Clark v Tong
2014 NY Slip Op 32903(U)
January 28, 2014
Supreme Court, Westchester County
Docket Number: 55976/11
Judge: Mary H. Smith

DECISION AND ORDER

FILED & ENTERED
1/28/14

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

----------X

LISA V. CLARK and KEVIN ROWELL,

Plaintiffs,

MOTION DATE: 1/17 /14
INDEX NO.: 55976/11

-against-

WAI H. TONG, SRIPANRUEN TONG, AISSATOU SANCHO and VILLAGE OF ELMSFORD,

Defendants.

----------X

The following papers numbered 1 to 7 were read on this motion by defendant Village of Elmsford for summary judgment dismissing the complaint and all cross-claims.

Papers Numbered

Notice of Motion - Affirmation (Feldman) - Exhs. (A-F) 1-3
Answering Affidavit (Slavit) - Exhs. (A-F) 4-5
Replying Affirmation (Feldman) - Exhs. (A-B) 6-7

Upon the foregoing papers, it is Ordered that this motion by is disposed of as follows:

Plaintiff Lisa V. Clark seeks to recover for personal injuries she allegedly had

sustained, on July 22, 2010, at approximately 1:15 p.m., as a result of her tripping and falling upon exterior stairs as she had exited a beauty salon, located at 65 East Main Street, Elmsford, owned by defendants Tong and Sancho; the subject stairs are comprised of two steps. Plaintiff had testified that, as she had walked down the stairs following her appointment, and while proceeding from the second step, she suddenly had felt a loss of balance which had caused her to let go of the handrail. She attributes her loss of balance to a step height differential, with the second step being "kind of deeper." Plaintiff then fell on to the abutting sidewalk, whereupon her left foot allegedly got caught in a one inch deep hole in the sidewalk.

Presently, defendant Village of Elmsford ("Village") is moving for summary judgment dismissing the complaint and cross-claims. In support thereof, defendant Village relies upon the deposition testimony of Michael Mills, the Village Administrator/Deputy Village Clerk, wherein he had averred that the subject sidewalk accident location, including both the sidewalk and the stairs, is owned by New York State Department of Transportation and not by defendant Village. Further, Mr. Mills had testified that defendant Village's Clerk's office maintains an indexed record of written notices of defects and that he personally had searched the records and that there was no prior written notice of any defective or dangerous sidewalk condition. According to Mr. Mills, the Village conducts inspections of its sidewalks and the State conducts inspections of sidewalks within the State's right of way; if the State had sent any notice to the Village advising of a defective stair condition at the site of plaintiff's accident, Mr. Mills had testified that notice too would have been kept in the same file as the public notices.

Firstly, the Court notes that defendant Village has not adequately addressed its

argument that the State, and not it, owns the sidewalk accident site; accordingly, judgment on this basis cannot be granted. Although Highway Law section 140, subdivision 18, states that the Town is responsible for all sidewalk repairs situated adjacent to State built roadways, and Village Law section 6-604 states that responsibility for sidewalks is a Town responsibility unless the Village has assumed such responsibility, no evidence with respect to any of the foregoing has been presented. Nevertheless, regardless of which municipality actually owns and is responsible for the maintenance of the sidewalk, there also is presented uncontroverted evidence that the Village had performed snow removal from the sidewalk.

Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained sidewalk unless it has received written notice of the defect or an exception to the written notice requirement applies. See Village Law Section 6-628; Amabile v. City of Buffalo, 93 N.Y.2d 471 (2006); Donnellan v. City of New York, 112 A.D.3d 780 (2nd Dept. 2013); Miller v. Village of E. Hampton, 98 A.D.3d 1007, 1008 (2nd Dept. 2012); Braver v. Village of Cedarhurst, 94 A.D.3d 933 (2nd Dept. 2012); Pennamen v. Town of Babylon, 86 A.D.3d 599 (2nd Dept. 2011). The two exceptions to the prior written notice requirement are where the municipality has created the defect or hazard through an affirmative act of negligence, or where a special use confers a special benefit upon it. See Amabile v. City of Buffalo, supra, 93 N.Y.2d at 474; Donnellan v. City of New York, supra; Miller v. Village of E. Hampton, supra, 98 A.D.3d at 1008.

Defendant Village prima facie has demonstrated that it had not received prior written notice of the allegedly defective sidewalk and/or stair condition as required by statute.

Plaintiffs have failed to raise any triable issue of fact with respect thereto.

However, plaintiffs argue that defendant City nevertheless has legal responsibility for Ms. Clark's injuries because it had created the allegedly defective sidewalk condition which had caused her to fall. Relying upon the deposition testimony of Heline Vasquez, an individual who had been hired by defendants Tong to maintain the subject premises, plaintiffs contend that the Village in 2010 had plowed and salted the subject sidewalk, and "they be hitting it, ... breaking the sidewalk." Plaintiffs argue that defendant Village is not entitled to judgment because it prima facie has failed to eliminate this theory of liability in its moving papers.

"[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings,(citations omitted)." Carlucci v. Village of Scarsdale, 104 A.D.3d 797, 798 (2nd Dept. 2013); see, also Ortega v. Liberty Holdings, LLC, 111 A.D.3d 904 (2nd Dept. 2013).

Here, plaintiffs allege in their complaint and bill of particulars that defendant Village, inter alia, negligently had created the abutting sidewalk tripping condition of a "raised, uneven and broken" sidewalk. This theory of the Village's liability thereafter had been developed through Ms. Vasquez's deposition testimony to the effect that the Village had caused a broken and uneven sidewalk condition as a result of its negligent plowing. Under these circumstances, in order to sustain its prima facie burden, defendant Village was required to eliminate all triable issues of fact as to whether it affirmatively had created the allegedly dangerous condition through its negligent snow removal actions. See Carlucci v. Village of Scarsdale, supra; Braver v. Village of Cedarhurst, 94 A.D.3d 933 (2nd Dept. 2012). This it has failed to do.

Indeed, nowhere in its moving papers does defendant Village present any evidence that it did not perform snow removal on the subject sidewalk location, nor that it had not undertaken any repairs, modifications or openings of the sidewalk and/or the stairs. It thus has not prima facie sustained its burden of eliminating all triable issues of fact; it therefor is not entitled to dismissal of all claims and cross-claims against it. See Giaquinto v. Town of Hempstead, 106 A.D.3d 1049, 1050 (2nd Dept. 2013); Carlucci v. Village of Scarsdale, supra, 104 A.D.3d 798-799; Braver v. Village of Cedarhurst, supra, 94 A.D.3d 933 (2nd Dept. 2012); cf. Cimino v. County of Nassau, 105 A.D.3d 883 (2nd Dept. 2013); Cuebas v. City of Yonkers, 97 A.D.3d 779, 780 (2nd Dept. 2012).

Although defendant Village had attempted in its replying papers to remedy its omission by responding to plaintiffs' opposition arguments and arguing that the Village does not have liability for having created the allegedly dangerous condition since its last snow removal had been months prior to Ms. Clark's June accident and not immediately preceding same, see Yarborough v. City of New York, 10 N.Y.3d 726, 728 (2008); Oboler v. City of New York, 8 N.Y.3d 888 (2007); Bielecki v. City of New York, 14 A.D.3d 301 (2005), this Court cannot properly consider defendant Village's newly raised arguments. See Merchants Bank of NY v. Gold Lane Corp., 28 A.D.3d 266, 269 (1st Dept. 2006); Watts v. Champion Home Builders Co., 15 A.D.3d 850, 851 (4th Dept. 2005).

Defendant Village's motion for summary judgment accordingly is denied in all respects. The parties shall appear in the Settlement Conference Part, Room 1600, at 9:30 a.m., on February 19, 2014.

Dated: January 28, 2014
White Plains, New York

MARY H. SMITH
J.S.C.

Law Office of Thomas K. Moore
Attys. For Deft. Village
701 Westchester Avenue
White Plains, New York 10604

Levine & Slavit
Attys. For Pltfs.
60 East 42nd Street, Suite 1614
New York, New York 10165

Robert Arena