

**Byrne v Nicosia**

2011 NY Slip Op 32526(U)

September 19, 2011

Sup Ct, Suffolk County

Docket Number: 07-32442

Judge: Peter H. Mayer

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**ORDERED** that the motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaints herein is denied; and it is further

**ORDERED** that the cross motion by Patrick Byrne and Tina Byrne for an order pursuant to CPLR 3212 granting summary judgment on their cause of action based on General Municipal Law § 205-e is granted; and it is further

**ORDERED** that the motion by plaintiff County of Nassau for an order pursuant to CPLR 3212 granting summary judgment on its cause of action based on General Municipal Law § 207-c (6) is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Patrick Byrne, a Nassau County Police Officer, on February 17, 2007 at approximately 4:52 a.m., when he slipped and fell on snow on the steps of the front stoop at the premises located at 1 Shorewood Drive, Bayville, New York while responding to a house alarm. The Byrnes commenced this action against the defendants, the owners of the premises. By order of this Court dated March 24, 2010, the County of Nassau was permitted to intervene as an additional plaintiff.

In their complaint and the bill of particulars, the Byrnes asserted a cause of action for negligence and a cause of action pursuant to General Municipal Law § 205-e. The Byrnes alleged that the defendants were negligent in, *inter alia*, permitting and allowing the premises to become and remain in a dangerous condition, failing to properly remove snow and ice, and failing to provide adequate lighting. In addition, the Byrnes alleged that the defendants violated numerous sections of the Bayville Village Code, Code of Town of Oyster Bay, New York State Property Maintenance Code, Nassau County Administrative Code, New York State Building Code, and the American Society for Testing Materials Standard.

In its complaint, the County of Nassau asserted a cause of action pursuant to General Municipal Law § 207-c (6). It alleged that due to the defendants' negligence, Mr. Byrne lost 575 days of work from the date of the incident through the latest date for which wage data is available, and has incurred and may continue to incur medical and hospital expenses to treat his injuries sustained as a result of the defendants' negligence. The County of Nassau also alleged that it paid Mr. Byrne's full wages, medical and hospital expenses, and related benefits.

The defendants now move for summary judgment on the grounds that they did not have actual or constructive notice of or create the alleged defective condition, nor did they violate any municipal or state code, regulation or statute. The Byrnes cross-move for summary judgment on their cause of action pursuant to General Municipal Law § 205-e, asserting that the defendants violated New York State Building Code § 713.1 (b) (4), New York State Building Code § 1245.1, and New York State Property Maintenance Code § 302.3. The County also moves for summary judgment on its cause of action pursuant to General Municipal Law § 207-c (6).

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v*

*Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (see *Alvarez v Prospect Hosp.*, *supra*).

“A property owner will be held liable for a slip and fall involving snow and ice on its property only when it created the dangerous condition that caused the accident . . . or had actual or constructive notice thereof” (*Medina v La Fiura Dev. Corp.*, 69 AD3d 686, 686, 895 NYS2d 98, 99 [2d Dept 2010]). To constitute constructive notice, the “condition must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it” (*Bolloli v Waldbaum, Inc.*, 71 AD3d 618, 619, 896 NYS2d 400, 402 [2d Dept 2010] [internal quotation marks omitted]). On a motion for summary judgment dismissing a complaint, the defendant bears the burden of proving the absence of notice as a matter of law (see *Alston v Starrett City Assoc.*, 72 AD3d 711, 898 NYS2d 859 [2d Dept 2010]).

General Municipal Law § 205-e (1) creates a statutory cause of action where a police officer is injured by another’s failure “to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus.” “[I]t is well settled that the statute cannot reasonably be applied literally in accordance with its broad language . . . Rather, as a prerequisite to recovery, a police officer must demonstrate injury resulting from negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties” (*Williams v City of New York*, 2 NY3d 352, 364, 779 NYS2d 449, 454 [2004]). To establish liability under General Municipal Law § 205-e, a police officer must specify the statute or regulation with which the defendant failed to comply, describe the manner in which the injury occurred, and demonstrate a reasonable or practical connection between the statutory or regulatory violation and the claimed injury (see *Williams v City of New York*, *supra*; *Campbell v City of New York*, 31 AD3d 594, 819 NYS2d 294 [2d Dept 2006]; *Campagna v Arleo*, 25 AD3d 528, 807 NYS2d 629 [2d Dept 2006]).

General Municipal Law § 207-c (6) provides that “a cause of action shall accrue to the municipality . . . for reimbursement in such sum or sums actually paid as salary or wages and or for medical treatment and hospital care as against any third party against whom the policeman shall have a cause of action for the injury sustained or sickness caused by such third party.”

The defendants’ motion is denied. Initially, the Court rejects the defendants’ contention that they cannot be held liable for failing to remove snow from their front stoop since it was not foreseeable that

Mr. Byrne would have approached their front door during early morning hours while responding to their house alarm (*cf. Mulholland v Willis*, 172 AD2d 482, 575 NYS2d 696 [2d Dept 1991] [finding the defendants not liable for failing to remove snow and ice from their backyard since it was not foreseeable that the police officer responding to their house alarm would have entered their backyard in the early morning hours]). The defendants acknowledged at their deposition that they were aware that the local authorities were notified if the alarm went off. Mrs. Nicosia also testified that even though that house was their summer home, she and her husband received mail during the winter at the premises in the mail slot located on the front door; nevertheless, the defendants did not hire anyone to remove snow or ice.

The defendants also failed to establish that they lacked constructive notice of the snow on their front stoop. Instead, they rely only on Mr. Byrne's deposition testimony that the snow covering the stoop had no footprints on it and had not been cleared. The defendants' burden of establishing their entitlement to judgment as a matter of law on the issue of constructive notice cannot be satisfied merely by pointing out gaps in the plaintiffs' case (*see Gaines v G&D Ventures, Inc.*, 64 AD3d 528, 883 NYS2d 256 [2d Dept 2009]; *South v K-Mart Corp.*, 24 AD3d 748, 807 NYS2d 133 [2d Dept 2005]).

While the defendants assert that they cannot be held liable because the snow on the front stoop was open and obvious, "[t]he fact that a defect may be open and obvious does not negate a landowner's duty to maintain its premises in a reasonably safe condition, but may raise an issue of fact as to the plaintiff's comparative negligence" (*Ruiz v Hart Elm Corp.*, 44 AD3d 842, 843, 844 NYS2d 80, 82 [2d Dept 2007]).

With respect to the Byrnes' cause of action based on General Municipal Law § 205-e, the defendants failed to establish that they did not violate New York State Property Maintenance Code § 302.3, 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." Since the defendants failed to demonstrate that Mr. Byrne's accident was not practically or reasonably connected to their failure to keep their front stairs free from hazardous conditions, they are not entitled to summary judgment dismissing the plaintiffs' cause of action based on General Municipal Law § 205-e (*see Rosabella v Metropolitan Transp. Auth.*, 23 AD3d 365, 804 NYS2d 771 [2d Dept 2005]).

To the extent that the defendants seek summary judgment dismissing the County of Nassau's complaint, the Court notes that the defendants have offered no argument for the granting of such relief.

The Byrnes' cross motion, which is for summary judgment on their cause of action pursuant to General Municipal Law § 205-e, is granted. In support of their cross motion, the Byrnes submit copies of the deposition transcripts of Mr. Byrne and the defendants. Mr. Byrne testified that he slipped on snow on the stairs of the front stoop while responding to a house alarm at the premises, and the defendants both testified that the subject premises was their summer home and that they did not hire anyone to remove snow or ice from the premises during the winter months. Since the Byrnes established that the defendants violated Property Maintenance Code § 302.3 by failing to keep the stairs "free from hazardous conditions" and that there was a reasonable or practical connection between the violation and Mr. Byrne's injury, and absent a showing to the contrary, they are entitled to summary judgment as a matter of law on their cause of action pursuant to General Municipal Law § 205-e (*see Campbell v City*

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of *New York*, 31 AD3d 594, 819 NYS2d 294 [2d Dept 2006].

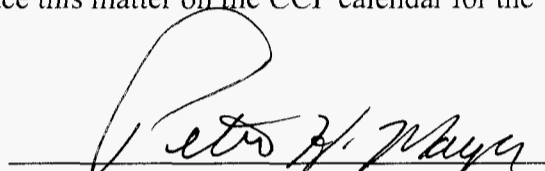
The County of Nassau's motion is denied. In support of its motion, the County failed to annex to its moving papers an affidavit by a party with personal knowledge of the facts setting forth the factual basis for its claim, to wit, that it paid Mr. Byrne's full wages, medical and hospital expenses, and related benefits. Thus, it is not entitled to summary judgment on its cause of action pursuant to General Municipal Law § 207-c (6) (*see Warrington v Ryder Truck, Inc.*, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]). While a verified complaint may be used in lieu of an affidavit to establish merit (CPLR 105 [u]), the complaint annexed to the County's moving papers was not verified.

Accordingly, the defendants' motion for summary judgment and the County of Nassau's motion for summary judgment are denied. The Byrnes' cross motion for summary judgment on their cause of action based on General Municipal Law § 205-e is granted. The Court directs that the cause of action as to which summary judgment was granted is hereby severed, and that the parties' remaining claims shall continue (*see* CPLR 3212 [e] [1]).

The Byrnes shall serve a copy of this order with notice of its entry upon the Calendar Clerk of this Court. Upon such service, the Calendar Clerk shall place this matter on the CCP calendar for the next available date.

Dated: \_\_\_\_\_

9/19/11

  
PETER H. MAYER, J.S.C.