Skaats v Town of Huntington
2015 NY Slip Op 30223(U)
February 5, 2015
Supreme Court, Suffolk County
Docket Number: 12-21544
Judge: John H. Rouse
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SHORT FORM ORDER

INDEX No. 12-21544
CAL No. 14-01101OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN H. ROUSE
Acting Justice of the Supreme Court

MOTION DATE 9-23-14 (#002)
MOTION DATE 10-15-14 (#003)
ADJ. DATE 10-29-14
Mot. Seq. # 002 - MD
003 - XMG

SANDRA SKAATS and ROBERT SKAATS,

Plaintiffs,

- against -

TOWN OF HUNTINGTON, COUNTY OF SUFFOLK and COLD SPRING HARBOR LIONS CLUB, INC.,

Defendants.

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Upon the following papers numbered 1 to 39 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers 14 - 28 ; Answering Affidavits and supporting papers 29 - 33; 34 - 35 ; Replying Affidavits and supporting papers 36 - 37; 38 - 39 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by Cold Spring Harbor Lions Club, Inc. for summary judgment dismissing the complaint against it is denied; and it is further

ORDERED that the cross motion by the Town of Huntington for summary judgment dismissing the complaint and all cross claims against it is granted.

Plaintiff Sandra Skaats commenced this action to recover damages for injuries allegedly sustained as a result of a trip and fall accident that occurred on a grassy median between the sidewalk and roadway in front of premises known as 143 Main Street, Cold Spring Harbor in New York. The accident allegedly occurred on May 12, 2011, when plaintiff, a mail carrier, tripped on a broken metal post protruding from a raised patch of concrete on a grassy strip of land between the sidewalk and the roadway, as she was returning to her vehicle after delivering mail. The complaint alleges that the broken metal post is a receptacle installed and maintained by the Spring Harbor Lions Club for placement of flags. By her bill of particulars, plaintiff alleges that a dangerous condition existed on the grassy area in that the protruding broken metal post constituted a trap and snare, and that defendants were negligent in failing to properly maintain it. Sandra Skaats' husband, Robert Skaats, brought a derivative cause of action for loss of services.

Defendant Cold Spring Harbor Lions Club, Inc. (hereinafter referred to as the Lions Club) now moves for summary judgment dismissing the complaint against it on the ground that it did not create or have notice of the alleged dangerous condition, and that the alleged dangerous condition was a trivial defect. In support of its motion, the Lions Club submits, among other things, copies of the pleadings, transcripts of the deposition testimony of Sandra Skaats and William Norton, and photographs of the subject area where plaintiff fell.

Plaintiffs oppose the Lions Club's motion, arguing that the Lions Club made a special use of the subject area and failed to demonstrate that it did not create or cause the defect by its special use. Plaintiffs also argue that the metal post constitutes a public nuisance. In opposition, plaintiffs submit excerpts of the deposition testimony of Sandra Skaats and William Norton, and photographs of the subject area where plaintiff allegedly fell.

Defendant Town of Huntington cross-moves for summary judgment dismissing the complaint against it on the grounds that there was no written notice of the alleged dangerous condition and there is no evidence that it created or had notice of said condition. The Town also argues that the alleged dangerous condition was trivial and de minimis. In support of its motion, the Town submits copies of the pleadings, transcripts of the parties' deposition testimony, affidavits of Stacy Colamussi and Michael Kaplan, and photographs of the subject area where plaintiff fell.

Plaintiffs oppose the Town's motion, arguing that the metal post constitutes a nuisance and, thus, the notice requirement is irrelevant. Plaintiffs also argue that a triable issue of fact exists as to whether the Town had notice of the alleged dangerous condition

At her examination before trial, Sandra Skaats testified that at the time of the accident, she was delivering mail along her route on Main Street in Cold Spring Harbor. She testified that as she was returning to her vehicle, she tripped over a "mangled piece of metal" which was located on the grassy dirt area between the curb and the sidewalk.

At his examination before trial, William Norton testified that he was the president of the Lions Club at the time of the accident, and that the club is a non-profit service organization. He testified that the object that plaintiff allegedly tripped over is a socket which flags are inserted into during national holidays. He explained that the sockets were first installed in front of 143 Main Street by members of the Lions Club in 1965, that there are 35 to 40 sockets, and that the sockets are plugged when not in use. He testified that during national holidays, members of the Lions Club would insert flags into the socket, and that the flags would be removed and the plugs placed back into the socket at the end of the day. He testified that after he learned of the subject accident, he inspected the subject socket and observed that it was bent and jammed. He testified that there is no policy for inspecting the sockets, but that they would be inspected when flags were inserted into them during the national holidays.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

In general, a landowner has a duty to maintain its property in a reasonable safe condition and to prevent the occurrence of foreseeable injuries (*see* ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). However, it is not an insurer of the safety of people on its premises (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Donohue v Seaman's Furniture Corp.***, 270 AD2d 451, 705 NYS2d 291 [2d Dept 2000]), and has no duty to warn or protect against an open or obvious condition on the property which, as a matter of law, is not inherently dangerous (*see* ***Terranova v Staten Is. Univ. Hosp.***, 57 AD3d 765, 870 NYS2d 84 [2d Dept 2008]; ***Lasky v Daly***, 50 AD3d 640, 854 NYS2d 751 [2d Dept 2008]).

To prove a prima facie case of negligence in a trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see* ***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]; ***Gaeta v City of New York***, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994]). Liability can be predicated only on failure of defendant to remedy the danger after actual or constructive notice of the condition (*see* ***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]). Constructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection (*see* ***Applegate v Long Is. Power Auth.***, 53 AD3d 515, 862 NYS2d 86 [2d Dept 2008]; ***Lal v Ching Po Ng***, 33 AD3d 668, 823 NYS2d 429 [2d Dept 2006]).

Here, the Lions Club has failed to establish its prima facie entitlement to summary judgment as a matter of law. Counsel for the Lions Club asserts that plaintiff "cannot prove that [the Lions Club] created the alleged condition or even that a dangerous condition ever existed at the time and place of [plaintiff's] accident." However, a defendant cannot obtain summary judgment by pointing to gaps in plaintiff's proof; rather, it must adduce affirmative evidence that its actions were not intentional and unreasonable (*see* ***Vittorio v U-Haul Co.***, 52 AD3d 823, 861 NYS2d 726 [2d Dept 2008]; ***Pappalardo v Long Is. R.R. Co.***, 36 AD3d 878, 829 NYS2d 173 [2d Dept 2007]).

Moreover, as to the contention by the Lions Club that the alleged defective condition is merely a trivial defect, it is unclear from the testimony and the photographs submitted in support of the motion whether the alleged defect is trivial or dangerous. Here, there is no testimony or any evidence as to the dimensions of the alleged defect. Furthermore, the photographs of the accident site are insufficient to demonstrate, as a matter of law, that the alleged defect was too trivial to be actionable (*see* ***Berry v Rocking Horse Ranch Corp.***, 56 AD3d 711, 868 NYS2d 270 [2d Dept 2008]; ***Friedman v Beth David Cemetery***, 19 AD3d 365, 796 NYS2d 167 [2d Dept 2005]; ***Corrado v City of New York***, 6 AD3d 380, 773 NYS2d 894 [2d Dept 2004]). Thus, inasmuch as the Lions Club has failed to demonstrate the absence of material issues of fact, the burden never shifted to plaintiffs to establish the existence of a triable issue of fact, and the sufficiency of plaintiffs' papers need not be considered (*see* ***DeLaRosa v City of New York***, 61 AD3d 813, 877 NYS2d 439 [2d Dept 2009]). Accordingly, the Lions Club's motion for summary judgment is denied.

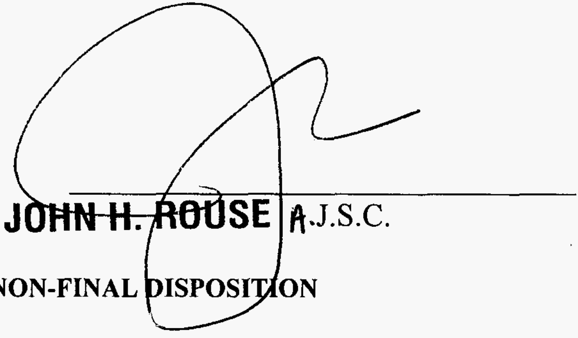
With regard to the Town's cross motion, it is well settled that where a municipal defendant has enacted a prior written notice statute it may not be subjected to liability for injuries caused by a dangerous or defective condition of a roadway or sidewalk unless it has received prior written notice of 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 (*see* ***Amabile v City of Buffalo***, *supra*). The second exception applies in cases where a special use confers a special benefit upon the municipality (*see* ***Amabile v City of Buffalo***, *supra*; ***Berner v Town of Huntington***, 304 AD2d 513, 757 NYS2d 585 [2d Dept 2003]).

Huntington Town Code § 174-3 (A) provides in relevant part that a civil action may not be maintained against the Town for personal injuries "sustained by reason of any...sidewalk or crosswalk owned, operated or maintained by the town...being defective, out of repair, unsafe, dangerous or obstructed unless written notice of the specific location and nature of such defective, unsafe, dangerous or obstructed condition by a person with first-hand knowledge was actually given to the Town Clerk or the Town Superintendent of Highways in accordance with § 174-5." Huntington Town Code § 174-3

(A) also provides that the Town of Huntington shall not "be liable for damage or injury to persons or property in the absence of such prior written notice," and that "constructive notice shall not be applicable or valid.

Here, the Town established, prima facie its entitlement to judgment as a matter of law that it did not receive the requisite prior written notice of the alleged defective condition (*see* ***Oliveri v Village of Greenport***, 93 AD3d 773, 940 NYS2d 675 [2d Dept 2012]; ***Daniel v City of New York***, 91 AD3d 699, 936 NYS2d 897 [2d Dept 2012]; ***Healy v Village of Patchogue***, 28 AD3d 519, 813 NYS2d 499 [2d Dept 2006]). The affidavit of Stacy Colamussi, the Deputy Town Clerk for the Town of Huntington, states that she searched the records of all prior written notice of defects and complaints the Town received regarding defects or dangerous conditions on the subject premises for a period of five years prior to the date of the accident, and no complaints were found. The affidavit of Michael Kaplan, the Highway Project Assistant for the Superintendent of Highways, states that the Superintendent of Highways does not maintain or have jurisdiction over the median between the sidewalk and roadway on the subject area where plaintiff fell. The affidavit further states that he conducted a search of the records of the Superintendent of Highways' office for a period of five years prior to the date of the accident and found no prior written complaints regarding any condition at the subject location. In opposition, plaintiffs failed to raise a triable issue of fact. Thus, the cross motion by the Town for summary judgment dismissing the complaint and all cross claims against it is granted.

Dated: FEBRUARY 5, 2015



JOHN H. ROUSE A.J.S.C.

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