

Bockstruck v Town of Islip
2018 NY Slip Op 30686(U)
April 13, 2018
Supreme Court, Suffolk County
Docket Number: 11-8516
Judge: Sanford Neil Berland
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SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK PART 6- SUFFOLK COUNTY

PRESENT:

Hon. Sanford Neil Berland, A.J.S.C.

KATHY BOCKSTRUCK and BRUCE
BOCKSTRUCK,

Plaintiff(s),

-against-

THE TOWN OF ISLIP, SUFFOLK COUNTY
SEWER DISTRICT, SUFFOLK COUNTY
WATER AUTHORITY, SUFFOLK COUNTY
and SOUTHWEST SEWER DISTRICT, WEST
ISLIP, POST #1738-AMERICAN LEGION,
INC.,

Defendant(s).

ORIG. RETURN DATE: March 21, 2017
FINAL RETURN DATE: December 19, 2017
MOT. SEQ. #: 005-MD

ORIG. RETURN DATE: May 23, 2017
FINAL RETURN DATE: December 19, 2017
MOT. SEQ. #: 006-MG

ORIG. RETURN DATE: September 12, 2017
FINAL RETURN DATE: September 12, 2017
MOT. SEQ. #: 007-MD

ORIG. RETURN DATE: October 10, 2017
FINAL RETURN DATE: December 19, 2017
MOT. SEQ. #: 008-MD

ORIG. RETURN DATE: May 23, 2017
FINAL RETURN DATE: December 19, 2017
MOT. SEQ. #: 009-MG

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion (Mot. Seq. 005) by defendant, West Islip Post #1738-American Legion, Inc., dated February 15, 2017, and supporting papers; (2) Answering Affidavits made by defendant, Suffolk County Water Authority, dated April 18, 2017, and supporting papers; (3) Answering Affidavits made by plaintiff, dated October 6, 2017, and supporting papers; (4) Replying Affidavits made by defendant West Islip Post #1738-American Legion, Inc., dated July 7, 2017, and supporting papers; (5) Notice of Motion (Mot. Seq. 006) by defendant, Town of Islip, dated May 3, 2017, and supporting papers; (6) Notice of Motion (Mot. Seq. 007) by defendant Suffolk County Water Authority, dated September 5, 2017, and supporting papers; (7) Notice of Motion (Mot. Seq. 008) by defendants Suffolk County Water Authority, dated October 2, 2017, and supporting papers; (8) Answering Affidavits made by plaintiff, dated October 6, 2017, and supporting papers; (9) Notice of Motion (Mot. Seq. 009) by defendants Suffolk County Sewer District, Suffolk County, and Southwest Sewer District, dated April 24, 2017, and supporting papers; (10) Notice of Motion made by defendants Suffolk County Sewer District, Suffolk County and the Southwest Sewer District, dated April 24, 2017 and supporting papers; (11) Replying Affidavits made by defendants Suffolk County Sewer District, Suffolk County and the Southwest Sewer District, dated July 17, 2017, and supporting papers; it is,

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

ORDERED that the motion made by defendant West Islip Post #1738-American Legion, Inc., (Mot. Seq. 005) pursuant to CPLR 3212 is denied without prejudice to renewal upon the completion of discovery; and it is further

ORDERED that the unopposed motion made by defendant Town of Islip (Mot. Seq. 006) pursuant to CPLR 3212 is hereby granted in its entirety; and it is further

ORDERED that the cross motion made by defendant Suffolk County Water Authority (Mot. Seq. 007) pursuant to CPLR 3212 is hereby denied as duplicative to defendant's subsequent motion (Mot. Seq. 008); and it is further

ORDERED that the cross motion made by defendant Suffolk County Water Authority (Mot. Seq. 008) pursuant to CPLR 3212 is hereby denied; and it is further

ORDERED that the motion made by defendants Suffolk County Sewer District, Suffolk County and the Southwest Sewer District (Mot. Seq. 009) pursuant to CPLR 3212 is hereby granted; and it is further

ORDERED that the remaining parties to the action are to appear for a compliance conference on **Wednesday, May 30, 2018** at 9:30 a.m. in Part 6 of the Supreme Court located at One Court Street in Riverhead, New York.

The plaintiff Kathy Bockstruck commenced the instant action seeking damages for injuries she allegedly incurred as a result of a trip and fall accident that occurred on May 31,

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2010 at approximately 11:15 a.m. on Higbie Lane, at or near its intersection with Sutton Court in West Islip, New York. Bockstruck's husband, Bruce, asserts a derivative claim. The accident is alleged to have occurred as plaintiff was marching in a Memorial Day parade organized and sponsored by the defendant West Islip Post #1738-American Legion (hereinafter Post #1738). While marching in the parade with her daughter's softball team, plaintiff allegedly stepped into an uncovered utility valve sleeve¹ in the roadway. It remains uncontroverted that more than a hundred other participants had marched ahead of plaintiff without incident. It is further alleged that the cover of the utility valve sleeve was quickly replaced by unknown parties.

The defendants are Post #1738, the Town of Islip ("Islip"); the Suffolk County Water Authority ("SCWA"), Suffolk County, the Suffolk County Sewer District ("SCSD") and the Southwest Sewer District ("SWSD"). Each has moved for summary judgment dismissing the claims that have been asserted against it. The grounds offered by the moving defendants vary. Thus, Post #1738 contends that it had no control over or responsibility for the condition of the roadway in general or the utility valve sleeve in particular, and therefore had no corresponding duty to plaintiffs. Islip argues that it does not own, control or maintain Higbie Lane, which is a county road, that it neither created the alleged "defect" nor made any special use of the area where Bockstruck's accident occurred, and that there was no prior written notice given to the town of the alleged defect, which is a prerequisite to any civil lawsuit against the town. Similarly, Suffolk County, the SCSD and the SWSD (the "County defendants") assert that regardless of the type of valve that was housed in the sleeve, they had no involvement with it and, in any event, no prior written notice of the alleged defect had been provided to them as required by Suffolk County Charter C8-2A. Plaintiffs, joined by the SCWA, oppose Post #1738's motion both as premature and as raising triable issues of fact, while plaintiff alone opposes the SCWA's motion, on the grounds that the SCWA admits to having ownership of and maintenance responsibility for the valve box and sleeve but has neither shown when its last inspection of the valve actually occurred nor made a prima facie showing that it lacked constructive notice of the alleged defect. No opposition, however, has been submitted to either Islip's or the County defendants' motion.

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

¹There appears to be some ongoing confusion on this score. On the one hand, the SCWA appears to believe that the sleeve houses a water valve, or water valve box, owned by SCWA and used to control the flow of water in an underlying water main. On the other hand, the County defendants maintain, and have tendered deposition testimony and other proof to the effect that the sleeve and box housed a gas valve owned by the gas utility.

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

WEST ISLIP POST #1738-AMERICAN LEGION, INC. MOTION FOR SUMMARY JUDGMENT

“A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment” (*Malester v Rampil*, 118 AD3d 855, 856, 988 NYS2d 226 [2d Dept 2014]; see *Video Voice, Inc. v Local T.V., Inc.*, 114 AD3d 935, 980 NYS2d 828 [2d Dept 2014]; *Bank of Am., N.A. v Hillside Cycles, Inc.*, 89 AD3d 653, 932 NYS2d 128 [2d Dept 2011]). Here, the Court agrees that movant’s motion for summary judgment is premature as discovery remains outstanding, and also that, on the current record, there are issues of fact precluding the grant of summary judgment at this time, both with respect to how and when the valve sleeve came to be uncovered and its opening unprotected, and concerning the full nature and extent of Post #1738’s control over the parade and its route and the extent of its corresponding responsibility, if any for, the safety of participants.

Accordingly, Post #1738’s motion (005) seeking dismissal of the complaint as against it is denied without prejudice to renewal upon the completion of discovery.

AS TO THE TOWN OF ISLIP

As a general rule, a municipality will not be held responsible for the negligent design of a highway it does not own or control (see *Ernest v Red Creek Cent. Sch. Dist.*, 93 NY2d 664 [1999]; *Horn v Town of Clarkstown*, 46 AD3d 621 [2d Dept. 2007]; *Carlo v Town of E. Fishkill*, 19 AD3d 442 [2d Dept. 2005]; *Hynes v Town of Cornwall*, 234 AD2d 423 [2d Dept. 1996]). Moreover, a municipality cannot be held liable for the failure to maintain in a reasonably safe condition on a road it does not own or control unless it affirmatively undertakes such a duty (see *Ernest v. Red Creek Cent. Sch. Dist.*, *supra*; *Horn v Town of Clarkstown*, *supra*; *Carlo v Town of E. Fishkill*, *supra*; *Hynes v Town of Cornwall*, *supra*). Here, the evidence submitted by the Town, including the affidavit of Peter Kletchka, Public Works Project Supervisor, established that the Town did not own or control the roadway at issue (see *Cuzzo v. Town of Hempstead*, 61 AD3d 921, 877 NYS2d 463 [2d Dept. 2009]; *Molina v Conklin*, 57 AD3d 860,

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871 NYS2d230 [2d Dept 2008]). Islip also demonstrated that no prior written notice of the alleged defect or condition had been provided to it. No papers in opposition to this motion were submitted.

Accordingly, the Town's motion (006) seeking dismissal of the complaint as against it is granted in its entirety.

AS TO THE SUFFOLK COUNTY WATER AUTHORITY

As previously discussed, a defendant who moves for summary judgment in a negligence case claiming injury from an allegedly hazardous condition has the initial burden of demonstrating, *prima facie*, 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 (*see DeFalco v BJ's Wholesale Club, Inc.*, 38 AD3d 824, 832 NYS2d 632 [2d Dept 2007]). Moreover, "[t]o meet its burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall" (*Mehra v Stop & Shop Supermarket Co., LLC*, 129 AD3d 1037, 1038, 12 NYS3d 269 [2d Dept 2015]; *see James v Orion Condo-350 W. 42nd St.*, LLC, 138 AD3d 927, 30 NYS3d 216 [2d Dept 2016]). In support of its motion, SCWA did not submit evidence as to when the valve box was last inspected, nor was any information provided as to its policies and practices governing the routine maintenance and inspection of its valve boxes and sleeves. Accordingly, the SCWA failed to meet its initial burden as the movant, and its motion must be denied (*see Gray v Lifetitz*, 83 AD3d 780, 920 NYS2d 693 [2d Dept 2011]; *Soto-Lopez v Board of Mgrs. of Crescent Tower Condominium*, 44 AD3d 846, 843 NYS2d 444 [2d Dept 2007]; *Cox v Huntington Quadrangle No. 1 Co.*, 35 AD3d 523, 826 NYS2d 638 [2d Dept 2006]).

AS TO SUFFOLK COUNTY SEWER DISTRICT, SUFFOLK COUNTY and SOUTHWEST SEWER DISTRICT

The Suffolk County Sewer District, Suffolk County and the Southwest Sewer District (collectively referred to herein as "County defendants") seek dismissal of the complaint as against them, contending that the County defendants as a whole have no involvement with the "utility valve" in question. The County defendants further contend that there was "no prior written notice" as to any defect at the accident location as required as a precondition to any lawsuit pursuant to Suffolk County Charter C8-2A. Suffolk County Charter C8-2A provides, in relevant part, that:

No civil action shall be maintained against Suffolk County or any of its departments, agencies, offices, districts, boards, commissions or subdivisions for damages or injuries to a person or property sustained by reason of any (a) highways; (b) roads; (c) streets; (d) parking lots and parking fields; (e) bridges;... street lighting; (q) drains and drainage

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structures; (r) sidewalks; (s) walkways; (t) boardwalks; (u) crosswalks and underpasses; (v) sewers; (w) manholes; (x) curbs; (y) gutters; (z) trees and tree limbs; (aa) street markings; (bb) traffic signs, signals or traffic control devices; ... under the jurisdiction of the County, on account of that structure or thing enumerated above, in whole or in part, allegedly being in a defective condition, out of repair, unsafe, dangerous or obstructed ..., unless the County has received written notice within a reasonable time before said injury or property damage was sustained,... Such written notice shall specify the particular place and nature of such defective, unsafe, dangerous, or obstructed condition or the particular location of the snow or ice. Such notice shall be made in writing by certified or registered, mail to the Clerk of the Suffolk County Legislature, who shall forward a copy to the County Attorney.

Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for personal injuries caused 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]). Here, based upon the affidavit of Jason Richberg, Clerk of the Suffolk County Legislature, attesting to the search of County records, the County defendants have established their prima facie entitlement to summary judgment by proffering proof that they had no prior written notice of any alleged defect at the subject property. Further, the record is clear that the County defendants neither created the alleged defect nor made any special use of the property created the defect (*Gonzalez v Town of Hempstead*, *supra*; *Forbes v City of New York*, 85 AD3d 1106, 1107, 926 NYS2d 309 [2d Dept 2011]). As such, the motion by the County defendants is granted and the complaint as against them is dismissed.

The court directs that the dismissed claims be and hereby are severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]). The remaining parties are reminded of the previously scheduled compliance conference on **Wednesday, May 30, 2018**.

Dated: 4/13/2018

Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.

 FINAL DISPOSITION

 XX NON-FINAL DISPOSITION