Varricchio v County of Suffolk
2016 NY Slip Op 32436(U)
December 5, 2016
Supreme Court, Suffolk County
Docket Number: 09-45796
Judge: Ralph T. Gazzillo
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[* 1]

SHORT FORM ORDER

COPY

INDEX No. 09-45796
CAL. No. 16-00011OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 5-23-16 (003)
MOTION DATE 10-3-16 (004)
ADJ. DATE 10-3-16
Mot. Seq. # 003 - MG
004 - MD

---X

JOSEPH VARRICCHIO and JOHANNA VARRICCHIO,

Plaintiffs,

- against -

THE COUNTY OF SUFFOLK and THE TOWN OF ISLIP,

Defendants.

---X

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Upon the following papers numbered 1 to 33 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-17; Notice of Cross Motion and supporting papers 18-28 ; Answering Affidavits and supporting papers 29-30 ; Replying Affidavits and supporting papers 31-33 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant Town of Islip for summary judgment dismissing the complaint it is granted; and it is further

ORDERED that the cross motion by the plaintiffs for summary judgment dismissing the sixth and seventh affirmative defenses asserted by the defendant Town of Islip is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Joseph Varricchio (the plaintiff) on December 22, 2008, at approximately 5:15 p.m., when he slipped and fell on ice in the street in front of the premises known as 160 Wurz Street, Brentwood, in the Town of Islip, County of Suffolk. It is alleged that the defendant Town of Islip was negligent in that it allowed a dangerous condition to develop, exist and remain. The plaintiff Johanna Varricchio seeks damages for loss of services.

The defendant Town of Islip (the Town) now moves for summary judgment dismissing the complaint on the ground it lacked prior written notice of the alleged dangerous condition which caused the plaintiff's accident and injuries, and that it was free from other negligence. In support of the motion, the Town submits, *inter alia*, its attorney's affirmation, the pleadings, the verified bills of particulars, the deposition transcripts of the plaintiffs and three Town employees, a copy of a Department of Public Works service notice, the affidavit of Thomas Owens, dated April 12, 2016, and the affidavit of Teresa Bogardt, dated March 10, 2016. The plaintiffs oppose the Town's motion and cross-move for summary judgment dismissing the Town's sixth and seventh affirmative defenses. In support thereof, the plaintiffs submit their attorney's affirmation, the pleadings, their verified bills of particulars, a Department of Public Works service notice, a Town Highway Department drainage request with sketch, a printout of a 2009 telephone complaint, and the affidavit of Richard Berkenfeld, dated July 29, 2016.

The plaintiff testified that on the date of his accident, December 22, 2008, it snowed a total of about one foot. He testified that he removed the snow from his driveway with a snowblower at about 2:00 p.m. that same day, and put down snow melt. The plaintiff further testified that, when he was done, he noticed there was snow on the street directly in front of his driveway. He stated that he saw water in the street from the driveway apron to about five feet into the street, although he did not know how deep it was. He indicated that the snow plows cannot go down directly to the blacktop. The plaintiff further testified that he went out again around 5:30 p.m. to put out the garbage, which he placed in the street to the right of his driveway. He testified that he fell on ice as he walked back into the street to place the lid on the garbage can. He indicated that he had never made any written complaint to the Town with regard to the condition he alleges caused his injuries, only that his wife had made telephone calls.

The plaintiff Johanna Varricchio testified that prior to the date of the accident she had spoken to employees of the Town. She testified that she had written to the Town many years ago, but could not find a copy of the letter. Mrs. Varricchio testified that she kept calling the Town to complain about flooding on the street in front of her driveway. Mrs. Varricchio testified that she did not see her husband fall. Mrs. Varricchio also testified that it was very cold on the date of the accident.

Noelle M. Martin testified that she is employed by the Town of Islip as an administrative aide in the Department of Public Works, and that, as part of her employment, she investigates allegations against the Town by causing a search to be made of the official records of the Department of Public Works to ascertain whether the said Department has been given written notice of any alleged defect or dangerous condition in any Town Street. Ms. Martin testified that she searched the official records of the Department of Public Works back seven years from the date of the plaintiff's accident and found no written notice with regard the roadway condition which allegedly caused the plaintiff's injuries.

The testimony of Ms. Martin and submitted documents establishes a number of relevant facts. In 2003, the Town received a telephone complaint as to flooding at the end of the driveway at 160 Wurz Street every time it rained. In response the Town had the nearby drainage basins cleaned out. In August of 2007, another telephone complaint was received by the Town from the plaintiff Johanna Varricchio complaining about a low lying area and water collecting in front of 160 Wurz Street. The Town responded by filling in the low area with asphalt. In November of 2007, the Town received another telephone call from Mrs. Varricchio stating that a Town employee who put the asphalt in front of her driveway told her that, if the asphalt did not work, to request drainage be installed. On December 10, 2007, a Town employee issued a drainage request in response to this complaint, which described the severity of the problem as "moderate." The request also included a rough sketch of the proposed drainage.

In an affidavit submitted in support of the Town's motion, Thomas Owens states that he is the Commissioner of the Town of Islip Department of Public Works and, as such, he is familiar with its administrative and management policies. He further states that he is not aware of any changes in protocols with regard to analysis of road flooding conditions from 2007 until he took office in 2012. He states that in and around 2007 the Town had 47 open drainage requests, and that authorization for drainage work is always made on the administrative level. Mr. Owens states that, as a municipal government, some difficult decisions have to be made by the Town, including foregoing certain improvements for the greater good of the community at large. Mr. Owens further states that at times a decision has to be made with regard to priority in evaluating localized improvements. He states that some of the factors in setting such priorities are the scope of the geographical area affected, the number of properties affected and degree, the number of complaints received, whether the site was or is a pumping site, and traffic volume. Mr. Owens states that the location at 160 Wurz Street did receive a request for drainage work in November of 2007, but that the site was not a priority pumping site, was limited in geographical scope, only affected a handful of residents, was not the site of any accidents, and to the department's knowledge, and was not the subject of many complaints. Finally, Mr. Owens states that, due to fiscal consideration, administrative constraints and priorities, the drainage work on Wurz Street was not performed until 2011.

The affidavit of Teresa Bogardt states that she in employed in the office of the Town Clerk of the Town of Islip. As part of her employment she investigates allegations against the Town by causing a search to be made of the official records of the Town Clerk's office to ascertain whether the Town Clerk has been given written notice of any alleged defect or dangerous condition in any Town street. She also states that she personally made a search of the records of the Town Clerk's office going back seven years for written notice given prior to December 22, 2008, of any defect or dangerous condition in the vicinity of 160 Wurz Street, Brentwood, New York. Ms. Bogardt further states that no record of any written notice of a defect or dangerous condition in the vicinity of 160 Wurz Street had been given to the Town Clerk's office prior to December 22, 2008.

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 (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Sillman v Twentieth***

Century-Fox Film Corp., 3 NY2d 395, 165 NYS2d 498 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). 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]).

The Town has made a prima facie showing of its entitlement to judgment as a matter of law by demonstrating that it lacked prior written notice of the allegedly defective condition that caused the plaintiff's accident. 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 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* ***Conner v City of New York***, 104 AD3d 637, 960 NYS2d 204 [2d Dept 2013]; ***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]). 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, 853NYS2d 261 [2008]; ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]; ***Carlucci v Village of Scarsdale***, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]).

Pursuant to Town Law § 65-a and Town of Islip Code, as a precondition to commencing a civil action against the Town to recover damages for personal injuries sustained as a result of a defect in Town property, the Town must be given prior written notice of the defect. Town of Islip Code § 47A-3 states, in relevant part:

> A. 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.

> B. The Commissioner of Public Works shall transmit in writing to the Town Clerk, within five days after the receipt thereof, all written notices received by him pursuant to this section and Subdivision 2 of § 65-a of the Town Law. The Town Clerk shall cause all written notices received by him or her, pursuant to this section and Subdivision 2 of § 65-a of the Town Law to be presented to the Town Board within five days of the receipt thereof or at the next succeeding Town Board meeting, whichever shall be sooner.

It is noted that the plaintiffs' claim that the Town fails to comply with § 47A (B) is without merit. The testimony of Town employee Noelle Martin on which the plaintiffs base their claim has been misconstrued. This section only requires that written complaints be forwarded to the Town Clerk's office. Ms. Martin's testimony only refers to telephone complaints and stated only that verbal complaints are not referred to the Town Clerk's office. Thus, no violation of this section of the Town Code has been established.

Any verbal complaints received, or 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]). A verbal complaint reduced to writing by a municipality does not constitute prior written notice (*see* ***McCarthy v City of White Plains***, 54 AD3d 828, 829–830, 863 NYS2d 500 [2d Dept 2008]; ***Akcelik v Town of Islip***, 38 AD3d 483, 831 NYS2d 491[2d Dept 2007]; ***Cenname v Town of Smithtown***, *supra*). Prior written repair orders do not constitute prior written notice of prior defects (***Lopez v Gonzalez***, 44 AD3d 1012, 1013, 845 NYS2d 91 [2d Dept 2007]; ***McCarthy v City of White Plains***, *supra*; ***Dalton v City of Saratoga Springs***, 12 AD3d 899, 901, 784 NYS2d 702 [3d Dept 2004]). The request for drainage prepared by a Town employee is the equivalent of a work order and, thus, does not give rise to a claim that defendant has received prior written notice. The plaintiffs' reliance on ***Prucha v Town of Babylon***, 138 AD3d 108, 330 NYS3d 671 (2d Dept 2016), is misplaced, as the facts of that case are clearly dissimilar from those before this Court. 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*).

The Town having established the lack of prior written notice, the burden shifts to the plaintiffs to proffer evidence that one of the claimed exceptions to the written notice requirement applies (*see* ***Gagnon v City of Saratoga Springs***, 51 AD3d 1096, 858 NYS2d 797 [3d Dept 2008]; ***Betzold v Town of Babylon***, 18 AD3d 787, 796 NYS2d 680 [2d Dept 2005]; ***Brooks v Village of Horseheads***, 14 AD3d 756, 788 NYS2d 437 [3d Dept 2005]).

The affidavit of Richard Berkenfeld submitted by the plaintiffs is inadmissible and will not be considered by the Court. "An expert is qualified to proffer an opinion if he or she is 'possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable' "(***Maott v Ward***, 48 NY2d 455, 459, 423 NYS2d 645 [1979]; *see* ***Doviak v Finkelstein & Partners, LLP***, 137 AD3d 843, 27 NYS3d 164 [2d

Dept 2016]; ***Leicht v City of N.Y. Dept. of Sanitation***, 131 AD3d 515, 516, 15 NYS3d 157 [2d Dept 2015]; ***Flanger v 2461 Elm Realty Corp.***, 123 AD3d 1196, 998 NYS2d 502 [3d Dept 2014]). Mr. Berkenfield's recitation of his expertise fails to disclose that he has any experience with regard to the design of either roadways or storm drainage systems. Furthermore, the opinions set forth in his affidavit rely, in part, on uncertified climatological data, which is inadmissible and cannot be considered (*see* ***McBryant v Pisa Holding Corporation***, 110 AD3d 1034, 973 NYS2d 757 [2d Dept 2013]; ***Morabito v 11 Park Place LLC***, 107 AD3d 472, 967 NYS2d 694 [1st Dept 2013].

The plaintiffs have also failed to clearly establish that the alleged dangerous condition was due to flooding. The plaintiff testified that on the date of his accident it snowed a total of about one foot. He further testified that the snow plows cannot go down directly to the blacktop. While a municipality may be held liable if its snow removal efforts result in a dangerous condition or exacerbate a previously existing dangerous condition (***Joseph v Pitkin Carpet***, 44 AD3d 462, 843 NYS2d 586 [1st Dept 2007]), liability will not attach for its failure to remove all the snow and ice from a particular area, because such failure is not an affirmative act of negligence (***Stallone v Long Is. R. R.***, 69 AD3d 705, 894 NYS2d 65 [2d Dept 2011]; ***Groninger v Vil. of Mamaroneck***, 67 AD3d 733, 888 NYS2d 205 [2d Dept 2010]; ***Zwielich v Incorporated Vil. of Freeport***, 208 AD2d 920, 617 NYS2d 871 [2d Dept 1994]). Based upon the plaintiff's own testimony, it is unclear whether or not the alleged condition which caused his fall was a result of flooding or the snowfall.

In any event, the Town is entitled to summary judgment dismissing the complaint. A municipality is immune from liability "arising out of claims that it negligently designed [a] sewerage system" or storm drainage system (***Tappan Wire & Cable, Inc. v County of Rockland***, 7 AD3d 781, 782, 777 NYS2d 517 [2d Dept 2004]; *see* ***Zarlin v Town of Clarkstown***, 102 AD3d 865, 958 NYS2d 464 [2d Dept 2013]; ***Carbonaro v Town of N. Hempstead***, 97 AD3d 624, 948 NYS2d 645 [2d Dept 2012]; ***Fireman's Fund Ins. Co. v County of Nassau***, 66 AD3d 823, 887 NYS2d 242 [2d Dept 2009]). However, a municipality is not immune from liability arising out of claims that it negligently maintained its storm drainage system (see ***De Witt Props. v City of New York***, 44 NY2d 417, 406 NYS2d 16 [1978]; ***Zarlin v Town of Clarkstown***, *supra*; ***Carbonaro v Town of N. Hempstead***, *supra*). It is also well settled that a governmental entity has a duty to the public to keep its streets in reasonably safe condition (*see* ***Friedman v State of New York***, 67 NY2d 271, 502 NYS2d 669 [1986]; ***Weiss v Fote***, 7 NY2d 579, 200 NYS2d 409 [1960]). While this duty is nondelegable, municipalities are accorded a qualified immunity from liability arising out of a highway planning decision which derives from a concern about unwarranted intrusion into discretionary governmental functions (*see* ***Friedman v State of New York***, *supra*; ***Weiss v Fote***, *supra*). Once a governmental entity becomes aware of a dangerous condition, undertakes a reasonable study thereof with an eye toward alleviating the danger, and formulates a remedial plan, "an unjustifiable delay in implementing the plan constitutes a breach ... just as surely as if it had totally failed to study the known condition in the first instance" (***Friedman v State of New York,*** *supra*, at 286, 502 NYS2d 669). However, deferment of remedial action may, however, be justified by proof that "the delay stemmed from a legitimate ordering of priorities with other projects based on the availability of funding" (***Friedman v State of New York***, *supra* at 287, 502 NYS2d 669; *see* ***Trautman v State of New York***, 179 AD2d 635, 578 NYS2d 24 [2d Dept 1992]; ***Longo v Tafaro***, 137 AD2d 661, 524 NYS2d 754 [2d Dept 1988]).

The Town has established through the affidavit of Thomas Owens, the Commissioner of the Town of Islip Department of Public Works, that at the time of the plaintiff's accident there were 47 open drainage requests. Based upon the criteria used by the Town, the plaintiffs' request was of a low priority because the site was not a priority pumping site, it was limited in geographical scope, only affected a handful of residents, was not the site of any accidents, and to the department's knowledge, was not the subject of many complaints. Finally, the affidavit noted that, unfortunately, due to fiscal consideration, administrative constraints and priorities, the drainage work on Wurz Street was not able to be performed until 2011. As such, the Town is entitled to qualified immunity, which shields it from liability herein (*see* ***Graff v State of New York***, 126 AD3d 1081, 3 NYS3d 458 [3d Dept 2015]; ***Cruz v City of New York***, 201 AD2d 606, 607 NYS2d 969 [2d Dept 1994]).

Accordingly, the motion by the Town of Islip for summary judgment dismissing the complaint is granted. The cross motion by the plaintiff seeks summary judgment dismissing the Town's sixth and seventh affirmative defenses asserting the plaintiffs' failure to provide written notice as defenses herein. For the reasons set forth above, the plaintiffs' cross motion is denied.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: 12/5/16

A.J.S.C.

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