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SHORT FORM ORDER

INDEX No. 09-36382
CAL. No. 11-01620OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 9-19-11 (#002)
MOTION DATE 11-30-11 (#003)
ADJ. DATE 1-25-12
Mot. Seq. # 002 - MD
003 - XMG

CAROL GARRETSON,

Plaintiff,

- against -

TOWN OF ISLIP, METROPOLITAN TRANSPORTATION AUTHORITYand THE LONG ISLAND RAIL ROAD COMPANY,

Defendants.

LAW OFFICES OF JOEL S. SCHWITZER
Attorney for Plaintiff
One Old Country Road
Carle Place, New York 11514

JOHN P. FINNERTY, ESQ.
Attorney for Defendant Town of Islip
21 Maple Avenue, P.O. Box 5151
Bay Shore, New York 11706

J. DENNIS MCGRATH, ESQ.
Attorney for Defendants MTA & LIRR
Jamaica Station
Jamaica, New York 11435-4380

Upon the following papers numbered 1 to 40 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motion and supporting papers 11 - 27 ; Answering Affidavits and supporting papers 28 - 33 ; Replying Affidavits and supporting papers 34 - 38; 39 - 40 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Town of Islip seeking summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that the cross motion by defendants Metropolitan Transportation Authority and The Long Island Railroad Company seeking summary judgment dismissing the complaint is granted.

Plaintiff Carol Garretson commenced this action to recover damages for injuries she allegedly sustained as a result of a slip and fall that occurred at the Central Islip Long Island Railroad train station located at Lowell Avenue and Suffolk Avenue in the Town of Islip on March 3, 2009. Plaintiff, by her complaint, alleges that as she was walking on the concrete walkway that separates the roadway from the commuter parking lot at the train station, she slipped and fell on an accumulation of snow and ice, causing her to sustain a fracture to her right ankle. The subject commuter parking lot is owned by the County of Suffolk, but snow plowing is provided by defendant Town of Islip (hereinafter referred to as the "Town").

Defendant Long Island Railroad (hereinafter referred to as the "LIRR") is a subsidiary of defendant Metropolitan Transportation Authority (hereinafter referred to as the "MTA"), and operates trains from the Central Islip train station.

The Town now moves for summary judgment on the bases that it did not receive prior written notice of the alleged defective condition in accordance with § 65-a(1) of the Town Law, and that, even if it had been served with prior written notice, it is allowed a reasonable time to remedy said condition. The Town also asserts that plaintiff has failed to establish that it created the defective condition. In support of the motion, the Town submits copies of the pleadings, the affidavit of Peter Keltchka, and a copy of a March 2009 local climatological data report. Plaintiff opposes the Town's motion on the ground that the prior written notice rule is inapplicable in the instant matter, because there are material issues of fact as to whether the Town's snow removal procedure created the alleged defective condition. In opposition to the motion, plaintiff submits the parties' deposition transcripts, her own affidavit, and photographs of the situs of the accident.

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 [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 [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, citing Zuckerman v City of New York, supra at 562).

It is well established that a municipality is under a continuing duty to maintain its public walkways in a reasonably safe condition and that such duty is independent of its duty not to create a defective condition (see Kiernan v Thompson, 73 NY2d 840 [1988]). Thus, a municipality cannot be held liable for the negligent performance of a government function, unless the municipality created the defect or hazard through an affirmative act of negligence, or where there is a "special use" conferring a special benefit upon the locality (see Amabile v City of Buffalo, 93 NY2d 471 [1999]). Moreover, 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 [1995]; DiGregorio v Fleet Bank of New York, NA, 60 AD3d 722 [2d Dept 2009]). Therefore, a written notice of a defect is a condition precedent that a plaintiff must plead and prove in order to maintain an action against a municipality for a defective condition on a publicly owned walkway (see Katz v City of New York, 87 NY2d 241 [1995]; Misek-Falkoff v Village of Pleasantville, 207 AD2d 332 [2d Dept 1994]). 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, supra at [1999]; see DiGregorio v Fleet Bank of New York, NA, supra at 723; Delgado v County of Suffolk, 40 AD3d 575 [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 [2007]; see Forbes v City of New York, 85 AD3d 1106 [2d Dept 2011]).

Here, the Town established, prima facie, its entitlement to judgment as a matter of law that it did not receive the requisite prior written notice of the accumulation of snow and ice mounds at the subject commuter parking lot upon which plaintiff allegedly fell (see Town Law § 65-a [1]; Daniel v City of New York, 91 AD3d 699 [2d Dept 2012]; Groninger v Village of Mamaroneck, 17 NY3d 125 [2011]; San Marco v Village/Town of Mount Kisco, 16 NY3d 111 [2010]; Wohlars v Town of Islip, 71 AD3d 1007 [2d Dept 2010]; Shannon v Village of Rockville Ctr., 39 AD3d 528 [2d Dept 2007]). Peter Kletchka testified on behalf of the Town that he is employed by the Town as the project supervisor for the Department of Public Works, and that he oversees the traffic safety and street lighting divisions. Kletchka testified that a search of the Town's complaint database and written notice logbooks for the 2008-2009 winter season, including the date of plaintiff's accident, was performed to determine if the Town had received any prior complaints of a defective condition at the subject commuter parking lot. Kletchka further testified that the search revealed that the Town had not received any prior written notice of any dangerous or defective condition at the subject commuter parking lot, although it had received a request ticket for sanding and salting of the parking lot across from the subject commuter parking lot on March 2, 2009, which it completed. When a municipal employee states by affidavit or deposition that a thorough search was conducted and that no prior written notice of the defect was found, there is a prima facie showing of entitlement to judgment, as a matter of law (see Dabbs v City of Peekskill, 178 AD2d 577, 577 [2d Dept 1991]). Moreover, at her deposition, plaintiff testified that she was unaware of any complaints having been made prior to her incident about the alleged dangerous condition in the subject commuter parking lot, and that she had not made any complaints about the subject commuter parking lot prior to her accident.

Plaintiff, in opposition, raised a triable issue of fact as to whether the Town created the alleged defective condition that resulted in her alleged injuries (see Kiernan v Thompson, supra; Perrington v City of Mount Vernon, 37 AD3d 571 [2d Dept 2007]; Magidenko v Consolidated Edison, 3 AD3d 553 [2d Dept 2004]), and, therefore, she was not required to provide the Town with prior written notice of the alleged dangerous condition (see Gelfand v Adjo Contr. Corp., 82 AD3d 932 [2d Dept 2011]). A prior written notice statute will not protect a municipality from liability where it can be proven that the "locality created the defect or hazard through an affirmative act of negligence" (Amabile v City of Buffalo, supra at 474). Although a municipality may not be held liable for failure to remove all snow and ice from a particular area, inasmuch as such a failure is not an affirmative act of negligence (Stallone v Long Is. R.R., 69 AD3d 705, 706 [2d Dept 2010]), it may be liable if the removal efforts made the walkway more dangerous (Joseph v Pitkin Carpet, Inc., 44 AD3d 462, 463 [2d Dept 2007]). Kletchka explained that although the subject commuter parking lot is owned by the County of Suffolk and is dedicated to the LIRR for its commuters usage, the Town maintains the commuter parking lot's pavement and its Highway Division performs all snow removal services for the paved surfaces of the commuter parking lot. Kletchka testified that the Town uses six-wheel dump trucks that are equipped with 10 foot snowplow blades and sand material spreaders to remove snow from the paved surfaces of the subject commuter parking lot, and that the snow is piled onto the walkways, medians and dividers of the commuter parking lot. Kletchka further testified that the snow is removed from the area to allow the vehicles to park in the parking spaces of the commuter parking lot, and that sand and salt will be spread if it is requested or if the condition of the parking lot requires it. In addition, in his affidavit, Kletchka indicates that there was a significant snow fall in the area on March 1st and March 2nd of 2009, which ended early in the morning of March 3rd, and that the Town's snowplows were on duty "24/7" during the snowfall and its aftermath until the clean-up was finished. Kletchka further states that a snowplow has no choice but to plow snow onto the divider if it is to plow the road surfaces of the parking lot on each side of the divider to make the road surface safe. Additionally, plaintiff testified

that her accident occurred at approximately 7:00 in the morning on March 3, 2009, that she had difficulty walking on the parking lot's surface because it was covered with snow and ice, and that she had to climb over snow and ice to cross the walkway, because the snowplow had pushed the snow onto the walkway (see, San Marco v Village/Town of Mount Kisco, 16 NY3d 111; compare Wohlars v Town of Islip, supra). Accordingly, the Town's motion for summary judgment is denied.

The MTA and the LIRR cross-move for summary judgment on the basis that plaintiff cannot establish a prima facie case against them, because they do not owe her a duty of care. In particular, the MTA and the LIRR assert that they do not own, operate or maintain the subject commuter parking lot and, therefore, they do not owe any duty of care to plaintiff. In addition, the MTA contends that, in accordance with Public Authorities Law § 1266, each of its subsidiaries are responsible for the maintenance and repair of its own facilities and, thus, liability predicated upon a personal injury claim by an employee of one of its subsidiaries cannot be imputed to it. In support of the motion, the MTA and the LIRR submit copies of the pleadings, the parties' deposition transcripts, and copies of the Town's Department of Public Works's complaint summary file request for sanding of Lowell Avenue. The MTA and the LIRR also submit a copy of the parking, bus and taxi information map for the Central Islip train station and photographs of the accident's location.

Here, the MTA satisfied its prima facie burden of establishing its entitlement to judgment as a matter of law by demonstrating that it did not own or operate the subject commuter parking lot, and that it is not vicariously liable for the torts of its subsidiaries, such as the LIRR (see Public Authorities Law § 1266[5]; Mayayev v Metropolitan Transp. Auth. Bus, 74 AD3d 910 [2d Dept 2010]; Rampersaud v Metropolitan Transp. Auth. of the State of N.Y., 73 AD3d 888 [2d Dept 2010]; Delacruz v Metropolitan Transp. Auth., 45 AD3d 482 [1st Dept 2007]; Noonan v Long Is. R.R, 158 AD2d 392 [2d Dept 1990]), and as such, is not a proper party to the litigation (see Montez v Metropolitan Transp. Auth., 43 AD2d 224 [1st Dept 1974]). Moreover, "[i]t is well settled, as a matter of law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility" (Cusick v Lutheran Med. Ctr.,105 AD2d 681, 681 [2d Dept 1984]).

The LIRR also established its prima facie burden that it is not liable to plaintiff, because it did not own, operate or maintain the subject commuter parking lot where plaintiff's injury allegedly occurred (see McElroy v Bernstein, 72 AD3d 757 [2d Dept 2010], lv denied 15 NY3d 704 [2010]; Dugue v 1818 Mgt. Corp., 301 AD2d 561 [2d Dept 2003]), and as a result, it did not owe a duty of care to plaintiff to maintain the commuter parking lot in a reasonably safe condition (see Cerrato v Rapistan Demag Corp., 84 AD3d 714 [2d Dept 2011]). "The law [only] imposes a duty to maintain property free and clear of dangerous and defective conditions upon those who own, occupy, or control property, or who put the property to a special use or derive a special benefit from it" (Segura v City of New York, 70 AD3d 670, 670 [2d Dept 2010], quoting Guzov v Manor Lodge Holding Corp., 13 AD3d 482, 483 [2d Dept]; see Aversano v City of New York, 265 AD2d 437[2d Dept 1999]; Turrisi v Ponderosa, Inc., 179 AD2d 956, 957, 578 NYS2d 724 [3d Dept 1992]), and "where none of these factors are present, a party cannot be held liable for injuries caused by [an] allegedly defective condition" (Grover v Mastic Beach Prop. Owners Assn., 57 AD3d 729, 730 [2d Dept 2008]; see Sanchez v 1710 Broadway, Inc., 79 AD3d 845 [2d Dept 2010]). Furthermore, "the duty of the LIRR to its passengers 'extends to the exercise of reasonable care in affording them safe approaches to the stations and platforms, and this duty applies not only to such approaches as may have been constructed

and owned by the company, but to those constructed and owned by others, if constantly and notoriously used by passengers as a means of approach'" (Ambriano v Town of Oyster Bay, 266 AD2d 415, 416 [2d Dept 1999], quoting Bruno v Vernon Park Realty, 2 AD2d 770, 771 [2d Dept 1956]). However, such duty to provide safe approaches to its stations does not encompass the responsibility for snow removal in adjacent town-owned parking lots (see Ambriano v Town of Oyster Bay, supra). The record demonstrates that although the subject commuter parking lot is dedicated solely for use by the LIRR commuters, the parking lot is owned by the County of Suffolk, and that the LIRR is not responsible for removing snow from the commuter parking lot or its appurtenant walkways. In fact, Rogelio Mitchell, testifying on behalf of the LIRR, stated that the LIRR employees clear snow from the station's platforms, the platform stairs, the waiting room and stairs, and the exterior area on the south side of the station, but do not clean walkways appurtenant to the commuter parking lot or the commuter parking lot itself. Mitchell further testified that the Town always cleaned the subject commuter parking lot and its appurtenant walkways, and that commuters were provided with the Town's phone number to call if there were any problems with the commuter parking lot.

Plaintiff opposes the MTA and the LIRR's cross motion on the ground that there are material issues of fact as to whether the MTA and the LIRR own, occupy, maintain or control the subject commuter parking lot, since they have failed to produce any lease or agreement to show that they are not the owners of the premises. Plaintiff further contends that the LIRR has made "special use" of the subject commuter parking lot and, as such, owes a duty of care to plaintiff to maintain the commuter parking lot in a reasonably safe condition.

In opposition, plaintiff failed to adduce evidence sufficient to raise a triable issue of fact as to whether the MTA and/or the LIRR owned, controlled or maintained the subject commuter parking lot, or whether it created the alleged defect that caused plaintiff's injury (see Zuckerman v City of New York, supra; Chahales v Westchester Joint Water Works, 47 AD3d 610 [2d Dept 2008]; Fedrescordero v 2527 Boston Rd. Corp., 301 AD2d 401 [2d Dept 2003]). Plaintiff also failed to present evidence that would raise a triable issue of fact regarding whether the LIRR derived a special benefit from its use of the subject commuter parking lot (see Oboler v City of New York, supra; Poirer v City of Schenectady, 85 NY2d 310 [1995]). The special use exception is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use, and is therefore, required to maintain that portion of the property (see Kaufman v Silver, 90 NY2d 204 [1997]; Poirer v City of Schenectady, supra at 315; Kiernan v Thompson, supra at 958). Accordingly, the MTA and the LIRR's cross motion for summary judgment is granted.

Dated: April 10, 2012

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION