LaFemina v Village of Patchogue
2015 NY Slip Op 30048(U)
January 9, 2015
Supreme Court, Suffolk County
Docket Number: 02847/2011
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

Ralph LaFemina and Lorraine LaFemina,

Plaintiffs,

-against-

Village of Patchogue and County of Suffolk,

Defendants.

Index No.: 02847/2011

Motion Sequence No.: 001; MG
Motion Date: 7/25/14
Submitted: 10/29/14

Motion Sequence No.: 002; MG; CD
Motion Date: 8/25/14
Submitted: 10/29/14

Motion Sequence No.: 003; XMD
Motion Date: 9/25/14
Submitted: 10/29/14

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Clerk of the Court

Upon the following papers numbered 1 to 44 read upon these motions for summary judgment and cross motion to strike: Notice of Motion and supporting papers, 1 - 13; 23 - 32; Notice of Cross Motion and supporting, 33 - 39; Answering Affidavits and supporting papers, 14 - 18; 40 - 42; Replying Affidavits and supporting papers, 19 - 22; 43 - 44; it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Village of Patchogue pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint is granted; and it is further

ORDERED that the unopposed motion by the defendant County of Suffolk for an order pursuant to CPLR 3211 (a) (7) dismissing the complaint against it is deemed a motion for summary judgment pursuant to CPLR 3212 and is granted; and it is further

ORDERED that the cross motion by the plaintiffs pursuant to CPLR 3126 for an order striking the answer of the defendant Village of Patchogue based on its spoliation of evidence is denied.

This action arises out of a personal injury claim by the plaintiff Ralph LaFemina (LaFemina) for injuries he allegedly sustained on November 28, 2009 as a result of a trip and fall accident that occurred on the sidewalk in front of 150 West Main Street, located in the Village of Patchogue, County of Suffolk, New York. In their complaint, the plaintiffs allege, among other things, that the defendants failed to properly operate, manage, control, inspect, repair, and maintain the sidewalk, that they negligently constructed a tree well in the sidewalk, and that they created or permitted a "large depression" to remain in the sidewalk. It is undisputed that the area where LaFemina allegedly fell, including the sidewalk and tree well, was the subject of an area improvement project completed prior to LaFemina's accident.

The Village of Patchogue (Village) now moves for summary judgment dismissing the complaint on the grounds that it never received prior written notice of the alleged defective condition, and that the plaintiffs have failed to produce any evidence that the Village caused or created the alleged defective condition. 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]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

At his deposition, LaFemina testified that he arrived at West Main Street at approximately 7:00 p.m. to watch the annual Thanksgiving Parade held in the Village, that he stood approximately 50 to 100 feet east of the location where he fell, and that he walked in a westerly direction as the parade was winding down. He stated that he was "weaving through the crowd," and his "ankle

turned at the lip" of a tree well located in the sidewalk. He indicated that he did not recall whether he was looking at the "last part" of the parade passing by just before he fell. LaFemina further testified that he did not know anyone who made a complaint to the Village about the tree well, and that he had never seen anyone repairing the tree well or sidewalk at that location.

Joseph Dean (Dean) was deposed on February 19, 2013, and testified that he was previously employed by the Village as a Trustee and the Commissioner of Public Works, and that he became the Superintendent of Public Works on or about November 21, 2009. He stated that he did not know when the sidewalk was installed, that the Village maintains those sidewalks or portions of sidewalks where it has a right of way, and that the Village "probably owns" the sidewalk in the area of LaFemina's fall "up [to] somewhere around the center line of the sidewalk." He indicated that the Department of Public Works (DPW) did not maintain records of any complaints regarding repairs and maintenance before 2011. Dean further testified that, before 2011, if DPW received a verbal or written complaint it would go and investigate and make any necessary repairs, and that regardless whether a repair was found to be necessary, the written complaints were discarded. He stated that he did not conduct a search of the DPW records with respect to the location where LaFemina allegedly fell prior to testifying because the department did not keep records for the relevant time period.

Patricia M. Seal (Seal) was deposed on January 14, 2014. She testified that she has been employed as the Village Clerk since 2005, and that her duties include maintaining the records of the Village, including complaints and area improvement projects initiated by the Village Board of Trustees (Board). She stated that records of projects by other agencies, such as the Community Development Agency (CDA), would be kept by that agency, and that she did not know which entity completed the subject project. She indicated that she did not know when the bricks and tree wells were installed on Main Street, but that she could search the minutes of Board meetings to learn the approximately time frame of that project. Seal further testified that she conducted a search of the office records to determine if a notice of claim or written notice of a defect regarding the subject location had been received, and that "nothing was found."

In her affidavit dated July 18, 2014, Seal swears that she has reviewed the notice of claim and verified complaint herein, and that she is aware that LaFemina was injured in front of the courthouse at 150 West Main Street on November 28, 2009. She states that it is her duty as Village Clerk to research and investigate notices of claim and written complaints related to alleged sidewalk defects in the village, that she conducted a search of the records for written complaints regarding the subject location, and that the Village did not receive any written complaints regarding the subject sidewalk and tree well. Seal further swears that the Village does not have special use of the subject location, and that the tree well at the location was constructed prior to her taking office in April 2004.

At his deposition, Paul Morano (Morano) testified that he is employed by the defendant County of Suffolk (County) as an assistant civil engineer in the Suffolk County Department of Public Works. He stated that he conducted a search of the department's records for complaints or work orders for the subject location for three years prior to the date of LaFemina's accident, and that he

did not see anything regarding sidewalks anywhere in the zone where the accident occurred. He indicated that the County "contracted ... out" the installation of the sidewalks in front of the courthouse at 150 West Main Street, and that he did not know when that work was done.

The Village has submitted a document entitled "Project: Downtown Street Improvement Project, Phase II in the Incorporated Village of Patchogue, New York," which is denominated as "bid documents" by the parties. Said document includes a notice to bidders wherein it states that "[p]ursuant to resolution adopted by the Patchogue Village Board of Trustees at their meeting of January 23, 1995," sealed bids are invited, and that, for additional information, bidders should contact the executive director of the CDA. The description of the project states, among other things, that "[t]his project includes the demolition of existing curbs and sidewalks and construction of new curbs, concrete and brick paver sidewalks ... along the north and south sides of Main Street." The document further provides that the Village reserves the right to reject any and all bids and that each bid must be accompanied by a bid bond made payable to the Village.

The Village has moved for summary judgment on the ground that it cannot be held liable unless the plaintiffs establish that the Village received prior written notice of the alleged defective condition pursuant to Village Law § 6-628. Said section, entitled "Liability of village in certain actions," provides in pertinent part:

> No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any ... sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed ... unless written notice of the defective, unsafe, dangerous or obstructed condition ... was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of ...

Where, as here, a prior written notice statute prevails, a municipality may not be subjected to liability for personal injuries caused by an improperly maintained sidewalk 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]). The courts recognize two exceptions to prior written notice laws, "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***, *supra*; *see also* ***Oboler v City of New York***, 8 NY3d 888, 832 NYS2d 871 [2007]; ***DiGregorio v Fleet Bank of N.Y., NA***, 60 AD3d 722, 875 NYS2d 204 [2d Dept 2009]).

The Village has established its *prima facie* entitlement to summary judgment regarding liability in this action. It is undisputed that the Village Clerk did not receive prior written notice of the alleged defective condition, and the Village has established that neither of the two exceptions to

the written notice requirement apply. The *prima facie* showing which a defendant is required to make on a motion for summary judgment is governed by the allegations of liability made by the plaintiffs in the pleadings (***Miller v Village of E. Hampton***, 98 AD3d 1007, 951 NYS2d 171 [2d Dept 2012]; ***Braver v Village of Cedarhurst***, 94 AD3d 933, 942 NYS2d 178 [2d Dept 2012]). The plaintiffs failed to allege any affirmative negligence in the complaint or bill of particulars, and they alleged only, in conclusory terms, that the defendant "negligently and carelessly constructed a sidewalk, and tree well, with a dangerous depression," and failed "to install a tree grate at the level of the sidewalk." The Court finds such generalized averments to be insufficient to impose on the Village, as part of its *prima facie* showing, the burden of negating the applicability of the affirmative negligence exception to the prior written notice requirement (*see* ***Baker v Buckpitt***, 99 AD3d 1097, 952 NYS2d 666 [3d Dept 2012]; *see also* ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 905 NYS2d 226 [2d Dept 2010]; *cf.* ***Braver v Village of Cedarhurst***, *supra*). In addition, the plaintiffs do not make any allegations regarding the special use exception in their pleadings or in the notice of claim.

In opposition to the motion, the plaintiffs contend that Dean's testimony that the DPW did not keep records of verbal or written complaints prior to 2011 makes it "disingenuous, at best, for Patricia Seal, the Clerk for the Village, to allege in her affidavit" that the Village did not receive any written complaints, and that the failure of the Village to maintain such records violates General Municipal Law §50-g. However, Dean's testimony establishes that the written complaints he is referring to are internal documents received by DPW, not the Village Clerk. It is well settled that internal documents generated by a municipality are insufficient to satisfy the statutory requirement of written notice (*see* ***Wilkie v Town of Huntington***, *supra*; ***Dalton v City of Saratoga Springs***, 12 AD3d 899, 784 NYS2d 702 [3d Dept 2004]; ***Cenname v Town of Smithtown***, 303 AD2d 351, 755 NYS2d 651 [2d Dept 2003]). Here, whether such written complaints were received or destroyed by the DPW is not relevant, as there is no requirement under the Village Law or the General Municipal Law that an agency or department of a municipality, other than the officer or employee designated in the written notice statute, must keep such records.

In addition, the plaintiffs contend that the Village has "no records whatsoever with respect to the commencement and completion of [the area improvement] project," that Seal's sworn statement that the project was completed before 2004 is speculation, and that a grate was not installed in the tree well to cover the dirt surrounding the tree therein. The adduced evidence establishes that the area improvement project was commenced sometime after January 23, 1995 and completed sometime before April 2004. Thus, the plaintiffs failed to raise a triable issue of fact regarding the affirmative negligence of the Village in creating the "dirt depression" which they allege was the cause of his accident. In addition, in order to excuse the requirement of written notice on the basis that the defendant created the condition, it must be shown that the defect is the product of the public corporation's active negligence, rather than its passive negligence, or nonfeasance (***Monteleone v Incorporated Vil. of Floral Park***, 74 NY2d 917, 550 NYS2d 257 [1989]; ***Davidson v Town of Chili***, 35 AD3d 1246, 827 NYS2d 795 [4th Dept 2006]; ***Kotler v City of Long Beach***, 44 AD2d 679, 353 NYS2d 800 [2d Dept 1974] *affd* 36 NY2d 774, 368 NYS2d 842 [1975]). Here, it is determined that the alleged negligent failure of the Village to install a grate in the tree well would be passive negligence or nonfeasance. In view of the foregoing, the Village's motion for

summary judgment dismissing the complaint against it is granted.

The County now moves for an order dismissing the complaint pursuant to CPLR 3211 (a) (7) on the ground that it "has never owned nor been responsible for the maintenance or control of the 'dirt depression' surrounding the tree," and that the plaintiffs failed to plead or prove compliance with the appropriate written notice statute. Initially, the Court notes that the County has served its answer. Because issue has been joined, this motion is deemed to have been brought under CPLR 3212, since the parties have treated it as such. Whenever a court elects to treat a motion to dismiss as a motion for summary judgment, it must provide "adequate notice" to the parties (CPLR 3211[c]) unless it appears from the parties' papers that they deliberately are charting a summary judgment course by laying bare their proof (*see* ***Rich v Lefkovits***, 56 NY2d 276, 452 NYS2d 1 [1982]; ***Schultz v Estate of Sloan***, 20 AD3d 520, 799 NYS2d 246 [2d Dept 2005]; ***Singer v Boychuk***, 194 AD2d 1049, 599 NYS2d 680 [3d Dept 1993]). Here, upon review of the papers, the Court finds that the parties clearly charted a summary judgment course, as the County submitted affidavits in support of its position (*see generally* ***Harris v Hallberg***, 36 AD3d 857, 828 NYS2d 579 [2d Dept 2007]). Under these circumstances, the court, in determining this motion, is free to apply the standard applicable to summary judgment motions without affording the parties notice of its intention to do so (*see* ***Mihlovan v Grozavu***, 72 NY2d 506, 534 NYS2d 656 [1988]; ***Doukas v Doukas***, 47 AD3d 753, 849 NYS2d 656 [2d Dept 2008]); ***Fuentes v Aluskewicz***, 25 AD3d 727, 808 NYS2d 739 [2d Dept 2006]). In addition, the motion is unopposed.

In an affidavit dated July 16, 2014, Lora Gellerstein swears that she is the Chief Deputy Clerk of the Suffolk County Legislature, and that her duties include maintaining the records of all written complaints received by the Clerk's Office "concerning defects on County owned property pursuant to the provisions of the Suffolk County Charter, §C8-2A." She states that she searched said records and that the Clerk is "not in receipt of any alleged defective or dangerous condition at the location of 150 West Main Street," Patchogue, New York, on or prior to November 28, 2009. She indicates that the County "does not have special use of the subject location."

In an affidavit dated July 23, 2014, John Donovan swears that he is an investigator in the office of the Suffolk County Attorney, and that his duties include maintaining the records of all written complaints received by the County Attorney's office concerning alleged defects on the streets, roads and sidewalks of the County prior to November 16, 2004, when the Suffolk County Charter was amended to provide that those notices be filed with the County Clerk. He states that he searched said records and that the County is "not in receipt of any written notice or written complaints concerning the alleged defective or dangerous condition at the location of 150 West Main Street," Patchogue, New York, on or prior to November 28, 2009. He indicates that the County "does not have special use of the subject location."

The Suffolk County Charter, Article VIII, section C8-2A(2)(i) provides, in pertinent part, that:

> . . . [N]o civil action shall be maintained against Suffolk County ... for damages or injuries to a person or property sustained by reason of any ... sidewalks ... trees and tree limbs ... allegedly being in a defective condition, out of repair, unsafe, dangerous or obstructed ... unless the County has received written notice within a reasonable time before said injury or property damage was sustained, that the item(s) allegedly causing such injury was in a defective, out of repair, unsafe, dangerous or obstructed condition, ... Such notice shall be made in writing by certified or registered mail to the Clerk of the Suffolk County Legislature, who shall forward a copy to the County Attorney.

Here, it is undisputed that the plaintiffs failed to establish that written notice regarding the alleged defective condition was ever received by the County. In addition, for the reasons set forth above, it is determined that the exceptions to the general rule requiring written notice are not applicable herein. Accordingly, the County's motion to dismiss the complaint is granted.

The plaintiffs cross-move for an order striking the answer of the defendant Village of Patchogue based on its spoliation of evidence. The determination of spoliation sanctions lies within the broad discretion of the court (***Lentz v Nic's Gym, Inc.***, 90 AD3d 618, 933 NYS2d 875 [2d Dept 2011]; ***Gotto v Eusebe-Carter***, 69 AD3d 566, 892 NYS2d 191 [2d Dept 2010]). A court may "impose a sanction even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided the party was on notice that the evidence might be needed for future litigation" (***Samaroo v Bogopa Serv. Corp.***, 106 AD3d 713, 964 NYS2d 255 [2d Dept 2013]; ***Iannucci v Rose***, 8 AD3d 437, 778 NYS2d 525 [2d Dept 2004).

The record demonstrates that the Village complied with the plaintiffs' discovery requests, and was unable to produce certain documents because they did not exist or were not in its possession. On March 20, 2014, the Village served an initial response to the plaintiffs' demands indicating that certain documents do not exist, fully responding to other demands, and indicating that "a search is being conducted [regarding other demands] and if any responsive documents are discovered the same will be disclosed under separate cover." On May 5, 2014, the Village served a supplemental response to the plaintiffs' demands supplying the above-referenced "bid documents." In addition, the testimony of the Village's witnesses establishes that the other requested documents may not exist.

A party seeking the drastic sanctions of striking a pleading or preclusion has the initial burden of coming forward with evidence clearly showing that the failure to comply with disclosure orders or discovery demands was willful, contumacious or in bad faith (*see* ***Conciatori v Port Auth. of N.Y. & N.J.***, 46 AD3d 501, 846 NYS2d 659 [2d Dept 2007]; ***Denoyelles v Gallagher***, 40 AD3d 1027, 834 NYS2d 868 [2d Dept 2007]; ***Shapiro v Kurtzman***, 32 AD3d 508, 820 NYS2d 311 [2d Dept 2006]). The Village cannot be compelled to produce documents which do not exist or are not in its possession (***Maffai v County of Suffolk***, 36 AD3d 765, 829 NYS2d 566 [2d Dept 2007];

Euro-Central Corp. v Dalsimer, Inc., 22 AD3d 793, 803 NYS2d 171 [2d Dept 2005]). Under the particular circumstances of this action, it is determined that the plaintiffs have failed to establish that the Village acted wilfully, contumaciously, or in bad faith. Accordingly, the plaintiffs' cross motion is denied.

Dated: 1/9/2015

William B Rebolini

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

___X___ FINAL DISPOSITION_____ NON-FINAL DISPOSITION