

Callan v LaRocca

2016 NY Slip Op 31961(U)

August 1, 2016

Supreme Court, Suffolk County

Docket Number: 12-00049

Judge: Peter H. Mayer

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SHORT FORM ORDER

INDEX No. 12 - 00049
CAL. No. 15 - 013390T

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 12-15-15 (001)
MOTION DATE 12-14-15 (002)
ADJ. DATE 3-25-16
Mot. Seq. #001 - MD
Mot. Seq. #002 - MG

-----X

DONNA CALLAN,

Plaintiff,

- against -

MICHAEL LARocca, ROBERTO RAMIREZ
AND TOWN OF BABYLON,

Defendants.

-----X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion for summary judgment by defendant Michael Larocca, dated November 10, 2015, and supporting papers; (2) Notice of Motion for summary judgment by defendant Town of Babylon, dated November 16, 2015, and supporting papers; (3) Affirmation in Opposition by plaintiff Donna Callan, dated February 24, 2016, and supporting papers; (4) Reply Affirmation by defendant Michael Larocca, dated March 8, 2016, and supporting papers; (5) Reply Affirmation by defendant Town of Babylon, dated March 24, 2016, and supporting papers; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (Seq. 001) by defendant Michael LaRocca and the motion (Seq. 002) by defendant Town of Babylon are consolidated for purposes of this determination; and it is

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ORDERED that defendant Michael LaRocca's motion for summary judgment dismissing all claims against him is denied; and it is

ORDERED that defendant Town of Babylon's motion for summary judgment dismissing all claims against it is granted.

This action was commenced by plaintiff Donna Callan to recover damages for injuries she sustained when she tripped and fell on a broken and uneven portion of the sidewalk in front of 12 Beach Avenue, Copiague, New York. Defendant Michael LaRocca owns the real property abutting the section of sidewalk where plaintiff fell and has cross claimed against defendants Town of Babylon and Roberto Ramirez for indemnification. Roberto Ramirez, the prior owner of the property now owned by Michael LaRocca, has not appeared in this action.

Defendants LaRocca and Town of Babylon have each filed a motion for summary judgment in this matter. LaRocca argues that the alleged sidewalk defect does not constitute a dangerous condition and, even if it did, he did not create or have actual or constructive notice of it. In support of his motion, LaRocca submits copies of the pleadings, his own affidavit, the deposition testimony of plaintiff, and five photographs. The Town argues that it did not receive prior written notice of the alleged sidewalk defect as required by Town Law § 65 (a) and Town of Babylon Code § 158-2 and, therefore, cannot be held liable. In support of its motion, the Town submits, among other things, copies of the pleadings; the General Municipal Law § 50-h hearing testimony and the deposition testimony of plaintiff; four photographs; the deposition testimony of Michael LaRocca and Robert Prager; and affidavits of Jennifer Taus and Thomas Stay.

Plaintiff testified at her deposition that she was walking home from her employment at the IGA supermarket located at 870 Montauk Highway in Copiague at approximately 3:45 p.m. on March 10, 2011. She indicated that she was walking on the sidewalk on the north side of Beach Avenue, heading in the direction of the house she rented at 28 Beach Avenue and that it was "rainy." Callan explained that this was the same route she has walked, back and forth, five days a week since the year 2000. She stated that the condition of the sidewalk has been the same since she began walking on it, and that neither she nor anyone she knows has complained to anyone about its condition. Callan testified that when she approached the area of the sidewalk in front of 12 Beach Avenue she was looking "[s]traight down the street towards [her] house," had a bag of groceries in each hand, and had her handbag on her left shoulder. She indicated that she was walking at a "normal" speed when her left foot "hit" the sidewalk, causing her to go "flying forward" and land on her hands. At her General Municipal Law § 50-h hearing, she testified that the area of the sidewalk that caused her fall was "where it was all damaged, where it was paved over, [where] it dips down and there is patchwork done to it." Callan further testified that she remained on the ground for approximately a minute and looked around to see if there were any people who witnessed her fall, but saw no one. She stated that she then stood up and walked to her home, which was three houses down the block, and called her brother for assistance.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 19

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NYS3d 488 [2015]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*Nomura, supra*; see also *Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*Daliendo v Johnson*, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*Nomura, supra*; see also *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Defendant LaRocca first contends that he is entitled to summary judgment on the ground that the sidewalk condition is, in essence, a trivial defect. It is well settled that “a property owner may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip” (*Copley v Town of Riverhead*, 70 AD3d 623, 624, 895 NYS2d 452, 453 [2d Dept 2010]; see *Richardson v JAL Diversified Mgt.*, 73 AD3d 1012, 901 NYS2d 676 [2d Dept 2010]). Nevertheless, “liability does not ‘[turn] upon whether the hole or depression causing the pedestrian to fall . . . constitutes a trap’” (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78, 19 NYS3d 802, 809 [2015], quoting *Loughran v New York*, 298 NY 320, 321-322 [1948]). “A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses” (*Hutchinson v Sheridan Hill House Corp.*, *supra* at 79).

Whether a dangerous or defective condition exists on a property depends upon the particular circumstances of each case and generally is a question of fact for the jury, unless the defect is trivial as a matter of law (see *Trincere v County of Suffolk*, 90 NY2d 976, 665 NYS2d 615 [1997]; *Das v Sun Wah Rest.*, 99 AD3d 752, 952 NYS2d 232 [2d Dept 2012]). In determining whether a defect is trivial as a matter of law, a court must examine the facts presented, “including the width, depth, elevation, irregularity, and appearance of the defect along with the ‘time, place and circumstance’ of the injury” (*Trincere v County of Suffolk, supra* at 978). It has been held that a number of factors may “render a physically small defect actionable, including a jagged edge[,] a rough, irregular surface[,] the presence of other defects in the vicinity[,] or a location— such as a parking lot, premises entrance/exit, or heavily traveled walkway— where pedestrians are naturally distracted from looking down at their feet” (*Hutchinson v Sheridan Hill House Corp.*, *supra* at 78). Generally, photographs of a defective condition which accurately depict how such condition appeared on the date of an incident may be used to as proof on the issue of whether such defect is trivial (see *Das v Sun Wah Rest.*, *supra*; *Schenpanski v Promise Deli, Inc.*, 88 AD3d 982, 931 NYS2d 650 [2d Dept 2011]). Viewing the limited photographic evidence submitted by LaRocca in the light most favorable to plaintiff, LaRocco has not established, as a matter of law, that the sidewalk defect in question is trivial (see *Das v Sun Wah Rest.*, *supra*). Rather, subject sidewalk appears to have cracked and subsided, creating a gap between adjacent concrete slabs, and that such defect was patched with asphalt.

LaRocca's second contention is that he did not create the alleged sidewalk defect or have actual or constructive notice of it. "A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that [he or she] neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Altinel v John's Farms*, 113 AD3d 709, 710, 979 NYS2d 360, 362 [2d Dept 2014]; see *Ingram v Long Is. Coll. Hosp.*, 101 AD3d 814, 956 NYS2d 107 [2d Dept 2012]). As there is no evidence in the record that LaRocca was personally notified of the defect in question, the Court will consider whether or not he had constructive notice of it. "A defendant has constructive notice of a defect when the defect is visible and apparent, and existed for a sufficient length of time before the accident that it could have been discovered and corrected" (*Altinel v John's Farms*, *supra* at 710). LaRocca admits, in an affidavit submitted in support of his motion, that the alleged defect was present when he purchased the property and that neither he, nor anyone else, took any action to repair it. Accordingly, LaRocca has failed to establish prima facie entitlement to summary judgment and, therefore, his motion is denied.

Turning to the Town's motion for summary judgment, it is well established that where a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a defect which comes within the ambit of the law unless it has received prior written notice of the alleged defect, or an exception to the prior written notice requirement applies (see *Masotto v Village of Lindenhurst*, 100 AD3d 718, 954 NYS2d 557 [2d Dept 2012]; *Braver v Village of Cedarhurst*, 94 AD3d 933, 942 NYS2d 178 [2d Dept 2012]; *Pennamen v Town of Babylon*, 86 AD3d 599, 927 NYS2d 164 [2d Dept 2011]). The Court of Appeals has recognized only two exceptions to the prior written notice requirement, namely, where the municipality created the defect through an affirmative act of negligence, or a special use confers a special benefit upon the municipality (see *Yarborough v City of New York*, 10 NY3d 726, 853 NYS2d 261 [2008]; *Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77 [1999]; *Pennamen v Town of Babylon*, *supra*). Thus, if a municipality subject to a prior written notice law establishes that it lacked prior written notice of an alleged defect, the burden shifts to plaintiff to demonstrate the applicability of one of the two recognized exceptions to the prior written notice requirement (*Lipari v Town of Oyster Bay*, 116 AD3d 927, 983 NYS2d 852 [2d Dept 2014]).

Babylon Town Code § 158-2 states in relevant part,

"No civil action will be maintained against the Town for damages or injuries to person or property sustained by reason of any defective, dangerous, unsafe, out-of-repair or obstructed sidewalks of the Town . . . unless written notice thereof, specifying the particular place, was actually given to the Town Clerk of the Town and there was a failure or neglect to cause such defective, dangerous, unsafe, out-of-repair or obstructed sidewalks to be remedied . . . or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice."

In support of its motion for summary judgment, the Town has submitted affidavits of two employees, Jennifer Taus and Thomas Stay. The affidavit of Ms. Taus, a clerk-typist assigned to the Town Clerk's office, states that she searched the records of the Town Clerk and found no prior written

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notice received by the Town in relation to the alleged defect. However, counsel for plaintiff does not contend that the Town had prior written notice of the alleged sidewalk defect but, rather, that this alleged defect falls within an exception to the Town's prior written notice law; namely, that the Town created the alleged defect by effectuating a repair to the subject sidewalk using an asphalt patch (*see Yarborough v City of New York, supra*). The affidavit of Mr. Stay, Commissioner of the Department of Public Works, states that he searched the records of the Department of Public Works and found no prior written notice of the alleged sidewalk defect in front of LaRocca's property and no record of any repairs being performed by the Town at such location. Accordingly, the Town has established prima facie entitlement to summary judgment (*see Lipari v Town of Oyster Bay, supra*). The burden then shifted to plaintiff to raise an issue of triable fact (*see Nomura, supra*).

In opposition, counsel for plaintiff submits an affirmation in which he argues that since the Town, in general, uses asphalt to perform certain repairs to streets and sidewalks, it must have performed the repair to the subject sidewalk. Plaintiff has failed to produce any relevant evidence whereby the Court could find that one of the two exceptions to the prior written notice rule is applicable to the alleged sidewalk defect, or that any triable fact exists (*see Yarborough v City of New York, supra; see also Daliendo v Johnson, supra*). Accordingly, the Town's motion for summary judgment dismissing all claims against it is granted.

Dated: August 1, 2016


PETER H. MAYER, J.S.C.