

Franco v Town of Cairo
2013 NY Slip Op 32668(U)
October 22, 2013
Sup Ct, Greene County
Docket Number: 10-0855
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT
NICOLE M. FRANCO,

COUNTY OF GREENE

Petitioner,

-against-

DECISION and ORDER
INDEX NO. 10-0855
RJI NO. 19-10-5083

TOWN OF CAIRO and
THE COUNTY OF GREENE,

Respondents.

Supreme Court Greene County All Purpose Term, September 27, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

As Plaintiff was walking along the sidewalk adjacent to the Town of Cairo’s (hereinafter “Town”) Main Street she slipped on snow and ice, fell and fractured her ankle. Plaintiff commenced this action seeking to recover her damages. Issue was joined by both Cairo and The

County of Greene (hereinafter “County”), discovery is complete, and a trial date certain is set (January 21, 2014). Both Defendants now move for summary judgment. Plaintiff opposes the motions. Because Defendants demonstrated their entitlement to judgment as a matter of law and Plaintiff raised no triable issue of fact, the Defendants’ motions are granted.

“[S]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue.” (Napierski v Finn, 229 AD2d 869, 870 [3d Dept 1996], quoting Moskowitz v Garlock, 23 AD2d 943 [3d Dept 1965]).

“When pursuing summary judgment, the movant bears the threshold burden of tendering evidentiary proof in admissible form establishing entitlement to judgment as a matter of law.” (Chiarini ex rel. Chiarini v County of Ulster, 9 AD3d 769 [3d Dept 2004]; Alvarez v Prospect Hospital, 68 NY2d 320 [1986]; CPLR §3212). If the movant establishes their right to judgment as a matter of law, the burden shifts to the non-movant to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Here, both the Town and County met their initial burdens. Both established that they have enacted local laws requiring, as a precondition to commencement of a civil action for damages, prior written notice of the dangerous condition that caused the plaintiff’s injury. (Town Law §65-a; Town of Cairo Local Law No. 1 or 1995; Highway Law §139; County of Greene Local Law No. 4 or 1989). In accord with the filing requirements of such provisions, the Town submitted its Town Highway Superintendent’s and its Town Clerk’s affidavit. The County too submitted affidavits made by its Highway Superintendent and Acting Clerk of the County Legislature. Each affidavit was made on personal knowledge and a review of their respective business records. The affidavits were all in agreement. They unambiguously stated that neither

defendant had received prior written notice of the snow/ice condition that allegedly caused Plaintiff's injury. Such proof duly established both Defendants' "prima facie entitlement to judgment as a matter of law" (Urban v City of Albany, 90 AD3d 1132, 1133 [3d Dept 2011]), "thereby shifting to plaintiff the burden of demonstrating either that a question of fact existed in that regard or that [an]... exception[] applied." (Groninger v Vil. of Mamaroneck, 17 NY3d 125, 129 [2011]).

In opposition, Plaintiff raised no triable issue of fact. She neither challenged Defendants' lack of prior written notice proof, nor claimed a "special use" exception to Defendants' prior written notice laws. (Groninger v Vil. of Mamaroneck, *supra*, quoting Amabile v City of Buffalo, 93 NY2d 471 [1999]). Instead, she relies solely on the prior written notice law exception that arises when a "municipality create[s] the defect or hazard through an affirmative act of negligence." (*Id.* at 127, quoting Amabile v City of Buffalo, *supra* [internal quotation marks omitted]; San Marco v Vil./Town of Mount Kisco, 16 NY3d 111 [2010]). On this record, she failed to make the requisite showing.

Preliminarily, Plaintiff's opposition has several evidentiary defects. Plaintiff's submission of the Town's former Highway Superintendent's unsigned and uncertified deposition transcript is inadmissible. (Marks v Robb, 90 AD3d 863 [2d Dept 2011]; Marmer v IF USA Exp., Inc., 73 AD3d 868 [2d Dept 2010]; Pavane v Marte, 2013 NY Slip Op 05991 [2d Dept Sept. 25, 2013]). Similarly, Plaintiff failed to demonstrate the admissibility of either the Town's "Daily Worksheet" or the Town Highway Superintendent's "notebook." Such documents were unsworn, uncertified, and accompanied by "no foundation in the record to support [their] admissibility (see CPLR 4518 [a])." (Toussaint v Ferrara Bros. Cement Mixer, 33 AD3d 991,

992 [2d Dept 2006]). In addition, because Plaintiff's attorney's affidavit is not based upon "personal knowledge of the operative facts [it is of no]... probative value." (2 North Street Corp. v Getty Saugerties Corp., 68 AD3d 1392 [3d Dept 2009]; Groboski v Godfroy, 74 AD3d 1524 [3d Dept 2010]; Zuckerman v. City of New York, 49 NY2d 557 [1980]; Chiarini ex rel. Chiarini v County of Ulster, 9 AD3d 769 [3d Dept 2004]).

Considering the admissible proof Plaintiff submitted, she failed to demonstrate that Defendants created the defect that caused her injury. Plaintiff properly submitted her own affidavit, which described her fall on an accumulation of snow/ice located on the Town's Main Street sidewalk. Plaintiff also correctly submitted Gary Harvey's, the County¹ Highway Superintendent, deposition transcript. He detailed the Town and County's long standing coordinated efforts in clearing the Town's Main Street sidewalk of snow/ice. Conspicuously absent from such proof, however, is any allegation establishing when the Defendants cleared snow/ice from the Town's Main Street prior to Plaintiff's fall. Without such proof, Plaintiff failed to demonstrate that Defendants created the allegedly defective condition that cause her fall. (D'Antuono v Vil. of Saugerties, 101 AD3d 1331, 1332 [3d Dept 2012]).

Moreover, even if all of Plaintiff's proof were admissible and considered, she still failed to raise a triable issue of fact. The inadmissible deposition transcript provided no proof of the snow plowing or removal activities Defendants actually performed during the applicable time period. While the documentary evidence establishes that both Defendants "hailed snow" or "cleared snow" from the Town's Main Street two days before Plaintiff's injury, neither document

¹ The County admitted, for purposes of this motion only, their ownership and control of the sidewalk where Plaintiff was injured.

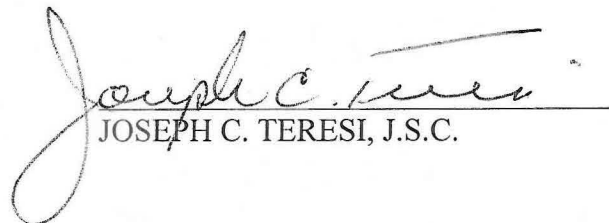
specified the location on Main Street where the hauling occurred. As such, Plaintiff failed to link Defendants' snow removal activities to her fall. Nor did either document sufficiently demonstrate Defendants' active negligence. Because "a municipality's failure to remove all snow and ice... is passive in nature and does not constitute an affirmative act of negligence excepting it from prior written notice requirements" (Masotto v Vil. of Lindenhurst, 100 AD3d 718, 719 [2d Dept 2012]), Plaintiff would have failed to raise a triable issue of fact even if her inadmissible documentary evidence were considered.

Accordingly, Defendants' motions are granted.

This Decision and Order is being returned to the attorneys for Cairo. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 22, 2013
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated August 30, 2013; Affidavit of Norah M. Murphy, dated August 30, 2013, with attached Exhibits A-D; Affidavit of Gary Harvey, dated August 30, 2013; Affidavit of Tammy Sciavillo, dated August 30, 2013.
2. Notice of Motion, dated September 6, 2013; Affirmation of Derek L. Hayden, dated September 6, 2013, with attached Exhibits A-B; Affidavit of Robert Hempstead, dated September 3, 2013, with attached Exhibit A; Affidavit of Tara Rumph, dated September 3, 2013, with attached Exhibit A.
3. Affidavit of Nicole M. Franco, dated September 20, 2013; Affidavit of Andrew B. Howard, dated September 16, 2013, with attached Exhibits A-H.
4. Affidavit of Norah M. Murphy, dated September 26, 2013, with attached Exhibit A; Affidavit of Gary Harvey, dated September 26, 2013
5. Affirmation of Derek L. Hayden, dated September 26, 2013.