

Rohr v County of Nassau

2018 NY Slip Op 34056(U)

April 17, 2018

Supreme Court, Nassau County

Docket Number: 604045/2017

Judge: Leonard D. Steinman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
LARRY ROHER,

Plaintiff,

-against-

THE COUNTY OF NASSAU, THE TOWN OF OYSTER
BAY and SYOSSET ENTERPRISES LLC,

Defendants.
-----X

LEONARD D. STEINMAN, J.

IAS Part 17
Index No. 604045/2017
Mot. Seq. No. 001

DECISION AND ORDER



The following papers, in addition to any memoranda of law, were reviewed in preparing this Decision and Order:

Defendant’s (Town of Oyster Bay) Notice of Motion, Affirmation & Exhibits	1
Plaintiff’s Affirmation in Opposition & Exhibits	2
Defendant’s Reply Affirmation & Exhibit	3

This is a personal injury action following plaintiff’s alleged trip and fall on a defective sidewalk adjacent to the premises located at 42 Cold Spring Road, Syosset, New York. Plaintiff asserts that he was caused to “be injured due to the negligence, carelessness and want of proper care of the defendants its [sic] agents, servants and/or employees.” (see Town’s Motion, Exhibit B, paragraph 30). Plaintiff asserts that he was caused to trip as a result of “roots which have pushed up the sidewalk, tree area and tree well” and the disrepair of the sidewalk. (see Town’s Motion, Exhibit B, page 11). The Town now seeks to dismiss the claim pursuant to CPLR 3211(a)(7) for failure to state a cause of action. Plaintiff opposes the application.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept as true the facts “alleged in the complaint and submissions in opposition to the motion, and accord plaintiff[f] ... the benefit of every possible favorable inference,” determining only “whether

the facts as alleged fit within any cognizable legal theory.” *Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409, 414 (2001); see *People ex rel. Cuomo v. Conventry First LLC*, 13 N.Y.3d 108 (2009). But “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to such consideration.” *Myers v. Schneiderman*, 30 N.Y.3d 1, 3 (2017).

“In assessing a motion under CPLR 3211(a)(7), a Court may freely consider affidavits submitted by a party to remedy any defects in the complaint,” and if the court does so, “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994); see also *Uzzle v. Nunzie Court Homeowners Ass’n, Inc.*, 70 A.D.3d 928 (2d Dept. 2010).

The Town argues that (1) it does not own or maintain the sidewalk where plaintiff was allegedly caused to slip and (2) even if it did, its prior written notice law precludes liability. In support of its application, the Town relies on the sworn affidavits of two employees. Kenneth Bishop, Engineering Aide I assigned to the Town’s Highway Department, attests that he searched the records of the Highway Department and the Department of Public Works in relation to the area where plaintiff allegedly fell and the location “is not currently and was never, owned, maintained or under the jurisdiction or control of the Town” and “the Town did not create the alleged sidewalk defect at the Accident Location because the Town exercises no jurisdiction over the Accident Location and did not perform any work at that location.” The Town further relies on the sworn affidavit of Town Clerk employee, Cindy Maloney, who attests that she reviewed the records of the Town Clerk in relation to the location plaintiff alleges and no prior notice of a defect is on file.

The Town has demonstrated through the submission of the affidavit of Kenneth Bishop that it did not own, control, operate or maintain the area in question. Without control or ownership, the Town does not owe a duty—a requisite element of a claim of negligence—and therefore there can be no recovery by plaintiff. *Horn v. Town of Clarkstown*, 46 A.D.3d 621, 622 (2d Dept. 2007).

Even assuming the Town owned or maintained the area at issue, the Town has demonstrated that liability may not be imposed. Where, as here, the municipality has enacted a prior written notice statute, such municipality may not be subjected to liability for injuries caused by a defect on the sidewalk unless the prior written notice of the defect was received or an exception to the written notice is applicable. *Pulka v. Edelman*, 40 N.Y.2d 781, 782 (1976), *see also Sola v. Vil. Of Great Neck Plaza*, 115 A.D.3d 661 (2d Dept. 2014); *Masotto v. Village of Lindenhurst*, 100 A.D.3d 718 (2d Dept. 2012).

In that regard, Section 160-1(A) of the Town Code provides, in relevant part, that:

No civil action shall be maintained against the Town of Oyster Bay for injuries or damages to persons or property sustained by reason of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out-of-repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, out-of-repair, dangerous or obstructed condition of such street, highway, bridge, culvert, sidewalk or crosswalk was actually served upon the Town Clerk or the Commissioner of Highways, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defective, out-of-repair, unsafe, dangerous or obstructed condition complained of. Under no circumstances shall the Town of Oyster Bay be liable for injuries or damages caused to persons or property due to the defective, out-of-repair, unsafe, dangerous or obstructed conditions of Town streets, highways, bridges, culverts, sidewalks or crosswalks in the absence of prior written notice, to the Town Clerk or the Commissioner of Highways, of the existence of such condition.

The Town has established that prior to the incident it did not receive written notice of the alleged defect as required by the Town Code to bring an action. *See* Town Code of the Town of Oyster Bay 160-1(A); *Holmes v. Town of Oyster Bay*, 82 A.D.3d 1047 (2d Dept. 2011). The Town provided the sworn affidavit of two separate employees – one in the Clerk’s Office and the other in the Highway Department – who both reviewed the records maintained by their respective offices regarding notice of potential defects. They both attested that no such notice was received. The court has reviewed these affidavits and they

are sufficient to demonstrate that no notice was received by the Town. *See Chirco v. City of Long Beach*, 106 A.D.3d 941 (2d Dept. 2013).

Furthermore, it was incumbent upon plaintiff to *plead* and prove that the Town received prior written notice of the claimed defect in the sidewalk. *See e.g. Passaro v. City of Newbridge*, 272 A.D.2d 385 (2d Dept. 2000); *Cipriano v. City of New York*, 96 A.D.2d 817 (2d Dept. 1983). Merely alleging “actual notice” (*see* Complaint ¶32) is insufficient. As a result, plaintiff’s argument that the Town has not satisfied its burden to obtain dismissal is misplaced.

Plaintiff also argues that the application by the Town is premature since additional discovery is needed regarding whether the Town created the defect or whether the Town had prior actual or constructive notice of the defect. However, there is sufficient evidence regarding the lack of ownership and prior written notice as it relates to the Town. The mere speculation that additional discovery will yield evidence to defeat an application is an insufficient basis for denying this application. *Conte v. Frelen Associates, LLC*, 51 A.D.3d 620 (2d Dept. 2008).

Accordingly, the application to dismiss is granted in its entirety. *See Ganzenmuller v. Incorporated Village of Port Jefferson*, 18 A.D.3d 703 (2d Dept. 2005); *see also Odell v. Town of Riverhead*, 305 A.D.2d 477 (2d Dept. 2003).

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: April 17, 2018
Mineola, New York

ENTER:


LEONARD D. STEINMAN, J.S.G.

ENTERED

APR 19 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE