

Breslin v Incorporated Vil. of Rockville Ctr.

2011 NY Slip Op 32296(U)

August 18, 2011

Supreme Court, Nassau County

Docket Number: 15267/10

Judge: Anthony L. Parga

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA
Justice

-----X
GERALDINE BRESLIN,

PART 8

Plaintiff,

INDEX NO. 15267/10

-against-

MOTION DATE: 07/08/11
SEQUENCE NO: 002, 003

INCORPORATED VILLAGE OF ROCKVILLE CENTRE,
COUNTY OF NASSAU, TOWN OF HEMPSTEAD, and
MED-REAL PARTNERSHIP, L.P.,

Defendants.

-----X

Notice of Motion, Affs & Exs.....	<u>1</u>
Notice of Motion, Affs & Exs.....	<u>2</u>
Affirmation in Opposition.....	<u>3</u>
Reply Affirmation.....	<u>4</u>
Reply Affirmation.....	<u>5</u>

Upon the foregoing papers, defendant County of Nassau's motion for summary judgment and defendant Town of Hempstead's motion for summary judgment, pursuant to CPLR §3212, are both 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 trip and fall which took place on September 26, 2009 on the sidewalk in front of 242 Merrick Road, in Rockville Centre, New York. Plaintiff alleges that she sustained injuries as a result of a dangerous and defective condition on the sidewalk, and it is alleged that defendants County of Nassau and the Town of Hempstead were negligent in their ownership, maintenance, and repair of the subject sidewalk.

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 of any complaints for said location for the three years prior to the date of plaintiff's accident, September 26, 2009. In addition, Mr. Dempsey attests that the County did not contract for any work at the subject location, nor did the County make any repairs to same.

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 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, and including, the date of plaintiff's accident. As such, the County has made a prima facie showing of entitlement to summary judgment.

The Town of Hempstead (hereinafter "Town") also moves for summary judgment on the grounds that the Town did not have jurisdiction over the location of the accident and that the Town received no prior written notice of the defective condition as alleged by the plaintiff. In support of its motion, the Town submits the affidavit of Andrew A. Brust, Records Access Officer of the Sidewalk Division of the Highway Department of the Town. In his affidavit, Mr. Brust attests that he performed a search of the Sidewalk Division records pertaining to sidewalk jurisdiction and determined that the site of the alleged accident is not under the jurisdiction of the Town. He also attests that the Town does not, and did not, own, control, operate, maintain or manage the sidewalk at the subject accident location on or prior to September 26, 2009. He further attests that the sidewalk location is within the jurisdiction of the Incorporated Village of Rockville Centre.

Additionally, Andrew A. Brust attests that he did a search of records of the Sidewalk Division regarding sidewalk repairs and found that the Town did not perform any affirmative acts with respect to the sidewalk at issue and did not repair, construct, inspect or design the sidewalk at the subject accident location on, or for five years prior to, September 26, 2009. He further attests that the Town did not contract with any entity to maintain, repair or perform construction work to that location for the same period of time. Finally, Mr. Brust attests that he conducted a search of the Sidewalk Divisions records regarding complaints/notices of sidewalk conditions. The records searched consisted of written complaints or notices regarding sidewalk conditions received from the Town Clerk and the Highway Department. Mr. Brust attests that his 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 five years prior to September 26, 2009.

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); see also, *Flynn v. Hanken*, 17 A.D.3d 523, 793 N.Y.S.2d 162 (2d Dept. 2005); *Horvath v. Rose*, 261 A.D.2d 438, 690 N.Y.S.2d 288 (2d Dept. 1999)). 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 sidewalk where the plaintiff fell, and the affidavit of Andrew Brust indicates that the Town did not have jurisdiction over the sidewalk where the plaintiff fell. As such, said defendants owed no duty to the plaintiff herein.

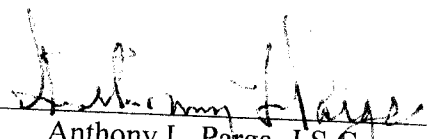
In addition, Section 12-4.0(e) of the Administrative Code of Nassau County provides that no civil action may be maintained against the County of Nassau for damages or injuries to persons sustained by reason of a defective highway, street or sidewalk unless written notice of the defect was given to the County of Nassau. Similarly, Town Law §65-a(2), as well as Section 6-3 of the Code of the Town of Hempstead, provide that no civil action shall be maintained against the Town for injuries or damages to persons sustained by reason of a defective sidewalk without service of prior written notice of the defect upon the Town Clerk or the Town Commissioner of Highways. Since neither the County nor the Town received prior written notice of the defect, and as neither caused or created the defect through an affirmative act, they 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)).

Defendants County and Town have made a prima facie showings 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 municipality

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)).

Opposition was submitted to the within motions only by defendant Med-Real Partnership (hereinafter "Med-Real"). Med-Real, however, has failed to raise a triable issue of fact that the County or Town had prior written notice of the defect, that the County or Town caused or created the condition, or that the County or Town was using the sidewalk at issue for a special use. Med-Real has also failed to submit any evidence to demonstrate that the location of plaintiff's accident is within the County and/or Town's jurisdictions. There is also no evidence before the Court that the County or the Town had prior written notice of the alleged defect or that the County or Town created the condition at issue through an affirmative act. (*See, Kiszenik v. Town of Huntington*, 70 A.D.3d 1007, 895 N.Y.S.2d 208 (2d Dept. 2010); *Groninger v. Village of Mamaroneck*, 67 A.D.3d 733, 88 N.Y.S.2d 205 (2d Dept. 2009); *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)). With respect to Med-Real's argument that the motions for summary judgment are premature, 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); *Simpson v. New York City Transit Authority*, 44 A.D.3d 930, 844 N.Y.S.2d 108 (2d Dept. 2007); *Lightfoot v. City of New York*, 279 A.D.2d 457, 719 N.Y.S.2d 99 (2d Dept. 2001); *Lopez v. WS Distribution, Inc.*, 34 A.D.3d 759, 825 N.Y.S.2d 516 (2d Dept. 2006)).

Accordingly, defendants County of Nassau and the Town of Hempstead's motions for summary judgment are granted, and the plaintiff's action, together with all cross-claims, is dismissed as against defendants County of Nassau and the Town of Hempstead only.
Dated: August 18, 2011



Anthony L. Parga, J.S.C.

Cc: Mulholland, Minion, Duffy, Davey, McNiff & Beyrer
374 Hillside Avenue
Williston Park, NY 11596

ENTERED
AUG 22 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

John Ciampoli, Esq.
County Attorney of Nassau County
Attn: Kristina Milone, Esq.
One West Street
Mineola, NY 11501

Joseph J. Ra, Esq.
Town Attorney
Town of Hempstead
1 Washington Street
Hempstead, NY 11550

Goldberg Segalla, LLP
200 Old Country Road, Suite 210
Mineola, NY 11501

McLaughlin & Stern, LLP
260 Madison Avenue
New York, NY 10016