Shea v Krauz
2015 NY Slip Op 31063(U)
June 12, 2015
Supreme Court, Suffolk County
Docket Number: 10-45956
Judge: Arthur G. Pitts

[* 1]

SHORT FORM ORDER

INDEX No. 10-45956
CAL. No. 14-11260OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 10-15-14 (#002)
MOTION DATE 10-16-14 (#003)
MOTION DATE 11-20-14 (#004 & #005)
ADJ. DATE 1-22-15
Mot. Seq. # 002 - MG; CASEDISP
003 - MG
004 - MG
005 - MG

DENISE SHEA,

Plaintiff,

- against -

DANIEL KRAUZ, MERRY KRAUZ, WILLIAM G. COWIE and JENNIFER COWIE, SOUTH HUNTINGTON WATER DISTRICT and TOWN OF HUNTINGTON,

Defendants.

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Upon the following papers numbered 1 to 83 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-20, 29-48 ; Notice of Cross Motion and supporting papers 21-28, 49-70; Answering Affidavits and supporting papers 71-72, 73-75, 76-85, 86-87, 88-89 ; Replying Affidavits and supporting papers 71-72, 73-74, 75-76, 77-78,79-81, 82-83 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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

ORDERED that the motion by defendant South Huntington Water District ("Water District") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross-claims against it is granted; and it is further

ORDERED that the motion by defendants Daniel Krauz and Merry Krauz for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross-claims against them is granted; and it is further

ORDERED that the motion by defendants William G. Cowie and Jennifer Cowie for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against them is granted; and it is further

ORDERED that the motion by defendant Town of Huntington ("Town") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross-claims against it is granted.

This is an action to recover damages for injuries allegedly sustained by the plaintiff Denise Shea on October 25, 2010 at approximately 6:30 p.m., when she was involved in a trip and fall accident which occurred on a concrete walkway between numbers 51 and 53 Sherwood Drive Huntington Station, County of Suffolk. Negligence is alleged against each of the defendants for failure to properly maintain the walkway.

Defendant Water District now moves for summary judgment dismissing the complaint pursuant to CPLR 3212. In support of the motion it submits, *inter alia*, its attorney's affirmation, the pleadings, the transcripts of the 50-h hearing and the depositions of plaintiff, the deposition transcripts of defendant William G. Cowie, of defendant Daniel Krauz, Kevin Carroll as a witness for defendant Water District, and James Haskell as a witness for defendant Town, the affidavit of Brian O'Donnell, sworn to on September 2, 2014, a copy of an easement with regard to the subject property and photographs of the subject property.

Defendants Daniel and Merry Krauz cross-move for summary judgment dismissing the complaint and all cross-claims. In support of the motion they submit, *inter alia*, their attorney's affirmation, a copy of First American Title Insurance Policy No. Y0079817, a certified copy of a tax map for Section 135 of the Town of Huntington, the affidavit of Daniel Krauz, sworn to on January 13, 2014, the affidavit of Merry Krauz, sworn to on January 13, 2014 and title documents. The motion also incorporates the exhibits filed by the defendant Water District.

Defendants William G. Cowie and Jennifer Cowie also move for summary judgment dismissing the complaint and all cross-claims. In support of the motion they submit, *inter alia*, their attorney's affirmation,

the pleadings, the transcripts of the 50-h hearing and the depositions of plaintiff, the deposition transcripts of defendants William G.Cowie and Daniel Krauz, Kevin Carroll as a witness for defendant Water District, and James Haskell as a witness for defendant Town, the affidavit of Matthew D. Crane, sworn to August 8, 2014, title documents and photographs.

Defendant Town also cross-moves for summary judgment 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 50-h hearing and the depositions of plaintiff, the deposition transcripts of defendants William G. Cowie and Daniel Krauz, the deposition transcript of James Haskell as a witness for defendant Town, the affidavit of Mark Tyree sworn to October 1, 2014, the affidavit of John W. Rech, sworn to in 2014, the affidavit of Michael Kaplan, sworn to September 30, 2014, and the affidavits of Suzanne Blanton, sworn to May 9, 2014 and October 1, 2014, respectively.

The plaintiff testified that on October 25, 2010 at approximately 6:30 p.m., she was walking her dog in her neighborhood in the Town of Huntington. The weather was clear and dry and when she left her home it was still light outside. Her walk brought her to the entrance of a municipal park, which leads to ballfields at Stimson Junior High School. There was a concrete walkway which connected the pedestrian entry to the park and the ballfields. The lights were on for the ballfields, and plaintiff, with her dog, proceeded on the walkway toward the fields. On each side there was a grassy area approximately two and a half feet wide. Each side of the walkway was bordered by a fence, and there was a house on each side of the path. After reaching the end of the walkway and disconnecting her dog's leash, plaintiff realized the area was too dark. She called to her dog and began to walk back the way she came. As she turned around and started to walk, a stick got stuck in her shoe and she lost balance. She tried to keep her balance, but her shoe got stuck on the lip of a hole in the sidewalk and she fell flat on her face. The branch was cut and about 18 inches long, with numerous offshoots. It did not appear to be freshly cut. Over the period of 13 years that she had been using the walkway, she had made telephonic complaints to the Town but never in writing. The last time she had done so was in 2005 or 2006.

Daniel Krauz testified that he and his wife were the owners of 53 Sherwood Drive. The walkway easement is not part of his property and was not his responsibility to maintain. During the time he had been living there, maybe once a month someone from the Town would clean it up, typically during the warmer months, spring, summer and early fall. His property has a wood stockade fence between his property and the cyclone fence which borders the path. He does not know who owns the cyclone fence. There is about a foot of space between the two fences. He has never seen plant growth from his property go into the easement area. Any clipping from his yard fell into his area, where he would clean it up. He had never made any complaints about the condition of the easement. He had never seen anyone remove snow from the easement. He had never seen employees of the Water District maintaining the easement.

William Cowie testified that he and his wife were the owners of 51 Sherwood Drive at the time of the accident. It was his understanding that the easement was Town property. He had made telephone calls to the Town to complain about the condition of the property, and was told that the easement was the responsibility of the Water District. He never contacted the Water District. He made less than five calls to the Town during the time he lived there. He never performed any work in the walkway area. He was only

responsible for the hedges on his side of the fence. On occasion his bushes grew through the fence into the easement area, but he never trimmed those bushes. He never performed any maintenance on the chain link fence and did not know who owned it. A landscaping company maintained his property. The only time he saw workers in the area was after the date of the accident. Someone did some maintenance on the walkway, but he did not know who.

Kevin Carroll testified as a witness for the defendant Water District. He is the Superintendent for the Water District and, as such, is responsible for the water distribution system, including piping production. Their piping goes below the subject walkway pursuant to an easement. He did not know who actually owns the property. A search of their records revealed no paperwork with regard to the easement. He did not know who had the responsibility to maintain the easement, but the Water District has never performed any maintenance in this area. Typically, the property owner maintains the easement.

Defendant Water District submitted the affidavit of Brian O'Donnell, the foreman for the Water District. He stated that he performed a search of the records and files of the Water District and found that no work, repairs, or restoration of the concrete composing the subject walkway was performed by the Water District since the installation of the underground water line in the 1970's. He further stated that the Water District did not own, control maintain or repair the walkway described in the plaintiff's notice of claim, and that the Water District did not and never has maintained the foliage or shrubbery thereon.

James Haskell testified as a witness for the defendant Town. He is employed by the Town as a Town Park Maintenance Mechanic 3. In 2010 his responsibilities included maintenance in town parks including mowing, weed wacking, etc. His assignment at that time included Peter Nelson Park, where the subject walkway is located. He recalled his photograph being taken cleaning the walkway, after the date of the accident (Town Exhibit N). He stated that the day the photograph was taken was the first time he had ever cleaned the area in question. He never knew prior to this that the walkway even existed.

The affidavit of Mark Tyree states that he is employed by the Town as deputy director of the Department of General Services. He maintains and searches records regarding complaints and correspondence received by his department and for daily work records related to work done by the Highway Department. He further stated that he had conducted a search of the department's records for any complaint received regarding the walkway located between 51 and 53 Sherwood Drive in Huntington for a period of five years prior from October 10, 2010. This search revealed that there was no record of the department receiving any complaints about the subject location for that time period.

The affidavit of Joseph W. Rech states that he is employed by the Town as town park maintenance supervisor for all of the town parks. It was his understanding that the subject walkway was not Town property and he did not consider it as part of the Town park. He never instructed any employee to perform any maintenance on the property, and he was unaware of any employee doing any work there until after the date of the accident.

The affidavit of Michael Kaplan states that he is employed by the Town as a highway project assistant and that his job duties included maintaining and searching for records regarding complaints and

notices of claim related to work performed by the department. He further stated that he had conducted a search of the highway department's records for any complaint received regarding the walkway located between 51 and 53 Sherwood Drive in Huntington for a period of five years prior from October 10, 2010. This search revealed that the was no record of the department receiving any written notice of claim or written complaints about the subject location for that time period.

The October 1, 2014 affidavit of Suzanne Blanton stated that she is employed by the Town as a clerk typist for the Town Clerk's office. She maintains and searches for records regarding complaints and notices of claim received by the Clerk's office. She further stated that she conducted a search of the highway department's records for any complaint received regarding the walkway located between 51 and 53 Sherwood Drive in Huntington for a period of five years prior from October 10, 2010. There was no record of the receipt of any written notice of claim or written complaints about the subject location for that time period.

The easement granted to defendant Water District has been submitted. The easement, which was filed June 6, 1972 at Liber 7172 of Deeds, page 229, "does grant and release to the South Huntington Water District, its successors and assigns, an easement and right of way to lay, maintain, operate, repair or remove water mains, pipe lines and all necessary appurtenances thereto under and across the property..." It further states, in part that the Water District "agrees at its own expense to repair, maintain and operate water mains, pipe lines or any part thereof which in it discretion it installs on the premises, and in the event it becomes necessary to dig up the ground to repair said main, to replace the terrain to its former condition."

A deed has also been submitted, dated February 14, 1974, which was filed in the Suffolk County Clerk's office on November 29, 1974, in Liber 7758 of Deeds at page 151, which transferred ownership of the 10 foot wide walkway to the Town of Huntington.

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). Proving that an accident occurred, or that the conditions existed for such an accident, is insufficient to establish negligence. "'Proof of negligence in the air, so to speak, will not do'" A property owner has a duty to maintain its premises in a reasonably safe condition (*see* ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Van Dina v St. Francis Hosp., Roslyn, N.Y.***, 45 AD3d 673, 845 NYS2d 430 [2d Dept 2007]). The owner's duty is to maintain the premises in a reasonably safe condition in view of the circumstances, including the likelihood of injury to others (***Comeau v Wray***, 241 AD2d 602, 659 NYS2d 347 [3d Dept 1997]). A property owner also has nondelegable duty to provide the public with reasonably safe premises and a safe means of ingress and egress (*see* ***Smith v Harri Associates, Inc.***, 109 AD3d 897, 971 NYS2d 451 [2d Dept 2013]; ***Sarisohn v 341 Commack Rd., Inc.***, 89 AD3d 1007, 934 NYS2d 202 [2d Dept 2011]). When a property owner moves for summary judgment in a premises liability action, it bears the burden of establishing that it neither created nor had actual or constructive notice of the allegedly defective condition that caused the accident (*see* ***Sheehan v J.J. Stevens & Co., Inc.***, 39 AD3d 622, 833 NYS2d 237 [2d Dept 2007]; ***Solomon v Loszynski***, 21 AD3d 366, 800 NYS2d 46 [2d Dept 2005]). To constitute constructive notice, the dangerous

condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***McMahon v Gold***, 78 AD3d 908, 910 NYS2d 561 [2d Dept 2010]).

Defendant Water District has established its entitlement to summary judgement. The extent and nature of an easement must be determined by the language contained in the grant, aided where necessary by any circumstances tending to manifest the intent of the parties (*see* ***Gates v AT&T Corp.***, 100 AD3d 1216, 956 NYS2d 589 [3d Dept 2012]; ***Phillips v Jacobson***, 177 AD2d 785, 499 NYS2d 428 [2d Dept 1986]). The easement required the Water District "to repair, maintain and operate water mains, pipe lines or any part thereof which in it discretion it installs on the premises." This requirement only involves repair etc. of the underground equipment it installs. There was no evidence in the record that any failure to honor this obligation pursuant to the easement resulted in the conditions that led to plaintiff's alleged injuries. The Water District's only obligation under the terms of the easement with regard to the surface of the walkway was "in the event it becomes necessary to dig up the ground to repair said main, to replace the terrain to its former condition." The evidence submitted shows that the easement under the walkway had not been touched by the Water District since its original installation work. The cases cited by the plaintiff (*e.g.* ***Piluso v Bell Atlantic Corp.***, 305 AD2d 68, 759 NYS2d 58 [1st Dept 2003]; ***Tagle v Jakob***, 275 AD2d 573, 574, 712 NYS2d 681 [3d Dept 2000], *affd.* on other grounds 97 NY2d 165, 737 NYS2d 331[2001]) do not require any different result, since they all involved the failure to maintain/repair equipment installed above ground pursuant to grants of easements.

In light of the foregoing, the defendant Water District is entitled to summary judgment dismissing the complaint and all cross-claims.

The adjoining property owners Daniel Krauz and Merry Krauz, and William G. Cowie and Jennifer Cowie have also established their entitlement to summary judgment.

Huntington Town Code Section 173-16 states, in relevant part that:

> The owner, lessee, tenant and occupant of lands fronting or abutting on any streets, highway, roadway, public lane, alley or square in any zoning district, shall maintain and repair the sidewalk adjoining his lands.

Huntington Town Code Section 173-15 defines a sidewalk as:

> The area between the edge of a roadway or highway pavement and the lot line of the abutting property, including but not limited to the curb, utility, brick, tree, dirt or landscape areas.

Huntington Town Code Section 173-19 states

> A violation of this article is hereby declared to be a violation, and any person, firm or corporation violating the same shall, upon conviction, be punished by a fine of not less than one hundred dollars ($100) nor more than two hundred fifty dollars ($250) for each

> offense. Each day or part thereof such violation continues after notification by the town shall be deemed a separate offense punishable in like manner. The town may also bring an action or proceeding to enjoin the violation and/or to recover the costs incurred by the town for cleaning up or otherwise remedying the conditions brought about by the violation of this chapter.

Unless a statute or ordinance clearly imposes liability upon an abutting landowner, only a municipality may be held liable for the negligent failure to maintain a public sidewalk (***Ahdout v. Great Neck Park Dist.***, 124 A.D.3d 810, 2 N.Y.S.3d 206 [2d Dept 2015]; *see* ***Marx . Great Neck Park Dist.***, 92 AD3d 925, 926, 939 NYS2d 518 [2d Dept 2012]; ***Gohn v Hoffman***, 248 AD2d 435, 436, 668 NYS2d 942 [2d Dept 1998]; ***Norcott v Central Iron Metal Scraps***, 214 AD2d 660, 660–661, 625 NYS2d 260 [2d Dept 1995]). Although the Code of the Town of Huntington requires an abutting landowner to keep a sidewalk in good and safe repair, it does not specifically impose tort liability for a breach of that duty (*see* ***Marx v. Great Neck Park Dist.***,*supra*; ***Hilpert v Village of Tarrytown***, 81 AD3d 781, 916 NYS2d 817 [2d Dept 2011]). Herein, the ordinance, even if it were applicable to these defendants, does not impose tort liability on the adjoining landowners. Moreover, pursuant to the definition of sidewalk contained in the ordinance, the subject walkway is not a sidewalk for the purposes of imposing liability on the adjoining landowners. Finally, the record contains no evidence to show that any negligence of these adjoining owners was responsible for the accident that befell plaintiff.

Based on these facts and the applicable law, the defendants Daniel Krauz and Merry Krauz, and William G. Cowie and Jennifer Cowie are entitled to summary judgment dismissing the complaint

Initially, it is noted that, despite the Town's attempt to claim otherwise, the Court finds that the Town is the fee owner of the subject walkway. The Town has established its right to summary judgment herein.

Huntington Town Code Section 174-2 defines a sidewalk as:

> The area between the edge of a roadway or highway pavement and the lot line of the abutting property, including but not limited to the curb, utility, brick, tree, dirt or landscape areas.

Huntington Town Code Section 174-3 states:

> No civil action shall be maintained against the Huntington Town Board, the Huntington Board of Trustees, the Town of Huntington, its elected officials, public officers, agents, servants and/or employees, and no civil action shall be maintained against an improvement or special district within the Town for damages or injuries to person or property sustained by reason of any highway, bridge, culvert, street, sidewalk or crosswalk owned, operated or maintained by the Town or owned, operated or maintained by any improvement or special district therein being defective, out of repair, unsafe, dangerous or obstructed unless written notice of the specific location and nature of such defective, unsafe, out of repair, 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 hereof and there was thereafter a failure or neglect within a reasonable time to repair or remove the defect, danger or obstruction complained of. In no event shall the Huntington Town Board, the Huntington Board of Trustees, the Town of Huntington, its elected officials, public officers, agents, servants and/or employees, or any improvement or special district, be liable for damage or injury to persons or property in the absence of such prior written notice. Constructive notice shall not be applicable or valid.
>
> Huntington Town Code Section 174-3 states:
>
> > Written notice of defect shall be served upon the Superintendent of Highways and/or Town Clerk by personal delivery or by registered, certified or regular mail. Such notice shall be made by a person with first-hand knowledge of the condition, defect or obstruction specified in the notice and shall identify, with particularity, the specific nature and location of each condition, defect or obstruction. In order to be valid, the notice of defect must be actually received by the Superintendent of Highways and/or Town Clerk as specified herein. Service of such notice upon a person other than as authorized in this article shall invalidate the notice.

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]; ***Ganzenmuller v Incorporated Vil. of Port Jefferson,*** 18 AD3d 703, 795 NYS2d 744 [2d Dept 2005]). The affidavits of Michael Kaplan and Suzanne Blanton establish 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* ***Amabile v City of Buffalo***, *supra;* ***Wilkie v Town of Huntington***, *supra;* ***Cenname Town of Smithtown***, *supra*).

While prior notification requirements which limit common law duties of care, are read strictly (*see* ***Gorman v Town of Huntington***, 12 NY3d 275, 879 NYS2d 379 [2009]), the courts have consistently found that municipalities, are not prohibited from requiring prior written notice of defects for areas over which the public has a general right of passage, which are the functional equivalent of a sidewalk or highway (*see* ***Scoville v Town of Amherst***, 277 AD2d 1038, 1039, 716 NYS2d 186 [4th Dept 2000] (bike path); ***Bacon v Mussaw***, 167 AD2d 741, 744, 563 NYS2d 854 (paved bike path which was public right of way); ***Schneid v City of White Plains***, 150 AD2d 549, 541 NYS2d 234 [2d Dept 1989](paved pedestrian walkway); ***Oprisko v Royal Jobbers, Inc.***, 551 NYS2d 670, 670, 158 AD2d 875, 875 [3d Dept 1990](right of way used

as public walkway). The subject walkway is the functional equivalent of a sidewalk, and, thus, subject to the Town's prior written notice requirement. The record herein establishes that no prior written notice was given to the Town Clerk or Town Highway Superintendent as required by the Town's written notice statute (*see* ***Gorman v Town of Huntington***, *supra).*

There are only two exceptions to the prior written notice rule, 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 (*see* ***Amabile v City of Buffalo***, *supra*; ***Ganzenmuller v Incorporated Vil. of Port Jefferson***, *supra*). No evidence was submitted by plaintiff with regard to either exception.

Accordingly, the motion by defendant Town for summary judgment dismissing the complaint and all cross-claims is granted.

Dated: June 12, 2015

J.S.C.

X FINAL DISPOSITION **____ NON-FINAL DISPOSITION**