SHORT FORM ORDER

INDEX No. 13-61188
CAL. No. 17-00641OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice Supreme Court

MOTION DATE 9-12-17 (004)
MOTION DATE 10-11-17 (005)
MOTION DATE 10-12-17 (006, 007)
ADJ. DATE 4-11-18
Mot. Seq. # 004 MG # 006 MG
005 MG # 007 MG; CASEDISP

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BARBARA BLAY-GORDON,

Plaintiff,

- against -

LONG ISLAND LIGHTING COMPANY d/b/a LONG ISLAND POWER AUTHORITY a/k/a LIPA, VERIZON NEW YORK, INC., TOWN OF ISLIP, COUNTY OF SUFFOLK and JACK CIPRIANO,

Defendants.

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Upon the following papers numbered 1 to 116 read on these motions for summary judgment : Notice of Motion and supporting papers 1-36; 41-69; 82-103; Answering Affidavits and supporting papers 37-38; 70-71; 72-77; 78-79; 104-112; 113-114; Replying Affidavits and supporting papers 39-40; 80-81; 115-116; it is,

ORDERED that the motion by defendant Town of Islip for summary judgment dismissing the plaintiff's complaint against it is granted; and it is further

ORDERED that the motion by defendant Jack Cipriano for summary judgment dismissing the plaintiff's complaint and all cross claims against him is granted; and it is further

ORDERED that the motion by defendant Verizon New York, Inc. for summary judgment dismissing the plaintiff's complaint and all cross claims against it is granted; and it is further

ORDERED that the motion by defendant County of Suffolk for summary judgment dismissing the plaintiff's complaint and all cross claims against it is granted.

This action was commenced by plaintiff to recover damages for personal injuries she allegedly sustained on March 3, 2012, when she tripped and fell on a metal rod protruding from a grassy area between a sidewalk and a fence. The accident allegedly happened in front of a private home owned by defendant Jack Cipriano, located at 64 East Suffolk Avenue, Central Islip, New York. The complaint alleges that defendants were negligent in failing to maintain the sidewalk in a reasonably safe condition and allowing a dangerous condition to exist. By order dated January 14, 2014, the motion of defendant Long Island Lighting Company was granted, and the action was dismissed against it, as no notice of claim was served upon such defendant.

The Town of Islip now moves for summary judgment dismissing the complaint and cross claims against it on the grounds that it did not have a duty to maintain the subject area, and that it did not receive prior written notice of the alleged dangerous condition. In support of its motion, the Town submits copies of the pleadings, plaintiff's testimony from a 50-h hearing, an affidavit by Peter Kletchka and copies of photographs of the subject area.

Plaintiff testified that on the date of the incident, she was walking on the sidewalk of East Suffolk Avenue in Central Islip between 2:00 and 3:00 p.m. She testified that it was a dry, sunny day, and that she intended to walk to her friends house. Plaintiff testified that while she was walking on the sidewalk, a woman with a push cart was walking towards her from the opposite direction, so she stepped off the sidewalk and onto a grassy area in front of a private home to allow room for the woman to pass. She testified that after she stepped onto the grass, she tripped on a metal rod and fell to the ground. She testified that the metal rod was protruding from the grass and was approximately four inches long, that it was approximately three inches from the sidewalk, and that she did not observe it before she tripped.

The affidavit of Peter Kletchka, an employee of the Town, states that he has worked for the Town for 30 years and is currently a supervisor in the Department of Public Works. It states that he is responsible for maintaining sidewalks and curbs that are adjacent to County roads, and that the sidewalk in front of 64

East Suffolk Avenue is within his area to maintain. In his affidavit, Kletchka states that he caused a search to be made of complaints filed with the Town about the subject location during the three-year period prior to the subject incident, and that he is unaware of any complaints regarding the metal rod. He states further that he inspected the area and observed the metal rod, which he describes as a metal anchor used by utility companies to secure a guy wire to hold a utility pole in place. He states that the rod was protruding from the grass on the north side of the sidewalk, which is private property, and avers that the Town is not responsible for maintaining the subject area. Kletchka states further that the Town did not become aware of the metal rod prior to the subject incident.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). The failure to meet such burden requires denial of the motion regardless of the sufficiency of the papers in opposition (*see* ***JMD Holding Corp. v Congress Fin. Corp.***, 4 NY3d 373, 384, 795 NYS2d 502 [2005]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851,487 NYS2d 316 [1985]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see* ***Rodriguez v 5432-50 Myrtle Ave., LLC***, 148 AD3d 947, 50 NYS2d 99 [2d Dept 2017]; ***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). A municipality has the nondelegable duty of maintaining its roads and highways in a reasonably safe condition (***Wittorf v City of New York***, 23 NY3d 473, 479, 991 NYS2d 578 [2014]; ***Stiuso v City of New York***, 87 NY2d 889, 639 NYS2d 215 [1995]), and that duty extends to conditions adjacent to the highway (***Finn v Town of Southampton***, 289 AD2d 285, 286, 734 NYS2d 215 [2d Dept 2001]).

Pursuant to Highway Law § 140 (18), the Town Superintendent shall"[m]aintain all sidewalks in the town constructed by the state adjacent to state highways and all sidewalks in the town constructed by the county adjacent to county roads and, when authorized by the town board, cause the removal of snow therefrom, and the cost thereof shall be paid from the miscellaneous or other town funds." Vehicle and Traffic Law § 144 defines sidewalk as"[t]hat portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for the use of pedestrians." The grassy area between the sidewalk and the curb line is considered part of the sidewalk (*see* ***Gallo v Hempstead***, 124 AD2d 700, 508 NYS2d 212 [2d Dept 1986]; ***Malone v Town of Southold***, 303 AD2d 651, 757 NYS2d 85 [2d Dept 2003]). Here, plaintiff testified that the metal rod was protruding from the grassy area between the sidewalk and a fence that was in front of a private house. Consequently, the incident did not occur on a sidewalk, and

the Town established that it did not have a duty to maintain such area, thus establishing its prima facie entitlement to summary judgment. The burden now shifts to plaintiff to raise a triable issue of fact.

In opposition, plaintiff submits an affirmation by counsel, which fails to raise a triable issue of fact. Counsel's argument is based upon the incorrect assumption that the metal rod was in the grassy area between the curb line and the sidewalk. As there is no evidence of same, the Town's motion for summary judgment is granted, and the action is dismissed against it.

Defendant Jack Cipriano moves for summary judgment in his favor on the grounds that the metal rod which allegedly caused plaintiff to trip was not on his property, and in any event, he is an out-of-possession landlord who had no duty to maintain the grassy area. In support of the motion, Cipriano submits copies of the pleadings, the affidavits of Paul Morano and David Keller, and copies of photographs of the subject property.

Cipriano testified that he has owned the property located at 64 East Suffolk Avenue since 1975, but he has never resided in the house; rather, he utilizes the house as a residential rental property. He testified that he does not enter into written leases with his tenants, and that he rents the property on a monthly basis. Cipriano testified that he has never observed the metal rod and is unaware of its purpose. He testified that when he purchased the property, he hired a contractor to install a fence, and that he placed the fence within the boundaries of his property according to the survey. He testified that there is four feet of grass in front of the fence that is adjacent to the sidewalk, and that it is owned by the County. Cipriano testified that he walks by the property frequently as he lives close by, but that he does not maintain the grass or the sidewalk area, as such maintenance is the responsibility of his tenants.

Paul Morano testified that he is employed by the County and works in the Department of Public Works, and that his current job title is Assistant Civil Engineer. Morano testified that his duties include researching records for claims brought against the County. He testified that the County does not maintain any records of complaints regarding the subject sidewalk, as the Town is responsible for maintaining the sidewalks, so all complaints are referred to the Town.

An affidavit by David Keller, a construction manager for Verizon, states that he has worked for Verizon since 1997, and that his duties include supervising technicians who perform aerial and underground placement of cable and poles. Keller states in the affidavit that he reviewed photographs of the subject area and the notice of claim, and that he performed an inspection of the subject area in May 2013 and took photographs of the metal object. Keller avers that the metal rod is an anchor and that he observed a LIPA wire called a "down guy" attached to the anchor which runs to two "cross arms" located at the top of the utility pole; that there were no Verizon wires or equipment attached to the anchor; and that a "ram's horn" would have been in place if Verizon wires had been attached to the anchor. He avers that the absence of the rams's horn and the absence of any Verizon equipment or wires indicates that the subject anchor was not owned, controlled, or utilized by Verizon.

Cipriano's submissions established his prima facie entitlement to summary judgment, thus shifting the burden to plaintiff and codefendants to come forward with evidentiary proof sufficient to raise a material issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

In opposition, plaintiff submits an affirmation of her attorney, which fails to raise a triable issue of fact. Verizon and the Town oppose the branch of Cipriano's motion for summary judgment dismissing their cross claims. Verizon submits the transcript of deposition testimony by non-party Thomas Brandt, an employee of PSEG. Brandt testified that he is a field supervisor for overhead lines, and that he inspected the subject area some time after the incident. He testified that the utility pole in front of the subject property is 40 years old, and that it is a "straightaway pole." He testified that anchors and guy wires are not used for straightaway poles; rather, they are used on corner poles and turn poles, and that the utility pole located on the grassy area between the sidewalk and the fence is a straightaway pole. Brandt testified that the only work order for the subject pole was created in 1975, and that the utility pole has not been altered since then. He was shown photographs of the metal rod and testified that it did not look like an anchor.

The Town opposes Cipriano's motion and cites Islip Town Code §§ 47A-17 and 47A-19, which require that owners and occupants of houses keep sidewalks in good and safe repair and free from "other obstructions or encumbrances." However, as discussed above, the dangerous condition that allegedly caused plaintiff to fall was not located on the sidewalk. Accordingly, the motion of Cipriano for summary judgment dismissing the complaint and cross claims against him is granted.

Verizon also moves for summary judgment dismissing the complaint and cross claims against it on the ground that it did not install, own or utilize the metal rod, and thus owed no duty of care to plaintiff. The complaint alleges that Verizon owned a utility pole on the subject property and that it was negligent in failing to maintain the utility pole and its "supporting structures" in a safe condition. In support of the motion, Verizon submits an affidavit of Robert Compitello, the transcript of deposition testimony of David Keller, and a document created by the Department of Public Works for the Town of Islip. In his affidavit, Compitello states that he has worked for Verizon for ten years and was a right of way agent for the subject property on the date of the incident. He states that his duties include receiving and handling complaints regarding Verizon's equipment, including poles, cables, guy wires and anchors. He avers that he searched Verizon's records for the five years preceding the subject incident, and that he did not find any complaints regarding the subject area.

A document created by the Department of Public Works for the Town of Islip states that on June 12, 2013, the Town sent two employees, including Peter Kletchka, to the subject area who observed a metal stake protruding through the grass on the north side of the sidewalk. The crew was unable to pull it up so they pounded into the ground. The notice also states that they were unable to ascertain who installed the metal stake.

Verizon also submits the transcript of deposition testimony by David Keller. He testified that he performed a site survey of the subject area in 2013, and that he did not see the metal rod. He was shown pictures of the rod and testified it looked like a "random piece of rusted metal." He testified that the pole did not have any of Verizon's wires on it, and that Verizon would not have used an anchor for that particular

pole as it is not on a corner or on a curve. He testified that ground rods are installed by the lighting company and that Verizon attaches its equipment to them.

Verizon also submits the transcript of testimony from Brandt's deposition, referred to above, which establishes that Verizon did not place the rod in the ground. Verizon's submissions established its entitlement to summary judgment. No opposition has been submitted by plaintiff or codefendants. Accordingly, the motion of Verizon for summary judgment dismissing the complaint and cross claims against it is granted.

Finally, as to the County's motion for summary judgment in its favor on the grounds that it did not receive prior written notice of the alleged dangerous condition, a municipality has the nondelegable duty of maintaining its roads and highways in a reasonably safe condition (***Wittorf v City of New York***, 23 NY3d 473, 479, 991 NYS2d 578 [2014]; ***Stiuso v City of New York***, 87 NY2d 889, 639 NYS2d 215 [1995]), and that duty extends to conditions adjacent to the highway (***Finn v Town of Southampton***, 289 AD2d 285, 286, 734 NYS2d 215 [2d Dept 2001]). However, a municipality that has enacted a prior written notice statute may not be subjected to liability for injuries caused by a dangerous condition which allegedly caused the accident unless it either has received written notice of the defect or an exception to the written notice requirement applies (***Dibble v Village of Sleepy Hollow***, 156 AD3d 602, 66 NYS3d 26 [2d Dept 2017]; ***Poveromo v Town of Cortlandt***, 127 AD3d 835, 6 NYS3d 617 [2d Dept 2015]; ***Dutka v Odierno***, 116 AD3d 823, 983 NYS2d 405 [2d Dept 2014]; ***Forsythe-Kane v Town of Yorktown***, 249 AD2d 505, 672 NYS2d 355 [2d Dept 1998]). 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, 720, 2 NYS3d 527 [2d Dept 2015]).

Suffolk County Charter § C8-2 (A) provides that no civil action shall be maintained against Suffolk County for personal injuries due to, among other things, walkways, sidewalks, buildings or other property and lands or any tree, bush, vegetation, appurtenance or structure "in near proximity or attached to or necessary for the functioning of items (a) through (r) identified above, 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 prior to said injury. The required notice must be in writing and sent by certified or registered mail to the Clerk of the Suffolk County Legislature, who is to forward a copy to the County Attorney.

Here, the County established a prima facie case that it did not receive written notice regarding the subject sidewalk and grassy area where the incident occurred by submitting the affidavit of Jason Richberg. Richberg states that he is the Clerk for the Suffolk County Legislature and is responsible for maintaining records of written complaints concerning defects and obstructions for sidewalks and adjacent areas, that he searched the records for complaints and notices created prior to the date of the incident, and that the search showed the County is not in possession of any written notice regarding the dangerous condition at the subject location.

Furthermore, plaintiff failed to allege any affirmative negligence or special use in her complaint or bill of particulars. As the prima facie showing which a defendant is required to make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings, the County is not required to establish that the two exceptions to prior written notice do not apply (***Toscano v Town of Huntington***, 156 AD3d 837, 68 NYS3d 81 [2d Dept 2017]; ***Miller v Village of E. Hampton***, 98 AD3d 1007, 951 NYS2d 171 [2d Dept 2012]). Neither the complaint nor the bill of particulars allege any acts of affirmative negligence on the part of the County. Rather, it is alleged that the County was "negligent in its ownership, operation, maintenance, management and control of their property, including the chain-link fence and the sidewalk and the metal rod/post that existed thereat, in that they improperly permitted the aforesaid metal rod/post to exist and remain and present a hazard." Such allegations do not expressly set forth the two exceptions and are insufficient to place the burden on the County to establish that the exceptions do not apply as part of its prima facie case (*see* ***Hsu v City of New York***, 145 AD3d 759, 43 NYS3d 139 [2d Dept 2016]; ***Barone v Nickerson***, 140 AD3d 1100, 32 NYS3d 663 [2d Dept 2016]). Having established its prima facie entitlement to summary judgment, the burden shifts to plaintiff to raise a triable issue of fact.

In opposition, plaintiff's counsel argues that Highway Law § 139 (2) enables plaintiff to recover even without the County having received prior written notice of the defect. The statute allows for tort recovery for dangerous highway conditions, where, in the absence of prior written notice, "such defective, unsafe, dangerous or obstructed condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence." It is undisputed that the subject accident occurred on a grassy area adjacent to the sidewalk, and not on a highway. Consequently, Highway Law § 139 is inapplicable (*see* ***Zash v County of Nassau***, 171 AD2d 743, 567, NYS2d 299 [2d Dept 1991]; ***Shapiro v County of Nassau***, 26 Misc3d 1238(A), 907 NYS2d 441 [Sup Ct, Nassau Cty 2010]). As plaintiff has failed to raise a triable issue of fact as to whether the County created the dangerous condition through its affirmative negligent acts, or whether a special use conferred a special benefit on the County (*see* ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]; ***Long v City of Mount Vernon***, 107 AD3d 765, 967 NYS2d 749 [2d Dept 2013]; ***Gianna v Town of Islip*** 230 AD2d 824, 646 NYS2d 707 [2d Dept 1996]), the County's motion for summary judgment is granted, and the complaint is dismissed against it.

Dated: May 29, 2018

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION