Pelliccione v Town of Babylon
2017 NY Slip Op 31011(U)
April 7, 2017
Supreme Court, Suffolk County
Docket Number: 13-26864
Judge: Denise F. Molia

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INDEX No. 13-26864
CAL. No. 16-00405OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 8-12-16
ADJ. DATE 10-14-16
Mot. Seq. # 002 - MD

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VICTORIA PELLICCIONE, BY HER MOTHER AND NATURAL GUARDIAN, COLLEEN PELLICCIONE, AND COLLEEN PELLICCIONE, INDIVIDUALLY,

Plaintiffs,

- against -

TOWN OF BABYLON,

Defendant.

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Upon the following papers numbered 1 to 27 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-18 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 19-25 ; Replying Affidavits and supporting papers 26-27 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Town of Babylon for summary judgment dismissing the complaint is denied.

This is an action for personal injuries arising from an accident which occurred on July 11, 2012, at John Pape Memorial Park in the Town of Babylon, in the County of Suffolk, when infant plaintiff, Victoria Pellicone, allegedly tripped and struck her head on a protruding fence screw or bolt while exiting the playground area of the park. Plaintiff Colleen Pellicone seeks damages for loss of services.

Defendant Town of Babylon ("Town") now moves for summary judgment dismissing the complaint. In support of the motion it submits, *inter alia*, a copy of the pleadings, the verified bill of particulars, the infant plaintiff's deposition transcript, the General Municipal Law §50 deposition and

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deposition transcripts of plaintiff Colleen Pellicone and Leo Sottile, the affidavit of Jennifer Taub, dated June 30, 2016, the affidavit of Pat M. Farrell, dated July 1, 2016, and the affidavit of Thomas Stay, dated July 1, 2016. In opposition plaintiffs submit their attorney's affirmation, the deposition transcripts of plaintiff Colleen Pellicone and Leo Sottile, two photographs, and the affidavit of Brian Goss, dated August 4, 2016.

Colleen Pellicone testified that the infant plaintiff's accident occurred at approximately 6:30 p.m. on July 11, 2012, at the playground at John Pape Memorial Park ("park") on Old Farmingdale Road in West Babylon. She testified that at the time of the accident she was at the park to watch her son's baseball practice, which began at approximately 6:00 p.m. She testified that the infant plaintiff was playing in the adjacent playground, as she had done on five or ten prior occasions when she had accompanied her mother and brother to baseball practice. The accident occurred approximately half an hour after they arrived at the park, when she was watching her son's baseball practice. She testified that Victoria and another child went to play at the park playground. She testified that she did not see her daughter's accident. She testified that she first learned of Victoria's accident when she heard her screaming, and saw her running toward her with her face covered with blood. She testified that she asked someone to call an ambulance. She testified that no one directly witnessed the accident, but that a number of adults witnessed the reaction to the accident, and who indicated where the accident took place. She testified that infant plaintiff said she tripped over unevenness from the soft part of the park to the hard concrete, as she was coming out of the park. She testified that infant plaintiff did not indicate if her head struck a bolt protruding from the pole to the right side of the exit or the pole on the left side of the exit.

Infant plaintiff's testimony was taken when she was six years old, a little more than two years after the accident. She testified that she was going to get a drink from her mother when she banged her head. She testified that she was not running when the accident happened and that she was looking straight ahead. She testified that "it was an entrance and I banged my head on it. There was a little thing sticking out and I banged my head on it and it went right through my head." She testified that when her mother came, she told her that she had banged her head.

Leo Sottile testified that he is employed by defendant as a public works coordinator, who oversees all daily maintenance jobs, including Town parks. He testified that John Pape Memorial Park is a Town park. He testified would perform maintenance, including fence work and playground repairs, as needed in Town parks. He testified that there is only one entrance to the playground area. When Mr. Sottile was asked if, when installing a fence in a playground there were any requirements as to how the bolts should be installed, he testified that they should be installed with the bolts facing away for the playground. He testified that this was done so that if a child fell, he or she would not hit the edge of the bolt. Mr. Sottile testified that there are no records kept of park inspections and there is no regular scheduled inspections of the parks, and he had "no idea" if there was ever an inspection of the fence in John Pape Memorial Park around or prior to July of 2012.

The affidavit of Jennifer Taus states that she is an employee of the Town Clerk's office, which

is responsible for keeping and maintaining 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 notices of any defect with regarding both the walkway by the entrance/exit to the playground, and the screws or bolts affixing the chain link fence bordering the perimeter of the playground area to fenceposts at the entrance/exit to the playground located at John Pape Memorial Park prior to July 11, 2012. She states that the search revealed no prior complaints or written notice regarding either the walkway by the entrance/exit to the playground or the screws or bolts affixing the chain link fence to the fence posts prior to July 11, 2012.

The affidavit of Patrick M. Farrell states that he is Deputy Commissioner of Public Safety, and, as such, he oversees the uniformed enforcement personnel who are responsible for protecting park resources. When a complaint is made to his department regarding a Town park an incident report is generated describing the nature of the complaint. Mr. Farrell states that he caused a search to be made for any complaints of an alleged incident involving plaintiffs made to the Office of Public Safety which occurred on July 11, 2012, regarding the entrance/exit to the playground at John Pape Memorial Park and the screws or bolts affixing the chain link fence to the fence posts at the entrance/exit, and that the records of his department contain no incident reports or complaints in regard thereto prior to July 11, 2012.

The affidavit of Thomas Stay states that he is Commissioner of the Department of Public Works for the Town, which involves overseeing the construction, maintenance and repair of all Town owned properties. He states that he caused a search to be made of the records of the Department of Public Works regarding any prior written notices or complaints of any defect with regard to the entrance/exit to the playground at John Pape Memorial Park and the screws or bolts affixing the chain link fence to the fence posts at the entrance/exit, and that the search of the records of his department reveals that they contain no incident reports or complaints in regard thereto prior to July 11, 2012.

The affidavit of Bruce Goss states that on July 11, 2011, at approximately 6:45 p.m., he was attending a baseball game at John Pape Memorial field, when he heard screaming and commotion at the nearby playground. He states that he proceeded to the playground and saw infant plaintiff bleeding from a cut on her forehead, and that she indicated to him that she had hit her head on the fence. He states that, at infant plaintiff's direction, he examined the left pole, as you exit the playground, connected to the fencing around the playground. He states that he noticed that the bolts connecting the fence to the pole were facing inward, toward the playground, and were protruding pieces of metal with a sharp edge and no safety caps. He stated that he took a photograph of the pole and bolt, and gave a copy to plaintiff Colleen Pellicone. A copy of the photograph is annexed to Mr. Goss's affidavit.

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 offer 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 Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Defendant has failed to establish its prima facie entitlement to summary judgment herein. It is first argued that the plaintiffs' claim is barred by the lack of prior written notice.

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.

"It is axiomatic that prior written notice laws are in derogation of the common law and must be strictly construed" (***Windsor Ct. Assoc., LP v Village of New Paltz***, 27 AD3d 814, 815, 809 NY2d 477 [3d Dept 2006]; *see* ***Gorman v Town of Huntington***,12 NY3d 275, 879 NYS2d 379 [2009]; ***Fisher v Town of N. Hempstead***, 134 AD3d 670, 20 NYS3d 167 [2d Dept 2015]; ***Selca v City of Peekskill***, 78 AD3d 1160, 912 NYS2d 287 [2d Dept 2010]). In ***Walker v Town of Hempstead*** , 84 NY2d 360, 618 NYS2d 758 (1994), the Court of Appeals construed General Municipal Law § 50–e (4) as limiting the reach of prior written notice provisions to defects occurring at six enumerated locations—streets, highways, bridges, culverts, sidewalks and crosswalks. The Court of Appeals explained:

> Furthermore, we can only construe the Legislature's enumeration of six, specific locations in the exception (i.e., streets, highways, bridges, culverts, sidewalks or crosswalks) as evincing an intent to exclude any others not mentioned (*see*, McKinney's Cons. Laws of N.Y., Book 1, Statutes § 240 ["where a statute creates provisos or exceptions as to certain matters the inclusion of such provisos or exceptions is generally considered to deny the existence of others not mentioned"]). Although, as defendant points out, the statute retains the validity of the excepted notice of defect provisions "where such notice now is, or hereafter may be, required by law", the phrase "such notice" can only be interpreted as encompassing notices of defect at the six locations previously specified.

Walker v Town of Hempstead, 84 NY2d at 367, 618 NYS2d 758.

However, in the wake of ***Walker v Town of Hempstead,*** *supra*, courts have consistently found that municipalities are not prohibited from requiring prior written notice of defects for areas over which the public has a general right of passage, and which are the functional equivalent of a sidewalk or highway (*see* ***Scoville v Town of Amherst***, 277 AD2d 1038, 1039, 716 NYS2d 186 [4th Dept 2000][(bike path; ***Bacon v Mussaw***, 167 AD2d 741, 744, 563 NYS2d 854 paved bike path which was public right of way; ***Schneid v City of White Plains***, 150 AD2d 549, 541 NYS2d 234 [2d Dept 1989] [paved pedestrian walkway]). Defendant argues that the accident occurred in a walkway and, thus, it is the functional equivalent of a sidewalk. This argument fails for two reasons, first, the accident occurred at the exit to the playground, but clearly inside of it, and not on the adjacent walkway; second, the alleged dangerous defect, the bolt sticking out of the fence, is not part of the walkway.

The Town further argues that it did not breach any duty owed to the infant plaintiff. "A municipality is under a duty to maintain its park and playground facilities in a reasonably safe condition" (***Marino v State of New York***, 16 AD3d 386, 790 NYS2d 553; *see* ***Nicholson v Board of Educ. of City of N.Y.***, 36 NY2d 798, 369 NYS2d 703 [1975]; ***Foreman v Town of Oyster Bay***, 140 AD3d 694, 30 NYS3d 895 [2d Dept 2016]; ***Engelhart v County of Orange***, 16 AD3d 369,790 NYS2d 704 [2d Dept 2005]). This duty "includes not only physical care of the property but also prevention of ultrahazardous and criminal activity of which it has knowledge" (***Benjamin v City of New York***, 64 NY2d 44, 484 NYS2d 525 [1984]; *see* ***Engelhart v County of Orange***, *supra*; ***Muzich v Bonomolo***, 209 AD2d 387, 618 NYS2d 437 [2d Dept 1994]). "A defendant who moves for summary judgment in a slip-and-fall or trip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it" (***Campbell v New York City Tr. Auth.***, 109 AD3d 455, 456, 970 NYS2d 284 [2d Dept 2013]; *see* ***Levine v Amverserve Assn., Inc.***, 92 AD3d 728, 938 NYS2d 593 [2d Dept 2012]; ***Amendola v City of New York***, 89 AD3d 775, 932 NYS2d 172 [2d Dept 2011]). "In order to meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall" (***Farren v Board of Educ. of City of NY***, 119 AD3d 518, [2d Dept 2014]; ***Maloney v Farris***, 117 AD3d 916, 985 NYS2d 882 [2d Dept 2014] ***Campbell v New York City Trans. Auth.***,*supra* at 456; *see* ***Levine v Amverserve Assn., Inc.***, *supra*; ***Tsekhanovskaya v Starrett City, Inc.***, 90 AD3d

909, 935 NYS2d 128 [2d Dept 2011]; ***Pryzywalny v New York City Trans. Auth.***, 69 AD3d 598, 892 NYS2d 181[2d Dept 2010]). The Townhas failed to do so. In addition to this, the Town's own witness testified that the fence bolt which injured infant plaintiff should have been installed with the bolts facing outward, away from the playground.

Finally, the Town argues that it is entitled to summary judgment because the proximate cause of the infant plaintiff's injuries is unknown. While proximate cause may be inferred from the facts and circumstances surrounding the injury, there must be sufficient proof in the record to permit a finding of proximate cause based not upon speculation, but upon the logical inferences to be drawn from the evidence (*see* ***Schneider v Kings Highway Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Pascucci v MPM Real Estate, LLC***, 128 AD3d 1206, 9 NYS3d 697 [2d Dept 2015]; ***Thompson v Commack Multiplex Cinemas***, 83 AD3d 929, 921 NYS2d 304 [2d Dept 2011]; ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]). However, infant plaintiff, at her deposition, was able to give a description of how her injuries occurred. In addition, the testimony of the non-party witness and other submitted evidence provides sufficient proof in the record which to permit a jury finding of proximate cause based not upon speculation, but upon the logical inferences to be drawn from said evidence (*see* ***DePreter v City of New York***, 219 AD2d 561, 631 NYS2d 351 [1st Dept 1995] [wherein the infant's father's testimony that, while he did not see infant fall, he heard the infant screaming and turned immediately to see her standing next to playground equipment with blood streaming down her face, was sufficient to raise an issue of fact as to liability]; *see also* ***Johnson v New York City Trans. Auth.***, 88 A.D.3d 321 929 NYS2d 215 [1st Dept 2011]; ***Phipps v Michalak***, 57 AD3d 1374, 870 NYS2d 200 [4th Dept 2008]). Plaintiffs having raised an issue of fact as to whether the defendant's negligence was the proximate cause of infant plaintiff's injuries, the motion for summary judgment must be denied.

Accordingly, the motion by defendant Town of Babylon for summary judgment dismissing the complaint is denied.

Dated: 4/7/17

Hon. Denise F. Molia

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION