

Brower v County of Suffolk

2018 NY Slip Op 32685(U)

October 10, 2018

Supreme Court, Suffolk County

Docket Number: 13-2276

Judge: Joseph A. Santorelli

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice Supreme Court

MOTION DATE 1-11-18 (002 & 003)
ADJ. DATE 3-8-18
Mot. Seq. # 002 - MG
003 - MG; CASEDISP

-----X
MARILYN BROWER and MARK BROWER,

Plaintiffs,

- against -

COUNTY OF SUFFOLK, TOWN OF
BROOKHAVEN, TOWN OF BROOKHAVEN
HIGHWAY DEPARTMENT AND
INCORPORATED VILLAGE OF MASTIC
BEACH,

Defendants.
-----X

LEO TEKIEL, ESQ.
Attorney for Plaintiffs
1900 Hempstead Turnpike, Suite 304
East Meadow, New York 11554

ANNETTE EADERESTO
BROOKHAVEN TOWN ATTORNEY
Attorney for Defendant Town of Brookhaven
One Independence Hill
Farmingville, New York 11738

MARTIN, CLEARWATER & BELL, LLP
Attorney for Defendant Incorporated
Village of Mastic Beach
90 Merrick Avenue, Suite 401
East Meadow, New York 11554

Upon the following papers numbered 1 - 55 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; 33 - 44; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 26 - 27; 45 - 50; 51 - 52; Replying Affidavits and supporting papers 28 - 30; 31 - 32; 53 - 55; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motions by defendants Incorporated Village of Mastic Beach and Town of Brookhaven are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Incorporated Village of Mastic Beach for summary judgment in its favor dismissing the complaint is granted; and it is further

ORDERED that the motion by defendant Town of Brookhaven for summary judgment in its favor dismissing the complaint is granted.

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Plaintiff Marilyn Brower commenced this action to recover for personal injuries she allegedly sustained when she slipped on snow and fell on January 23, 2012, on Lynbrook Drive right, before its intersection with Dogwood Avenue, while walking home from a local pub around midnight. On January 24, 2012, plaintiff allegedly reported to her physician that she fell on her driveway on an icy patch. She alleges, inter alia, negligence on behalf of the Incorporated Village of Mastic Beach and the Town of Brookhaven for failure to properly maintain the roadway. Plaintiff's husband, Mark Brower, alleges he was deprived of the services and companionship of his wife due to defendants' negligence. The Incorporated Village of Mastic Beach has also cross-claimed against the Town of Brookhaven. Issue has been joined, discovery is complete and a note of issue has been filed. Plaintiff, by stipulation of discontinuance, dated June 15, 2017, dismissed the action against defendant County of Suffolk.

Defendant Incorporated Village of Mastic Beach now moves for summary judgment on the ground that, pursuant to an agreement with the defendant Town of Brookhaven, it was the Town of Brookhaven's responsibility to remove snow and ice; therefore, it owed no duty to plaintiff. It also argues that it did not have prior written notice of the alleged defective condition, and that it did not create the alleged defective condition. In support of the motion, the Village of Mastic Beach submits, among other things, a copy of the pleadings, the deposition transcripts of plaintiffs, Peter Constelloe, Michael Murphy, and Virgilia Gross, plaintiff's medical records, the snow and ice removal agreement with the Town of Brookhaven, and an affidavit of Virgilia Gross.

Defendant Town of Brookhaven moves for summary judgment pursuant to CPLR 3212 on the grounds it was not negligent, owed no duty to plaintiff, did not breach any duty, did not have actual or constructive notice of any defective condition, and did not create the alleged condition. In support of the motion the Town submits a copy of the pleadings, the deposition transcript of plaintiff pursuant to General Municipal Law § 50-h, the transcript of plaintiff's deposition, the deposition transcript of Virgilia Gross, and the affidavits of Marie Angelone, and Linda Sullivan.

In opposition to both motions, plaintiff submits, among other things, an affirmation of counsel, and portions of the deposition transcripts of Michael Murphy and Virgilia Gross.

Plaintiff testified at her deposition that on January 22, 2012, she and her husband walked to a local pub called Linsa Torres. She testified she consumed two beers, and walked home around midnight. While walking home she slipped and fell on some snow in the street on Lynbrook Drive right before its intersection with Dogwood.

Virgilia Gross testified that she was the first clerk for the Incorporated Village of Mastic Beach and was responsible for receiving written complaints for the Village. She testified that from January 1, 2012 to January 22, 2012, that there were no snow and ice complaints made to the Village of Mastic Beach. She avers that a review of the Village's "prior notice book reveals that there were no previous complaints filed with the Village concerning any condition/defect at the subject location prior to plaintiff's accident on January 23, 2012." An agreement between the Incorporated Village of Mastic Beach and the Town of Brookhaven provides that from November 1, 2011 until April 30, 2012 the Town of Brookhaven will remove snow and ice from Village roadways.

Marie Angelone avers that she is employed by the Town of Brookhaven with the Highway Department, and that her search of the records of the Highway Department for five years prior to January 23, 2012, did not reveal any written complaints related to snow or icy conditions at Lynbrook Drive. Likewise, Linda Sullivan avers that she is employed by the Town of Brookhaven with the clerk's office as a senior clerk typist, and her search of the books and files maintained by the Town Clerk for five years prior to January 23, 2012 did not reveal any prior written complaints with regard to snow and icing conditions at Lynbrook Drive.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form 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]; *Friends of Animals, Inc. v Associated Fur Mars., Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). 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]). "Once this showing has been made, however, 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 at 324, 508 NYS2d 923, *citing Zuckerman v City of New York*, 49 NY2d at 562, 427 NYS2d 595).

The Incorporated Village of Mastic Beach has established its prima facie entitlement to judgment. A municipality has a duty to maintain its roadways in a reasonably safe condition (*Friedman v State*, 67 NY2d 271, 502 NYS2d 669 [1986]). However, 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 roadway or sidewalk unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (*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]; *Gazenmuller v Inc. Vil. of Port Jefferson*, 18 AD3d 703, 795 NYS2d 744 [2d Dept 2005]). Actual or constructive notice of a defect does not satisfy this requirement (*Wilkie v Town of Huntington, supra*). There are only two exceptions to the prior written notice 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 (*see Amabile v City of Buffalo, supra; Ganzenmuller v Incorporated Vill. of Port Jefferson, supra*).

Village Law § 6-628 provides:

No civil action shall be maintained against the village for damages or injuries to person or property sustained by reason of any street, highway, bridge, culvert, sidewalk, or crosswalk being defective, out of repair, unsafe, dangerous or obstructed or damages or injuries to persons or property sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk, street, highway, bridge or culvert unless written notice of such defective, unsafe, dangerous or obstructed condition or the existence of snow or ice,

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relating to the particular place, was actually given to the village clerk and there was a failure or neglect within a reasonable time after receipt of such notice to repair or remove the defect, danger, or obstruction complained of, or to cause the snow or ice to be removed, or the place otherwise made reasonably safe.

The Incorporated Village of Mastic Beach, which enacted Village Law § 6-628 on May 1, 2011, as Mastic Beach Code § 290-1, has established that it did not receive prior written notice of the alleged snow and icy condition on Lynbrook Drive which caused plaintiff's injuries. No special use of Lynbrook Drive has been alleged, and the Incorporated Village of Mastic Beach Town has established that it did not create the defect or hazard through an affirmative act. Additionally, the agreement between Incorporated Village of Mastic Beach and the Town of Brookhaven establishes that the Town of Brookhaven, not the Incorporated Village of Mastic Beach, was responsible for snow removal.

Likewise, the Town of Brookhaven and the Town of Brookhaven Highway Department has established that it did not receive prior written notice of the alleged snow and icy condition on Lynbrook Drive. Brookhaven Town Code § 84-1 provides:

Prior written notice required. No 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, ...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, 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. No such civil action shall be maintained for damages or injuries to person or property sustained solely in consequence of the existence of snow or ice upon any highway, street, ... unless written notice thereof specifying the particular place and location, was actually given to the Town Clerk or the Town Superintendent of Highways and there was a failure or neglect to cause such snow or ice to be removed, or to make the place otherwise reasonably safe within a reasonable time after receipt of such notice.

Section 84.1 B of the Brookhaven Town Code states as follows:

In the absence of written notice as required above, 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.

The testimony and affidavit of Marie Angelone, and the affidavit of Linda Sullivan establish that no prior written notice of the alleged dangerous condition was filed with either the Town Clerk's office or with the Highway Department, as required by the Town ordinance. The affidavit of an official charged with the responsibility of keeping an indexed record of all notices of defective conditions received by a town is sufficient to establish that no prior written notice was filed (*Velho v Village of Sleepy Hollow*, 119 AD3d 551, 552, 987 NYS2d 879 [2d Dept 2014]; *Petrillo v Town of Hempstead*, 85 AD3d 996, 998, 925 NYS2d 866 [2d Dept 2011]; *Pagano v Town of Smithtown*, 74 AD3d 1304, 904 NYS2d 729 [2d Dept 2010]; *LiFrieri v Town of Smithtown*, 72 AD3d 750, 752, 898 NYS2d 629 [2d Dept 2010]; *Scafidi v Town of Islip*, 34 AD3d 669, 824 NYS2d 410 [2d Dept 2006]). The affidavit need only indicate that the official has caused a search of the department's records to be made and that no written notice of the defective condition was found (*Cruz v City of New York*, 218 AD2d 546, 547 [1st Dept 1995]; *Goldberg v Town of Hempstead*, 156 AD2d 639, 733 NYS2d 691 [2d Dept 1989]; see *Campisi v Bronx Water & Sewer Serv.*, 1 AD3d 166, 766 NYS2d 560 [1st Dept. 2003]; see also *Kapilevich v City of New York*, 103 AD3d 548, 960 NYS2d 39 [1st Dept 2013]). Any verbal complaints or other internal documents generated by the Town are insufficient to satisfy the statutory requirement (see *Wilkie v Town of Huntington*, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006]; *Cename v Town of Smithtown*, 303 AD2d 351, 755 NYS2d 651 [2d Dept 2003]). A verbal complaint reduced to writing by a municipality does not constitute prior written notice (see *McCarthy v City of White Plains*, 54 AD3d 828, 829-830, 863 NYS2d 500 [2d Dept 2008]; *Akcelik v Town of Islip*, 38 AD3d 483, 831 NYS2d 491 [2d Dept 2007]; *Cename v Town of Smithtown*, supra). Prior written repair orders do not constitute prior written notice of prior defects (*Lopez v Gonzalez*, 44 AD3d 1012, 1013, 845 NYS2d 91 [2d Dept 2007]; *McCarthy v City of White Plains*, supra; *Dalton v City of Saratoga Springs*, 12 AD3d 899, 901, 784 NYS2d 702 [3d Dept 2004]). Neither constructive notice nor actual notice of a defect obviates the need for prior written notice to the Town (see *Amabile v City of Buffalo*, supra; *Wilkie v Town of Huntington*, supra; *Cename Town of Smithtown*, supra).

The Town and the Village having established the lack of prior written notice, the burden shifts to plaintiff to proffer evidence that one of the claimed exceptions to the written notice requirement applies (see *Gagnon v City of Saratoga Springs*, 51 AD3d 1096, 858 NYS2d 797 [3d Dept 2008]; *Betzold v Town of Babylon*, 18 AD3d 787, 796 NYS2d 680 [2d Dept 2005]; *Brooks v Village of Horseheads*, 14 AD3d 756, 788 NYS2d 437 [3d Dept 2005]). In opposition, plaintiffs have failed to raise a triable issue of fact. Contrary to plaintiffs position the affidavits of Virgilia Gross, Marie Angelone, Linda Sullivan are admissible on the motions as both defendants have affirmative pleaded the affirmative defense of lack of prior written notice. The affidavits are sufficient to show that the Town and the Village did not receive prior written notice of the alleged snow and ice condition. Moreover, there is no evidence in this record that the Village or the Town created the alleged dangerous condition, or that the Village or Town had actual or constructive notice of any such condition (see *Gonzalez v Town of Hempstead*, supra; *Forbes v City of New York*, supra).

Accordingly, the motions by defendants are granted.

Dated: October 10, 2018



HON. JOSEPH A. SANTORELLI
J.S.C.