Flynn v Suffolk County Water Auth.
2014 NY Slip Op 32008(U)
July 25, 2014
Supreme Court, Suffolk County
Docket Number: 10-215
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

INDEX No. 10-215
CAL No. 13-01396OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 1-3-14 (#001)
MOTION DATE 12-27-13 (#002)
MOTION DATE 3-27-14 (#003)
ADJ. DATE 5-8-14
Mot. Seq. # 001 - MG
002 - MD
003 - XMD

---X

ELINORE FLYNN,

Plaintiff,

- against -

SUFFOLK COUNTY WATER AUTHORITY and TOWN OF BABYLON,

Defendants.

---X

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Upon the following papers numbered 1 to 66 read on these motions for summary judgment; and this cross motion for partial summary judgment and to preclude ; Notice of Motion/ Order to Show Cause and supporting papers 1-13; 14 -29 ; Notice of Cross Motion and supporting papers 30-58 ; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 59-61; 62-63; 64-66; Other Memorandum of Law 67 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant Town of Babylon's motion for summary judgment is granted; and it is further

ORDERED that defendant Suffolk County Water Authority's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross motion for an order of preclusion and for partial summary judgment against defendant Suffolk County Water Authority on the issue of liability is denied.

According to the allegations in the underlying pleadings, plaintiff tripped and fell over an uplifted portion of the curb or street on the afternoon of December 25, 2008 at the premises located at or near 31 Flint Road, Amityville, New York, the plaintiff's residence. The incident occurred when she was on her way to her son's parked car, while she was carrying a cake with both hands and looking straight ahead. According to her testimony at a General Municipal Law §50-h hearing and during a deposition, the curb came to be in this condition as a result of the repair of a water main break and gas leak occurring on October 24, 2008. While she could not identify exactly who caused the particular section of the curb to be uprooted, plaintiff testified that she observed utility trucks from both the Suffolk County Water Authority (SCWA) and the Town of Babylon (the Town) when the condition was created on October 24, 2008. Although plaintiff indicated that she called the Town and possibly the SCWA on more than one occasion to determine when repairs would be made, she repeatedly answered "no" when asked whether she ever put her request in writing. Further, she also testified to someone coming out to the property to inspect its condition, but could not say with any certainty whether this person was an agent of the Town, although that was what she had surmised.

According to SCWA Assistant Superintendent Chris Givens' (Givens) deposition testimony, he supervised the job on October 24, 2008, Givens testified that the SCWA was excavating the area of the water leak, when they struck an allegedly unmarked gas line. National Grid was called and crimped off the gas line, and the SCWA jack-hammered the area so that National Grid could get to the line to make the necessary repairs. Town of Babylon Highway Superintendent for the Engineering Department Frank Vaccaro (Vaccaro) testified during his deposition that a permit issued (subsequently) to Key Span for work to begin at the premises on October 24, 2008. It does not appear that a permit was ever issued to SCWA. In fact, while it was Vaccaro's testimony that the SCWA was exempt from filing permits for excavations, they were held to the Town's standards for roadway excavation or repair (Vaccaro Deposition Transcript, pp. 37-38, 43).

It is SCWA's argument that the complaint and any cross-claims against them should be dismissed, as they had no duty to maintain the premises and plaintiff cannot establish that they created the allegedly defective condition.

The Town also moves for summary judgment, but premise their application on Town Law §65-a(1) and §65-a(2), as well as the Babylon Town Code §158-1 and §158-2, which require prior written notice to the Town of the allegedly defective condition. It is the Town's position that the allegedly defective condition did not exist prior to the SCWA's work at the premises on October 24, 2008. Further, they contend that plaintiff failed to plead or prove that the Town received prior written notice of the condition, pursuant to the statutory requisites. To this end, the Town produces the affidavits of Town Clerk Jennifer Taus (Taus) and Commissioner of Public Works Thomas Stay (Stay), who aver that a search of the records maintained by the Town did not establish receipt of a written notice. The Town argues that this is supported by the deposition testimony of Town Highway Coordinator George Price (Price) and Highway Superintendent Vaccaro. The Town also argues that they did not perform work at the site.

Plaintiff responds to the defendants' motions for summary judgment and cross-moves for an order of preclusion against the Town and partial summary judgment against the SCWA on the issue of liability. It is plaintiff's contention that the court should preclude consideration of the Taus and Stay affidavits because the Town failed to comply with a "conditional order of preclusion" dated May 24, 2012. Plaintiff

also claims that the SCWA failed to comply with the minimum statutory standards required of an excavator under the General Business Law Article 36, Sections 761-767 and 16 NYCRR 753-3.1 to 753-3.15.

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 issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The Town has moved for summary judgment on the ground that it cannot be held liable unless the plaintiff establishes that the Town received prior written notice of the alleged defective condition pursuant to Town Law § 65-a and Town of Babylon Code § 158-2. The latter statute provides that "[n]o civil action will be maintained against the Town ... by reason of any defective, dangerous, unsafe, out-of-repair or obstructed sidewalks ... unless written notice thereof, specifying the particular place, was actually given to the Town Clerk or to the Commissioner of the Department of Public Works of the Town." Town Code §158-1 has similar language, but refers to defective highways, bridges or culverts. In essence, Town Law § 65-a provides for the same procedure before a municipality can be found liable for a defective condition.

Where, as here, a municipality has enacted a prior written notice statute pursuant to Town Law, Article 65, it may not be subjected to liability for personal injuries caused by an improperly maintained sidewalk, or in this case curb, unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006], citing ***Amabile v City of Buffalo,*** 93 NY2d 471, 693 NYS2d 77 [1999]; ***Lopez v G&J Rudolph***, 20 AD3d 511, 799 NYS2d 254 [2d Dept 2005]; ***Gazenmuller v Incorporated Vil. of Port Jefferson***, 18 AD3d 703, 795 NYS2d 744 [2d Dept 2005]). The Court of Appeals has recognized only two exceptions to this rule, "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 at 474, 693 NYS2d at 79; ***Oboler v City of New York***, 8 NY3d 888, 832 NYS2d 871 [2007]). Actual or constructive notice of a defect does not satisfy this requirement (***Wilkie v Town of Huntington***, *supra*). Further, the statute at issue requires prior written notice and does not provide for a telephonic complaint about an alleged condition which is not the equivalent of prior written notice of the condition, *see* ***Gorman v Town of Huntington,*** 12 NY3d 275 [2009]; ***Kiszenik v Town of Huntington,*** 70 AD3d 1007, 895 N.YS2d 208 [2d Dept 2010]).

A review of the record reflects that the "conditional order of preclusion" referred to by plaintiff is not an order at all, but a stipulation between counsel for the plaintiff and defendant Town wherein it was agreed that the "...Town of Babylon shall produce a witness w/ knowledge of the claims made by plaintiff w/ respect to the Town's Indexing System and Inspection w/ respect to notice of the defect claimed by plaintiff on or before June 30, 2012. Failure to produce the witness by the said date will result in an order of preclusion concerning plaintiff's claims of notice of the defective condition...."(Plaintiff's Appendix of Exhibits, Exh. A). This form stipulation is handwritten, presumably by counsel, but has not been "so-ordered" by the court.

A so-ordered stipulation signed by counsel for each party in an action during a court appearance is a binding contract (*see* ***Born to Build, LLC v Ibrahim Saleh***, 115 AD3d 780, 982 NYS2d 355 [2d Dept. 2014]; ***Kirkland v Fayne***, 78 AD3d 660, 915 NYS2d 270 [2d Dept. 2010]; *see also* CPLR 2104). The stipulation functions as a conditional order of preclusion, which becomes absolute upon the party's failure to comply with its terms (*see id*). As noted above, the May 24, 2012 stipulation is not "so-ordered" by the court. Indeed, the copy of an earlier "Preliminary Conference Stipulation and Order" dated October 20, 2010 and provided the court as part of Plaintiff's Appendix of Exhibits (Ex. B) is also not an executed court order. Clearly, this situation involves counsel who were presumably authorized by their clients to represent them during the subject litigation and entered into a stipulation during a court appearance, wherein they agreed to provide specified discovery by a certain date. Arguably, the parties should be held to such an agreement, as they would to the terms of a binding contract, whether the assigned Supreme Court Justice "ordered" compliance or not. Indeed, the Town's response to plaintiff's argument in favor of preclusion is that they satisfied the terms of the stipulation by producing Vaccaro for a deposition on June 11, 2012. However, Vaccaro testified that he had someone check the Highway Engineering Department records for any written complaints prior to December 25, 2008 (Vaccaro Deposition Transcript, p.59), which were not found; and that he was unaware of where such complaints would be filed (Vaccaro Deposition Transcript, p.69). The Taus and Stay affidavits were not produced until they were filed in support of the Town's motion and were sworn to by the Town employees responsible for maintaining such records.

In spite of the foregoing, it is plaintiff's burden to plead and prove prior written notice in accordance with the statutory requisites, and the court may not relieve the plaintiff of that burden (***Perez v City of New York***, 43 Misc3d 1217(A) *3, citing ***Mollahan v Village of Port Washington North***, 153 AD2d 881, 884, 545 NYS2d 601 [2d Dept 1989]). Therefore, plaintiff's cross motion for an order of preclusion striking the Taus and Stay affidavits is denied.

The court is satisfied that there was no prior written notice of the defective condition, as required by Town Law §65-a(1) and §65-a(2), as well as the Babylon Town Code §158-1 and §158-2. Thus, the Town has made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that it did not receive the requisite prior written notice of the allegedly defective condition (*see* ***Betzold v Town of Babylon***, 18 AD3d 787, 796 NYS2d 680 [2d Dept 2005]; ***Khaghan v Rye Town Park Commn.***, 8 AD3d 447, 778 NYS2d 313 [2d Dept 2004]). The burden, therefore, shifts to plaintiff, and it is incumbent upon plaintiff to submit "competent evidence" so as to establish that the Town affirmatively caused or created the defect (*see* ***Betzold v Town of Babylon***, *supra*; ***Hinkley v Village of Ballston Spa***, 306 AD2d 612, 759 NYS2d 612 [3d Dept 2003]) or that the subject sidewalk/curb confers a special benefit upon the Town (*see* ***Ganzenmuller v Incorporated Vill. of Port Jefferson***, *supra*; ***Poirier v City of Schenectady***, 85 NY2d 310, 624 NYS2d 555 [1995]). Plaintiff has failed to establish compliance with the condition precedent for a suit against the municipality (prior written notice), and cannot establish that the Town caused or contributed to the defective condition. SCWA's Given's aforementioned testimony establishes that only the SCWA and National Grid/KeySpan were involved in digging up the street in order to access the water and gas lines. Plaintiff herself was unable to identify who was doing the drilling or excavating on the property (Flynn Deposition Transcript, p. 65).

Accordingly, the Town of Babylon's motion for an order granting summary judgment dismissing the complaint and all cross claims asserted against it is granted.

With respect to the SCWA, its position is, essentially that, although it repaired a water main break located beneath the subject premises, it did not create the alleged dangerous condition which caused the plaintiff to trip and fall. To impose liability upon a defendant in a trip and fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it (*see* ***Starling v Suffolk County Water Auth.***, 63 AD3d 822, 881 NYS2d 149 [2d Dept. 2009]; ***Denker v Century 21 Dept. Stores, LLC***, 55 AD3d 527, 866 NYS2d 681 [2d Dept. 2008]; ***Weber v City of New York***, 24 AD3d 130, 808 NYS2d 155 [1st Dept. 2005]). A defendant moving for summary judgment in a personal injury action has the burden of establishing that it did not create the defective condition or have actual or constructive notice of its existence (*see* ***Noia v Maselli***, 45 AD3d 746, 846 NYS2d 326 [2d Dept. 2007]; ***Franks v G & H Real Estate Holding Corp.***, 16 AD3d 619, 793 NYS2d 61 [2d Dept. 2005]).

Here, the SCWA has not established entitlement to judgment as a matter of law. The area identified as the area where the water leak and gas line disruption occurred was in the vicinity of the area where plaintiff sustained her injury. Although their employee (Given) testified that the broken curb was broken when he first arrived on the property on October 24, 2008 and that the area of excavation was not the same as the area of the broken curb, he also testified that SCWA brought a small backhoe to the site and jack-hammered the area to give National Grid access to the gas line SCWA encountered above the water main line. Subsequently, galvanized pipe was driven underground by a power driven machine. After the pipe was installed the SCWA left the work site unfinished on October 28, 2008. While there appears to be conflicting testimony between the Town Highway Coordinator of the Dept. of Public Works (Price) and Highway Engineering Dept. Supervisor Vaccaro over whether a permit was required for SCWA to excavate in a street bed, plaintiff has established that any entity seeking to perform such an excavation is required to obtain a permit, pursuant to the Babylon Town Code, Chapter 191, Article II, §§191-5, *et seq*. Any allowable exemption would appear to apply to the fees for such permit applications.

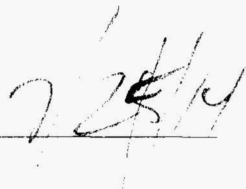
SCWA's assertions that the plaintiff's cross-motion for summary judgment on the issue of the SCWA's liability should not be considered by the court as untimely is of no avail. CPLR 3212 (a) requires that a motion for summary judgment be made within 120 days after the filing of a note of issue, except with leave of court on good cause shown (*see* CPLR 3212 [a]). The plaintiff made its cross motion subsequent to the 120-day deadline following the filing of the note of issue, which would render it untimely (*see* CPLR 3212[a]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]), however, the cross motion falls within the exception where a timely motion for summary judgment was made on nearly identical grounds and the issues are already properly before the court (*see e.g.* ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]; ***Bressingham v Jamaica Hosp. Med. Ctr.***, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]; ***James v Jamie Towers Hous. Co.***, 294 AD2d 268, 743 NYS2d 85 [1st Dept 2002], *affd* 99 NY2d 639, 760 NYS2d 718 [2003]). The SCWA's motion seeks summary judgment dismissing the complaint and all cross-claims against it on grounds that it did not create the alleged defective condition. Plaintiff's cross motion seeks summary judgment on the issue of SCWA's liability on grounds that the SCWA's negligence created or contributed to the condition causing plaintiff's injury. Thus, the motion and the cross motion are nearly identical and seek similar relief such that the untimely cross motion can be considered by the court (*see* ***Bickelman v Herrill Bowling Corp.***, 49 AD3d 578, 853 NYS2d 383 [2d Dept 2008]; ***Brill & Meisel v Brown***, 113 AD3d 435, 979 NYS2d 283, 285 [1st Dept. 2014], citing ***Filannino v Triborough Bridge & Tunnel Auth.***, 34 AD3d 280, 281, 824 NYS2d 244 [1st Dept. 2006], *appeal dismissed* 9 NY3d 862, 840 NYS2d 765, 872 NE2d 878 [2007]; ***Osario v BRF Constr. Corp.***, 23 AD3d 202, 203, 803 NYS2d

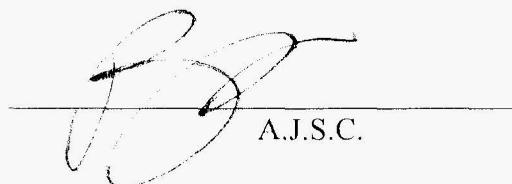
525 [1st Dept. 2005]; *cf.* ***Kershaw v Hospital for Spec. Surgery***, 114 AD3d 75, 978 NYS2d 13 [1st Dept 2013]).

The SCWA also claims that the statutes relied upon by plaintiff in her cross motion were not specifically plead in her bill of particulars, and, therefore, should not be considered by the court. As plaintiff argues, CPLR 4511(a) requires that the court take judicial notice of the common law, constitutions and public statutes of the United States and of every state, territory and jurisdiction of the United States and of the official compilation of codes, rules and regulations of the state and of all local laws and county acts. While this absolves a litigant from proving the substance of such laws, it must be distinguished from the obligation of a litigant to raise the issue to which the law applies (*see* McKinney's Cons. Laws of New York, Practice Commentaries by Vincent J. Alexander, Chapter Eight, Article 45, §4511). The issue becomes whether this defendant was deprived of an opportunity to be heard and prejudiced thereby (*see* ***Kinkopf v Triborough Bridge & Tunnel Authority***, 6 Misc3d 73, 792 NYS2d 291 [App.Term 2004]). The bill of particulars does not specify the statutory authority relied upon by plaintiff in support of her motion, however the bill of particulars does refer to negligent excavation of the street bed in front of the subject premises.

Article 36 of the General Business Law imposes a duty on those entities performing excavation services on a public street. Plaintiff argues that SCWA breached its duty when it failed to comply with the obligations imposed upon excavators pursuant to General Business Law § 764 and 16 NYCRR sub part 753–3, including the duty to contact the one-call notification system prior to commencing excavation work (*see* General Business Law § 764[1]; 16 NYCRR 753–3.1[a]), and the duty to verify the precise location, type, size, direction of run, and depth of any underground facilities in the area (*see* General Business Law § 764[2]; 16 NYCRR 753–3.6). SCWA's employee Given testified that the Authority's attempt to discern lines for other utilities in the area through another entity called "Eastern Locating" did not reveal the unmarked gas line. While a "violation of the statute's implementing rules and regulations ... constitutes some evidence of negligence" (***Level 3 Communications, LLC v Petrillo Contracting, Inc***., 73 AD3d 865, 867, 902 NYS2d 113 [2d Dept. 2010] citations omitted), whether this contributed to plaintiff's injury under the facts and circumstances of this case is a question of fact for the trier of fact.

Accordingly, the motion by Suffolk County Water Authority for summary judgment and the plaintiff's cross motion for summary judgment on the issue of the SCWA's liability are denied. The Town's motion for summary judgment having been granted, the action is severed and shall continue as against the remaining defendant (SCWA).

Dated: 


A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**