

**Mahabir v Suffolk County Water Auth.**

2013 NY Slip Op 31217(U)

May 31, 2013

Sup Ct, Suffolk County

Docket Number: 09-38728

Judge: Hector D. LaSalle

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 48 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. HECTOR D. LaSALLE  
Justice of the Supreme Court

MOTION DATE 12-14-12 (#001)  
MOTION DATE 2-19-13 (#002 & #003)  
MOTION DATE 3-19-13 (#004)  
ADJ. DATE 3-19-13  
Mot. Seq. # 001- MD # 003-MG  
                  # 002- MD # 004 - MotD

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CHANDRA MAHABIR,  
  
Plaintiff,

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- against -

PAUL MARGIOTTA, ESQ.  
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SAMAAN & AYDELOTT, LLP  
Attorney for Defendant Pav-Co Asphalt  
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SUFFOLK COUNTY WATER AUTHORITY,  
COUNTY OF SUFFOLK, TOWN OF  
BABYLON and PAV-CO ASPHALT, INC.,  
  
Defendant.

HAUKINS ROSENFELD RITZERT &  
VARRIALE, LLP  
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(PR)

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Upon the following papers numbered 1 to 77 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-15; Notice of Cross Motion and supporting papers 16-26, 27-29, 30-35; Answering Affidavits and supporting papers 36-51, 52-64, 65-67; Replying Affidavits and supporting papers 68-69, 70-71, 72-73, 74-75, 76-77; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that these motions are consolidated for purposes of this determination; and it is further

**ORDERED** that the motion by defendant County of Suffolk (“County”) for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross-claims insofar as asserted against it is denied; and it is further

**ORDERED** that the motion by defendant Suffolk County Water Authority (“SCWA”) for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross-claims insofar as asserted against it is denied; and it is further

**ORDERED** that the motion by defendant Pav-Co Asphalt, Inc. (“Pav-Co”), for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and cross claims asserted against it is granted; and it is further

**ORDERED** that the motion by defendant Town of Babylon (“Town”) for an order, pursuant to CPLR 3212, granting summary judgment dismissing the remaining cross-claim of defendant Pav-Co, and pursuant to 22 NYCRR 130-1.1 awarding the Town costs and sanctions is granted to the extent that the Town’s motion for summary judgment dismissing the remaining cross-claim is granted, but is otherwise denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff when she tripped and fell while crossing the street on County Line Road in the Town of Babylon. It is alleged that her foot went into a hole in the roadway, causing her to fall on her left side and sustain injuries.

Defendant County now moves (#001) for summary judgment dismissing the complaint and all cross-claims against it. In support of the motion defendant County submits, *inter alia*, its attorney’s affirmation, the pleadings, the General Municipal Law §50(h) deposition of the plaintiff; the deposition of Paul Morano as a witness for defendant County, the affidavit of John Donovan, sworn to November 8, 2012, and the affidavit of Renee Ortiz, sworn to November 8, 2012. In opposition, plaintiff submitted, *inter alia*, its attorney’s affirmation, the depositions of the plaintiff, the deposition of Paul Morano as a witness for defendant County, photographs of the accident site, the affidavit of John Robinson, sworn to February 14, 2013, and affidavit of Stanley H. Fein, sworn to on February 8, 2013.

Defendant SCWA now cross-moves (#002) for summary judgment dismissing the complaint and all cross-claims against it. In support of the motion defendant SCWA submits, *inter alia*, its attorney’s affirmation, the pleadings, the depositions of the plaintiff, the deposition of Frederick Berg, as a witness for defendant SCWA, the deposition of Paul Morano as a witness for defendant County, the deposition of William Fehr, Jr., as a witness for defendant Pav-Co, and a copy of a contract between the defendant County and various parties, including the defendant Pav-Co. In opposition, plaintiff submitted, *inter alia*, its attorney’s affirmation, the deposition of the plaintiff, the deposition of Paul Morano as a witness for

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defendant County, photographs of the accident site, and the deposition of Frederick Berg, as a witness for defendant SCWA

Defendant Pav-Co also cross-moves (#003) for summary judgment dismissing the complaint and all cross-claims against it. In support of the motion defendant Pav-Co submits, *inter alia*, its attorney's affirmation and reply affirmation. In opposition, plaintiff submitted its attorney's affirmation and a portion of the deposition of William Fehr, Jr., as a witness for defendant Pav-Co.

Defendant Town also cross-moves (#004) for summary judgment dismissing the remaining cross-claim of defendant Pav-Co against it, and awarding the Town costs and sanctions against Pav-Co. In support of the motion defendant Town submits, *inter alia*, its attorney's affirmation, a copy of the stipulation by which all parties, except Pav-Co, discontinued the action as against the Town, with prejudice, and the affidavit of Thomas Stay, sworn to in March 2013. Defendant Pav-Co has submitted its attorney's affirmation in opposition to the cross motion.

Plaintiff Chandra Mahabir testified that on November 2, 2008, she was walking on County Line Road, in Amityville, in the Town of Babylon. While crossing the street, her right foot went into a hole and she fell, striking the ground with the left side of her body, allegedly causing injuries. It was a square hole with a round metal inside. The hole was twelve inches by twelve inches and about four inches deep.

Paul Morano testified as a witness for the defendant County. He has been employed by the defendant County for thirty-one years, and his current job title is Assistant Civil Engineer. He testified that he had reviewed pictures of the area of the accident, but had not personally visited the site. He had searched for records of prior complaints about the area of the accident, but did not search for repair records. He stated that the SCWA maintained the water valve in question, and that they did not need a County permit if they wanted to do a cutout around the valve to perform repairs or to raise the height of the valve. Covers to the water valves are supplied by the defendant SCWA. He did not know if the defendant SCWA made the cutout, but it was not made by the defendant County. Defendant SCWA repaired their own water valves. Defendant County never does repairs for the SCWA. No road work had been performed by the County for at least a year prior to the accident. He also had checked back three years and found no complaints about water service in the area. He had not seen a cutout like the one around the water valve in this matter. He believed that the last time the defendant County did any road work in the area was the paving job in the 1990's. There were no records of any prior accidents in the area. He identified the contract pursuant to which the defendant Pav-Co had paved County Line Road. He said that during any paving job there was always a County inspector checking the work on a daily basis. If the inspector found any defects in the paving, the contractor would be directed to correct the problem while the paving was progressing.

Frederick Berg testified as a witness for the defendant SCWA. He has been employed by the defendant SCWA for almost twenty-five years, and his current job title is supervisor of distribution. Previously, he was supervisor of construction. He checked records back for more than a year prior to the accident and found no record of main breaks or surface leaks in the area. He testified that he could not find any work orders at any time prior to the accident for valves in this vicinity. He stated that a search of records was done by another, now former SCWA employee, and there was no record of any work done by the defendant SCWA in the area of the accident. He visited the accident site three days prior to his testimony.

He testified that someone did the cutout around the valve, but he did not know who made the cut. He testified that someone other than the defendant SCWA created the cut around the water valve, possibly in response to deteriorations in the roadway. He testified that when they do repair work, they have an "open permit" from the County for maintenance work. He testified that the defendant SCWA had "not to his knowledge" created the cutout or hired someone to make the repair. It was the policy of the defendant SCWA that after any repairs the hole should be left true and level. It was customary for the SCWA to maintain water valve caps and recap any open valves. He testified that the last work defendant SCWA performed on County Line Road was likely performed in 1972. When asked if defendant SCWA kept records of the placing of extenders on existing water service in the event of road resurfacing, he testified that sometimes they do and sometimes they don't. He said that sometimes they just supply them to the municipality at the right heights.

William Fehr, Jr. testified on behalf of the defendant Pav-Co. He is currently employed by All County Paving Corp. with the title of General Superintendent. Prior to that he was employed by defendant Pav-Co with the same title and he scheduled and performed paving work for the company and was so employed when defendant Pav-Co repaved County Line Road, pursuant to a contract with defendant County of Suffolk in the area of plaintiff's accident. He only had a generalized recollection of the actual paving job but said as the field supervisor, he was involved in the paving work on County Line Road. He did recall the procedures involved in great detail. Their work was limited to paving. Pav-Co did no construction work. He was asked if there was a procedure for paving roads with covers or sewer caps and things of that nature. He testified that the defendant County would coordinate with the utilities to have crews on standby to raise any of the hardware in the road to finish grade, which would be even with the top of the surface Pav-Co was applying. If the utility did not appear, he testified that, hypothetically, they would pave over a cap or cover. After the work was completed, it was inspected by an employee of Suffolk County, Pete Ragano. After inspecting, he would sign off on the job as well. If there was any problem with the work, they would be notified by the Suffolk County Department of Public works. He was not aware of any complaints being made with regard to this job. The witness was shown a picture of the water valve and hole where plaintiff alleges she fell. He identified it as a water valve and that the road was not in that condition at the time the County signed off on the job. He testified that the cut around the water valve was made by a tool of some kind.

The defendant County submitted the affidavit of John Donovan, an investigator in the County Attorney's office. His duties require him to maintain records of all written complaints concerning all defects and obstructions, pursuant to Suffolk County Charter § C8-2A on all of the streets, roads etc. in Suffolk County. He searched the appropriate records with regard to this matter and found no prior written complaints with regard to the alleged defect which is the subject of this action. The defendant County also submitted the affidavit of Renee Ortiz, the Chief Deputy Clerk of Suffolk County. Her duties require her to maintain records of all written complaints concerning all defects and obstructions, pursuant to Suffolk County Charter § C8-2A on all of the streets, roads etc. in Suffolk County. She searched the appropriate records of the Suffolk County Legislature with regard to this matter and found no prior written complaints with regard to the alleged defect which is the subject of this action.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the

case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court’s function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O’Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Where a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a defect which comes within the ambit of the law unless it has received prior written notice of the alleged defect, or an exception to the prior written notice requirement applies (*see Conner v City of New York*, 104 AD3d 637, 960 NYS2d 204 [2d Dept 2013]; *Masotto v Village of Lindenhurst*, 100 AD3d 718 [2d Dept 2012]; *Braver v Village of Cedarhurst*, 94 AD3d 933 [2d Dept 2012]). The Court of Appeals has recognized only two exceptions to the prior written notice requirement, namely, where the municipality created the defect through an affirmative act of negligence, or a special use confers a special benefit upon the municipality (*see Yarborough v City of New York*, 10 NY3d 726 [2008]; *Amabile v City of Buffalo*, 93 NY2d 471 [1999]; *Carlucci v Village of Scarsdale*, 104 AD3d 797, 961 NYS2d 318 *supra*).

Here, defendant County has made a prima facie showing of entitlement to judgment as a matter of law on the issue of prior written notice by demonstrating that it did not receive the requisite prior written notice of the alleged defective condition (*see Betzold v Town of Babylon*, 18 AD3d 787, 796 NYS2d 680 [2005]; *Khaghan v Rye Town Park Commn.*, 8 AD3d 447, 778 NYS2d 313 [2004]). However, the prima facie showing a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings (*Miller v Village of East Hampton*, 98 AD3d 1007, 951 NYS2d 171 [2d Dept 2012]; *Carlucci v Village of Scarsdale*, *supra*).

The plaintiff having also alleged that the defendant County created the dangerous condition which led to the plaintiff’s injuries, it was incumbent upon said defendant to eliminate all triable issues of fact as to whether it created the condition. This defendant County has failed to do. No mention at all of this issue was made in this defendant’s initial motion papers. While the defendant County’s witness, Paul Morano testified that he searched for records of prior complaints about the area of the accident, he did not search for repair records. Thus, there is a gap in the submitted proof sufficient to raise an issue of fact, and require a denial of summary judgment.

The plaintiff having also alleged that the defendant SCWA created the dangerous condition which led to the plaintiff’s injuries, it was incumbent upon this defendant to eliminate all triable issues of fact as to whether it created the condition. This defendant SCWA has failed to do. William Fehr, Jr., a former employee of the defendant Pav-Co, testified that the defendant County would coordinate with the utilities to have crews on standby to raise any of the hardware in the road to finish grade, which would be even with the top of the surface Pav-Co was applying. If the utility did not appear, he testified that, hypothetically, they

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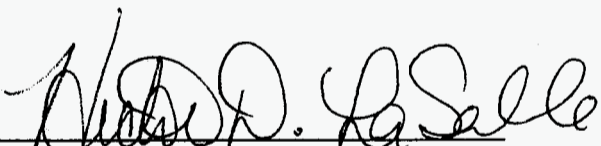
would pave over a cap or cover. Frederick Berg, the witness for the defendant SCWA testified that the SCWA was responsible for maintaining and repairing water valves in their system. The “cutout” that the plaintiff allegedly fell into surrounds a SCWA water valve. The repaving of County Line Road would have involved placing of extenders on the existing water service valves. Mr. Berg admitted that the SCWA does not always keep records with regard to the placing of such extenders. There are no records presented as to when such an extender was placed on the valve at the accident site after the 1998 repaving project. Mr. Berg testified that the defendant SCWA had “not to his knowledge” created the cutout or hired someone to make the repair. Under these circumstances, there are triable issues of fact on these issues and summary judgment must be denied.

Defendant Pav-Co has made a prima facie showing of its entitlement to summary judgment as a matter of law. Its witness, William Fehr, Jr. testified that Pav-Co’s paving work on County Line Road was inspected by the County, no complaints were made and the company was paid for its work. The testimony of Paul Morano, on behalf of the defendant County, confirms that the work was inspected on a daily basis by the County inspector. William Fehr, Jr. testified, upon being shown a picture of the accident site, that the road was not in that condition when the paving of County Line Road was completed. In response to this, neither the plaintiff nor the cross-claimants have produced any evidence sufficient to raise an issue of fact as to Pav-Co having any liability in this matter. Accordingly, its motion for summary judgment dismissing the complaint and all cross-claims against it is granted.

The motion by defendant Town of Babylon for an order granting summary judgment dismissing the remaining cross-claim of defendant Pav-Co, and pursuant to 22 NYCRR 130-1.1 awarding the Town costs and sanctions, is granted only to the extent that summary judgment is granted dismissing the cross-claim. The Town produced evidence that it did not own, operate, maintain, repair or control any portion of County Line Road. All of the other parties signed a stipulation dismissing their claims, with prejudice. Defendant Pav-Co produced no evidence to the contrary. With regard to the portion of the motion seeking costs and sanctions, the Court agrees that the conduct of the counsel for Pav-co borders on frivolous and counsel’s explanations are unconvincing. While, the Court will not impose costs and sanctions at this time, it strongly suggests that such conduct not reoccur.

The foregoing constitutes the Order of this Court.

**Dated: May 31, 2013**  
**Riverhead, NY**

  
 HON. HECTOR D. LASALLE, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION