Soehl v Town of Babylon
2016 NY Slip Op 32525(U)
October 6, 2016
Supreme Court, Suffolk County
Docket Number: 60273/2013E
Judge: William B. Rebolini

Short Form Order

COPY

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

William Soehl,

Plaintiff,

-against-

The Town of Babylon, Robert J. Clemens, Toni Clemens, Lawrence C. Landa and Jennifer E. Landa,

Defendants.

Index No.: 60273/2013E

Motion Sequence No.: 001; MG
Motion Date: 8/4/15
Submitted: 1/13/16

Motion Sequence No.: 002; MG
Motion Date: 8/10/15
Submitted: 1/13/16

Motion Sequence No.: 003; MG; CD
Motion Date: 9/16/15
Submitted: 1/13/16

Attorney for Defendants
Robert J. Clemens and Toni Clemens:

Nicolini, Paradise, Ferretti, Sabella
114 Old Country Road, #500
Mineola, NY 11501

Attorney for Defendants
Lawrence C. Landa and Jennifer E. Landa:

Devitt, Spellman, Barrett, LLP
50 Route 111, Suite 314
Smithtown, NY 11787

Clerk of the Court

Attorney for Plaintiff:

Suris & Associates
999 Walt Whitman Road, Suite 201
Melville, NY 11747

Attorney for Defendant
Town of Babylon:

Joseph Wilson, Town Attorney
Town of Babylon
200 East Sunrise Highway
Lindenhurst, NY 11757

Upon the following papers numbered 1 to 58 read upon these motions for summary judgment: Notice of Motion and supporting papers, 1 - 12; 13 - 28; 29 - 43; Answering Affidavits and supporting papers, 44 - 47; 48 - 49; 50 - 52; Replying Affidavits and supporting papers, 53 - 54; 55 - 56; 57 - 58; it is

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

ORDERED that the motion by defendants Robert J. Clemens and Toni M. Clemens for summary judgment dismissing the complaint and any cross claims against them is granted; and it is further

ORDERED that the motion by defendants Lawrence C. Landa and Jennifer E. Landa for summary judgment dismissing the complaint and any cross claims against them is granted; and it is further

ORDERED that the motion by defendant Town of Babylon for summary judgment dismissing the complaint and any cross claims against it is granted.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff William Soehl on January 28, 2012, when he tripped and fell on a raised part of the sidewalk in front of residential properties located at 603 and 605 Hollywood Avenue, Copiague, New York. Plaintiff alleges that his injuries occurred as a result of the negligence of defendants Robert J. Clemens and Toni M. Clemens, the owners of 605 Hollywood Avenue, defendants Lawrence C. Landa and Jennifer E. Landa, the owners of 603 Hollywood Avenue, and the Town of Babylon (Town).

Defendants Robert J. Clemens and Toni M. Clemens now move for summary judgment dismissing the complaint and any cross claims against them. In support of the motion the Clemens submit, *inter alia*, their attorney's affirmation, the pleadings, the verified bill of particulars, the deposition transcripts of the plaintiff, Robert J. Clemens, Toni M. Clemens, and Robert Prager, as a witness for the defendant Town, five (5) photographs, and copies of the current and prior versions of Section 191-6 (A) of the Town Code of the Town of Babylon. Defendants Lawrence C. Landa and Jennifer E. Landa also move for summary judgment dismissing the complaint and any cross claims against them. In support of the motion the defendants Landa submit, *inter alia*, their attorney's affirmation, the pleadings, the verified bill of particulars, the deposition transcripts of the plaintiff, Robert J. Clemens, Toni M. Clemens, Robert Prager, Lawrence Landa, Jennifer E. Landa, 10 photographs, the affidavit of Lawrence Landa, dated July 1, 2015, and the affidavit of Jennifer E. Landa, dated July 1, 2015. Defendant Town also moves for summary judgment. In support of its motion, it submits, *inter alia*, a copy of the notice of claim, its attorney's affirmation, the pleadings, the verified bill of particulars, the deposition and 50-h examination transcripts of the plaintiff, the deposition transcripts Robert J. Clemens Toni M. Clemens, Robert Prager, Lawrence Landa and Jennifer E. Landa, the affidavit of Jennifer Taub, dated July 28, 2015, and the unsworn affidavit of Thomas Stay, dated July 2015.

Plaintiff testified at his deposition that his accident occurred on January 28, 2015, between 6:00 and 6:30 p.m. He was walking west on the north side of Hollywood Avenue, heading home after picking up food at a local Chinese restaurant. He was approximately half a block from home when the accident occurred. Plaintiff testified that he would walk along Hollywood Avenue once

or twice a week. He was not aware of any other accidents which occurred on the area of sidewalk where he fell. Plaintiff testified that the street lights were on when he walked to the restaurant, but they were off as he walked back to his home, and that it was dark at the time of his accident. Plaintiff testified that he was in the process of taking a step with his right foot when his foot came into contact with a raised flag in the sidewalk and he fell to the ground. He testified that the raised flag straddled the border of the properties located at 603 and 605 Hollywood Avenue. Plaintiff further testified that prior to January 28, 2015, he had never made any complaints to the Town or any other municipality regarding the defective sidewalk condition, nor was he aware of anyone else who had complained to the Town. He also testified that at no time prior to his accident was he aware of any construction or repair work being performed in the area where he fell.

Defendant Robert Clemens testified that he and his wife Toni Clemens were the owners of the premises located at 605 Hollywood Avenue, Copiague. They had owned the property for approximately fifteen (15) years, but that they had lived there prior to that time, when the property was owned by his wife's mother. He testified that his neighbors, the Landas, reside at 603 Hollywood Avenue. Mr. Clemens testified that the sidewalk in front of the properties has never been resurfaced or re-paved while he has lived there, and that he never witnessed any municipal employees performing any work or repairs on the sidewalk. He testified that he had noticed the sidewalk was cracked and uneven prior to plaintiff's accident, but that he had never complained to any one about its condition. Mr. Clemens further testified that he believed that a tree on the Landas' property had caused the sidewalk to uplift. However, he also testified that he had not seen any roots near the sidewalk, and that his belief as to the cause of the cracked and uneven condition was based on speculation. Toni Clemens also testified that the cracked and raised sidewalk slabs were in front of both her house and the Landas' house. She testified that she never witnessed any work being done on the sidewalk or received any complaints with regard to the sidewalk. Ms. Clemens further testified that she has never witnessed any municipal employees performing any work or repairs on the sidewalk. She also testified that the artificial lighting conditions in front of their home and that of the Landas were fine.

Mr. Landa testified that he and his wife Jennifer had owned and lived in the premises at 603 Hollywood Avenue, Copiague, since 2005. He testified that they had never received any notification from the Town to repair the sidewalk in front of their house. Mr. Landa further testified that prior to January 28, 2015, he had never made any verbal or written complaints to the Town or any other municipality regarding the sidewalk in front of his house. Ms. Landa also testified that she had never made any verbal or written complaints to the Town or any other municipality regarding the sidewalk in front of his house, nor had she ever observed the Town performing repairs on the subject sidewalk. Each of the Landas submitted affidavits stating that neither they, nor anyone acting on their behalf, ever did any work on the area of the sidewalk where the plaintiff's accident occurred.

Robert Prager testified as a witness for the Town. He is employed by the Town as a highway construction supervisor and his duties include all cement and repair work on curbs, streets and sidewalks within the Town. He testified that, prior to his deposition, he visited the accident site and conducted a visual inspection of the sidewalk area in front of 603 and 605 Hollywood Avenue,

Copiague. He stated that he observed no Town owned trees in the vicinity of the subject sidewalk. He opined that tree roots from a tree in front of 603 Hollywood Avenue may have caused the sidewalk to raise the sidewalk in that area. Mr. Prager also testified that homeowners are responsible for the maintenance and repair of sidewalks abutting their property in the Town of Babylon. He further testified that in certain instances the Town may repair sidewalks in certain instances, such as when the Town has performed road or drainage work and sidewalks are damaged in the process. Mr. Prager further testified that, pursuant to his request, Yvonne Di Carlo, an employee of the Public Works Department, searched the records of the Department of Public Works for any complaints or work performed at the location of the plaintiff's accident. Mr. Prager testified that the search revealed that no written or verbal complaints were made to the Department of Public Works regarding the subject sidewalk prior to January 28, 2015. He testified that the search also showed that no maintenance or repair work had been performed to the subject sidewalk prior to plaintiff's accident.

The affidavit of Jennifer Taus states that she is an employee of the Town Clerk's office, which is responsible for keeping and maintaining written records of all written notices of roadway and sidewalk defects received. Her job duties include intake and logging in of written notices of such defects. The affidavit states that she has searched the records of the Clerk's office for any prior written notice(s) of any sidewalk defect for the sidewalk located in front of the residential properties located at 603 and 605 Hollywood Avenue, Copiague, prior to January 28, 2015. It states that her search revealed that the records contain no prior written notice of a side walk defect for that location for any time prior to January 28, 2015. The affidavit of Thomas Stay is unsworn, and, thus, is inadmissible.

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 Hospital***, 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]).

Both the defendants Clemens and Landa have established their prima facie entitlement to summary judgment dismissing the complaint. "Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner" (***Hausser v Giunta***, 88

NY2d 449, 452–453, 646 NYS2d 490 [1996]; *see* ***Bachvarov v Lawrence Union Free Sch. Dist.***, 131 AD3d 1182, 17 NYS3d 168 [2d Dept 2015]; ***Maya v Town of Hempstead***, 127 AD3d 1146, 8 NYS3d 372 [2d Dept 2015]). An abutting owner or lessee will be liable to a pedestrian injured by a dangerous condition on a public sidewalk only when the owner or lessee either created the condition or caused the condition to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner or the lessee and expressly makes the owner or the lessee liable for injuries caused by a breach of that duty (***Rodriguez v City of Yonkers***, 106 AD3d 802, 965 NYS2d 527 [2d Dept 2013]; ***Hevia v Smithtown Auto Body of Long Is., Ltd.***, 91 AD3d 822, 937 NYS2d 284 [2d Dept 2012]; *see* ***Dalder v Incorporated Vil. of Rockville Ctr.***, 116 AD3d 908, 983 NYS2d 83 [2d Dept 2014]; ***Morelli v Starbucks Corp.***, 107 AD3d 963, 968 NYS2d 542 [2d Dept 2013]; ***Petrillo v Town of Hempstead***, 85 AD3d 996, 925 NYS2d 660 [2d Dept 2011]). "In order for a statute, ordinance or municipal charter to impose tort liability upon an abutting owner for injuries caused by his or her negligence, the language thereof must not only charge the landowner with a duty, it must also specifically state that if the landowner breaches that duty he will be liable to those who are injured" (***Conlon v Village of Pleasantville***, 146 AD2d 736, 737, 537 NYS2d 221[2d Dept 1989]; *see* ***Obee v Ricotta***, 140 AD3d 1134, 35 NYS3d 386 [2d Dept 2016]; ***Bachvarov v Lawrence Union Free Sch. Dist.***, *supra*; ***Dalder v Incorporated Vil. of Rockville Ctr.***, 116 AD3d 908, 983 NYS2d 835 [2d Dept2014]).

The defendants Clemens and Landa have submitted evidence that they did not create the alleged dangerous condition of the sidewalk in front of their residences or that they caused the condition to occur because of a special use. Any testimony that the condition was caused by the roots of a tree on the Landa' property is entirely speculative and insufficient to raise an issue of fact.

As to liability based on statute or ordinance, Section 191-6 (A) of the Town Code of the Town of Babylon states:

> Each owner, lessor, lessee, tenant, occupant or other person in charge of any property within the Town shall keep the sidewalk in front of or abutting the lot, house, or building in good and safe repair and shall maintain and repair the sidewalk adjoining his property. Such owner, lessor, lessee, tenant or occupant, and each of them, shall be liable for any injury or damage to person or property by reason of the omission, failure or neglect to repair or maintain such sidewalk in a safe condition.

However, this section of the Town Code was only amended to impose tort liability on adjoining property owners on June 19, 2012, more than four and a half months after plaintiff's accident. These defendants have established that the prior Section 191-6 did not impose such liability on the abutting landowners and, therefore, cannot be used to impose liability on these defendants.

In response, plaintiff attempts to impose liability on the Clemens and the Landa based upon an alleged failure to properly light the sidewalk where plaintiff tripped and fell. "Absent a hazardous condition or other circumstance giving rise to an obligation to provide exterior lighting for a particular area, landowners are generally not required 'to illuminate their property during all hours of darkness' " (***Miller v Consolidated Rail Corp.***, 9 NY3d 973, 974, 848 NYS2d 599 [2007], quoting ***Peralta v Henriquez***, 100 NY2d 139, 145, 760 NYS2d 741 [2003]; *see* ***Steed v. MVA Enters.***, 136 AD3d 793, 794, 26 NYS3d 98 [2d Dept 2016]). The sidewalk, however, is not owned by either the Clemens or the Landa, and thus, they had no legal obligation to provide lighting for this section of sidewalk. Plaintiff's reliance on ***Conneally v Diocese of Rockville Ctr.***, 116 AD3d 905, 984 NYS2d 127 (2d Dept 2014) is misplaced. In that case the plaintiff allegedly tripped and fell due to an elevation differential between the outdoor plaza area of the premises owned by the defendants and the abutting public sidewalk below it. The court found that because the accident occurred at the intersection of the public sidewalk and the defendants property, and because the plaintiff was an invitee on the defendants premises, there was an issue of fact as to whether the defendants had properly lit the area where the accident occurred. That is not the case here, where the plaintiff fell on the Town's sidewalk, not on property owned by either the Clemens or the Landa.

Defendant Town has established its prima facie entitlement to summary judgment dismissing the plaintiffs' complaint by setting forth proof in admissible form that it had no prior written notice of any defect in the sidewalk located in front of, the date of the alleged accident, and that it did not have a duty to provide lighting in the area where plaintiff's accident occurred.

Section 158-2 of the Town Code of the Town of Babylon states:

> 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 or in consequence of the existence of snow, ice or anything upon any of its sidewalks, unless such sidewalks have been constructed or are maintained by the Town pursuant to statute; nor shall any action be maintained for damages or injuries to person or property sustained by reason of such defective, dangerous, unsafe, out-of-repair or obstructed sidewalks or in consequence of such existence of snow, ice or anything upon any of its sidewalks unless written notice thereof, specifying the particular place, was actually given to the Town Clerk or to the Commissioner of the Department of Public Works 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, such snow or ice

> to be removed or to make the place otherwise reasonably safe within a reasonable time after the receipt of such 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]; ***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 Robert Prager with regard to the search carried out of the records of the Department of Public Works (*see* ***Kapilevich v City of New York***, 103 AD3d 548, 960 NYS2d 39 [1st Dept 2013]), as well as the affidavit of Jennifer Taus establish that there was no prior written notice filed with either the Town Clerk's office or with the Department of Public Works as required by the Town ordinance. Any 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]). 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).* 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]; ***Velho v Village of Sleepy Hollow***, 119 AD3d 551, 552, 987 NYS2d 879 [2d Dept 2014]; ***Berner v Town of Huntington***, 304 AD2d 513, 757 NYS2d 585 [2d Dept 2003], ***Amabile v City of Buffalo***, *supra;* ***Wilkie v Town of Huntington***, *supra;* ***Cenname Town of Smithtown***, *supra*). Thus, plaintiff has failed to raise an issue of fact by submitting evidence in admissible form to show that the Town either affirmatively created the condition causing plaintiff's accident or of a special use of the property. The Town, therefore, is entitled to summary judgment (*see* ***Gonzalez v Town of Hempstead***, *supra;* ***Forbes v City of New York***, *supra*).

Plaintiff's claim in response that the Town failed to maintain its street light at the accident location does not require a different result. A municipality's duty to maintain existing street lights is limited to those situations where illumination is necessary to avoid dangerous or potentially hazardous conditions. In order to prevail, a plaintiff must show that the municipality permitted a dangerous or potentially hazardous condition to exist and cause injury (***Thompson v City of New York***, 78 NY2d 682, 578 NYS2d 507 [1991]; *see* ***Hayden v City of New York***, 26 AD3d 262, 809

NYS2d 75 [2006]; ***Michetti v City of New York,*** 184 AD2d 263, 585 NYS2d 201 [1992]). Since no evidence has been submitted showing that the Town had notice of the alleged dangerous condition, there is no basis for holding the Town liable for failing to provide lighting (*see* ***Thompson v City of New York***, *supra*; ***Adamson v City of New York***, 104 AD3d 533, 961NYS2d 402 [2d Dept 2013]).

Accordingly, the motion by defendants Robert J. Clemens and Toni M. Clemens for summary judgment dismissing the complaint and any cross claims against them is granted. The motion by defendants Lawrence C. Landa and Jennifer E. Landa for summary judgment dismissing the complaint and all cross claims against them is also granted. Furthermore, the motion by defendant Town of Babylon for summary judgment dismissing the complaint and all cross claims against it is granted.

Dated: 10/6/2016

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

___X___ FINAL DISPOSITION_____ NON-FINAL DISPOSITION