Hagan v County of Nassau

2012 NY Slip Op 32084(U)

July 26, 2012

Sup Ct, Nassau County

Docket Number: 4294/11

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 31
NASSAU COUNTY

WILLIAM HAGAN,

Plaintiff,

Index No.: 4294/11
Motion Seq. No.: 03
Motion Date: 06/04/12

- against -

THE COUNTY OF NASSAU, THE TOWN OF HEMPSTEAD, THE VILLAGE OF ATLANTIC BEACH, ARTURO MANZO and MARINA MANZO,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	**1**
Affirmation in Support	**2**
Affirmation in Opposition and Exhibits	**3**
Affirmation in Reply	**4**

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant The Village of Atlantic Beach ("Atlantic Beach") moves, pursuant to CPLR § 3212, for an order granting it summary judgment dismissing plaintiff's Verified Complaint against it, as well as any cross-claims against it. Plaintiff actually filed an Affirmation in Support which stated, "[a]fter a review and consideration of the materials and evidence exchanged during discovery, plaintiff respectfully does not oppose the application of the defendant, **The Village of Atlantic Beach**." Defendants Arturo Manzo and Marina Manzo (collectively the "Manzos") oppose the motion.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on May 20, 2010, when he tripped and fell in the roadway adjacent to the premises known as 83 Queens Avenue, Atlantic Beach, New York. The basis of liability against defendant Atlantic Beach rests on allegations in the Verified Complaint that defendant Atlantic Beach was negligent in the ownership, operation, management, maintenance and control of the aforesaid roadway, all of which caused plaintiff's injuries. Plaintiff commenced the instant action with the filing of a Summons and Verified Complaint on or about March 22, 2011. Defendant Atlantic Beach served a Verified Answer on or about May 6, 2011.

Defendant Atlantic Beach moves for summary judgment dismissing the Verified Complaint on the grounds it did not receive prior written notice of the defective condition as required by N.Y. Village Law § 6-628 and the Code of Incorporated Village of Atlantic Beach § 200-2.

In support its motion, defendant Atlantic Beach submits the deposition transcript of Steven Cherson, Superintendent of Public Works for defendant Atlantic Beach. *See* Defendant Atlantic Beach's Affirmation in Support Exhibit F. Mr. Cherson testified that his job duties include maintaining the infrastructure of defendant Atlantic Beach. He further testified that he learned about plaintiff's claim when the Village Clerk told him about the Notice of Claim. Upon learning of the claim, he went to the subject location to check out the allegations. When Mr. Cherson arrived at the subject location, he determined that no road work had been done in that area. He also determined that some type of repair had been done to the driveway apron adjacent to 83 Queens Avenue. Mr. Cherson added that it is the responsibility of the property owner to maintain the sidewalk and driveway, including the apron, in front of their residence. Mr. Cherson stated that repairing the conditions that he observed on the driveway and sidewalk were not the responsibility of defendant Atlantic Beach. *See id.*

In further support of its motion, defendant Atlantic Beach submits the Affidavit of Emily Siniscalchi, the Village Clerk for defendant Atlantic Beach. *See* Defendant Atlantic Beach's Affirmation in Support Exhibit G. Ms. Siniscalchi states, "I am the Village Clerk for the Incorporated Village of Atlantic Beach. I have reviewed a copy of the Notice of Claim served on behalf of the claimant named above [plaintiff] concerning a trip and fall on November 30, 2010 over a dangerously hazardous condition located adjacent to the driveway in the roadway in front of 83 Queens Avenue, Atlantic Beach, New York. The Incorporated Village of Atlantic Beach did not receive prior written notice of any defect for the location identified in the Notice of Claim." *See id.*

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary

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judgment and necessitates a trial. *See Zuckerman v. City of New York, supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp., supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

In derogation of the common law, a municipality may avoid liability for injuries sustained as a result of defects or hazardous conditions on its public property by means of prior written notification laws. *See Amabile v. City of Buffalo*, 93 N.Y.2d 471, 693 N.Y.S.2d 77 (1999). An exception to the prior written notice laws exists where the municipality creates the defective condition through an affirmative act of negligence. *See id.* Actual or Constructive notice of a condition are insufficient to satisfy the requirement of prior written notice under the Village Law. *See id.*; *Magee v. Town of Brookhaven*, 95 A.D.3d 1179, 945 N.Y.S.2d 177 (2d Dept. 2012)

"Where, as here, a municipality has enacted a prior written notice statute, it may not be subject to liability for personal injuries caused by a defective street or sidewalk condition unless it has received prior written notice of the defect or an exception to the notice requirement applies. *See Despositio v. City of New York*, 55 A.D.3d 659, 866 N.Y.S.2d 248 (2d Dept. 2008); *Sollowen v. Town of Brookhaven*, 43 A.D.3d 816, 841 N.Y.S.2d 351 (2d Dept. 2007); *Katsoudas v. City of New York*, 29 A.D.3d 740, 815 N.Y.S.2d 243 (2d Dept. 2006); *Borgorova v. Incorporated Village of Atlantic Beach*, 51 A.D.3d 840, 858 N.Y.S.2d 359 (2d Dept. 2007). *See also Poirier v. City of Schenectady*, 85 N.Y.2d 310, 624 N.Y.S.2d 555 (1995).

On this record, defendant Atlantic Beach has made a *prima facie* showing of entitlement

to summary judgment by demonstrating that it did not receive prior written notice of the alleged defect on the sidewalk, as well as the fact that it did not create the alleged dangerous condition.

Since defendant Atlantic Beach has demonstrated *prima facie* entitlement to summary judgment, the burden therefore shifts to the party opposing said motion to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York, supra.*

In opposition to the motion, defendants Manzos argue that defendant Atlantic Beach has failed to eliminate or prove that they were not without affirmative negligence in the creation of the subject roadway condition. Defendants Manzos submit that "[a]s the proponent of this motion for summary judgment, it was incumbent upon Atlantic Beach to proffer evidence affirmatively demonstrating the absence of any exception to the prior written notice rule....Testimonial evidence was elicited during discovery that at least two years prior to plaintiff's alleged accident, water that was run from fire hydrants as they were flushed caused erosion in the street in front of 83 Queens Avenue and that complaints about such erosion were made to Atlantic Beach by Arturo Manzo before he passed away....No evidence was submitted by Atlantic Beach to refute this contention and any participation Atlantic Beach may have had in the erosion caused by such flushing. A jury could determine that Atlantic Beach was affirmatively negligent in permitting the water from the fire hydrant to wash the asphalt way and therefore, Atlantic Beach has not met their burden of demonstrating a lack of affirmative negligence that would entitle them to summary judgment." *See* Defendants Manzos Affirmation in Opposition Exhibit B pp. 21, 64-65.

Defendants Manzos add that "[f]urther evidence was also elicited during discovery that prior to plaintiff's accident, the demolition and construction of a house across the Queens Avenue from the Manzo property caused cracks in the street that were part of the defect later identified by plaintiff at his deposition....Additionally, it was testified that Atlantic Beach hires officers whose sole job is to patrol the streets in order to maintain adherence to Village Code....Therefore, it is possible for a jury to conclude that Atlantic Beach's own code

enforcement officers were actively negligent in their enforcement of contracting work that caused street cracks contributing to plaintiff's fall. Atlantic Beach has not proven freedom from affirmative negligence and therefore they cannot be granted summary judgment." *See* Defendants Manzos Affirmation in Opposition Exhibit B pp. 54-58, 60 and Exhibit D.

In reply to defendants Manzos' opposition, defendant Atlantic Beach argues that there are no issues of fact precluding granting it summary judgment. Defendant Atlantic Beach claims that there is no evidence that it either created the alleged defect or that it had some special use of the area in question. It submits that defendants Manzos contend that there is an issue of fact as to whether or not defendant Atlantic Beach created the defect in question. With respect to same, "[c]o-defendant Manzo specifically alleges that there is evidence that Atlantic Beach created the defect at issue by flushing out fire hydrants near the Manzo home. However, not only does Co-defendant Manzo's own witness admit that the 'water company' is the entity that flushed out the hydrants..., but Mr. Cherson affirmatively testified that the Village of Atlantic Beach does not own the fire hydrants at issue nor flushes them out....Indeed, if the erosion was the result of the flushing out of these hydrants it could not have been caused by Defendant Atlantic Beach since they do not own, control or flush out the fire hydrants at issue. By the same token, co-defendant Manzo's second argument of actual and/or constructive notice also fails. Co-defendant Manzo alleges that Defendant Atlantic Beach had actual or constructive notice of the alleged defect because their code officers were monitoring the construction across the street from the Manzo home and this construction was also a cause of the defect at issues. This argument fails as a matter of law because it is well established that '[n]either actual notice nor constructive notice of a condition is sufficient to satisfy the requirement of prior written notice.' Regardless of the well established case law which prevents actual or constructive notice from raising a triable issue of fact here, the records is clear that there is no proof of the same. It was affirmatively established that Mr. Cherson did the inspection of the construction of the home across the street from the co-defendant Manzo's himself and did not observe any roadway defects created by this

construction....Additionally, Mr. Cherson testified that he did not notice any erosion of the roadway as a result of the work being performed across the street from the Manzo's property." *See* Defendant Atlantic Beach's Affirmation in Support Exhibit F.

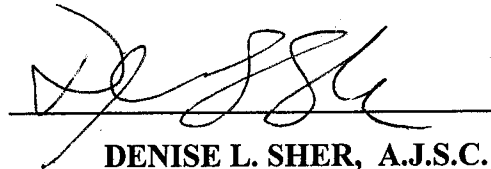
Based upon the above, the Court concludes that plaintiff's proof is insufficient to raise a triable issue of fact. *See Zuckerman v. City of New York, supra.*

Accordingly, defendant Atlantic Beach's motion, pursuant to CPLR § 3212, for an order granting it summary judgment dismissing plaintiff's Verified Complaint against it, as well as any cross-claims against it, is hereby **GRANTED**.

The remaining parties shall appear for a Pre-Trial Conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on August 8, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
July 26, 2012

ENTERED
JUL 31 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE