Schuleter v Davin's Funeral Home, Inc.
2014 NY Slip Op 31007(U)
April 14, 2014
Supreme Court, Suffolk County
Docket Number: 11832/2010
Judge: William B. Rebolini

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Joann Schuleter,

Plaintiff,

-against-

Davin's Funeral Home, Inc.,
Town of Brookhaven and County of Suffolk,

Defendants.

Index No.: 11832/2010

Motion Sequence No.: 001; MG; CD
Motion Date: 9/23/13
Submitted: 1/31/14

Motion Sequence No.: 002; MG; CD
Motion Date: 9/23/13
Submitted: 1/31/14

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Clerk of the Court

Upon the following papers numbered 1 to 23 read upon these motions for summary judgment: Notice of Motion and supporting papers, 1 - 4; Notice of Cross Motion and supporting papers, 9 - 15; Answering Affidavits and supporting papers, 9 - 15; Replying Affidavits and supporting papers, 16 - 23; it is

ORDERED that the motion for summary judgment by defendant Davin's Funeral Home, Inc. is granted and the complaint and any cross claims asserted against it are severed and dismissed; and it is further

ORDERED that the cross motion for summary judgment by defendant Town of Brookhaven is granted and the complaint any cross claims asserted against it are severed and dismissed.

Plaintiff commenced this action against defendant Davin's Funeral Home, Inc. ("Davin's") and defendant Town of Brookhaven (the "Town") for negligence seeking to recover damages for injuries she sustained to her right ankle when she slipped and fell on the sidewalk in front of Davin's Funeral Home located at One Old Montauk Highway in Mastic, New York. In her verified complaint as amplified by her verified bill of particulars, plaintiff alleges that on February 5, 2009, at approximately 7:30 p.m., she was caused to slip and fall due to an accumulation of snow and ice on the sidewalk which had not been plowed, shoveled, sanded or salted. Plaintiff alleges that Davin's and the Town were negligent in failing to maintain the sidewalk and allowing it to remain in a hazardous condition. It is plaintiff's contention that Davin's and the Town caused and created the condition by failing to properly and timely remove the ice and snow of which they each had actual or constructive notice.

Discovery has been completed and the note of issue filed. The parties executed a stipulation, dated July 11, 2012, discontinuing the action, with prejudice, as to defendant County of Suffolk. Davin's now moves for summary judgment dismissing the complaint and any cross claims on the grounds that it does not own the area where plaintiff's accident occurred, and did not create or exacerbate the condition alleged to have caused plaintiff's injury. The Town cross-moves for summary judgment dismissing the complaint on the ground that it did not have prior written notice of the allegedly dangerous condition.

Before the court is the affidavit and transcript of Suzanne Mauro's deposition testimony, a principal clerk for the Town's Highway Department. Mauro's responsibilities include handling claims and litigation which come to the Highway Departmen, which entails searching the records to ascertain if any prior complaints were made of a dangerous condition. Mauro testified that as part of the search, a determination is made as to whether the Town maintains and has jurisdiction over the subject area. In the case at bar, Mauro asserts that the sidewalk in front of Davin's Funeral Home and the roadway of Old Montauk Highway are within the Town's jurisdiction, and testified that the Highway Department would be responsible for removing snow from the subject sidewalk and roadway.

Nevertheless, "[a] municipality that has adopted a prior written notice law cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies" (***Keating v Town of Oyster Bay***, 111 AD3d 604, 604, 974 NYS2d 271 [2d Dept 2013]; ***Masotto v Village of Lindenhurst***, 100 AD3d 718, 718, 954 NYS2d 557 [2d Dept 2012]). "Recognized exceptions to the prior written notice requirement exist where the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers

a special benefit upon it" (***Keating v Town of Oyster Bay***, *supra* at 604; ***Masotto v Village of Lindenhurst***, *supra* at 719).

Here, the Town has enacted such a prior written notice law. Brookhaven Town Code § 84-1 requires, as a precondition to commencing a civil action to recover damages for injuries sustained as a result of a defective, out-of-repair, unsafe or dangerous condition on the street or sidewalk, that the Town Clerk or Town Superintendent of Highways have prior written notice of the condition and fail to repair it within a reasonable time thereafter (***Ferris v County of Suffolk***, 174 AD2d 70, 579 NYS2d 436 [1992]).

Mauro asserts that she conducted a search of the Town's Highway Department, Superintendent of Highways and Clerk's records, which are all of the departments which would maintain records relative to prior written notices, complaints, snow and ice removal and plowing for the sidewalk and street at One Old Montauk Highway in front of the funeral home. The searches conducted were for the five-year period preceding plaintiff's accident. Mauro asserts that no prior written notices or complaints were found. Thus, the Town has made a prima facie showing that it did not have prior written notice of the allegedly dangerous condition as required by the Town Code (*see* ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]; ***Magee v Town of Brookhaven***, 95 AD3d 1179, 945 NYS2d 177 [2d Dept 2012]; ***Ferris v County of Suffolk***, *supra*). To defeat the Town's motion, the plaintiff is required to come forward with admissible evidence sufficient to raise a triable issue of fact as to whether the Town either created or exacerbated the icy condition through its affirmative negligent acts, or whether a special use conferred a special benefit on the Town (*see* ***Magee v Town of Brookhaven***, *supra*; ***Lichtman v Village of Kiryas Joel***, 90 AD3d 1001, 935 NYS2d 331 [2d Dept 2011]). The plaintiff has failed to satisfy this burden.

Plaintiff has failed to adduce any evidence that the patch of ice upon which she allegedly slipped was created as a consequence of an affirmative act of negligence by the Town, and there is no claim of special use (*see* ***Masotto v Village of Lindenhurst***, *supra*; ***Magee v Town of Brookhaven***, *supra*; ***Lichtman v Village of Kiryas Joel***, *supra*). The plaintiff's reliance on ***San Marco v Village/Town of Mount Kisco***, 16 NY3d 111, 919 NYS2d 459 (2010), is misplaced. In contrast to the situation presented in the ***San Marco*** case, there is no evidence here that the Town attempted to remove the snow and therefore no evidence that plaintiff's snow removal efforts created any new, dangerous condition (*see id.*; ***Masotto v Village of Lindenhurst***, *supra*).

The plaintiff's contention that the Town had actual or constructive notice of the icy condition is unavailing. "Constructive notice of a condition is insufficient to satisfy the requirement of prior written notice" (***Chirco v City of Long Beach***, 106 AD3d 941, 943, 966 NYS2d 450 [2d Dept 2013]; ***Magee v Town of Brookhaven***, *supra* at 1180; *see* ***Amabile v City of Buffalo***, *supra*). Similarly, actual notice does not obviate the need to comply with the prior written notice requirement (***Chirco v City of Long Beach***, *supra*; ***Granderson v City of White Plains***, 29 AD3d 739, 815 NYS2d 246 [2d Dept 2006]). Therefore, the Town is entitled to summary judgment on its cross motion dismissing the complaint.

As to the motion by Davin's, "[g]enerally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions [on] public sidewalks is placed on the municipality and not the abutting landowner" (***Hausser v Giunta***, 88 NY2d 449, 452–453, 646 NYS2d 490 [1996]; ***Cangemi v Burgan***, 81 AD3d 583, 583, 916 NYS2d 135 [2d Dept 2011]; *see* ***Hevia v Smithtown Auto Body of Long Island, Ltd.***, 91 AD3d 822, 937 NYS2d 284 [2d Dept 2012]). "An owner of property abutting a public sidewalk is under no duty to pedestrians to remove snow and ice that naturally accumulates on the sidewalk unless a statute or ordinance specifically imposes tort liability for failing to do so" (***Bi Chan Lin v Po Ying Yam***, 62 AD3d 740, 741, 879 NYS2d 172 [2d Dept 2009]; *see* ***Hausser v Giunta***, *supra*; ***Smalley v Bemben***, 12 NY3d 751, 880 NYS2d 878 [2009]; ***Hevia v Smithtown Auto Body of Long Island, Ltd.***, *supra*).

Here, the plaintiff has not cited to any statute or ordinance which requires an abutting landowner to remove snow and ice from the abutting public sidewalk. Indeed, the record demonstrates that the Town is responsible for clearing the snow from the sidewalk and roadway in front of the funeral home. In the absence of such a statute or ordinance, "the owner of property abutting a public sidewalk will be held liable only where it, or someone on its behalf, undertook snow and ice removal efforts which made the naturally occurring conditions more hazardous" (***Hilbert v Village of Tarrytown***, 81 AD3d 781, 782, 916 NYS2d 817 [2d Dept 2011]; ***Bi Chan Lin v Po Ying Yam***, *supra* at 742; *see* ***Cangemi v Burgan***, *supra*) or where the owner caused the condition through the special use of the sidewalk (*see* ***Rodriguez v City of Yonkers***, 106 AD3d 802, 965 NYS2d 527 [2d Dept 2013]; ***Cuapio v Skrodzki***, 106 AD3d 769, 966 NYS2d 438 [2d Dept 2013]).

While it is not clear as to the precise location of the plaintiff's fall, in her verified complaint and bill of particulars it is alleged that she fell on the sidewalk in front of Davin's Funeral Home as she was exiting the driver's side of her car. In addition, although she was asked in numerous ways where she slipped and fell, plaintiff consistently testified that she fell on the sidewalk. Depending on the way the question was formed, plaintiff described the sidewalk in the area where her accident occurred as cement colored, black, or the grassy area of the sidewalk which was covered in snow, but consistently denied that she was on the roadway, the asphalt or the blacktop.

During his deposition Richard Davin, the sole shareholder of Davin's, testified that snow was continuously cleared from in front of the funeral home as it had snowed several inches throughout the day of the plaintiff's accident. Richard Davin testified that he had the snow cleared from the sidewalk which ran in front of the funeral home alongside the fence on his property line. He also testified that he had a path cleared from the property line of the funeral home, across the cement sidewalk and what is the grassy area when not covered with snow, to Old Montauk Highway. Richard Davin also testified that prior to the plaintiff's accident he had not received any complaints about the condition of the sidewalk, and that there had been no previous accidents. Davin's has proffered the affidavits of John LaFace ("LaFace") and Thomasina Taylor ("Taylor"), who performed the snow removal work.

LaFace and Taylor each assert that at approximately 6:30 p.m. on the day of plaintiff's accident, they shoveled the concrete sidewalk in front of Davin's Funeral Home. After the shoveling was completed, rock salt was applied to the sidewalk.

Based on the evidence submitted, Davin's has established the condition of the sidewalk shortly before the plaintiff's accident, and that the snow removal efforts did not create or exacerbate an existing hazard (*see* ***Cuapio v Skrodzki***, *supra*; ***Cangemi v Burgan***, *supra*; ***John v City of New York***, 77 AD3d 792, 909 NYS2d 142 [2d Dept 2010]). Thus, it is incumbent upon plaintiff to make an affirmative evidentiary showing that a genuine issue of fact exists (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The plaintiff failed to do so.

In opposition, the plaintiff failed to proffer any evidence sufficient to raise a triable issue of fact as to whether Davin's created or exacerbated the alleged icy condition on the sidewalk through its snow removal efforts, or caused such condition by a special use of the sidewalk (*see* ***Cangemi v Burgan***, *supra; **John v City of New York***, *supra*). Plaintiff's theory that the snow removal efforts created the icy condition is based on sheer speculation with no suggestion of the manner in which Davin's allegedly created or exacerbated the icy condition which is insufficient to defeat the prima facie showing (*see* ***Zabbia v Westwood, LLC***, 18 AD3d 542, 795 NYS2d 319 [2d Dept 2005]; *see also* ***Panzica v Fantauzzi***, 109 AD3d 1118, 971 NYS2d 756 [4th Dept 2013; ***Christal v Ramapo Cirque Homeowners Assn.***, 51 AD3d 846, 847, 857 NYS2d 729 [2d Dept 2008]). Moreover, plaintiff's simple assertion that Davin's shoveled the sidewalk to keep it free from ice and snow, and in doing so derived a benefit from the sidewalk, is also insufficient to defeat summary judgment. Special use of a public sidewalk is use by the abutting owner in a manner unrelated to the public use (*see* ***Kaufman v Silver,*** 90 NY2d 204, 659 NYS2d 250 [1997]; ***Poirier v City of Schenectady***, 85 NY2d 310, 624 NYS2d 555 [1995]), which has not been established. Therefore, Davin's is entitled to summary judgment dismissing the complaint.

Summary dismissal is also warranted as Davin's has demonstrated that it did not have actual or constructive notice of the icy condition (*see* ***Sweeney v Doria***, 95 AD3d 1298, 944 NYS2d 893 [2d Dept 2012]; ***Cantwell v Fox Hill Community Assn., Inc.***, 87 AD3d 1106, 930 NYS2d 459 [2d Dept 2011]; ***Aurilia v Empire Realty Assocs.***, 58 AD3d 773, 873 NYS2d 103 [2d Dept 2009]). Plaintiff testified that before she exited her car, she looked down and did not see the ice, took two steps and fell. Based on the conditions in the area, and what she heard others say when they came to assist her, plaintiff surmised that she fell on ice. Additionally, the plaintiff presented no proof to controvert the testimony by Richard Davin that no complaints were made about the condition of the sidewalk, or to show that the ice was visible and apparent and had existed for a sufficient length of time before the accident for Davin's to discover and remedy it (*see* ***Aurilia v Empire Realty Assocs.***, *supra*; ***Christal v Ramapo Cirque Homeowners Assn.***, *supra*). Thus, Davin's established the absence of notice as a matter of law, thereby entitling it to summary judgment (*see* ***Cuillo v Fairfield Pro. Svcs., LP***, 112 AD3d 777, 977 NYS2d 353 [2d Dept 2013]; ***Dwoskin v Burger King Corp.*** 249 AD2d 358, 671 NYS2d 494 [2d Dept 1998]).

Although unfortunate, the mere happening of the subject accident does not give rise to liability (*see* ***Killeen v State of New York***, 66 NY2d 850, 498 NYS2d 358 [1985]; ***Wells v Finnegan***, 177 AD2d 893, 576 NYS2d 653 [3d Dept 1991]). Any remaining arguments not explicitly addressed herein have been reviewed and deemed to be without merit.

Accordingly, defendant Davin's Funeral Home, Inc. and defendant Town of Brookhaven are entitled to summary judgment dismissing the complaint and any cross claims asserted against them.

Dated: April 14, 2014

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

___X___ FINAL DISPOSITION_____ NON-FINAL DISPOSITION