

**Geslani v County of Nassau**

2011 NY Slip Op 31632(U)

June 9, 2011

Supreme Court, Nassau County

Docket Number: 7158/2005

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X  
ELAINE GESLANI,

PART 8

Plaintiff,

INDEX NO. 7158/2005

XXX

MOTION DATE: 04/13/11

SEQUENCE NO: 01, 02, 03

-against-

THE COUNTY OF NASSAU, TOWN OF HEMPSTEAD,  
and LONG ISLAND POWER AUTHORITY,

Defendants.

-----X

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Upon the foregoing papers, defendant County of Nassau’s motion for summary judgment, defendant Town of Hempstead’s cross-motion for summary judgment, and defendant Long Island Power Authority’s motion for summary judgment, pursuant to CPLR §3212, are granted.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This action is to recover monetary damages for personal injuries allegedly sustained by the plaintiff as a result of a slip and fall which took place on February 4, 2004 around 7:00 A.M. in the roadway near the curb abutting the premises known as 3504 Manchester Road, Wantagh, New York. Plaintiff alleges that she was caused to slip and fall as she walked along said roadway as the result of an icy condition on the road.

The County of Nassau (hereinafter “County”) moves for summary judgment on the

grounds that the County did not have jurisdiction over the location of the accident and that the County received no prior written notice of the defective condition as alleged by the plaintiff. In support of its motion, the County submits the affidavit of John Dempsey, Civil Engineer II with the Nassau County Department of Public Works. Mr. Dempsey attests that he performed a search of the Nassau County Department of Public Works' records and found that the location where plaintiff's accident is alleged to have occurred is not under the jurisdiction of the County of Nassau and that there was no prior written notice for said location for the five year prior to the date of plaintiff's accident, February 4, 2004. In addition, the County submits the affidavit of Veronica Cox, who is assigned to the Bureau of Claims and Investigations in the Office of the Nassau County Attorney. Ms. Cox also attests that she personally searched the Nassau County Notice of Claim Files and Notice of Defect Files and found that the County did not receive any prior notices of claim or prior written complaints regarding the location of the plaintiff's accident for three years prior to the plaintiff's accident. As such, the County has made a prima facie showing of entitlement to summary judgment.

As a general rule, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property. (*See, Ellers v. Howitz Family Ltd. Partnership*, 36 A.D.2d 849, 831 N.Y.S.2d 417 (2d Dept. 2007); *see also, Carlo v. Town of East Fishkill*, 19 A.D.3d 442, 798 N.Y.S.2d 64 (2d Dept. 2005); *Horn v. Town of Clarkson*, 46 A.D.3d 621, 848 N.Y.S.2d 260 (2d Dept. 2007)). Where none is present, a party cannot be held liable for injuries caused by the allegedly dangerous condition. (*See, Dague v. 1818 New York Management Corp.*, 301 A.D.2d 561, 756 N.Y.S.2d 51 (2d Dept. 2003)). In order for a plaintiff to demonstrate a prima facie case of negligence against a municipality, the plaintiff must first demonstrate the existence of a duty owed to the plaintiff. (*Murray v. Wolff*, 242 A.D.2d 265, 660 N.Y.S.2d 732 (2d Dept. 1997); *see also Schulman v. City of New York*, 190 A.D.2d 663, 593 N.Y.S.2d 286 (2d Dept. 1993)(holding that the defendant municipality, which did not own the roadway where the accident happened, owed no duty to plaintiff because the municipality did not have jurisdiction over the location of the accident)). The affidavit of John Dempsey indicates that the County did not have jurisdiction over the roadway where the plaintiff fell, and therefore owed no duty to the plaintiff herein.

In addition, Section 12-4.0(e) of the Administrative Code of Nassau County provides that no civil action may be maintained against the County of Nassau for damages or injuries to persons sustained by reason of a defective highway, street or sidewalk unless written notice of the defect was given to the County of Nassau. As the County did not receive prior written notice of the defect, and did not cause or create the defect through an affirmative act, the County cannot be found liable to the plaintiff for her injuries herein. (*Galante v. Village of Sea Cliff*, 13 A.D.3d 577, 787 N.Y.S.2d 376 (2d Dept. 2004); *Berner v. Town of Huntington*, 304 A.D.2d 513, 757

N.Y.S.2d 585 (2d Dept. 2003)). The Court notes that there is no opposition to the County's motion. Accordingly, summary judgment is granted to defendant County of Nassau.

The Town of Hempstead (hereinafter "Town") moves for summary judgment on the grounds that plaintiff did not file a Notice of Claim until January 18, 2005, nearly one year after the accident, and that the Town cannot be found liable as it did not have prior written notice of the defect. In support of its motion, the Town submits the affidavit of Sheila Dauscher, Records Access Officer of the Highway Department of the Town. In her affidavit, Ms. Dauscher attests that she performed a search of the Highway Department records regarding complaints/notices of roadway conditions. The records consisted of written complaints or notices regarding roadway accidents or conditions received from the Town Clerk. Ms. Dauscher attests that her search revealed that no written complaints or notices, or notices of claim, were received regarding the location of plaintiff's accident for a period of three years prior to February 4, 2004. Further, Ms. Dauscher attests that a search of the roadway repair records of the Highway Department revealed that the Town did not perform any repairs and did not contract with any municipality or contractor to maintain, repair or perform construction work to the roadway located in front of and adjacent to 3504 Manchester Road in Wantagh, New York, for a period of three years prior to February 4, 2004.

Additionally, the Town submits the date stamped Notice of Claim, which shows that the Notice of Claim was received by the Town on January 18, 2005. Accordingly, the Town argues that it is entitled to summary judgment due to plaintiff's untimely filing of the Notice of Claim.

In opposition, plaintiff argues that the Notice of Claim was served on April 19, 2004, but the Court notes the plaintiff fails to annex any affidavit of service indicating that same was served on April 19, 2004. Instead, plaintiff annexes a photocopy of a certified mail receipt which has a postage meter date stamp and only the hand written notation of "Town." The receipt does not indicate to what address it was sent or how much postage was paid. In addition, the plaintiff does not attach any return receipt indicating receipt of the Notice of Claim by the Town.

Plaintiff also argues that the Town did not establish that it did not maintain a special use over the area of the dangerous and defective roadway condition which is alleged to have caused the plaintiff's injury. Plaintiff further argues that there is a question of fact regarding whether the Town received prior notice of the icy condition on the roadway where the accident occurred as the plaintiff testified that her parents made phone calls to the Town about standing water that would pool in front of their house.

Defendant Town has made a prima facie showing of entitlement to summary judgment. In opposition to the motion, plaintiff has failed to produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which she rests her claim. (*See, Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)). Where the Town establishes that it

lacked prior written notice, "the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule - that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality." (*Yarborough v. City of New York*, 10 N.Y.3d 726, 822 N.E.2d 873 (2008); *Denio v. City of New Rochelle*, 71 A.D.3d 717, 718, 895 N.Y.S.2d 727 (2d Dept. 2010)). The plaintiff has failed to raise a triable issue of fact that the Town had prior written notice of the defect, that the Town caused or created the condition, or that the Town was using the roadway at issue for a special use. Pursuant to Chapter 6 of the Code of the Town of Hempstead, and New York Town Law §65-a, no civil action may be maintained against a town for injuries caused by roadway defects or snow or ice on any of the town's roadways, unless prior written notice is served upon the Town in accordance with the statute. (*See*, McKinney's Town Law § 65-a). Where a town establishes that it has not received written notice of the defect pursuant to Town Law 65-a, it is incumbent upon the plaintiff to submit "competent evidence" that the Town "affirmatively created the defect." (*Gianna v. Town of Islip*, 230 A.D.2d 824, 646 N.Y.S.2d 707 (2d Dept. 1996); *Block v. Potter*, 204 A.D.2d 672, 612 N.Y.S.2d 236 (2d Dept. 1994)). Plaintiff's testimony that phone calls were made by her parents to verbally complain about water pooling and icing in front of their home is insufficient to establish prior written notice. Accordingly, the Town cannot be held liable herein. (*See*, *Wohlars v. Town of Islip*, 71 A.D.3d 1007, 898 N.Y.S.2d 59 (2d Dept. 2010)). Where there is no evidence that the municipality received prior written notice of the defect, a town will not be found liable unless there is evidence that the town created the defective or dangerous condition through an affirmative act or where a special use conferred a special benefit upon the municipality unrelated to public use. (*Farrell v. City of New York*, 49 A.D.3d 806, 854 N.Y.S.2d 470 (2d Dept. 2008); *Herman v. Village of Kiryas Joel*, 19 A.D.3d 544, 796 N.Y.S.2d 534 (2d Dept. 2005)).

Further, the Code of the Town of Hempstead, Section 6-4 requires service of written notice of any defect by personal service or service by registered or certified mail actually received by the Town Clerk or Town Commissioner of Highways. Plaintiff's submission of a blank date stamped certified mail receipt, without any affidavit of service or copies of return receipts, is insufficient to establish that the Notice of Claim was timely served. A certified mail receipt, standing alone, is insufficient to raise a triable issue of fact as to actual mailing. (*See*, *Mid City Construction v. Sirius America Insurance Company*, 70 A.D.3d 789, 894 N.Y.S.2d 113 (2d Dept. 2010)). Pursuant to General Municipal Law §50-e, a condition precedent to a personal injury suit against a municipality is the filing of a Notice of Claim within ninety days of the occurrence upon which the suit is based. Plaintiff's late filing of the notice of claim was done without court approval, and is therefore rendered a nullity. (*Pierre v. City of New York*, 22 A.D.3d 733, 804

N.Y.S.2d 365 (2d Dept. 2005); *Small v. New York City*, 14 A.D.3d 690, 789 N.Y.S.2d 229 (2d Dept. 2005)). Accordingly, plaintiff's complaint against the Town must be dismissed.

Defendant Long Island Power Authority ("LIPA") moves for summary judgment on the grounds that plaintiff failed to commence this action within the statutory period provided in the Public Authorities Law, that plaintiff failed to serve a Notice of Claim within the statutory period, and that LIPA is not liable for the icy condition that allegedly caused plaintiff's fall. Defendant LIPA argues that LIPA is not the "owner" or "possessor" of the premises where the plaintiff fell and had no duty to maintain or inspect the subject premises. In support of its argument, LIPA submits an affidavit of James Luckie, a Senior Supervisor with National Grid and Electric Services. Mr. Luckie attests that he performed a site inspection of the accident location and during his inspection, he observed LIPA facilities in the form of overhead electrical lines. Based upon his observations, Mr. Luckie attests that LIPA does not maintain any underground facilities in the area where the plaintiff's accident occurred. In addition, Mr. Luckie attests that he also performed a map search of the area which revealed that LIPA does not maintain any underground facilities in the area. Mr. Luckie further attests that a search for and all records relating to any excavations performed by LIPA at the location of the accident was performed and no such records of excavations were discovered. Lastly, Mr. Luckie attests that LIPA has no ownership interest in the roadway where the accident occurred. Accordingly, LIPA argues that it is entitled to summary judgment as it had no ownership interest in the roadway where the accident happened, it does not maintain any facilities under the roadway, it did not perform any work on the roadway, it did not have notice of the icy condition, and it did not cause or create the condition.

Defendant further contends that plaintiff failed to serve a Notice of Claim upon LIPA within the statutory ninety day period, as LIPA did not receive the Notice of Claim until January 25, 2005, nearly one year after the plaintiff's accident. Defendant additionally argues that because plaintiff's accident occurred on February 4, 2004 and plaintiff filed a summons and complaint on May 5, 2005, plaintiff's action is barred by the applicable one year ninety day statute of limitations. The Court, however, notes that based upon said dates, the plaintiff did file the summons and complaint within the statute of limitations.

In opposition, the plaintiff argues that the Notice of Claim was served on April 19, 2004. The plaintiff again fails to annex any affidavit of service indicating same was served on April 19, 2004. Instead, plaintiff annexes a photocopy of a certified mail receipt which has a postage meter date stamp, but contains only the hand written notation of "LIPA" and does not note the address to which it was sent or how much postage was paid. In addition, the plaintiff does not submit any return receipt indicating receipt of the Notice of Claim by LIPA.

Plaintiff also argues that LIPA's motion is premature, as LIPA has not yet produced a witness for deposition. Plaintiff argues that plaintiff testified at her deposition that in 2001, a neighbor underwent a kitchen renovation and gas lines were installed in the street from the corner of Briard Street and Manchester Road. Plaintiff testified that it was after this work was done that the the alleged "dangerous and defective" condition originated. Plaintiff argues that LIPA did not address the corner of Briard Street and Manchester Road and did not state whether they installed gas lines. Additionally, plaintiff argues that in paragraph numbered seven of Mr. Luckie's affidavit, he mistakenly states that because LIPA had no underground facilities in the area, it would have no reason to perform excavations of the roadway "at Walnut Avenue East at or near its intersection with North Crescent Drive, Farmingdale, New York," which is not the location of plaintiff's accident. As such, plaintiff argues that summary judgment should be denied to defendant LIPA.

In reply, LIPA contends that the above-noted error in paragraph number seven of Mr. Luckie's affidavit is a typographical error found only once in the affidavit and does not negate the remaining nine paragraphs which contain the correct accident location. Additionally, LIPA argues that the within motion is not premature, as plaintiff stipulated to proceed with LIPA's deposition after the within motions were determined. LIPA also contends that it is a non-profit municipal electric provider, which owns the retail electric Transmission and Distribution System on Long Island and is not a provider of natural gas and has no involvement with the installation and maintenance of gas lines.

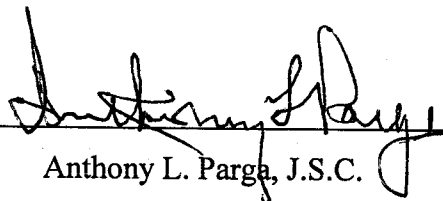
Defendant LIPA has made a prima facie showing of entitlement to summary judgment, and plaintiff has failed to set forth any evidence in admissible form sufficient to require any trial of material questions of fact. The plaintiff has failed to raise a triable issue of fact that LIPA did any excavation work or otherwise caused or created the particular icy condition which existed on the roadway on February 4, 2004. Where persons are not the owners of the property upon which the defective condition is located, they cannot "fairly be held accountable for injuries resulting from a hazard on the property." (*Crawford v. Forrest Hills Gardens*, 16 A.D.3d 540, 792 N.Y.S.2d 135 (2d Dept. 2005)). As a general rule, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property. (*See, Ellers v. Howitz Family Ltd. Partnership*, 36 A.D.2d 849, 831 N.Y.S.2d 417 (2d Dept. 2007); *see also, Carlo v. Town of East Fishkill*, 19 A.D.3d 442, 798 N.Y.S.2d 64 (2d Dept. 2005); *Horn v. Town of Clarkson*, 46 A.D.3d 621, 848 N.Y.S.2d 260 (2d Dept. 2007)). Where none is present, a party cannot be held liable for injuries caused by the allegedly dangerous condition. (*See, Dague v. 1818 New York Management Corp.*, 301 A.D.2d 561, 756 N.Y.S.2d 51 (2d Dept. 2003)). A property owner will be held liable for a slip and fall accident involving snow and ice on its property only when it created the dangerous condition which caused the

accident or had actual or constructive notice thereof.” (See, *Simon v. Maimomides Medical Center*, 52 A.D.3d 683, 859 N.Y.S.2d 373 (2d Dept. 2008); *Robinson v. Trade Link America*, 39 A.D.3d 616, 833 N.Y.S.2d 243 (2d Dept. 2007)). There is no evidence before this Court that LIPA had notice of the icy condition which allegedly caused plaintiff's accident or that LIPA caused or created said condition to exist. There is also no evidence that LIPA owned or maintained the roadway where the accident occurred. Lastly, the plaintiff has failed to offer an evidentiary basis to suggest that discovery may lead to relevant evidence sufficient to defeat the defendant's motion. The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered" by further discovery is an insufficient basis for denying the motion. (*Woodard v. Thomas*, 2010 WL 4008451 (2d Dept. 2010); *Lopez v. WS Distribution, Inc.*, 34 A.D.3d 759, 825 N.Y.S.2d 516 (2d Dept. 2006)). Accordingly, defendant LIPA is entitled to summary judgment.

In addition, Public Authorities Law 1020-y states that a notice of claim must be served upon the authority in accordance with all the requirements of Section 50-e of the General Municipal Law (which requires the Notice of Claim to be served within ninety days after the claimant's accident). Public Authorities Law 1020-y states that an action founded in tort may not be brought against a public authority unless a notice of claim is timely served upon said authority. The timely service of a Notice of Claim is a condition precedent to maintaining an action against a public corporation. (See, *Barchet v. New York City Transit Authority*, 20 N.Y.2d 1, 281 N.Y.S.2d 289 (1967)). As noted above, plaintiff's submission of a blank certified mail receipt, containing no address, is not sufficient to establish timely service of the Notice of Claim. Accordingly, plaintiff's action against LIPA is barred by the failure to timely serve a Notice of Claim.

As each defendant has established its entitlement to summary judgment, and as plaintiff failed to raise any triable issues of fact sufficient to defeat the defendants' prima facie showing, the defendants' motions for summary judgment are granted and plaintiff's complaint, together with all cross-claims is hereby dismissed.

Dated: June 9, 2011

  
 Anthony L. Parga, J.S.C.

**ENTERED**  
 JUN 13 2011  
 NASSAU COUNTY  
 COUNTY CLERK'S OFFICE

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