

Petrocone v Town of N. Hempstead

2012 NY Slip Op 31190(U)

April 20, 2012

Sup Ct, Nassau County

Docket Number: 24399/98

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 PART 6

JOHN PETROCONE,

Plaintiff,

INDEX NO. 24399/98

XXX

-against-

MOTION DATE: 03/13/12

SEQUENCE NO: 001, 002

THE TOWN OF NORTH HEMPSTEAD and THE
COUNTY OF NASSAU,

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 North Hempstead’s motion for summary judgment, pursuant to CPLR §3212, are granted.

This action is to recover monetary damages for personal injuries allegedly sustained by the plaintiff on June 28, 1997 when he was “struck in the face and eye with a low-lying tree branch while he was riding his bicycle along the northwest sidewalk of Searingtown Road.” Plaintiff alleges that he was “struck in the face with a low lying tree branch [which] originates upon the premises of 110 Searington Road [but which] severely overhangs across the sidewalk.” The tree was on the private property located at 110 Searingtown Road, but a branch was allegedly overhanging the sidewalk on the date of plaintiff’s accident.

In his bills of particulars, plaintiff alleges that the County of Nassau (hereinafter “County”) and the Town of North Hempstead (hereinafter “Town”) were “negligent in their

ownership, operation, maintenance and control of the public sidewalk at 110 Searingtown Road in that they permitted the low-lying tree branch which originates upon the premises of 110 Searingtown Road to heavily overhang the public sidewalk so as to allow the subject area to become, constitute and remain in a dangerous, hazardous and defective condition.”

To begin, the County moves for summary judgment on the grounds that it received no prior written notice of the defect alleged and that plaintiff has failed to state a cause of action against the County as plaintiff has failed to plead in his complaint that the County received prior written notice in accordance with the Nassau County Administrative Code Section 12-4.0(e). In support of its motion, the County submits the plaintiff’s examination before trial transcript in which plaintiff testified that he was riding his bicycle on the sidewalk adjacent to Searingtown Road and that the tree branch at issue was hanging over the sidewalk from a tree that was behind a fence in the yard of the property adjacent to the location where the accident occurred.

The County further submits the examination before trial transcript of the County’s witness, Anthony DiPrima. Mr. DiPrima testified that he searched the records maintained by the Department of Public Works for 1997 with regard the maintenance of any trees in the area of the plaintiff’s accident and found no such maintenance records. Additionally, Mr. DiPrima found no complaints for any low lying tree branches in that location. Further, Mr. DiPrima testified that the tree in question was on private property and that the County has no responsibility for maintaining the tree in question.

In further support of its motion, the County submits an affidavit executed by Veronica Cox, an employee of the Bureau of Claims and Investigations at the Office of the Nassau County Attorney. Her responsibilities include maintaining the Nassau County notices of claim and notices of defect files. Ms. Cox attests that she conducted a search to determine whether the County received prior written notice of a low lying tree branch on the northwest sidewalk at 110 Searingtown Road and found that, for a period of three years prior and up to the date of plaintiff’s accident, there were no records of any prior notices of claim or prior written complaints involving a low lying tree branch or any other dangerous or defective condition at the accident location. As the County did not receive prior written notice of the alleged defect, it contends that it is entitled to summary judgment on liability grounds.

The Town similarly moves for summary judgment on the grounds that the Town received no written notice of the claimed dangerous or defective tree branch overhanging the sidewalk at 110 Searingtown Road and that plaintiff's complaint fails to state a cause of action in that it fails to allege that the Town received prior written notice of the claimed defective sidewalk condition. In support of its motion, The Town submits the duly executed affidavit of its Superintendent of Highways, Thomas P. Tiernan. Mr. Tiernan attests that his responsibilities include the receipt, maintenance and response to complaints about the conditions of the roadways within the Town's jurisdiction. Mr. Tiernan attests that the sidewalk where the accident occurred is located within the unincorporated area of the Town, but that the Town did no maintenance or repair to the sidewalk or any trees or branches at said location during the three years prior to and including the accident date; that the Town did not issue any permits, contracts or easements for any construction, repair, or alteration to the sidewalk or to any trees or branches at the location of the accident; and that his office did not receive any oral or written complaints about the sidewalk or any trees or branches at the location of the accident during the three years prior to and including the date of the accident. As the Town did not receive prior written notice, did not cause or create the defect at issue and did not utilize the sidewalk for any special use, the Town contends that it is entitled to summary judgment on liability grounds.

Additionally, both the Town and the County argue that since prior written notice is a prerequisite to liability herein, and as the plaintiff failed to allege that either municipality had prior notice of low lying tree branch at issue herein, the plaintiff's complaint fails to state a cause of action against the County and the Town and should also be dismissed upon said ground.

Both the County and the Town have made a prima facie showings of entitlement to summary judgment. 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, out of repair, unsafe, dangerous or obstructed condition of any highway, street or sidewalk unless written notice of the defect was given to the County of Nassau by mailing same by certified or registered mail to the Office of the County Attorney. Similarly, Section 26-1 of the Code of the Town of North Hempstead, provides that no civil action shall be maintained against the Town for damages or injuries to persons sustained in

consequence of any sidewalk being defective, out-of-repair, unsafe, dangerous or obstructed, unless written notice of said condition was actually given to the Town Superintendent of Highways or the Town Clerk, and there was a failure or neglect, within a reasonable time after the receipt of such notice, to repair or remove the complained of defect, danger or obstruction.

A prior written notice law adopted by a municipality bars a claim for personal injury caused by a defect in a sidewalk, or other specifically designated area, unless the claimant can establish that the municipality created the defect in question through an affirmative act of negligence. (*Galante v. Village of Sea Cliff*, 13 A.D.3d 577, 787 N.Y.S.2d 376 (2d Dept. 2004); *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 715 N.E.2d 104 (1999); *Berner v. Town of Hempstead*, 304 A.D.2d 513, 757 N.Y.S.2d 585 (2d Dept. 2003); *Betzold v. Town of Babylon*, 18 A.D.3d 787, 796 N.Y.S.2d 680 (2d Dept. 2005); *Mahler v. Incorporated Village of Port Jefferson*, 18 A.D.3d 450, 794 N.Y.S.2d 435 (2d Dept. 2005); see also, General Municipal Law §50-e(4)). Where there is no evidence that the municipality received prior written notice of the defect, a municipality will not be found liable unless there is evidence that the municipality 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); *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 715 N.E.2d 104 (1999)). Since neither the County nor the Town received prior written notice of the defect, and as there is no evidence that they caused or created the defect through an affirmative act or that they conferred a special benefit unrelated to public use, neither the County nor the Town can be found liable to the plaintiff for his injuries herein. (*Berner v. Town of Huntington*, 304 A.D.2d 513, 757 N.Y.S.2d 585 (2d Dept. 2003); *Zash v. County of Nassau*, 171 A.D.2d 743, 567 N.Y.S.2d 70 (2d Dept. 1991); *Galante v. Village of Sea Cliff*, 13 A.D.3d 577, 787 N.Y.S.2d 376 (2d Dept. 2004)).

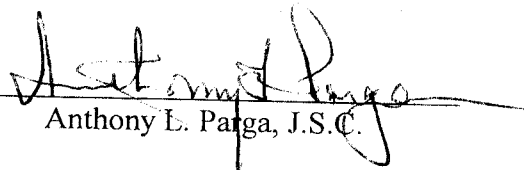
Further, in a case analogous to the instant matter, the Court of Appeals held that where a plaintiff was struck in the eye by a low-lying branch overhanging the sidewalk on which he was walking, the lower courts properly dismissed the complaint on the grounds that the low-lying tree branch was an obstructed condition within the meaning of the municipality's prior written notice

statute and that the municipality had not received any notice of the alleged condition as required by the prior notice statute. (*Monteleone v. Incorporated Village of Floral Park*, 74 N.Y.2d 917, 550 N.Y.S.2d 257 (1989)). The Court of Appeals further held that the municipality's planting of, and subsequent failure to prune, the tree that injured the plaintiff did not constitute affirmative negligence rendering the prior notice statute inapplicable, but, at most, amounted to nonfeasance. (*Id.*; *See also, Michela v. County of Nassau*, 175 A.D.2d 707, 574 N.Y.S.2d 965 (2d Dept. 1991); *Zizzo v. City of New York*, 176 A.D.2d 722, 574 N.Y.S.2d 966 (2d Dept. 1991)).

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); *Kiszenik v. Town of Huntington*, 70 A.D.3d 1007, 895 N.Y.S.2d 208 (2d Dept. 2010)). 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)). Plaintiff 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 there was any special use by the County or Town. (*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)).

Accordingly, the motions for summary judgment by the County and the Town are granted, and plaintiff's complaint, together with all cross-claims, is hereby dismissed.

Dated: April 20, 2012


 Anthony L. Parga, J.S.C.

ENTERED
 APR 24 2012
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE

Cc: Dell, Little, Trovato & Vecere, LLP
5 Orville Drive, Suite 100
Bohemia, NY 11716

Richard S. Finkel, Town Attorney
Town of North Hempstead
220 Plandome Road
P.O.B. 3000
Manhasset, NY 11030

John Ciampoli, Nassau County Attorney
One West Street
Mineola, NY 11501