

O'Connel-Cohen v County of Suffolk

2017 NY Slip Op 32474(U)

October 17, 2017

Supreme Court, Suffolk County

Docket Number: 13-17573

Judge: Arthur G. Pitts

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INDEX No. 13-17573

CAL. No. 16-01858OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 3-14-17
ADJ. DATE 6-15-17
Mot. Seq. # 001 - MG
002 - MG; CASEDISP

-----X
MARY O'CONNEL-COHEN,

Plaintiff,

- against -

THE COUNTY OF SUFFOLK, THE TOWN OF
BROOKHAVEN, THOMAS DUGAN AND
STACEY DUGAN,

Defendants.
-----X

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Upon the following papers numbered 1 to 37 read on these motions for summary judgment; Notice of Motion and supporting papers 1 - 13, 14 - 25; Answering Affidavits and supporting papers 26 - 27, 28 - 29, 30 - 31; Replying Affidavits and supporting papers 30 - 31, 32 - 33, 34 - 37; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (seq. 001) by defendants Thomas Dugan and Stacey Dugan, and the motion (seq. 002) by defendant Town of Brookhaven, are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendants Thomas Dugan and Stacey Dugan for summary judgment dismissing the complaint and all cross claims against them is granted; and it is further

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

This action was commenced by plaintiff Mary O'Connel-Cohen to recover damages for injuries she allegedly sustained on June 14, 2012, when she tripped and fell on the sidewalk in front of the premises known as 231 Middle Road, Blue Point, New York. The premises in question are owned by defendants Thomas Dugan and Stacey Dugan. By her bill of particulars, plaintiff alleges among other things, that the sidewalk was in a "raised, uneven" condition,

that a "space" existed between the sidewalk's concrete slabs, and that defendants were negligent in failing to correct such condition. The parties, by a stipulation of discontinuance dated April 28, 2015, abandoned all claims against defendant County of Suffolk.

Defendants Thomas Dugan and Stacey Dugan now move for summary judgment in their favor on the grounds that they did not own or maintain the subject sidewalk. In support of their motion, they submit copies of the pleadings, transcripts of the parties' deposition testimony, a copy of a Town of Brookhaven "work order" dated September 28, 2012, a copy of an affidavit of Marie Angelone, and nine photographs.

Defendant Town of Brookhaven (the Town) also moves for summary judgment in its favor, arguing that while it maintains the sidewalk in question, it received no prior written notice of any defect thereupon and that, even if it had received such notice, the alleged defect in question is trivial. In support of its motion, the Town submits, among other things, a copy of plaintiff's notice of claim, a transcript of plaintiff's General Municipal Law § 50-h hearing testimony, an affidavit of Marie Angelone, an affidavit of Linda Sullivan, three photographs, and a copy of the stipulation of discontinuance as to defendant County of Suffolk.

Plaintiff testified that at approximately 7:00 p.m. on the date in question, she and her husband, Gilbert Cohen, were walking westward on the sidewalk on the north side of Middle Road in Blue Point, New York, "within close proximity of Bergen Lane." She indicated she walked the same route daily. Plaintiff stated that she was walking at a "[n]ormal to fast" pace, that the weather was dry, and that the area was well lit. She testified that immediately prior to the incident in question, she was looking ahead and nothing was obstructing her vision. Upon questioning, plaintiff indicated that her fall was caused by her right toe becoming "wedged between two pieces of the sidewalk." She stated that she believed one of the concrete slabs, of which the sidewalk was composed, was elevated and separated from its adjacent slab by a "couple of inches."

Plaintiff testified that she is not aware of how long the sidewalk's alleged dangerous condition existed prior to her fall, or how such condition was created. Instead, she indicated that she "personally think[s] it was probably the Town of Brookhaven and that "[t]hey didn't really do a good job paving." Plaintiff denied having any knowledge of when the sidewalk was paved or installed. Plaintiff further denied seeing the Town perform any work on the subject sidewalk, and denied knowing of any complaints being filed with the Town regarding such sidewalk.

Marie Angelone, deposed on behalf of the Town, testified that she is a "neighborhood aide," and that her responsibilities include receiving notices of claim against the Town's highway department. She stated that her duties also include searching the highway department's records for any prior written notice of defects at a location. Ms. Angelone indicated that when complaints are lodged with the highway department, a "work order" is generated, and the form of communication used to transmit the complaint is noted. She testified that she searched the highway department's records immediately upon receipt of information regarding plaintiff's alleged fall and found no record of any prior written complaints at that location. She indicated that she also contacted the engineering department, inquired if the Town highway department maintains the subject location, and learned that it does. Ms. Angelone further stated that she sent a memorandum to the Town Clerk's office, inquiring as to whether that department had received any prior written notice of a dangerous condition at the subject location.

Stacey Dugan testified that she and her husband, Thomas Dugan, reside at 231 Middle Road with their daughter. Mrs. Dugan indicated that she first learned of plaintiff's alleged incident when she received the summons and complaint attendant to the instant matter. She stated that upon receipt of the summons and complaint, she conducted an inspection of the sidewalk in front of her home and found no defects. She further stated that she walks

the subject sidewalk occasionally, that she was never aware of any unevenness in that sidewalk, and that she has never lodged a complaint with the Town in relation to it. Additionally, Mrs. Dugan indicated that the subject sidewalk was present at the time she purchased the home, that she does not know who installed the sidewalk, and that she denies any repairs have been performed on that sidewalk.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 19 NYS3d 488 [2015]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*Nomura, supra*; see also *Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*Daliendo v Johnson*, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*Nomura, supra*; see also *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (see *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Milewski v Washington Mut., Inc.*, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). "A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Altinel v John's Farms*, 113 AD3d 709, 710, 979 NYS2d 360, 362 [2d Dept 2014]; see *Ingram v Long Is. Coll. Hosp.*, 101 AD3d 814, 956 NYS2d 107 [2d Dept 2012]). However, "the owner has no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous" (*Bluth v Bias Yaakov Academy for Girls*, 123 AD3d 866, 866, 999 NYS2d 840 [2d Dept 2014]).

Generally, "liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions on public sidewalks is placed on the municipality" (*Hevia v Smithtown Auto Body of Long Is., Ltd.*, 91 AD3d 822, 822, 937 NYS2d 284 [2d Dept 2012]). 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., supra*; see *Dalder v Incorporated Vil. of Rockville Ctr.*, 116 AD3d 908, 983 NYS2d 83 [2d Dept 2014]; *Morelli v Starbucks Corp.*, 107 AD3d 963, 964-965, 968 NYS2d 542; *Petrillo v Town of Hempstead*, 85 AD3d 996, 997, 925 NYS2d 660 [2d Dept 2011]).

Here, the Dugan defendants have established a prima facie case of entitlement to summary judgment in their favor by adducing evidence, in the form of deposition testimony by the Town admitting its ownership, that they did not own the sidewalk upon which plaintiff allegedly fell (see *Williams v Town of Smithtown*, 135 AD3d 854, 24 NYS3d 150 [2d Dept 2016]; see generally *Alvarez v Prospect Hosp., supra*). Having established a prima facie case, the burden shifted to the opposing parties to raise a triable issue (see *Vega v Restani Constr. Corp., supra*).

In opposition to the Dugan defendants' motion, plaintiff's counsel argues that while plaintiff "acknowledges that the maintenance of the sidewalk was the responsibility of" the Town, the Dugans "were negligent in exacerbating the dangerous condition on the sidewalk by the obstruction caused by foliage [sic] present on their premises." Raised for the first time in opposition to defendants' motion, plaintiff's counsel appears to argue, somewhat cryptically and without specificity, that a tree on the Dugan property somehow contributed to plaintiff's fall. Given the Town's admission it owns and maintains the sidewalk in question, any sidewalk disturbance caused by a tree would also remain the Town's duty to remedy. Further, plaintiff's own deposition testimony states that her hair merely grazed a tree when she fell to the ground-- a fact she used only to determine the location of her fall. Accordingly, the motion by defendants Thomas Dugan and Stacey Dugan for summary judgment dismissing the complaint and any cross claims against them is granted.

As to the Town's motion, where a municipality has enacted a prior written notice statute, 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]; *Masotto v Village of Lindenhurst*, 100 AD3d 718, 954 NYS2d 557 [2d Dept 2012]; *Wilkie v Town of Huntington*, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006]; *Ganzenmuller v Incorporated Vil. of Port Jefferson*, 18 AD3d 703, 795 NYS2d 744 [2d Dept 2005]). 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, 853 NYS2d 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 the Brookhaven Town 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 on Town property, the Town must be given prior written notice of the defect. Section 84-1 (A) of the Code provides, in relevant part:

[n]o civil action shall be commenced against the Town of Brookhaven or the Superintendent of Highways for damages or injuries to persons or property sustained by reason of the defective, out-of-repair, unsafe, dangerous or obstructed condition of any highway, street, bridge, culvert, or crosswalk or pedestrian walkway open to the public, of the Town of Brookhaven, unless, previous to the occurrence resulting in such damages or injuries, written notice of such defective, out-of-repair, unsafe, dangerous or obstructed condition, identifying with particularity the specific nature and location of each defective, out-of-repair, unsafe, dangerous or obstructed condition complained of, was actually given, in writing, by a person with firsthand knowledge of the condition complained of and specified in the notice, to the Town Clerk or the Town Superintendent of Highways by personal service or service by registered or certified mail actually received by the Town officer or officers specified herein, specifying the particular place and location was actually given to the Town Clerk or Town Superintendent of Highways and there was a failure or neglect within a reasonable time, after the giving of such notice, to repair or remove the defect, danger or obstruction complained of.

Section 84-1 (B) of the Code further provides, in relevant part, that:

[i]n the absence of written notice as required [pursuant to Section 84-1 (A)], no civil claim shall be maintained against the Town of Brookhaven; nor shall any civil claim be maintained based on an allegation that such defect, danger or obstruction existed for so long a period of time that the same should have been discovered and remedied in the exercise of reasonable care and diligence; nor a claim that any Town employee possessed actual notice of such defect, danger or obstruction unless written notice is filed with the Town Clerk as required above.

Marie Angelone supplied an affidavit on behalf of the Town. Therein, she states that she is employed by the Town as a neighborhood aide, and that her duties include "the investigation of allegations set forth in claims against the Town of Brookhaven by searching the official records of the Town of Brookhaven, specifically those contained within the Highway Department, and ascertaining whether the Town of Brookhaven owns, maintains, controls or exercises any jurisdiction over incident locations." She further states that she made a diligent search of those records and found that the Town owns and maintains the sidewalk in question. In addition, Ms. Angelone indicates that her search of the Town's highway department records revealed no written complaints regarding the subject location within the prior five years.

Linda Sullivan provided an affidavit in which she states that she is employed by the Town, at the Town Clerk's Office, as a Senior Clerk Typist. She indicates that her duties include the "logging of litigation pleadings, which include [sic] conducting searches of the Town Clerk log book to determine whether the Town of Brookhaven had prior written notice of defects at incident locations." She further states that she made a diligent search of the Town Clerk's files for a period of five years prior to plaintiff's incident and found no prior written complaints regarding the subject location.

The Town has thus established a prima facie case of entitlement to summary judgment in its favor by submitting the sworn affidavits of two Town employees. The Town employees, whose responsibility it is to maintain all notices of alleged dangerous conditions on Town property, averred that neither had found any prior written notice of a defective condition at the subject premises. Therefore, the Town has established, prima facie, that it is exempt from civil claims relating to the subject premises (*see* Brookhaven Town Code § 84-1 [A]). The burden thus shifts to the opposing parties to raise a triable issue (*see Vega v Restani Constr. Corp., supra*).

In opposition to the Town's motion, plaintiff argues that the Town failed in its duty to maintain the subject sidewalk, that the Town had constructive notice of the alleged defect, that the Town created the alleged defect, and that the defect in question was not trivial. Plaintiff offers no evidence that the Town created the alleged dangerous condition (*see Williams v Town of Smithtown, supra; Jason v Town of N. Hempstead*, 61 AD3d 936, 877 NYS2d 454 [2d Dept 2009]; *cf. Bohm v Town of Brookhaven*, 43 AD3d 454, 841 NYS2d 144 [2d Dept 2007]). Thus, plaintiff's arguments are unavailing in light of the Town's lawfully-enacted "prior written notice" statute (*see Barnes v Incorporated Vil. of Port Jefferson, supra; Brookhaven Town Code § 84-1*). Accordingly, the motion by defendant Town of Brookhaven for summary judgment dismissing the complaint and any cross claims against it is granted.

Dated: Riverhead, New York
October 17, 2017


ARTHUR G. PITTS, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION