

Monaco v Hodosky

2014 NY Slip Op 33514(U)

March 26, 2014

Supreme Court, Suffolk County

Docket Number: 11-2282

Judge: Joseph Farneti

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defendants Gary Hodosky and Catherine Hodosky and known as 65 Circuit Road, Bellport, New York. The accident allegedly occurred on May 7, 2010, while plaintiff Joy Monaco was jogging on Circuit Road and tripped on the sidewalk as she ducked under some tree branches. By the bill of particulars, plaintiffs alleges that defendant Village of Bellport failed to properly maintain the sidewalk, allowing a dangerous condition to exist, in that a portion of the sidewalk was raised and projected above the surface of the adjoining portions of the sidewalk. They further allege that defendant Village negligently patched the alleged dangerous condition. As to the Hodosky defendants, plaintiffs allege that they were negligent in failing to maintain the subject sidewalk and for failing to keep the trees trimmed. Joy Monaco's husband, Roy Monaco, alleges a derivative cause of action.

Defendant Village of Bellport now moves for summary judgment dismissing the complaint against it on the ground that it had no notice of the alleged hazardous condition as there was no written notice of a defect on file. In support of its motion, the Village submitted, among other things, copies of the pleadings, transcripts of the parties' deposition testimony and the plaintiffs' testimony at a 50-h hearing, and an affidavit from Katie Mehrkens, Village Clerk for the Village of Bellport.

The Hodosky defendants cross-move for summary judgment dismissing the complaint against them, arguing that they did not create the alleged defect and that the Village statute does not transfer liability resulting from plaintiff's injuries to them as an adjacent homeowner. In support of their cross motion, the Hodosky defendants submit a photograph of the sidewalk where plaintiff tripped and fell.

Plaintiffs oppose the motion by defendant Village, arguing that it had written notice of the defect and failed to properly fix it. Plaintiffs oppose the motion by the Hodosky defendants, arguing that they failed to establish that it complied with the Village statute. In opposition, plaintiffs submit, among other things, an affidavit of Joy Monaco.

In her affidavit, Katie Mehrkens states that the Village performed a patch repair on the subject sidewalk on May 15, 2009, and that there was no additional work performed at the site between that day and the day of the subject accident. She states that after a review of the prior written notice book, which records any complaints of a hazard located on a public sidewalk, she found that there were no complaints filed with the Village concerning any defect at the subject location between May 15, 2009 and plaintiff's accident on May 7, 2010. She further states that the Village did not receive any notice concerning the trees adjacent to the sidewalk in front of the subject property.

At her examination before trial and 50-h hearing, Joy Monaco testified that she was jogging with her husband on the sidewalk of Circuit Road at the time of the accident. She testified that as she ducked down to avoid tree branches, she tripped on a raised sidewalk slab. She explained that the slabs of concrete were not even and level, and that there was a five inch elevation difference. She further stated that there was black tar between the two slabs of concrete.

At his examination before trial, defendants Gary Hodosky testified that sometime in 2009, a Village employee came to the subject premises to make a repair to the sidewalk. He testified that prior to the repair, he made a complaint to the Village regarding the elevation difference in the concrete slabs

on the sidewalk. He further testified that the repair was sufficient and that he did not make any further complaints after the repair was completed.

It is well settled that where a municipal defendant has enacted a prior written notice statute it may not be subjected to liability for injuries caused by a dangerous or defective condition of a roadway or sidewalk unless it has received prior written notice of the dangerous or defective condition complained of by the plaintiff or an exception to the prior written notice requirement applies (*see Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77 [1999]; *Griesbeck v County of Suffolk*, 44 AD3d 618, 843 NYS2d 162 [2d Dept 2007]; *Wilkie v Town of Huntington*, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006]). Prior written notice statutes require receipt of written notice of the particular condition about which the plaintiff complains (*see Hampton v Town of North Hempstead*, 298 AD2d 556, 748 NYS2d 675 [2d Dept 2003]). The Court of Appeals has recognized only two exceptions to the statutory rule requiring prior written notice (*Amabile v City of Buffalo, supra*; *Carlo v Town of Babylon*, 55 AD3d 769, 869 NYS2d 549 [2008]). The first exception applies in cases where the municipality caused or created the subject defect or hazard through an affirmative act of negligence. This exception has been held to be limited to work done by the municipality which immediately results in the existence of a dangerous condition (*see Yarborough v City of New York* 10 NY3d 726, 853 NYS2d 261 [2008]). Where the plaintiff produces evidence that a repair to a public roadway or other improvement subject to a prior written notice law had been made by the municipality, the plaintiff must establish such repair was of such recent vintage to permit an inference that the subject defect was the result of such repair and not the result of normal wear, tear and natural conditions that occur over time (*see Trinidad v City of Mount Vernon*, 51 AD3d 661, 857 NYS2d [2d Dept 2008]; *Daniels v City of New York*, 29 AD3d 514, 814 NYS2d 258 [2d Dept 2006]; *Augustine v Town of Islip*, 28 AD3d 503, 813 NYS2d 493 [2d Dept 2006]). The second exception applies in cases where a special use confers a special benefit upon the municipality (*see Amabile v City of Buffalo, supra*; *Delgado v County of Suffolk*, 40 AD3d 575, 835 NYS2d 379 [2d Dept 2007]; *Berner v Town of Huntington*, 304 AD2d 513, 757 NYS2d 585 [2d Dept 2003]).

Here, defendant Village asserts that it has found no prior written notice of any defect regarding the subject property between the time when it was repaired in 2009 and when plaintiff's accident occurred on May 7, 2010. However, the *prima facie* showing a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings (*see Miller v Village of East Hampton*, 98 AD3d 1007, 951 NYS2d 171 [2d Dept 2012]). Plaintiffs alleged that defendant Village created the alleged dangerous condition by negligently patching it. Defendant Village failed to eliminate all triable issues of fact as to whether it affirmatively created the condition, as it merely points to the deposition testimony of codefendants who stated that the repair of the sidewalk was sufficient and that they made no further complaints regarding it (*see Carlucci v Village of Scarsdale*, 104 D3d 797, 961 NYS2d 318 [2d Dept 2013]; *Braver v Village of Cedarhurst*, 94 AD3d 933, 942 NYS2d 178 [2d Dept 2012]). Accordingly, the motion by defendant Village for summary judgment dismissing the complaint against it is denied.

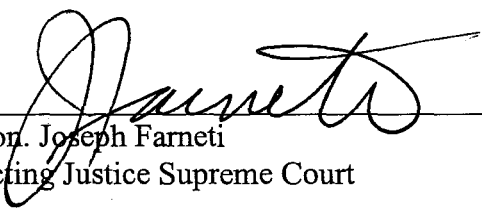
As to the cross motion, generally, liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks is placed on the municipality and not the abutting landowner.

(see *Hauser v Giunta*, 88 NY2d 449, 646 NYS2d 490 [1996]; *Sachs v County of Nassau*, 60 AD3d 1032, 876 NYS2d 454 [2d Dept 2009]). However, an abutting landowner or tenant will be liable to a pedestrian injured as a result of a defect on a public sidewalk if the landowner created the defective condition or caused the defect to occur because of some special use of the sidewalk, or if a local ordinance or statute specifically charges the landowner with a duty to maintain and repair the sidewalks and imposes liability for injuries resulting from the breach of that duty (see *Hausser v Giunta, supra*; *Jacobs v Village of Rockville Centre*, 41 AD3d 539, 838 NYS2d 597 [2d Dept 2007]; *Fishelberg v Emmons Ave. Hosp. Corp.*, 26 AD3d 460, 810 NYS2d 502 [2d Dept 2006]).

Pursuant to Section 17-1 of Bellport Village Code, it "shall be the duty of every property owner or occupant to keep the sidewalk and curb adjoining his premises in a safe, passable condition." Pursuant to 17-4 of Bellport Village Code, it "shall be the duty of every owner or occupant to keep the trees and shrubs in front of his premises so trimmed as not to interfere with passers by on the sidewalk or roadway. All overhanging limbs shall be at least eight (8) feet above the center of the sidewalk and thirteen (13) feet above the roadway."

Here, while there is a local ordinance which charges an abutting landowner with a duty to maintain the sidewalk and the tree limbs, it does not transfer liability for a defective condition to the landowner. The statute, ordinance or municipal charter "must not only charge the abutting owner or occupier with a duty to maintain the public sidewalk, but it must also specifically state that a breach of that duty will result in liability to those who are injured by defects in the sidewalk (see *Leggio v County of Nassau*, 281 AD2d 518, 721 NYS2d 837 [2d Dept 2001]; *Coon v Ray*, 266 AD2d 780, 699 NYS2d 176 [3d Dept 1999]). Moreover, the evidence submitted by the Hodosky defendants established that they did not create the alleged dangerous condition or cause the condition through a special use of the sidewalk. In opposition, plaintiffs failed to raise a triable issue of fact. Thus, the cross motion by the Hodosky defendants for summary judgment dismissing the complaint against them is granted.

Dated: March 26, 2014



Hon. Joseph Farneti
Acting Justice Supreme Court

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