Oriani v Village of Patchogue
2016 NY Slip Op 32517(U)
October 6, 2016
Supreme Court, Suffolk County
Docket Number: 14-10999
Judge: W. Gerald Asher
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[* 1]

SHORT FORM ORDER

INDEX No. 14-10999
CAL. No. 15-01928OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 1-12-16 (003)
MOTION DATE 12-22-15 (004)
ADJ. DATE 3-15-16
Mot. Seq. # 003 - MG
004 - MG CASEDISP

---X

EDWARD ORIANI,

Plaintiff,

- against -

VILLAGE OF PATCHOGUE, TOWN OF BROOKHAVEN and COUNTY OF SUFFOLK,

Defendant.

---X

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---X

INCORPORATED VILLAGE OF PATCHOGUE,

Third Party Plaintiff,

- against -

202-206 MAIN STREET, INC.,

Third Party Defendant.

---X

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Upon the following papers numbered 1 to 43 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; 30 - 43; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 17 - 27; Replying Affidavits and supporting papers 28 - 29; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED the motions herein are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Village of Patchogue for summary judgment in its favor dismissing plaintiff's complaint and the crossclaim of defendant 202-206 Main Street, LLC, is granted; and it is further

ORDERED that the motion by defendant 202-206 Main Street, LLC, for summary judgment in its favor dismissing plaintiff's complaint and the third-party complaint is granted.

Plaintiff Edward Oriani commenced this action to recover damages for personal injuries he allegedly sustained on January 10, 2014, when he slipped and fell on the sidewalk in front of commercial premises know as 206 East Main Street in the Village of Patchogue. The complaint alleges negligence on behalf of the Village of Patchogue, the Town of Brookhaven and Suffolk County. The action against the Town of Brookhaven has been discontinued. The Village of Patchogue, in a third-party action, seeks indemnification and contribution from third-party defendant property owner, 202-206 Main Street, LLC. 202-206 Main Street has counterclaimed against the Village of Patchogue. The complaint has been amended to allege a direct action against 202-206 Main Street, LLC; however, it has not been provided by Main Street. Issue has been joined, discovery has been completed, and a note of issue has been filed.

Defendant Village of Patchogue now moves for summary judgment dismissing the complaint and the cross claims of 202-206 Main Street, maintaining that no written notice of the alleged defective condition had been given, the Village Code imposes liability of sidewalk maintenance and repair on the adjoining property owner, and that on January 10, 2014, at the time of plaintiff's alleged fall, a storm was in progress. In support of the motion the Village of Patchogue submits, among other things, an affidavit of meteorologist Mark L. Kramer; the pleadings; the deposition transcripts of plaintiff, Village of Patchogue Clerk Patricia Seal, and 202-206 Main Street member Isaac Moradi; various photographs; letters dated July 30, 2013, and April 15, 2014.

Third-party defendant and property owner 202-206 Main Street moves for summary judgment dismissing "the complaint" of the plaintiff Edward Oriani, along with all cross claims and the third-party complaint. Plaintiff's first amended verified complaint is notably absent from 202-206 Main Street's moving papers, as well as the caption, but can be surmised from the verified answer to the first amended complaint, and it has been submitted by the Village of Patchogue in the related motion. In support of the motion, 202-206 Main Street submits the pleadings, the note of issue, and the deposition transcripts of plaintiff, Patricia Seal, and Isaac Moradi.

In opposition to both motions, plaintiff submits his own deposition transcript and the deposition transcripts of Patricia Seal and Isaac Moradi. He also submits various photographs, letters dated July 30, 2013, and April 15, 2014, a sidewalk repair contract between the Village of Patchogue and 202-206 Main Street dated April 24, 2014, climatological data, and an affidavit of a professional engineer, Scott M. Silberman.

Plaintiff testified that on January 10, 2014, he was working as an optician for Brookhaven Opticians and, between 10:30 a.m. and 11:00 a.m., he left the office to walk east to Bethpage Credit Union. He testified the sidewalks were icy and he remembers icy rain and precipitation that morning, but not as he

started walking. He observed a section of broken sidewalk and ice in front of the Sherwin Williams store and decided to proceed. His errata sheet indicates "I know that I slipped and fell but I don't remember which leg I was moving forward at the moment I slipped." He remembers waking up inside the store. Isaac Moradi testified that he is a member of 202-206 Main Street, LLC, and which owns the property known as 202-206 East Main Street in Patchogue and leases it to Sherwin Williams. He admits that the owner, not the tenant, was responsible for the sidewalk pursuant to the lease.

Patricia Seals, Village Clerk for the Village of Patchogue, testified that she performed a search of the Village's written records. She testified the search produced no record of a written notice of a sidewalk defect at 206 East Main Street. On July 30, 2013, the village sent a letter requesting 202-206 Main Street, LLC, repair the sidewalk. In 2014, the sidewalk was replaced using federal sidewalk reconstruction, streetscape, and beautification grant money.

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 NewYork 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 Village 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. Section 6-628 of the Village Law states as follows:

> No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed or for damages or injuries to person or property sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk, street, highway, bridge or culvert unless written notice of the defective, unsafe, dangerous or obstructed condition or of the existence of the snow or ice, relating to the particular place, was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or to cause the snow or ice to be removed, or the place otherwise made reasonably safe.

Where, as here, a municipality has enacted a prior written notice statute pursuant to Village Law 6-628, 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]; ***Forbes v City of New York***, 85 AD3d 1106, 1107, 926 NYS2d 309 [2d Dept 2011]).

The testimony of Patricia Seal, the Village Clerk, establishes that there was no prior written notice of the alleged defective condition filed with Village Clerk's office as required by the Village ordinance. The testimony of an official charged with the responsibility of keeping an indexed record of all notices of defective conditions received by a village is sufficient to establish that no prior written notice was filed (***Velho v Village of Sleepy Hollow***, 119 AD3d 551, 552, 987 NYS2d 879 [2d Dept 2014]; ***Petrillo v Town of Hempstead***, 85 AD3d 996, 998, 925 NYS2d 866 [2d Dept 2011]; ***Pagano v Town of Smithtown***, 74 AD3d 1304, 904 NYS2d 729 [2d Dept 2010]; ***LiFrieri v Town of Smithtown***, 72 AD3d 750, 752, 898 NYS2d 629 [2d Dept 2010]; ***Scafidi v Town of Islip***, 34 AD3d 669, 824 NYS2d 410 [2d Dept 2006]). The testimony need only indicate that the official has caused a search of the department's records to be made and that no written notice of the defective condition was found (***Cruz v City of New York***, 218 AD2d 546, 547 [1st Dept 1995]; ***Goldberg v Town of Hempstead***, 156 AD2d 639, 733 NYS2d 691 [2d Dept 1989]; *see* ***Campisi v Bronx Water & Sewer Serv.***, 1 AD3d 166, 766NYS2d 560 [1st Dept. 2003]; *see also* ***Kapilevich v City of New York***, 103 AD3d 548, 960 NYS2d 39 [1st Dept 2013]). Any verbal complaints or other internal documents generated by the Village 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 also 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 fact that the Village sent a letter dated July 30, 2013 to Main Street to repair the sidewalk in the vicinity of the alleged dangerous condition is insufficient to give the Village prior written notice (*see* ***Factor v Town of Islip***, 134 AD3d 984, 22 NYS3d 230 [2d Dept 2015]; ***Arcabascio v City of New York***, 91 AD3d 684, 937 NYS2d 121 [2d Dept 2012]; ***Michela v County of Nassau***, 176 AD2d 707, 574 NYS2d 965 [2d Dept 1991]). Similarly, neither constructive notice nor actual notice of a defect obviates the need for prior written notice to the Village (*see* ***Amabile v City of Buffalo***, *supra;* ***Wilkie v Town of Huntington***, *supra;* ***Cenname Town of Smithtown***, *supra*).

The Village having established the lack of prior written notice, the burden shifts to plaintiff 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 affirmative negligence exception "is limited to work by the City that immediately results in the existence of a dangerous condition" (*see* ***Yarborough v City of New York***, 10 NY3d 726, 853 NYS2d 261 [2008]; ***Oboler v City of New York***, 8 NY3d 888, 832 NYS2d 871 [2007]). The work herein was commenced after plaintiff's alleged accident. Plaintiff has failed to proffer evidence in admissible form sufficient to raise an issue of fact as to whether the Village's alleged negligence caused or immediately resulted in the existence of a dangerous condition (*see* ***Epperson v City of New York,*** 133 AD3d 522, 21 NYS3d 23 [1st Dept 2015]; ***Yarborough v City of New York***, *supra*; ***McCarthy v City of White Plains***, 54 AD3d 828, 863 NYS2d 500 [2d Dept 2008]). Thus, plaintiff having failed to raise an issue of fact by submitting evidence in admissible form to show that the defendant either affirmatively created the condition causing plaintiff's accident the Village is entitled to summary judgment (*see* ***Gonzalez v Town of Hempstead***, *supra;* ***Forbes v City of New York***, *supra*).

As to 202-206 Main Street's motion, in order to establish a prima facie slip and fall negligence case, a plaintiff is required to show that the landowner failed to meet his proprietary duty of ordinary care by either creating the dangerous condition which caused the injury, or that defendant had actual or constructive notice of the condition and failed to rectify it (*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]). Although proximate cause can be established in the absence of direct evidence of causation and may be inferred from the facts and circumstances of the case, where the accident could have been caused by some other factor, such as a misstep or loss of balance, mere speculation as to the cause of the fall is fatal to a cause of action (*see* ***Lissauer v Shaarei Halacha, Inc.***, 37 AD3d 427, 829 NYS2d 229 [2d Dept 2007]; ***Oettinger v Amerada Hess Corp.***, 15 AD3d 638, 790 NYS2d 693 [2d Dept 2005]; ***Garvin v Rosenberg***, 204 AD2d 388, 614 NYS2d 190 [2d Dept 1994]). Moreover, while a landowner has a duty to maintain his property in a reasonably safe manner, he has no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous (*see* ***Capozzi v Huhne***, 14 AD3d 474, 788 NYS2d 152 [2d Dept 2005]; ***Jang Hee Lee v Sung Whun Oh***, 3 AD3d 473, 771 NYS2d 134 [2d Dept 2004]; ***Cupo v Karfunkel,*** 1 AD3d 48, 767 NYS2d 40 [2d Dept 2003]).

Defendant 202-206 Main Street has met its burden of establishing prima facie entitlement to summary judgment by demonstrating that plaintiff was unable to identify the cause of his accident (*see* ***Lissauer v Shaarei Halacha, Inc.***, *supra*; ***Oettinger v Amerada Hess Corp.***, *supra*; ***Rizzi v Y.S.G.F. Realty, LLC.***, *supra*). Plaintiff testified that he did not know what caused his fall. Plaintiff specifically testified "I only can tell you that I stood in front of it, stopped and assessed that this was difficult to do, to walk over past this stretch of the sidewalk and that was my last clear recollection." When he started walking his "memory breaks." He testified that he did not recall if he took steps to go further east, after

he assessed what was in front of him. When asked if he fell, plaintiff responded, "I don't know that for sure," and that he "presumed that [he] slipped." As such, plaintiff has failed to raise a triable issue of fact in opposition to defendants' motion (*see* ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Any cause of plaintiff's fall is speculative, since plaintiff testified that he himself did not know the cause (*see* ***Plowden v Stevens Partners, LLC***, 45 AD3d 659, 846 NYS2d 238 [2d Dept 2007]; ***Kane v Hestia Greek Rest. Inc.***, 4 AD3d 189, 772 NYS2d 59 [1st Dept 2004]; ***Bitterman v Grotyoham***, 295 AD2d 383, 743 NYS2d 167 [2d Dept 2002]; ***Rizzi v Y.S.G.F. Realty, LLC.***, *supra*).

Thus, plaintiff's failure to identify the cause of his accident or raise an issue of fact in opposition to 202-206 Main Street's motion requires dismissal of plaintiff's complaint, since a jury would be forced to speculate as to the cause of his accident which could have been caused by a sudden misstep or loss of balance (*see* ***Penn v Fleet Bank***, 12 AD3d 584, 785 NYS2d 107 [2d Dept 2004], *lv denied* 5 NY3d 704, 801 NYS2d 2 [2005]; ***Bitter man v Grotyoham***, *supra*; ***Plowden v Stevens Partners, LLC***, *supra*; *see also* ***Rizzi v Y.S.G.F. Realty, LLC.***, *supra*). Accordingly, 202-206 Main Street's motion for summary judgment dismissing plaintiff's amended complaint and the third-party complaint is granted.

Dated: Oct. 6, 2016

W. Gerard Asher
J.S.C.
HON. W. GERARD ASHER

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION