

Mazurkewics v Metropolitan Tr. Auth.

2011 NY Slip Op 32360(U)

August 24, 2011

Supreme Court, Suffolk County

Docket Number: 08-42522

Judge: Peter H. Mayer

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SHORT FORM ORDER

INDEX No. 08-42522CAL No. 10-02442OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY**PRESENT:**

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 3-25-11
ADJ. DATE 5-6-11
Mot. Seq. # 001 - MG;CASEDISP
002 - XMotD

<p>KAREN MAZURKEWICS, Plaintiff, - against - METROPOLITAN TRANSIT AUTHORITY, MTA LONG ISLAND RAILROAD, COUNTY OF SUFFOLK, TOWN OF BROOKHAVEN and TOWN OF ISLIP, Defendants.</p>	<p>BRAGOLI & ASSOCIATES, P.C. Attorney for Plaintiff 999 Walt Whitman Road, Suite 100 Melville, New York 11747</p> <p>BREEN & CLANCY, ESQS. Attorney for Defendants MTA and LIRR 1355 Motor Parkway, Suite 2 Hauppauge, New York 11749</p> <p>DEVITT SPELLMAN BARRETT, LLP Attorney for Defendant Town of Brookhaven 50 Route 111 Smithtown, New York 11787</p>
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Town, dated February 11, 2011, and supporting papers 1-14 (including Memorandum of Law dated ____); (2) Notice of Cross Motion by the defendants MTA and MTA LIRR, dated February 19, 2011, supporting papers 15-19 (including Memorandum of Law dated February 18, 2011); (3) Affirmation in Opposition by the plaintiff, dated April 27, 2011, and supporting papers 20- 25; (4) Reply Affirmation by the defendant Town, dated May 5, 2011, and supporting papers 26-27; (5) Reply Affirmation by the defendants MTA and MTA LIRR, dated May 3, 2011, and supporting papers 28-30 (including Memorandum of Law dated May 3, 2011); (6) Other ____ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion (#001) by the defendant Town of Brookhaven for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and all cross claims as against it is granted; and it is further

ORDERED that this cross motion (#002) by the defendants Metropolitan Transit Authority and MTA Long Island Railroad for an order pursuant to CPLR 3212 granting summary judgment in their

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favor dismissing the complaint and all cross claims as against them or, in the alternative, directing the defendant Town of Brookhaven to hold harmless and indemnify them is determined herein.

This is an action to recover damages for injuries allegedly sustained by the plaintiff on December 15, 2007 at approximately 12:20 p.m. when her left foot slipped on ice, her right foot tripped on an uneven, depressed or defective portion of a sidewalk that had frozen pooled water, and she fell. The sidewalk was located at the north side of the Long Island Railroad, Ronkonkoma Station in Ronkonkoma, Suffolk County, New York, just west of the station ticket office.

By her verified complaint, the plaintiff alleges that the defendants Metropolitan Transit Authority (MTA), MTA Long Island Railroad (MTA LIRR), and Town of Brookhaven (Town)¹ were negligent in, among other things, their ownership, maintenance, inspection and repair of said sidewalk, causing or allowing said sidewalk to become and remain in a raised, cracked, broken, depressed, defective and dangerous condition, failing to remove snow and ice from said sidewalk, pushing or throwing snow and ice from the parking lot onto the sidewalk, and failing to spread sand or salt in the area of the dangerous condition. In addition, the plaintiff alleges that the defendants had actual and constructive notice of the dangerous and defective condition. The defendant Town asserted affirmative defenses in its answer including, that the action is barred under the Town Code and Town Law for lack of prior written notice. The defendant Town also asserted a cross claim against its co-defendants for contribution and indemnification. The defendants MTA and MTA LIRR asserted a cross-claim against their co-defendants for contribution and indemnification in their answer. The Court's computer records indicate that the note of issue in this action was filed on November 18, 2010.

The defendant Town now moves for summary judgment dismissing the complaint and all cross claims as against it on the ground that the Town did not have prior written notice of any alleged sidewalk defect on the north side of the Long Island Railroad, Ronkonkoma Station pursuant to Town of Brookhaven Code § 84-1 as established by the affidavits of Town employees Linda Sullivan (Ms. Sullivan) of the Office of the Town Clerk and Suzanne Mauro (Ms. Mauro) of the Town Highway Department. Counsel for the defendant Town informs the Court that the subject sidewalk was owned by the defendants MTA and MTA LIRR but that the defendant Town was responsible for the maintenance of the sidewalk and adjacent parking lot pursuant to a lease agreement between the Town and MTA.

The defendants MTA and MTA LIRR cross-move for summary judgment in their favor dismissing the complaint and all cross claims as against them on the ground that the defendant Town was responsible for the maintenance and repair of the area where the plaintiff allegedly fell based on a Commuter Parking License Agreement dated August 8, 2007 (Agreement). They also request that in the event that summary judgment is denied, that the Court direct that the defendant Town defend, hold harmless, and indemnify them in this action pursuant to paragraph 23 of the Agreement. The defendants MTA and MTA LIRR incorporate by reference the submissions of the defendant Town on its motion. They also submit a copy of the Agreement and refer to the deposition testimony of Eric Ptarcinski, who testified on behalf of MTA LIRR, submitted by the defendant Town.

¹By so ordered stipulation dated May 18, 2010, this action and all cross claims were discontinued as against the defendants County of Suffolk and Town of Islip.

The plaintiff opposes the motion and cross motion arguing that the defendant Town contractually agreed to maintain the sidewalk and to assume the risk of loss and that, in any event, the defendant Town created the defective and dangerous condition through an affirmative act of negligence, and that the defendants MTA and MTA LIRR as owners have a non-delegable duty to maintain their property in a reasonably safe condition, cannot assume the position of out-of-possession landlords, and had actual and constructive notice of the dangerous and defective condition of the sidewalk. The submissions in support of her opposition include her own affidavit dated April 25, 2011, the affidavit dated April 19, 2011 of her expert engineer, Robert L. Schwartzberg, P.E., and the deposition transcript dated February 23, 2010 of Ms. Mauro.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see, Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d at 324 [1986], citing to *Zuckerman v City of New York*, 49 NY2d at 562).

As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property (*see Forbes v Aaron*, 81 AD3d 876, 918 NYS2d 118 [2d Dept 2011]). An out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair unsafe conditions (*see Valenti v 400 Carlls Path Realty Corp.*, 52 AD3d 696, 696, 861 NYS2d 357 [2d Dept 2008]; *Lindquist v C & C Landscape Contractors, Inc.*, 38 AD3d 616, 616-617, 831 NYS2d 523 [2d Dept 2007]). Control may be established by lease provisions holding the landlord responsible for repairs or by a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises (*Ever Win, Inc. v 1-10 Indus. Assoc., LLC*, 33 AD3d 845, 846, 827 NYS2d 63 [2d Dept 2006]).

A municipality cannot be held liable for the failure to maintain in a reasonably safe condition property it does not own or control unless it affirmatively undertakes such a duty (*see Ernest v Red Cr. Cent. School Dist.*, 93 NY2d 664, 675, 695 NYS2d 531 [1999]; *Mudgett v Long Is. R.R.*, 81 AD3d 612, 917 NYS2d 220 [2d Dept 2011]). A municipality that has enacted a prior written notice law is excused from liability absent proof of prior written notice or an exception thereto (*see, Poirier v City of Schenectady*, 85 NY2d 310, 313, 624 NYS2d 555 [1995]; *DiGregorio v Fleet Bank of New York, NA*, 60 AD3d 722, 723, 875 NYS2d 204 [2d Dept 2009]). The Court of Appeals has recognized two exceptions to this rule, “namely, where the locality created the defect or hazard through an affirmative act of negligence” and “where a ‘special use’ confers a special benefit upon the locality” (*Amabile v City of Buffalo*, 93 NY2d 471, 474, 693 NYS2d 77 [1999]; *see, DiGregorio v Fleet Bank of New York, NA*, 60 AD3d at 723; *Delgado v County of Suffolk*, 40 AD3d 575, 835 NYS2d 379 [2d Dept 2007]). The “affirmative negligence exception ... [is] limited to work by the [municipality] that immediately results

in the existence of a dangerous condition' ” (*Oboler v City of New York*, 8 NY3d 888, 889, 832 NYS2d 871 [2007] quoting *Bielecki v City of New York*, 14 AD3d 301, 301,788 NYS2d 67 [1st Dept 2005]; see *Forbes v City of New York*, ___ AD3d ___, 926 NYS2d 309 [2d Dept 2011]). Generally, a municipality may not be held liable for its failure to remove all snow and ice from a particular area, inasmuch as such a failure is not an affirmative act of negligence (see *Stallone v Long Is. R. R.*, 69 AD3d 705, 894 NYS2d 65 [2d Dept 2010]).

A defendant owner or entity who is responsible for maintaining a premises who moves for summary judgment in a slip-and-fall or trip-and-fall case involving the property has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (see *Przywalny v New York City Tr. Auth.*, 69 AD3d 598, 892 NYS2d 181 [2d Dept 2010]).

The plaintiff's deposition testimony from October 20, 2009 reveals that the incident occurred on a sunny, cold Saturday, that it had rained the previous night, and that there was patchy, wet ice and puddles on the sidewalk as she walked from the parking lot to the train station. She did not observe any sand or salt on the sidewalk. The plaintiff also testified that prior to her fall she was watching for puddles but she “wasn't really paying attention to it” and she did not look at the sidewalk. According to the plaintiff, her left foot slipped on ice and then her right foot hit into something and turned in, but she was not sure if it caught on anything, and she fell on her left side. After she fell, the plaintiff did not look at the area where she fell. The defendant Town submits photographs of the area where the plaintiff allegedly fell.

Ms. Sullivan averred in her affidavit dated January 19, 2011 that she is employed as a clerk in the Town Clerk's Office and that her personal search of the files maintained by the Town Clerk's Office for notices relating to any alleged defective condition including a snow and/or ice condition revealed that no prior notices of defect or notices of claim were filed with or received by the Town within a three year period prior to December 15, 2007 with respect to the sidewalk at the subject location. Ms. Mauro indicated in her affidavit dated February 4, 2011 that she is a principal clerk in the Town Highway Department and that her personal search of the department's files revealed that no prior written notice of defect for the subject location was filed with or received by the Town's Superintendent of Highways within a three year period prior to December 15, 2007. In addition, Ms. Mauro averred that her records search failed to locate any records or work orders indicating that the Town's highway department performed any repair and/or maintenance work on the sidewalk at said location within a three year period prior to December 15, 2007. She also stated that her search failed to locate any records or work orders indicating that the Town performed any snow and/or ice removal work on any sidewalks and/or parking lots at the train station within a 45 day period prior to December 15, 2007.

Eric Ptarcinski (Mr. Ptarcinski), staff engineer of the structures department of the defendant MTA LIRR, testified at his deposition on March 31, 2010 that his responsibilities included handling requests from the LIRR claims department concerning structural issues. Mr. Ptarcinski indicated that upon being made aware of the subject incident he searched for trouble tickets, which are generated whenever there is a defect at the station and serve as a record that a problem was reported and has been repaired. He explained that a structure defect reported to an LIRR employee would be called into the

trouble desk and a trouble ticket would be created in an electronic system that is accessible by supervisors in the field so that they can plan the work and make repairs. According to Mr. Ptarcinski, a written complaint would yield the same result. He added that if the complaint was not the responsibility of MTA LIRR, the trouble desk would contact the proper person and that a paper trail was not generated. Mr. Ptarcinski averred that he reviewed the yearly station inspection records and that said records did not mention anything about the subject sidewalk. He noted that the structural inspection group would not inspect areas of a train station including parking lots and walkways that are leased to the Town. Mr. Ptarcinski stated that the area of the plaintiff's alleged fall was owned by the defendant MTA LIRR and that pursuant to an agreement, the defendant Town was responsible for the maintenance and repair of the area.

Here, the defendant Town, through the affidavits of its employees, met its burden of establishing that it did not receive prior written notice of the icy condition or of the raised, cracked, broken, depressed condition of the sidewalk, as required by Town of Brookhaven Code § 84-1 (*see Groninger v Village of Mamaroneck*, 2011 WL 2149504, 2011 N.Y. Slip Op. 04544 [N.Y. Jun 02, 2011]; *Richards v Incorporated Vil. of Rockville Ctr.*, 80 AD3d 594, 914 NYS2d 643 [2d Dept 2011]).

Once the defendant Town satisfied its burden of showing a lack of prior written notice, the plaintiff was required to come forward with admissible evidence to raise a triable issue of fact as to whether written notice was given, whether the defendant created or exacerbated the alleged icy condition through its affirmative negligent acts, or whether a special use conferred a special benefit on the Town (*see Wohlars v Town of Islip*, 71 AD3d 1007, 1008-1009, 898 NYS2d 59 [2d Dept 2010]).

The plaintiff states in her affidavit that she was caused to slip and trip and fall by the depressed, raised, cracked and broken sections of sidewalk that had accumulated water which had frozen, that she sustained a right ankle fracture, and that the color photographs annexed to the affidavit of her expert engineer depict the condition of the sidewalk. Her expert engineer indicates in his affidavit that he visited the area of the plaintiff's alleged fall on April 24, 2008 and took photographs and measurements of the sidewalk. He states that he observed a crack, of significant size and displacement, running longitudinally across 2 ½ flags of the sidewalk with an elevation differential on either side of the crack in excess of 1 1/16 inches, and that there was considerable wear and discoloration in the area of the crack. He opines that this height differential caused water on the sidewalk to become trapped and to accumulate. The plaintiff's expert opines with a high degree of engineering certainty that the cause of the crack and the settlement of the portion of the sidewalk south of the crack was the result of poor, shoddy and unworkmanlike preparation of the ground prior to the pouring and finishing of the concrete walkway, that the underlying ground area was not properly or adequately tamped, rolled or compacted. He further opines that the defendants were in violation of sections 102.2 relating to maintenance and 302.3 relating to exterior property areas of the Property Maintenance Code of New York State.

Here, the plaintiff failed to raise a triable issue of fact as to whether there was prior written notice by the defendant Town of the subject dangerous and defective condition (*see Politis v Town of Islip*, 82 AD3d 1191, 920 NYS2d 185 [2d Dept 2011]). In addition, the plaintiff failed to demonstrate that the alleged icy condition was created by the defendant Town's affirmative negligence (*see Wohlars v Town of Islip*, 71 AD3d at 1009). The plaintiff attempted to raise a triable issue of fact as to the applicability

of the “affirmative negligence exception” by arguing that the defendant Town originally negligently constructed the sidewalk resulting in its settling and cracking (*see Richards v Incorporated Vil. of Rockville Ctr.*, 80 AD3d at 594-595). However, the plaintiff has no proof as to who originally constructed the sidewalk and submits the deposition testimony of Ms. Mauro from February 23, 2010 that she did not know if the Town originally constructed the sidewalk (*see Goldhamer v. Home Life Ins. Co.*, 256 AD 951, 10 NYS2d 145 [2d Dept 1939]). Thus, the argument is speculative and insufficient to defeat a motion for summary judgment (*see generally Crosthwaite v Acadia Realty Trust*, 62 AD3d 823, 879 NYS2d 554 [2d Dept 2009]; *Bobien v City of White Plains*, 272 AD2d 283, 707 NYS2d 354 [2d Dept 2000]). Moreover, the fact that the defendant Town contracted to maintain said sidewalk and assume the risk of loss does not obviate the written notice requirement (*see Friedland v County of Warren*, 61 AD3d 1138, 876 NYS2d 757 [3d Dept 2009]). Furthermore, the affidavit of the plaintiff’s engineering expert and attached photographs failed to raise a triable issue of fact as to whether the deterioration of the sidewalk was caused by the original construction, instead of developing gradually and worsening over a period of time (*see Kiszzenik v Town of Huntington*, 70 AD3d 1007, 895 NYS2d 208 [2d Dept 2010]; *Trinidad v City of Mount Vernon*, 51 AD3d 661, 857 NYS2d 657 [2d Dept 2008]). With respect to alleged violations of the Property Maintenance Code of New York State, the Court notes that only Section 302.3 of the Property Maintenance Code of New York State, which provides that “[a]ll sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions,” is relevant herein (*see* 19 NYCRR § 1226.1 [302.3]). Said provision is non-specific and reflects simply a general duty to maintain the premises (*see Ortiz v RVC Realty Co.*, 253 AD2d 802, 677 NYS2d 598 [2d Dept 1998]). Therefore, the defendant Town is granted summary judgment dismissing the complaint as against it.

The defendants MTA and MTA LIRR established their prima facie entitlement to judgment as a matter of law by establishing that they were out-of-possession landlords who did not retain control over the sidewalks and were not contractually obligated to maintain or repair them or to remove snow and ice from them (*see McElroy v Bernstein*, 72 AD3d 757, 898 NYS2d 471 [2d Dept 2010], *lv denied* 15 NY3d 704, 907 NYS2d 752 [2010]; *Sparozic v Bovis Lend Lease LMB, Inc.*, 50 AD3d 1121, 858 NYS2d 207 [2d Dept 2008], *lv denied* 11 NY3d 712, 872 NYS2d 717 [2008]; *Salgado v Ring*, 21 AD3d 362, 363, 798 NYS2d 920 [2d Dept 2005]). The Agreement allowed the defendant Town to use and occupy the parking facility at the Ronkonkoma Station as an unrestricted commuter parking facility. Pursuant to paragraph 20 of the Agreement, entitled “Maintenance & Repairs,” the defendant Town agreed to maintain the premises “in first class condition and good order” and to make all repairs to improvements including, curbing, pavement, driveways and sidewalks as and when necessary or as instructed by the defendants MTA and MTA LIRR. The defendant Town also agreed to clean and remove debris, ice and snow from the premises. Pursuant to paragraph 19 of the Agreement, the defendant Town agreed to permit the defendants MTA and MTA LIRR to enter the premises for inspection or to make repairs or alterations that they deemed necessary and understood that such action would not relieve the defendant Town of its contractual obligation to make such repairs. Paragraph 20 of the Agreement further provided that in the event that the defendant Town failed “to promptly make repairs or replacements,” the defendants MTA and MTA LIRR “may make the necessary repairs or replacements and charge” the defendant Town for said expenditures.

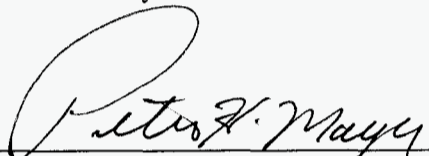
In opposition to the cross motion, the plaintiff failed to raise a triable issue of fact (*see*

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McComish v Luciano's Italian Rest., 56 AD3d 534, 868 NYS2d 79 [2d Dept 2008]). While the defendants MTA and MTA LIRR reserved the right to enter the premises for inspection and repair, the plaintiff failed to raise a triable issue of fact as to whether the defendants violated a specific statutory safety provision (see *McElroy v Bernstein*, 72 AD3d at 758). The affidavit submitted by the plaintiff's expert was speculative and insufficient to raise a triable issue of fact as to whether the sidewalk was in violation of any applicable statutory provisions (see *Landy v 6902 13th Ave. Realty Corp.*, 70 AD3d 649, 894 NYS2d 497 [2d Dept 2010]). The Property Maintenance Code of New York State whose provisions the plaintiff's expert engineer claims were violated are nonspecific and reflect only a general duty to maintain the premises in a safe condition (see *Robinson v M. Parisi & Son Constr. Co., Inc.*, 51 AD3d 653, 856 NYS2d 678 [2d Dept 2008]; compare *Dorestant v Snow, Inc.*, 274 AD2d 542, 712 NYS2d 131 [2d Dept 2000]). Based on the foregoing, the defendants MTA and MTA LIRR are granted summary judgment dismissing the complaint as against them.

Accordingly, the motion by the defendant Town of Brookhaven and that portion of the cross motion by the defendants Metropolitan Transit Authority and MTA Long Island Railroad for summary judgment dismissing the complaint and all cross claims as against them is granted (see *Zabbia v Westwood, LLC*, 18 AD3d 542, 795 NYS2d 319 [2d Dept 2005]). The portion of the cross motion by the defendants Metropolitan Transit Authority and MTA Long Island Railroad seeking the alternate relief that the defendant Town of Brookhaven hold harmless and indemnify them is denied as moot.

Dated: 8/24/11


PETER H. MAYER, J.S.C.