 256 of the City Charter refers to roadway, specifically, the area where the Plaintiff alleges to have fallen on Roosevelt Boulevard.

The City further contends that it is entitled to summary judgment alleging that the Plaintiff's complaint should be dismissed as a matter of law, based on the ground that no prior written notice of the defect, pursuant to Section 256 A (1) of the City of Long Beach Charter, was ever received. Section 256 A (1) of the City of Long Beach Charter provides, in pertinent part:

No civil action shall be maintained against the City for damage to property or

injury to person or death sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrance thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless at least 48 hours before prior to the occurrence resulting in such damage, injuries or death, written notice of the defective, unsafe, dangerous or obstructed condition of such street, highway, bridge, culvert, sidewalk or crosswalk shall have been filed in the office of the commissioner of Public Works of the City, and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonable safe.

Prior written notice of an alleged defect is a necessary prerequisite to imposing liability upon a municipality for an allegedly defective and/or dangerous sidewalk condition (*Frullo v. Incorporated Village of Rockville Centre*, 274 A.D.2d 499 [2d Dept. 2000]; *Brooks v. Village of Babylon*, 251 A.D.2d 526 [2d Dept. 1998]). Prior notification laws are a valid exercise of legislative authority. Such laws reflect a legislative judgment to modify the duty of care owed by a locality in order to address the vexing problem of municipal street and sidewalk liability. General Municipal Law, § 50-e (4), the authorizing statutory provision, specifically allows for the enactment of prior notification statutes and requires compliance with such laws. Thus, a locality may avoid liability for injuries sustained as a result of defects or hazardous conditions on its sidewalks if it has not been notified in writing of the existence of the defect or hazard at a specific location. Neither actual nor constructive notice may override the statutory requirement of prior written notice of a sidewalk defect. The legislature has made plain its judgment that a municipality should be protected from liability in these circumstances until it has received written notice of the defect or obstruction. *Amabile v. City of Buffalo*, 93 N.Y.2d 471 (1999). There are only two exceptions to the

statutory rule requiring prior written notice, namely where the locality created the defect or hazard through an affirmative act of negligence or where a “special use” confers a special benefit upon the locality. *Amabile v. City of Buffalo*, supra.

In opposition to the Defendant, City’s Cross-motion, the Plaintiff’s counsel once again argues that summary judgment is premature as discovery has not yet been conducted. The Plaintiff’s counsel contends that the affidavit of Kevin Mulligan, the Commissioner of Public Works of the City of Long Beach, attesting that the City has no written notice of a defective, dangerous or obstructed condition at the location where the Plaintiff allegedly fell, is conclusory and that the Plaintiff should be afforded an opportunity to conduct pre-trial discovery to obtain any evidence that would lead to prior written notice.

The court finds the additional discovery that the Plaintiff seeks is unnecessary. “It is well settled that the mere hope by the party opposing a summary judgment motion that it will uncover evidence that will prove its case is insufficient under CPLR § 3212 (f) to postpone a decision on a summary judgment motion”. *Town of Hempstead v. Inc. Village of Atlantic Beach*, 278 A.D.2d 308 (2d Dept. 2000). See, also, *Spratt v. Sloan*, 280 A.D.2d 465 (2d Dept. 2001). *Monteleone v. Inc. Village of Floral Park*, 123 A.D.2d 312 (2d Dept. 1986).

The law specifically states that written notice must have been received by the City in order to maintain a civil action for damages sustained from a defective roadway. The Defendant, City has submitted sufficient proof that no notice of any defect or unsafe condition existed with regard to the roadway located at 471 Roosevelt Boulevard, a/k/a 669

East Park Avenue, Long Beach, New York. The Plaintiff had sufficient time to search the records of the City to discover any written notice of such defect. Additionally, the Plaintiff would have to submit evidence that the City negligently caused the defect.

Summary judgment is a drastic remedy and should only be granted where there are no triable issues of fact. *Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974). The goal of summary judgment is issue finding, rather than issue determination. *Hantz v. Fleishman*, 155 A.D.2d 415, 457 N.Y.S.2d 350 (2d Dept. 1998). It is uncontroverted that the Defendant, The City of Long Beach, did not receive prior written notice of the alleged dangerous condition, which is required by the statute. There is no competent evidence submitted by the Plaintiff that the Defendant, City, created the defect or hazard through an affirmative act of negligence nor that any “special use” which conferred a special benefit upon the locality was the cause of the Plaintiff’s fall.

Because the Plaintiff provided no competent evidence that the City of Long Beach affirmatively created the defect which caused the accident nor received written notice of such defect, the Defendant, City’s motion for summary judgment pursuant to CPLR § 3212, is **GRANTED**.

Despite the Defendant, City’s feeble attempt to pass along to the Defendant, O’ROURKE, the responsibility for maintaining and repairing its roadway and the Plaintiff’s equal feeble attempt to seize onto that theory of liability, this Court is unpersuaded that the Defendant, O’ROURKE owed the Plaintiff any duty of care. There is no evidence that the Defendant, O’ROURKE made any special use of the location of the accident. The Plaintiff

testified under oath that he would park any where he found a spot in order to make his delivery. There is no evidence that the particular location where the Plaintiff parked his truck and unloaded his delivery of bread was controlled, maintained, repaired or used by the Defendant, O'ROURKE, for any special use.

The Court now turns to that branch of the Defendant, O'ROURKE's application which seeks an order imposing sanctions upon the Plaintiff's counsel. The Rules of the Chief Administrator of the Courts empower this Court with the authority to impose sanctions and award costs for conduct which is determined to be frivolous (22 NYCRR 130-1.1 *et seq*). Conduct is deemed to be frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (22 NYCRR 130-1.1[c][1]). In determining whether particular conduct is frivolous as contemplated by the regulation, the Court is required to consider "(1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, or was brought to the attention of counsel or the party." (22 NYCRR 130-1.1[c][3]).

Guided by the foregoing, the Court has thoughtfully reviewed the arguments posited by the respective parties herein, as well as the allegations comprising the underlying complaint. Upon said review and after careful consideration, this Court, in its discretion, hereby declines to impose sanctions upon the Plaintiff's counsel (22 NYCRR 130-1.1[a]).

Accordingly, it is hereby


ORDERED, that the Defendant, O'ROURKE's motion for an order granting summary judgment pursuant to CPLR § 3212 is **GRANTED** and the complaint is dismissed as against him without costs; and it is further

ORDERED, that the Defendant, CITY's motion for an order granting summary judgment pursuant to CPLR § 3212 is **GRANTED** and the complaint is dismissed as against it without costs; and it is further

This decision constitutes the decision and order of the court.

All applications not specifically addressed herein are **DENIED**.

DATED: Mineola, New York
March 4, 2011



Hon. Randy Sue Marber, J.S.C.
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ENTERED
MAR 11 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE