

Bosch v Incorporated Vil. of Is. Park

2017 NY Slip Op 33478(U)

November 1, 2017

Supreme Court, Nassau County

Docket Number: Index No. 606682/2015

Judge: Julianne T. Capetola

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At a Term of the Supreme Court of the State of New York held in and for the County of Nassau, 100 Supreme Court Drive, Mineola, New York, on the 1st day of November 2017

P R E S E N T:

HON. JULIANNE T. CAPETOLA
Justice of the Supreme Court

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MEAGHAN BOSCH,

Plaintiff,

DECISION AND ORDER ON MOTION

Index No: 606682/2015
Motion Sequence: 003, 004, 005

- against -

INCORPORATED VILLAGE OF ISLAND PARK,
TOWN OF HEMPSTEAD, COUNTY OF NASSAU,
DEMI'S PLACE, INC. and JOANNE FANTOZZI,
or her successors, as Trustee of the Jack F. Linden
and Mary Lou Linden Irrevocable Trust,

Defendants.

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The following papers were read on these Motions:

- Defendant County of Nassau's Notice of Motion and Supporting Documents (Motion Sequence 003)
- Defendant Joanne Fantozzi's Notice of Motion and Supporting Documents and Memorandum of Law (Motion Sequence 004)
- Defendant Demi's Place, Inc.'s Notice of Motion and Supporting Documents (Motion Sequence 005)
- Plaintiff's Affirmation in Opposition (Mo. Seq. 003)
- Plaintiff's Affirmation in Opposition (Mo. Seq. 004)
- Plaintiff's Affirmation in Opposition (Mo. Seq. 005)
- Plaintiff's Supporting Documents (Mo. Seq. 003, 004, 005)
- Defendant Joanne Fantozzi's Affirmation in Opposition and Supporting Documents (Mo. Seq. 003)
- Defendant Joanne Fantozzi's Affirmation in Partial Opposition (Mo. Seq. 005)
- Defendant Demi's Place Inc.'s Affirmation in Opposition (Mo. Seq. 003)
- Defendant County of Nassau's Reply Affirmation
- Defendant Joanne Fantozzi's Reply Affirmation (004)
- Defendant Demi's Place Inc.'s Reply Affirmation to Partial Opposition by Defendant Joanne Fantozzi (005)
- Defendant Demi's Place Inc.'s Reply Affirmation to Plaintiff's Opposition (005)

Defendant County of Nassau (hereinafter "Defendant County") in this civil action has moved, by notice of motion, for an order pursuant to CPLR §3212 granting them summary judgment and, accordingly, dismissing the complaint as against them. Defendant Joanne Fantozzi or her successors, as Trustee of the Jack F. Linden and Mary Lou Linden Irrevocable Trust (hereinafter "Defendant Fantozzi") has moved separately for the same relief. Defendant Demi's Place, Inc. (hereinafter "Defendant DPI") has also moved separately for the same relief. Plaintiff separately opposed each motion, Defendants Fantozzi and DPI opposed Defendant County's motion, Defendant County submitted a reply and the motions were deemed submitted September 28, 2017.

CPLR §3212(b) states, in relevant part, that a motion for summary judgment shall be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party".

"The standards regarding summary judgment motions are familiar and fundamental. The party moving for summary judgment 'bears the initial burden of making a prima facie showing of its entitlement to judgment as a matter of law' (*Holtz v Niagara Mohawk Power Corp.*, 147 A.D.2d 857, 858). Once such a showing has been established, the 'burden is shifted to the opposing party to come forward with proof in evidentiary form to show the existence of genuine triable issues of fact' (*Mahar v Mahar*, 111 A.D.2d 501, 502; *see also, Ferber v Sterndent Corp.*, 51 N.Y.2d 782; *Cusano v General Elec. Corp.*, 111 A.D.2d 557). General conclusory statements, expressions of hope, and repetition of the allegations in the pleadings do not constitute evidentiary proof substantiating the party's claim and, therefore, are insufficient to defeat a summary judgment motion". *Fresh Meadows Country Club v. Lake Success*, 158 A.D.2d 581 (2d. Dept. 1990).

The underlying complaint alleges injuries sustained as a result of a trip and fall on a sidewalk. Defendant County argues that they did not have the requisite prior written notice about any defective sidewalk condition as required by General Municipal Law and Nassau County Administrative Code.

General Municipal Law §50-e(4) states:

"Requirements of section exclusive except as to conditions precedent to liability for certain defects or snow or ice. No other or further notice, no other or further service, filing or delivery of the notice of claim, and no notice of intention to commence an action or special proceeding, shall be required as a condition to the commencement of an action or special proceeding for the

enforcement of the claim; provided, however, that nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice”.

Nassau Administrative Code §12-4.0(e) states:

“No civil action shall be maintained against the County for damages or injuries to person or property sustained by reason of any sidewalk, street, highway, parking field, stairway, walkway, ramp, driveway, bridge, culvert, curb or gutter being defective, out of repair, unsafe, dangerous, or obstructed or in consequence of the existence of snow or ice thereon, regardless of whether such facility be one as defined by this title or one constructed pursuant to the provisions of article six of the highway law or one constructed by the State and maintained by the County, unless such sidewalk, street, highway, parking field, stairway, walkway, ramp, driveway, bridge, culvert, curb or gutter was constructed by the County or by the State or under a permit issued by the County or by the State, and unless written notice of such defective, unsafe, dangerous or obstructed condition of such sidewalk, street, highway, parking field, stairway, walkway, ramp, driveway, bridge, culvert, curb or gutter or the existence of snow or ice thereon 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 or to cause such snow or ice to be removed or to make the place otherwise reasonably safe. Such written notice shall specify the particular place and nature of such defective, unsafe, dangerous or obstructed condition or the particular location of such snow or ice. Notice required to be given as herein provided shall be made in writing by certified or registered mail directed to the Office of the County Attorney, One West Street, Mineola, New York, 11501”.

In support of their motion, Defendant County has provided affidavits from Veronica Cox of the Bureau of Claims and Investigations at the Office of the Nassau County Attorney whose job responsibilities include maintaining the Nassau County notice of claim and prior written notice files. Her affidavit confirms that no prior notices of claim had been received for the location in question for a period of two years prior to the date of the incident.

Plaintiff argues that Defendant County derived a “special use” from the location and that, therefore, no prior written notice was required.

“A municipality that has enacted a prior written notice law is excused from liability absent proof of prior written notice or an exception thereto (see *Poirier v. City of Schenectady*, 85 N.Y.2d 310, 624 N.Y.S.2d 555, 648 N.E.2d 1318; *Perrington v. City of Mount Vernon*, 37 A.D.3d 571, 829 N.Y.S.2d 667). The Court of Appeals has recognized two exceptions to this rule, “namely, where the locality created the defect or hazard through an affirmative act of negligence” and “where a ‘special use’ confers a special benefit upon the locality” (*Amabile v. City of Buffalo*, 93 N.Y.2d 471, 474, 693 N.Y.S.2d 77, 715 N.E.2d 104; see *Delgado v. County of Suffolk*, 40 A.D.3d 575, 835 N.Y.S.2d 379; *Padula v. City of Long Beach*, 20 A.D.3d 555, 799 N.Y.S.2d 557; *Lopez v. G & J Rudolph Inc.*, 20 A.D.3d 511, 799 N.Y.S.2d 254). *Smith v. Town of Brookhaven*, 45 A.D.3d 567 (2d. Dept. 2007).

Here, Defendant County established its entitlement to judgment as a matter of law by demonstrating that it did not have prior written notice of the alleged defect, shifting the burden to Plaintiff.

To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact. CPLR §3212(b). Thus where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so. *Vermette v Kenworth Truck Co.*, 68 NY2d 714 (1986); *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 (1st Dept 2003).

Plaintiff, Defendant DPI, and Defendant Fantozzi argue in their opposition papers that Defendant County derived a special use from the area in question based upon the existence of a storm drain located in the concrete slab which was allegedly raised up approximately four inches from the adjacent slab, which gap was covered by a patched concrete “ramp”.

It has been held that storm drains fall within the prior written notice requirement and are not exempt therefrom based upon special use inasmuch as the drainage function of the storm drain served to provide for the proper maintenance of a safe roadway and, thus, served no municipal function inuring to the special benefit of Defendant County. See, *Vise v. County of Suffolk*, 207 A.D.2d 341 (2d. Dept. 1994); see also, *Marona v. Incorporated Vil. of Mamaroneck*, 203 A.D.2d 337, (2d. Dept. 1994); *Poirier v. City of*

Schenectady, 201 A.D.2d 845, (3d. Dept. 1994); *Waters v. Town of Hempstead*, 166 A.D.2d 584, (2d. Dept. 1990).

Further, even if the Court were to recognize a special use derived from the storm drain, which it does not, Plaintiff has failed to establish that the condition of the storm drain itself was the proximate cause of the fall, and therefore there lacks a nexus between the alleged special use with regard to the storm drain and the alleged defective condition of the sidewalk. *See, Marona, supra*. Accordingly, the complaint must be dismissed as against Defendant County.

Defendant Fantozzi has also moved for summary dismissal of the complaint as against them. Defendant Fantozzi argues that Defendant County produced a witness, to wit, Thomas Caligiuri, who testified that, in the event the concrete flag had become damaged, Defendant County would be responsible for the repairs and that Defendant County has issued notices to repair and notices of violations and no such notice was received regarding this alleged defective condition. Accordingly, they argue, they are responsible for the alleged defective condition.

Plaintiff argues in opposition that Defendant Fantozzi had control over the property to make repairs, as evidenced by their performance of repairs to the entire sidewalk as a result of a Demand Notice sent by Defendant County, and that, despite their denial of same, there exists a triable issue of fact as to whether Defendant Fantozzi performed the repairwork, to wit, the pouring and setting of a concrete gradient to correct the unevenness between the two concrete flags resulting in the difference in elevation that allegedly caused Plaintiff to trip and fall.

“Generally, liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks is placed on the municipality, and not the abutting landowner (see *Hausser v. Giunta*, 88 N.Y.2d 449, 452–453, 646 N.Y.S.2d 490, 669 N.E.2d 470; *Lahens v. Town of Hempstead*, 132 A.D.3d 954, 18 N.Y.S.3d 187; *Maya v. Town of Hempstead*, 127 A.D.3d 1146, 1147, 8 N.Y.S.3d 372). “However, an abutting landowner will be liable to a pedestrian injured by a defect in a sidewalk where the landowner created the defect, caused the defect to occur by some special use of the sidewalk, or breached a specific ordinance or statute which obligates the owner to maintain the sidewalk” (*Staruch v. 1328 Broadway Owners, LLC*, 111 A.D.3d 698, 698, 974 N.Y.S.2d 796; see *O’Toole v. City of Yonkers*, 107 A.D.3d 866, 867, 967 N.Y.S.2d 751; *Romano v. Leger*, 72 A.D.3d 1059, 1059, 900 N.Y.S.2d 346)”. *Lewis v. Palazzolo*, 143 A.D.3d 783 (2d. Dept. 2016).

“Liability may only be imposed on the abutting owner or lessee where it either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the owner or lessee the obligation to maintain the sidewalk which imposes liability upon that party for injuries caused by a violation of that duty”. *Lowenthal v. Theodore H. Heidrich Realty Corp.*, 304 A.D.2d 725 (2d. Dept. 2003).

“It is well settled that an owner of land abutting on a public sidewalk does not, solely by reason of being an abutting owner, owe to the public a duty to keep the sidewalk in a safe condition (*Conlon v. Village of Pleasantville*, 146 A.D.2d 736, 737, 537 N.Y.S.2d 221). A defendant will be liable, however, if he or she negligently constructed or repaired the sidewalk or actually created the defect that caused the accident or if the sidewalk was constructed in a special manner for the defendant's benefit (*Kobet v. Consolidated Edison Co. of NY*, 176 A.D.2d 785, 786, 575 N.Y.S.2d 114)”. *Davi v. Alhamidy*, 207 A.D.2d 859 (2d. Dept. 1994).

However, it is incumbent upon a plaintiff to come forth with evidentiary facts, “more than surmise, suspicion and conjecture” in order to defeat a motion for summary judgment. *See, Peppermill Realty v. Vahab*, 152 A.D.2d 554 (2d. Dept. 1989).

In the instant matter, Plaintiff has provided nothing more than their own conclusory statements that, based upon the length of time the property has been owned by Defendant Fantozzi, it would not be reasonable to believe that Defendant Fantozzi or its agents had performed repairwork to the area of the sidewalk in question. Without more than mere suspicion and conjecture to establish a triable issue of fact as to whether the defective repairs were performed by Defendant Fantozzi, Plaintiff has failed to meet their burden and the complaint must be dismissed as against Defendant Fantozzi.

Defendant DPI has also moved for summary dismissal of the complaint as against them on identical grounds, that they are not liable for injuries sustained on the sidewalk, nor do they fall within any exception that would extend liability.

With respect to the exception in the event that Defendant DPI had conducted the repairwork or created the allegedly hazardous condition, Plaintiff has similarly failed to come forth with anything more than mere speculation, suspicion and conjecture in an effort to establish Defendant DPI's allegedly having created the condition. Accordingly, Plaintiff has failed to meet their burden on those grounds.

Plaintiff further argues that Defendant DPI derived a “special use” from the sidewalk both for the placement of signs and dining tables for patrons, and for patrons to traverse the sidewalk to gain entry into the business.

First, Plaintiff has neither established that any dining tables or signs have ever been placed on the particular area of the sidewalk in question, nor have they demonstrated how, if the tables and/or signs were placed there, they created the hazardous condition, to wit, faulty repairwork. Further, it has been well-settled that the use of a sidewalk by patrons to access a business, or even to wait in line to enter a business, does not constitute a special use. *See, Roe v. City of Poughkeepsie*, 229 A.D.2d 568 (2d. Dept. 1996). Accordingly, Plaintiff has failed to meet their burden and the complaint must be dismissed as against Defendant DPI.

Finally, Defendant Fantozzi and Defendant DPI’s motions seek summary relief based upon Defendant Fantozzi’s cross-claims for breach of contract and contractual indemnity.

Defendant Fantozzi argues that, to the extent a defect is found to be attributable to Defendant DPI, they are in breach of contract with respect to the term of the lease agreement between the parties that requires Defendant DPI to keep the leased premises in good condition. As a result of the instant motion the complaint shall be dismissed as against both Defendant Fantozzi and Defendant DPI as no liability is found and, accordingly, the cross-claim for breach of contract must be similarly denied as moot.

With respect to the contractual indemnity claim, inasmuch as there is no liability as to either of these Defendants, there is no indemnification claim as to damages, leaving only the portion of the contractual indemnification claim that seeks reimbursement for counsel fees incurred in defending the underlying lawsuit as Defendant Fantozzi argues that Defendant DPI is responsible for their defense in this action pursuant to the lease terms.

The Lease Rider states, in relevant part,

“The Tenant shall indemnify and save harmless, landlord, mortgagee, or underlying lease, and their respective officers, directors, contractors, agents and employees against all liability statutory or otherwise, claims suits, demands, damages, judgments costs, interest and expenses, including but not limited to counsel fees and disbursements incurred in the defense of any action or proceeding to which they may be subject or which they may suffer by reason of, or by reason of any claim for any injury or death of any person or persons or damage to property including any loss of use thereof or

otherwise arising from or in connection with work, installation or anything done by someone other than landlord in the premises during the term of the lease or arising from any condition of the premises due to or resulting from any default of tenant in the performance of tenant's obligations under the lease or from any act malicious or negligent conduct of tenant or any officer, director, agent contractor, servant, employee licensee or invitees of tenant".

The burden is on Defendant Fantozzi to establish that Defendant DPI is responsible for their defense in this action pursuant to the lease terms. Pursuant to same, Defendant DPI would be responsible for their defense with respect to a personal injury arising out of any breach of contract with respect to Defendant DPI's obligations to maintain the premises, or an injury sustained as a result of "work, installation or anything done by someone other than landlord in the premises during the term of the lease". It has already been held that there was no breach of contract with respect to Defendant DPI's responsibility to maintain the premises inasmuch as no liability was found. Further, while Plaintiff was unable to sufficiently demonstrate that any particular Defendant herein conducted the repairwork to the sidewalk which resulted in the trip and fall and the underlying complaint herein, Defendant Fantozzi similarly has failed to provide sufficient evidence to demonstrate that any work was done by anyone other than "landlord" and has failed to demonstrate or even allege a timeframe for the alleged faulty repairwork. Accordingly, Defendant Fantozzi has failed to establish its entitlement to indemnification with respect to the costs of defending the underlying lawsuit.

In accordance with the forgoing, it is hereby:

ORDERED, that the motion by Defendant County of Nassau is hereby granted in its entirety and the complaint filed under Index # 606682/2015 is hereby dismissed as against Defendant County of Nassau; and it is further

ORDERED, that the motion by Defendant Joanne Fantozzi or her successors, as Trustee of the Jack F. Linden and Mary Lou Linden Irrevocable Trust is hereby granted to the extent that the complaint filed under Index #606682/205 is dismissed as against Defendant Joanne Fantozzi or her successors, as Trustee of the Jack F. Linden and Mary Lou Linden Irrevocable Trust. The motion is denied to the extent that it seeks summary judgment as to their cross-claims as against Defendant Demi's Place, Inc.; and it is further

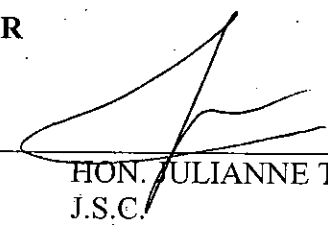
ORDERED, that the motion by Defendant Demi's Place, Inc. is hereby granted in its entirety and the complaint filed under Index #606682/2015, as well as all cross-claims, is dismissed as against Defendant Demi's Place, Inc..

Defendant County of Nassau shall serve a copy of this order on all parties within ten (10) days of their receipt hereof.

This constitutes the decision and order of the Court.

ENTER

Dated: November 1, 2017



HON. JULIANNE T. CAPETOLA
J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE