

Thomas v City of Yonkers
2016 NY Slip Op 33171(U)
November 16, 2016
Supreme Court, Westchester County
Docket Number: Index No. 59559/2014
Judge: Mary H. Smith
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DECISION AND ORDER

To commence the statutory period of appeals as of right (CPLR 5531[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

ALICE THOMAS and THOMAS MELAKATHU,

Plaintiffs,

-against-

MOTION DATE: 11/04/16
INDEX NO.: 59559/2014

THE CITY OF YONKERS,

Defendant.

The following papers numbered 1 to 4 were read on this unopposed motion by defendant for an Order pursuant to CPLR 3212 granting defendant summary judgment, etc.

Papers Numbered

Notice of Motion – Affirmation (Levinson) – Exhs. A-J – Memorandum of Law.....1-4

Upon the foregoing papers, it is Ordered that this unopposed motion by defendant for an Order pursuant to CPLR 3212 and General Municipal Law 50-i granting defendant summary judgment and dismissing plaintiff's complaint is disposed of as follows:

This is an action wherein plaintiff Alice Thomas seeks to recover for personal injuries that she allegedly sustained on October 3, 2013, at approximately 8:45 a.m., as a result of her tripping and falling on a City of Yonkers' sidewalk located at at 443 Bronxville Road, Yonkers, New York. According to plaintiff Thomas, she had been walking along the sidewalk and then tripped and fell over a metal stump protruding two inches out of the sidewalk.

Plaintiff Thomas alleges that the stump was a remnant of a metal sign or post removed by defendant.

Plaintiffs commenced this action, alleging negligence against defendant in its ownership, operation, management, maintenance and control of the sidewalk and in failing to properly remove a dangerous condition, the metal stump, and allowing it to exist for an unreasonable period of time. Plaintiffs also assert claims for loss of consortium on behalf of plaintiff Thomas's husband, Thomas Melakathu. All discovery has been completed and a Note of Issue has been filed.

Now, defendant is moving for summary judgment dismissing the complaint arguing that liability may not be imposed upon it because it had lacked prior written notice of the allegedly defective sidewalk condition, as required by Section 24-11 of the Charter of the City of Yonkers; there is no evidence supporting any finding that defendant had affirmatively created the allegedly negligent condition of protruding sidewalk metal; and that plaintiff Melakathu's loss of consortium claim must fail because it cannot survive without plaintiff Thomas' primary claims and plaintiffs failed to assert it by Notice of Claim under General Municipal Law sections 50-e and 50-i.

Section 24-11 of the Charter of the City of Yonkers provides in relevant part that:

"No civil action shall be maintained against the city...for...injury to person...sustained in consequence of any...sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the Commissioner of the Department of Public Works or any person or department authorized by the Commissioner to receive such notice by certified or registered mail, or where there was previous existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to the

Commissioner by certified or registered mail, or 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 the place otherwise made reasonably safe.”

However, “the only recognized exceptions to the statutory prior written notice requirement involve situations in which the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a benefit upon the municipality.” Conner v. City of New York, 104 A.D.3d 637, 638 (2d Dep’t 2013); Methal v. City of N.Y., 116 A.D.3d 743, 743 (2d Dep’t 2014); Phillips v. City of New York, 107 A.D.3d 774, 775 (2d Dep’t 2013).

Defendant has submitted the 50-H testimony and second deposition testimony of plaintiff Thomas and the affidavit of Lori Tangredi, an Administrative Assistant to the Commissioner of the Department of Public Works for the City of Yonkers, whose duties and responsibilities include her maintaining defendant’s prior written notice records. Ms. Tangredi states that she searched defendant’s prior written records and did not find any prior written notice records for the subject accident location.

Defendant also submits the deposition testimony of James Grimm, an Environmental Maintenance Worker for the City of Yonkers, whose duties and responsibilities include installing, repairing, maintain and removing signs and posts. He testified, and cited to a Work Order made in the regular course of his duties, that the only work performed at that location was the installation of a new post and firehouse sign and not the removal of any sign. If anything was removed, it would have been noted on the Work Order. Additionally, if there was a sign post stump, his department would remove the stump and fill in the hole.

Based on the foregoing, the Court finds that defendant prima facie has established entitlement to judgment. It therefore was incumbent upon plaintiffs to raise a triable issue of

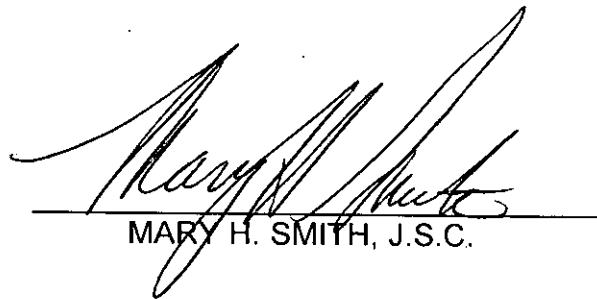
fact with respect thereto and this they have failed to do so as they have failed to submit any opposition to defendant's motion. See, e.g., Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1990); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

Plaintiff Thomas has failed to raise any triable issues of fact as to whether defendant had prior notice to this alleged metal stump on the subject sidewalk or whether defendant had created such dangerous condition. Additionally, plaintiffs had not identified in the Notice of Claim, nor had they alleged in the complaint, that defendant had derived any special benefit or special use from the sidewalk. Plaintiffs also failed to include plaintiff Melakathu's loss of consortium claim in their Notice of Claim.

Ultimately, plaintiffs' failure to have opposed this motion notwithstanding due notice of same must be deemed a concession as to the correctness of defendant's presentation of the facts and legal arguments entitling it to judgment and the relief sought herein. See Kuehne & Nagel, Inc. v. F. W. Baiden, 36 N.Y.2d 539, 544 (1975); Springer v. Keith Clark Pub. Co., 191 AD.2d 922 (3d Dep't 1993), lv. to app. dsmd. 82 N.Y.2d 706 (1993); John William Costello Associates, Inc. v. Standard Metals Corp., 99 AD.2d 227, 228 (1st Dep't 1984), app. dsmd. 62 N.Y.2d 942 (1984).

Accordingly, defendant's summary judgment motion is granted and this action is hereby dismissed.

Dated: November 16, 2016
White Plains, New York



MARY H. SMITH, J.S.C.