Kelley v Incorporated Vil. of Hempstead
2013 NY Slip Op 34052(U)
February 22, 2013
Supreme Court, Nassau County
Docket Number: 005612/12
Judge: Thomas P. Phelan
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[* 1]

Amended Caption

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice.

TRIAL/IAS PART 2
NASSAU COUNTY

ADELA KELLEY,

Plaintiff,

-against-

INCORPORATED VILLAGE OF HEMPSTEAD, TOWN OF HEMPSTEAD, COUNTY OF NASSAU, MADONNA HOLDINGS, LLC, 7-11, INC. and SOUTHLAND CORPORATION,

Defendants.

ORIGINAL RETURN DATE: 01/15/13
SUBMISSION DATE: 02/15/13
Index No. 005612/12

MOTION SEQUENCE #001

The following papers read on this motion:

Notice of Motion..... 1
Affirmation in Opposition..... 2

Defendant, Town of Hempstead, (the "Town"), moves, pursuant to CPLR 3212, seeking an order granting summary judgment dismissing plaintiff's complaint and any and all cross claims against it. Plaintiff opposes the motion.

It is well settled that on a motion for summary judgment movant must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the lack of any material issues of fact (*Ayotte v Gervasio,* 81 NY2d 1062 [1993]; *Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986]). If such a showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require resolution at trial (*Id.* at 324).

Where, as here, defendants move for summary judgment in a trip and fall type of action based upon defendants' lack of written notice of the alleged dangerous condition, "defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (citations omitted)" (*Beltram v. Metropolitan Life Ins. Co.*, 259 AD2d 456, 457 [2d Dept. 1999]).

This action was brought by plaintiff to recover damages for personal injuries allegedly sustained by plaintiff on April 4, 2011, when she tripped and fell on a traffic sign stump in the grassy area between the sidewalk and curb approximately six to seven feet north of the northwest corner of the intersection of California Avenue and Fulton Avenue (Route 24), Incorporated Village of Hempstead (the "Village"), County of Nassau and State of New York.

The Town submits that the sidewalk where the accident occurred is not under the jurisdiction of the Town but rather it is under the jurisdiction of the Village. According to the affidavit of Sheila Dauscher, the Records Access Officer of the Highway Department of the Town, she searched the records maintained by the Highway Department and avers that the Town "did not own, control, operate, maintain or manage the roadways or immediately surrounding areas, including the grass areas located between the roadways and sidewalks" (¶ 4). In light of the foregoing, the Town maintains that it cannot be held liable for injuries caused by the allegedly dangerous condition.

The Town further alleges that it did not receive prior written notice of the alleged dangerous or defective condition prior to the occurrence as a condition precedent for liability. The Town cites to Section 6-3 Chapter 6 of the Code of the Town of Hempstead and Section 65-a(2) of the Town Law.

Ms. Dauscher avers that she searched prior written notice records maintained by the Highway Department for a period of three (3) years prior to the date of the accident and found no prior written notice. In support of its position, the Town has also provided an affidavit of John W. Morrison, the Assistant Director of Traffic Control Division of the Department of General Services of the Town, who avers that he conducted a search of the Traffic Control Division's records for a period of three (3) years prior to the date of the accident and found no prior written notice.

Ms. Dauscher's search of the Highway Department's records also revealed that the Town "did not repair, construct, inspect or design the subject roadways or grassy area at the subject location" (¶5). Mr. Morrison's search of the Traffic Control Division's records also reveals that the Town "did not install, own, control, operate, maintain or manage the signage at the subject location" prior to the accident, concluding that the signage "is not Town of Hempstead signage" (¶4). In any event, neither actual nor constructive notice obviates the statutory requirement of written notice (*McCarthy v. City of White Plains,* 54 AD3d 828, 830 [2d Dept. 2008]).

Two exceptions exist to the prior written notice rule: the creation of the dangerous or defective condition by the municipality and when a benefit is conferred upon the municipality by a special use. (*See, Lopez v. Town of Hempstead,* 854 N.Y.S.2d 750, 2008 WL 893918 [2d Dept. 2008]). Plaintiff has failed to demonstrate the applicability of either of the above exceptions to the prior written notice requirement with regard to the Town. Plaintiff proffered no more than speculation in this regard (*see, McCarthy v. City of White Plains,* 54 AD3d at 830). Therefore, an issue of fact does not exist with regard to the exceptions to the prior written notice rule.

The Town contends that it, therefore, has made a *prima facie* showing of entitlement to judgment as a matter of law by proffering sufficient evidence that it has not been provided with prior written notice of the alleged defective condition as required under law (*See, Lopez v. Gonzalez,* 44 AD3d 1012 [2d Dept. 2007]). Once the initial burden has been met, the burden then shifts to plaintiff to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). This plaintiff has failed to do.

The "contention that the motion for summary judgment was premature is without merit. [Plaintiff] failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. The hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery" does not warrant denial of the motion (*Essex Ins. Co. v. Carpentry,* 74 A.D.3d 733, 734 [2d Dept. 2010]).

Based upon all of the foregoing, defendant's the Town's motion to dismiss is granted, and the complaint and any and all cross claims as against it are dismissed.

Accordingly, the caption is amended to read as follows:

"ADELA KELLEY,

Plaintiff, Index No. 005612/12

-against-

INCORPORATED VILLAGE OF HEMPSTEAD, COUNTY OF NASSAU, MADONNA HOLDINGS, LLC, 7-11, INC. and SOUTHLAND CORPORATION,

Defendants."

This decision constitutes the order of the court.

Dated: February 22, 2013

THOMAS P. PHELAN, J.S.C.

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