

Crespo v Santoro

2013 NY Slip Op 32878(U)

June 4, 2013

Sup Ct, Nassau County

Docket Number: 23899-2009

Judge: James P. McCormack

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

_____ x

ANA CRESPO,

Plaintiff(s),

-against-

SONIA SANTORO as the Executor of the Estate of
ANGELINA SANTORO,

Defendant(s).

_____ x

SONIA SANTORO as the Executor of the Estate of
ANGELINA SANTORO,

Third Party Plaintiff(s),

-against-

VILLAGE OF ISLAND PARK and TOWN OF
HEMPSTEAD,

Third Party Defendant(s).

_____ x

TRIAL/IAS, PART 42
NASSAU COUNTY

Index No.: 23899-2009

Motion Seq. No.: 002 & 003
Motion Submitted: 3/27/13

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Defendant/Third Party Plaintiff, Sonia Santoro, moves pursuant to CPLR

§3211(a)(7), for an order dismissing the counterclaim interposed by third party defendant,

Town of Hempstead (Sequence #002).

Third Party Defendant, Town of Hempstead [hereinafter the Town], cross moves pursuant to CPLR §3212, for an order granting summary judgment dismissing the third party complaint, together with any and all cross claims asserted against it (Sequence #003).

On August 28, 2008, the plaintiff, Ana Crespo, was injured when she tripped and fell on a raised portion of sidewalk in front of the premises located at 60 Warwick Road, Island Park, New York (*see* Munson Affirmation in Support at Exh. A at ¶10). As a result of this accident, the plaintiff commenced the main action in 2009 against defendant, Angelina Santoro, the owner of the subject premises, alleging that said defendant was negligent in failing to warn the plaintiff of the defective sidewalk condition, as well as in failing to take any remedial action in connection therewith (*id.* at ¶13).

Subsequent to the main action having been commenced, Angelina Santoro passed away on September 3, 2010, after which her daughter, Sonia Santoro, was named executor of the decedent's estate on June 16, 2011 (*id.* at ¶¶3,4). Thereafter, on January 23, 2013, Sonia Santoro served a third party summons and complaint upon the Town, as well as upon the Village of Island Park [hereinafter the Village], alleging that any dangerous condition present on the subject sidewalk was due to the negligence of the third party defendants in failing to "inspect, maintain, and repair the sidewalk in question" (*see* Heine Affirmation in Support of Cross Motion at Exh. A at ¶¶7,8). In response thereto, the Town interposed a counterclaim against Sonia Santoro alleging that

in the event a “verdict” is rendered in favor of the plaintiff and against the Town, then defendant/third party plaintiff will be liable to the Town, in whole or in part, for the amount of said “verdict”(*id.* at Exh. B at ¶14). The applications respectively submitted by the moving parties thereafter ensued and are determined as set forth below.

The Court initially addresses the application submitted by the defendant/third party plaintiff, Sonia Santoro, which seeks dismissal of the counterclaim interposed by the Town. In support of the application, counsel contends that the counterclaim must be dismissed as it fails to state a claim upon which relief can be granted (*see* Munson Affirmation in Support at ¶5). More specifically, counsel argues that as the plaintiff, Ana Crespo, does not have an action pending against the Town, the potential “verdict” upon which the counterclaim is based can never be realized, thereby warranting dismissal thereof (*id.*).

“In determining a motion to dismiss a cause of action pursuant to CPLR §3211(a)(7), or, as in this case, a counterclaim, the pleading is afforded a liberal construction, the facts alleged are accepted as true, and the proponent of the pleading is accorded the benefit of every favorable inference” (*J&D Evans Constr. Corp. v Iannucci*, 84 AD3d 1171 [2d Dept 2011] quoting *Bank of America, N.A. v 414 Midland Ave. Associates, LLC*, 78 AD3d 746 [2d Dept 2010]; *Leon v Martinez*, 84 NY2d 83 [1994]). “[T]he sole criterion is whether the pleading states a cause of action, and from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268,275 [1977]; *Doria v*

Masucci, 230 AD2d 764 [2d Dept 1996]). However, when entertaining a motion to dismiss, “bare legal conclusions, in addition to factual assertions which are squarely contradicted by the record, are not entitled to any such consideration” (*Doria v Masucci*, *supra*; *Mayer v Sanders*, 264 AD2d 827 [2d Dept 1999]).

In the instant matter, the relief demanded in the counterclaim is expressly and unequivocally predicated upon a verdict which will never be rendered given the absence of a pending action by the plaintiff against the Town. Thus, as the Town’s counterclaim does not set forth a legally cognizable action, the defendant/third party plaintiff’s application seeking dismissal thereof is hereby GRANTED (*id.*).

The Court now addresses the cross motion interposed by the Town. In support thereof, counsel argues, *inter alia*, that the Town was not in possession of prior written notice of the alleged defective sidewalk condition as is required by Town Law §65-a, as well as §6.3 of the Code of the Town of Hempstead, and as such the third party complaint must be dismissed (*see* Heine Affirmation in Support at ¶¶12,13,16).

Counsel provides the affidavit of Andrew Brust, a Sidewalk Inspector with the Sidewalk Division of the Department of Highways, who avers that based upon his “personal search * * * of the records of the Sidewalk Division”, the Town “does not and did not own, control, operate, maintain or manage the sidewalk at the subject accident location on or prior to August 28, 2008” and rather the subject sidewalk “is located within the jurisdiction of the * * * Village * * * ” (*see* Brust Affidavit at ¶4). Mr. Brust further states that in the five year period prior to August 28, 2008, the Town “did not repair,

construct, inspect or design the subject sidewalk” and “did not contract with any municipality or contractor” in connection therewith (*id.* at ¶¶5,6). Finally, Mr. Brust states that the Town did not receive any “written complaints or notices or notices of claim” with respect to the sidewalk location involved in the plaintiff’s accident (*id.* at ¶7).

The Town’s application is opposed by counsel for the defendant/third party plaintiff, who asserts that there are unresolved questions of fact as to the respective liability of the third party defendants thereby warranting denial of the application (*see* Falletta Affirmation in Opposition to Cross Motion at ¶¶2,11). Counsel further asserts that the Town’s application is premature as discovery has yet to take place and the defendant/third party plaintiff has not been afforded an opportunity to obtain information in the exclusive possession and control of the Town and the Village, to wit: which municipality has jurisdiction over the subject sidewalk (*id.* at ¶5).

“A municipality that has enacted a prior written notice law is excused from liability absent proof of prior written notice or an exception thereto” (*Reagan v Town of North Hempstead*, 66 AD3d 863 [2d Dept 2009]; *Marshall v City of New York*, 52 AD3d 586 [2d Dept 2008]). The Court of Appeals “has recognized only two exceptions to the statutory rule requiring prior written notice, 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*, 93 NY2d 471,474 [1999] [internal citations omitted]; *Piorier v City of Schenectady*, 85 NY2d 310 [1995]; *Reagan v Town of North Hempstead, supra*).

Of particular relevance herein, §6.3 of the Code of the Town of Hempstead provides the following, in pertinent part:

“No civil action shall be maintained against the Town of Hempstead for injuries or damages to persons or property sustained by reason of any defect or obstruction whatsoever in its * * * sidewalks, * * * unless said * * * sidewalks, * * * no matter where situated, have been constructed or are maintained by the Town of Hempstead or the Commissioner of Highways pursuant to statute and written notice of * * * said defect or obstruction causing the injuries or damages was actually served upon the Town Clerk or Town Commissioner of Highways in accordance with §6.4 hereof, * * *.”

Having reviewed the record, the Court finds that the Town has established entitlement to summary judgment by demonstrating that it was not in possession of prior written notice of the sidewalk defect alleged to have caused the plaintiff's accident and by establishing that it did not own, operate, maintain, control or manage the subject sidewalk (*Martens v County Suffolk*, 100 AD3d 839 [2d Dept 2012]; *Rodriguez v Town of Islip*, 89 AD3d 1077 [2d Dept 2011]; *Reagan v Town of North Hempstead, supra*).

In opposition to the Town's *prima facie* showing, the defendant/third party plaintiff has failed to come forth with any proof which raises a triable issue of fact (*id.*). Moreover, “[a] party who claims ignorance of critical facts to defeat a motion for summary judgment must first demonstrate that ‘the ignorance is unavoidable’ and that reasonable attempts were made to discover the facts which give rise to a triable issue” (*Kenworthy v Town of Oyster Bay*, 116 AD2d 628 [2d Dept 1986] [internal citations omitted] quoting *Overseas Reliance Tours & Travel Service Inc. v Sarne Co.*, 17 AD2d 578 [1st Dept 1963]). In the instant matter, the defendant/ third party plaintiff has failed

to articulate what efforts, if any, were undertaken to discover which of the municipal defendants had control over the subject sidewalk (*id.*). Further, the “[o]wnership of [a] sidewalk is a matter of public record and, thus does not constitute information in the sole and exclusive possession” of a municipality (*Martens v County Suffolk, supra*).

Based upon the foregoing, it is hereby

ORDERED, that the application interposed by defendant/third party plaintiff, Sonia Santoro, which seeks an order dismissing the counterclaim interposed by third party defendant, Town of Hempstead, is hereby GRANTED (Sequence #002); and it is further

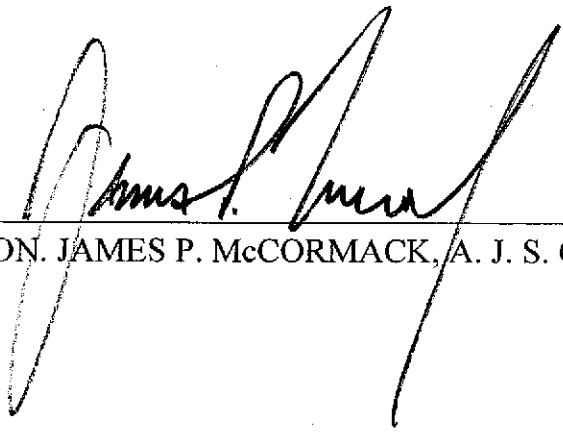
ORDERED, that the application interposed by third party defendant, Town of Hempstead, which seeks an order granting summary judgment dismissing the third party complaint, together with any and all cross claims asserted against it, is hereby GRANTED in its entirety (Sequence #003).

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are Denied.

Dated: June 4, 2013
Mineola, N.Y.

ENTERED
JUN 13 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE


HON. JAMES P. McCORMACK, A. J. S. C.