Devlin v County of Suffolk
2015 NY Slip Op 31011(U)
June 9, 2015
Supreme Court, Suffolk County
Docket Number: 10-5729
Judge: Joseph A. Santorelli
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[* 1]

SHORT FORM ORDER

COPY

INDEX No. 10-5729
CAL. No. 14-00862OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 10-16-14
ADJ. DATE 3-12-15
Mot. Seq. # 003 - MG; CASEDISP
004 - MG

CONSTANCE DEVLIN and TIMOTHY DEVLIN,

Plaintiffs,

- against -

THE COUNTY OF SUFFOLK and TOWN OF ISLIP,

Defendants.

SULLIVAN PAPAIN BLOCK MCGRATH & CANNAVO, P.C.
Attorney for Plaintiffs
1140 Franklin Avenue, Suite 200
Garden City, New York 11530

DENNIS M. BROWN, ESQ.
SUFFOLK COUNTY ATTORNEY
By: Marcia J. Lynn, Esq.
Attorney for Defendant County of Suffolk
H. Lee Dennison Building
100 Veterans Memorial Highway
Hauppauge, New York 11788

BARTLETT, MCDONOUGH, & MONAGHAN
Attorney for Defendant Town of Islip
170 Old Country Road, 4th Floor
Mineola, New York 11501

Upon the following papers numbered 1 to 47 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-12; 13-26 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 27-36; 37-47 ; Replying Affidavits and supporting papers 48-51; 52-53 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Town of Islip ("Town") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any cross-claims insofar as asserted against it is granted; and it is further

ORDERED that the cross motion by defendant County of Suffolk ("County") for an order pursuant to CPLR 3211 and 3212 granting summary judgment dismissing the complaint and any cross-claims insofar as asserted against it is granted.

This is an action to recover damages for injuries allegedly sustained by the plaintiff Constance Devlin on January 9, 2009, at approximately 8:30 p.m., when she was involved in a trip and fall accident. This occurred on a sidewalk in the Deer Park train station of the Long Island Railroad, located in Deer Park, Town of Islip, County of Suffolk. Plaintiff Timothy Devlin seeks damages for loss of services.

Defendant Town now moves for summary judgment dismissing the complaint and all cross-claims on the ground of a lack of prior written notice. In support of the motion, it submits, *inter alia*, its attorney's affirmation, the pleadings, the transcripts of the depositions of plaintiff Constance Devlin, Paul Morano as a witness for the defendant County, and of Peter Kletchka, as a witness for defendant Town, the affidavit of Peter Kletchka, sworn to December 5, 2014, and the affidavit Teresa Bogardt, sworn to December 5, 2014. Defendant County cross-moves for summary dismissing the complaint and all cross-claims. In support of the motion, it submits, *inter alia*, its attorney's affirmation, the pleadings, the transcripts of the depositions of plaintiff and Paul Morano as a witness for the defendant County, the affidavit of John Donovan, sworn to September 25, 2014, and the affidavit Laura Gellerstein, sworn to September 25, 2014. In opposition, the plaintiffs submit their attorney's affirmation, the pleadings, the transcripts of the depositions of plaintiff Constance Devlin, and witness Paul Morano, and a copy of a Long Island Railroad parking program agreement for the Deer Park station dated August 10, 2001.

Plaintiff testified that on January 9, 2009 she was employed as a police sergeant by the Metropolitan Transit Authority Police Department. At approximately 8:30 p.m. on that date, she was on duty and walking through the parking lot on the north side of the Deer Park train station. As she passed through the parking lot east of the Deer Park station building, she tripped and fell over a fallen parking sign located on a raised curb.

Paul Morano testified that he is employed as an assistant civil engineer in the County's department of public works. Pursuant to an agreement between the County and the Long Island Railroad, the County was responsible for the maintenance of the parking lot in which the accident occurred. In turn, the County contracted with the Town to maintain the signs in the parking lot. He further testified that the County had received no complaints about a downed sign in that parking lot.

Peter Kletchka testified that he is employed by the Town's department of public works. He confirmed that the Town was responsible for the maintenance of parking signs at the Deer Park train station. He further testified that he conducted a search of the records of his department for complaints with regard to the sign that allegedly caused plaintiffs accident for a period of more than two years prior to the date of the accident and found no prior complaints. He also testified that if any Town records existed with regard to a written complaint about the sign that is the subject of this action, he would have found them. An affidavit by Mr. Kletchka was also submitted clarifying that his testimony reflected the fact that he had searched all of the Town's records, including those of his department, the Town Clerk and the records in the traffic safety files, and found no written complaints regarding the parking sign which is the alleged cause of plaintiff's accident. He further noted that any written complaint to the Town Clerk or department of public works is automatically and contemporaneously sent to the traffic safety division's repair order files.

The Town also submitted the affidavit of Teresa Bogardt, who is the executive assistant to the Town Clerk of the Town of Islip. However, since her proof was submitted for the first time in reply papers, it will not be considered on the motion (*see* ***Reyes v Arco Wentworth Mgt. Corp.***, 83 AD3d 47, 52, 919 NYS2d 44 [2d Dept 2011]; ***Tingling v C.I.N.H.R., Inc.***, 74 AD3d 954, 956, 903 NYS2d 89 [2d Dept 2010]).

The defendant County submitted the affidavit John Donovan, who states that he is employed as an investigator by the County. His duties require that he maintain records of all written complaints of defects or obstructions on the streets, roads, parking lots and sidewalks of the County, pursuant to § C8-2A of the Suffolk County Charter. He has searched the appropriate records, and the County is not in receipt of any written complaints or notices of defects with regard to a dangerous or defective condition, in the east parking lot of the Deer Park train station, and specifically with regard to the alleged fallen parking sign which is the subject of this action.

The defendant County also submitted the affidavit of Laura Gellerstein, the Chief Deputy Clerk of Suffolk County. Her duties require her to maintain records of all written complaints concerning all defects and obstructions, pursuant to Suffolk County Charter § C8-2A on all of the streets, roads etc. in Suffolk County. She searched the appropriate records of the Suffolk County Legislature with regard to this matter and found no prior written complaints or written notices with regard to the alleged fallen parking sign which is the subject of this action.

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 issues of fact from the case (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). 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]).

Section 47A-3 of the Town of Islip Code states:

> No civil action shall be maintained against the Town of Islip or any of its employees for damages or injuries to persons or property sustained by reason of any highway, street, bridge, culvert, sidewalk, crosswalk, highway or street marking, traffic sign, signal or device, tree, tree limb or other property owned or maintained by the Town of Islip being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such

> defective, out of repair, unsafe, dangerous or obstructed condition of such highway, street, bridge, culvert, sidewalk, crosswalk, highway or street marking, traffic sign, signal or device, tree, tree limb, or other property was actually given to the Town Clerk or Commissioner of Public Works and there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger, obstruction or condition complained of.

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 unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (***Barnes v Incorporated Vil. of Port Jefferson***, 120 AD3d 528, 529, 990 NYS2d 841 [2d Dept 2014]; ***Carlucci v Village of Scarsdale***, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]; ***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]; ***Ganzenmuller v Incorporated Vil. of Port Jefferson,*** 18 AD3d 703, 795 NYS2d 744 [2d Dept 2005]). "The only two recognized exceptions to a prior written notice requirement are the municipality's affirmative creation of a defect or where the defect is created by the municipality's special use of the property" (***Gonzalez v Town of Hempstead***, 124 AD3d 719, 2 NYS3d 527 [2d Dept 2015]). Furthermore, Municipal Home Rule Law § 10(1)(ii)(d)(3), permits a town to amend or supercede any provision of the Town Law "unless the legislature expressly shall have prohibited the adoption of such a local law". Because the legislature has not expressly prohibited towns from enacting a more restrictive notice requirement than what is contained in Town Law § 65-a(1), Islip is permitted to do so (***Horan v Town of Tonawanda***, 83 AD3d 1565, 1566 [4th Dept 2011]; ***Amabile v City of Buffalo***, *supra*). Testimony establishes that there was no prior written notice filed with either the town clerk's office or with the highway department, as required by the Town ordinance. Any prior verbal complaints or other internal documents generated by the Town are insufficient to satisfy the statutory requirement (*see* ***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006]; ***Cenname v Town of Smithtown***, 303 AD2d 351, 755 NYS2d 651 [2d Dept 2003]). Similarly, neither constructive notice nor actual notice of a defect obviates the need for prior written notice to the Town (*see* ***Velho v Village of Sleepy Hollow***, 119 AD3d 551, 552, 987 NYS2d 879 [2d Dept 2014]; ***Amabile v City of Buffalo***, *supra*; ***Wilkie v Town of Huntington***, *supra*; ***Cenname Town of Smithtown***, *supra*).

The plaintiffs having failed to raise an issue of fact by submitting evidence in admissible form to show that the defendant Town either affirmatively created the condition causing plaintiff's accident or of a special use of the property, defendant Town is entitled to summary judgment (*see* ***Gonzalez v Town of Hempstead***, *supra*; ***Smith v City of Mount Vernon***, 101 AD3d 847, 848, 955 NYS2d 635 [2d Dept 2012]).

Suffolk County Charter § C8-2A provides, in relevant part, that:

> No civil action shall be maintained against Suffolk County or any of its departments, agencies, offices, districts, boards, commissions or

> subdivisions for damages or injuries to a person or property sustained by reason of any (a) highways; (b) roads; (c) streets; (d) parking lots and parking fields; (e) bridges;... street lighting; (q) drains and drainage structures; (r) sidewalks; (s) walkways; (t) boardwalks; (u) crosswalks and underpasses; (v) sewers; (w) manholes; (x) curbs; (v) gutters; (z) trees and tree limbs; (aa) street markings; (bb) traffic signs, signals or traffic control devices; ... under the jurisdiction of the County, on account of that structure or thing enumerated above, in whole or in part, 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, ... Such written notice shall specify the particular place and nature of such defective, unsafe, dangerous, or obstructed condition or the particular location of the snow or ice. 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.

Based upon the affidavits submitted with regard to the search of County records, defendant County has established its prima facie entitlement to summary judgment by proffering proof, in the form of testimony and affidavits, that it had no prior written notice of any alleged defect at the subject property.

In response, plaintiffs allege that there is an issue of fact as to whether or not the County had constructive notice of the subject defective condition, based upon Highway Law § 139. Under Highway Law § 139 (2), a county can enact a prior written notice statute that provides that it may not be subjected to liability for injuries caused by an improperly maintained highway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (*see* ***Gold v County of Westchester***, 15 AD3d 439, 440, 790 NYS2d 675 [2d Dept 2005]). Notwithstanding the existence of a prior written notice statute, a County may be liable for an accident caused by a defective highway condition where the County has constructive notice of the condition (***Napolitano v Suffolk County Dept. of Pub. Works***, 65 AD3d 676, 677, 884 NYS2d 484 [2d Dept. 2009]; ***Moxey v County of Westchester***, 63 AD3d 1124, 883 NYS2d 80 [2d Dept. 2009]; ***Phillips v. County of Nassau***, 50 AD3d 755, 856NYS2d 172 [2d Dept. 2008]). However, Highway Law § 139(1) states, in relevant part: "[w]hen. by law, a county has charge of the repair or maintenance of a road, highway, bridge or culvert, the county shall be liable for injuries to person or property...sustained in consequence of such road, highway. bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed existing because of the negligence of the county, its officers, agents or servants." The statute does not, however, refer to either sidewalks or traffic signs. Therefore, Highway Law § 139 is not applicable to the matter before this Court and raises no issue of fact herein (*see* ***Zash v County of Nassau***, 171 AD2d 743, 567, NYS2d 299 [2d Dept 1991]; ***Shapiro v County of Nassau***, 26 Misc3d 1238(A), 907 NYS2d 441[Sup Ct, Nassau Cty 2010].

Suffolk County Charter § C8-2A is, however, applicable to sidewalks, traffic signs and parking lots, and plaintiffs have failed to show that the County had prior written notice of the alleged defect. The plaintiffs having also failed to raise an issue of fact by submitting evidence in admissible form to show that the defendant County either affirmatively created the condition causing plaintiff's accident or of a special use of the property, defendant County is entitled to summary judgment (*see* ***Gonzalez v Town of Hempstead***, *supra*; ***Smith v City of Mount Vernon***, *supra*).

Dated: Jan 09 2015

HON. JOSEPH A. SANTORELLI
J.S.C.

_X_ FINAL DISPOSITION ____ NON-FINAL DISPOSITION