

**Harron v Freeport Union Free Sch. Dist.**

2018 NY Slip Op 34242(U)

December 10, 2018

Supreme Court, Nassau County

Docket Number: Index No. 607642/17

Judge: Randy Sue Marber

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**  
**JUSTICE**

TRIAL/IAS PART 9

\_\_\_\_\_  
AUDREY HARRON,

X

Plaintiff,

-against-

Index No.: 607642/17  
Motion Sequence...02  
Motion Date...09/18/18

**XXX**

FREEPORT UNION FREE SCHOOL DISTRICT,  
VILLAGE OF FREEPORT and TOWN OF  
HEMPSTEAD,

Defendants.

\_\_\_\_\_  
X

Papers Submitted:

Notice of Motion.....X

Affirmation in Opposition.....X

Reply Affirmation.....X

Upon the foregoing papers, the motion by the Defendant, FREEPORT UNION FREE SCHOOL DISTRICT (hereinafter the "DISTRICT"), seeking an Order pursuant to CPLR § 3212, granting it summary judgment and dismissing the Plaintiff's Complaint, is decided as hereinafter provided.

In this action, the Plaintiff seeks to recover damages for personal injuries allegedly sustained on August 20, 2016 at 3:45 p.m., when she was caused to fall while riding her bicycle on the sidewalk on the east side of South Long Beach Avenue

approximately 90 feet south of the intersection of Archer Avenue in Freeport, New York<sup>1</sup> (See Notice of Claim, annexed to Defendant's Motion as Exhibit "B"; see also Plaintiff's Bill of Particulars at ¶ 1, annexed to Defendant's Motion as Exhibit "E"). The Plaintiff alleges that while she was riding her bicycle on the sidewalk, the front wheel went over an uneven portion of the concrete which caused her to fall over the handlebars of the bicycle (See Plaintiff's Examination Before Trial ("EBT") Transcript at p. 9, annexed to Defendant's Motion as Exhibit "G").

The Plaintiff originally commenced this action on June 1, 2017 against the DISTRICT, the Town of Hempstead and the Village of Freeport. By Order dated December 21, 2017, this Court granted a motion to dismiss filed by the Village of Freeport based upon the Plaintiff's failure to properly serve a Notice of Claim upon the Village pursuant to General Municipal Law § 50-e (3)(a) and (b). Thereafter, by Stipulation of Discontinuance dated February 22, 2018 and filed on May 4, 2018, the Plaintiff discontinued this action against the Town of Hempstead with prejudice. Accordingly, the DISTRICT is the only remaining Defendant in this matter.

In support of its motion, the Defendant proffers the EBT testimony of Thomas Fucci, the DISTRICT's Director of Facilities, who is tasked with overseeing the maintenance, custodial, security and construction for all facilities of the DISTRICT (See Fucci EBT Transcript at p.8, annexed to the Defendant's of Motion as Exhibit "H"). Fucci

---

<sup>1</sup> The Court notes that the Complaint refers to an accident date of "August 28, 2016" while the Notice of Claim and Bill of Particulars denote that the accident occurred on August 20, 2016. The Court shall refer to the August 20, 2016 date as it was referenced throughout the parties' respective depositions.

testified that the head custodian is responsible for inspecting the exterior of the buildings which included walking around the three sides of the Archer Street School to pick up garbage and observe the sidewalk with regard to its condition (*Id.* at pp.15-16). If a custodian noticed there was a damaged sidewalk, they would notify him by phone call or e-mail. Fucci testified that he started a program to replace the sidewalks at each school by priority. However, the program had yet to reach the Archer Street School by the date of the Plaintiff's accident (*Id.* at pp.22-23). Fucci acknowledged that there was a repair done to a portion of the sidewalk some distance away from the subject accident location (*Id.*).

The Defendant, DISTRICT, now moves to dismiss the Plaintiff's Complaint on the grounds that: (1) there is no legal basis to impose liability on the DISTRICT as an abutting property owner; and (2) the Plaintiff's own violation of the Village of Freeport Code was the cause of her injuries.

In support of its position, the DISTRICT argues that it does not owe a duty to the public to keep the sidewalk in a safe condition simply by virtue of being an abutting property owner. The DISTRICT contends that it did not make any special use of or derive any particular benefit from the public sidewalk adjacent to the school. It is further claimed that the DISTRICT neither caused the defect nor negligently constructed or repaired it.

The DISTRICT also highlights that, although the Village of Freeport Code specifically charges an abutting landowner with a duty to maintain and repair the sidewalks, it does not impose liability for injuries resulting from the breach of that duty. In this matter, as relevant here, the Village of Freeport Code, Chapter 180-2, provides as follows:

It shall be the duty of every property owner and occupant to keep the sidewalk and curb adjoining his premises in safe, passable condition. For failure, upon notice by the Village Clerk of not less than 24 hours, to make such repairs as are specified as to place and manner, the Board of Trustees may cause the same to be done and assess the expense upon the adjoining land.

The Board of Trustees may construct, build, flag, surface, resurface, alter, repair, grade, regrade, maintain, care for and clean sidewalks, curbs and gutters in public streets; may direct and order any such work, repair or improvement to be done by the property owner and occupant of the property and on default may have the same done by the Village and charged or assessed against the abutting property; may regulate and prescribe the grade, width, materials, construction and other specifications of any such work; may have such work or improvement performed by the Village or by contract and may pay for the same from the Village funds and assess such total cost against the property benefited; and may provide that the cost of any such work or improvement be paid at a specified time or in annual installments.

The DISTRICT also proffers an Affidavit by Mary Bediako, Ed.D, the Assistant Superintendent for Personnel and District Clerk, wherein she attests that there were no prior complaints of the claimed defect or incidents of anyone falling on the subject sidewalk (*See* Bediako Affidavit, annexed to the Defendant's Motion as Exhibit "K").

Moreover, the DISTRICT proffers the Plaintiff's EBT testimony to show that the Plaintiff was riding her bicycle on the sidewalk in violation of the Village of Freeport Code, § 82-17(A), which pertains to the operation of bicycles on sidewalks. To this end, the DISTRICT argues that the proximate cause of the Plaintiff's injuries her failure to operate her bicycle in accordance with the Code.

The Plaintiff's opposition largely disputes Ms. Bediako's Affidavit and the DISTRICT's argument concerning the Plaintiff's violation of the Code by operating her bicycle on the sidewalk. The Plaintiff also argues that the DISTRICT owes a duty to the public to maintain the sidewalk because it regularly inspected the sidewalk for defects and established a program for sidewalk repair, including the subject sidewalk. The Plaintiff does not appear to oppose the DISTRICT's argument that the Code fails to impose liability on abutting property owners for failing to maintain the sidewalks.

### *Legal Analysis*

It is well-settled that a court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*See Alvarez v Prospect Hosp.*, 68 N.Y.2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*See Miller v Journal News*, 211 A.D.2d 626 [2d Dept. 1995]). The burden on the moving party seeking summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*See Ayotte v Gervasio*, 81 N.Y.2d 1062 [1993]).

A claim for negligence requires the pleading of facts that impose a duty of care upon the defendant in favor of the plaintiff, a breach of that duty, and that the breach of such duty was a proximate cause of the plaintiff's injuries (*See Pulka v. Edelman*, 40 N.Y.2d 781 [1976]; *Akins v. Glens Falls School Dist.*, 53 N.Y.2d 325, 333 [1981]). Absent

a duty of care, there is no breach, and without breach there can be no liability (*See Pulka v. Edelman, supra; Gordon v. Muchnick*, 180 A.D.2d 715 [2d Dept. 1992]). Preliminarily, however, whether a duty of care is imposed upon the defendant in favor of the plaintiff under the circumstances alleged is an issue of law for the court to decide (*See Church v. Callanan Indus.*, 99 N.Y.2d 104 [2002]).

“It is well settled that a landowner will not be liable to a pedestrian injured by a defect in a public sidewalk abutting the landowner’s premises unless ‘the landowner created the defective condition or caused the defect to occur because of some special use, or unless a statute or ordinance placed the obligation to maintain the sidewalk upon him’ ” (*Figueroa v. City of New York*, 227 A.D.2d 373 [2d Dept. 1997], citing *Bloch v. Potter*, 204 A.D.2d 672, 673 [2d Dept. 1994], quoting *Surowiec v. City of New York*, 139 A.D.2d 727, 728 [2d Dept. 1988]; *see also, Darringer v. Furtsch*, 225 A.D.2d 577 [2d Dept. 1996]; *Yass v. Deepdale Gardens*, 187 A.D.2d 506 [2d Dept. 1992]; *Conlon v. Village of Pleasantville*, 146 A.D.2d 736, 737 [2d Dept. 1989]).

The validity of provisions imparting liability on the abutting property owner for sidewalk accidents has been upheld by the New York Court of Appeals, (*See Hausser v. Giunta*, 88 N.Y.2d 449, 454 [1996] [“Municipal Home Rule Law § 11 (1) (j) does not prohibit the transfer of a locality’s liability to abutting property owners for injuries sustained due to defective sidewalks”]). In order for a statute, ordinance, or municipal charter to impose liability upon an abutting property owner for injuries caused by its negligence, the language thereof must not only charge the landowner with a duty, it must

also specifically state that if the landowner breaches that duty he or she will be liable to those who are injured (*See Picone v. Schlaich*, 245 A.D.2d 555 [2d Dept. 1997]).

In the *Hausser* case, the Court of Appeals identified the exceptions to the general rule, holding that:

“Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner (*See City of Rochester v Campbell*, 123 NY 405; *Roark v Hunting*, 24 NY2d 470, 475). There are, however, circumstances under which this general rule is inapplicable and the abutting landowner will be held liable. Liability to abutting landowners will generally be imposed where the sidewalk was constructed in a special manner for the benefit of the abutting owner (*Clifford v Dam*, 81 NY 52), where the abutting owner affirmatively caused the defect (*Colson v Wood Realty Co.*, 39 AD2d 511, 512), where the abutting landowner negligently constructed or repaired the sidewalk (*id.*) and where a local ordinance or statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalks and imposes liability for injuries resulting from the breach of that duty (*Willis v Parker*, 225 NY 159).”

In the instant matter, the Plaintiff failed to raise a triable issue of fact that any exceptions are applicable here. Preliminarily, it is undisputed that while the Village of Freeport Code, Chapter 180-2, imposes on abutting landowners a duty to maintain the public sidewalk, it does not expressly impose tort liability upon the landowner for injuries caused by a violation of that duty (*See Parker v. Singer*, 202 A.D.2d 409, [2d Dept. 1994]; *Conlon v. Village of Pleasantville*, 146 A.D.2d 736 [2d Dept. 1989]). Thus, liability may not be imposed upon the DISTRICT based upon a statutory duty to maintain the subject sidewalk.

Additionally, the Plaintiff failed to proffer sufficient evidence that the DISTRICT negligently repaired the subject area of the sidewalk that caused the Plaintiff's

injuries. While there is some evidence that a repair was done to a different part of the sidewalk, no evidence exists that the DISTRICT made such repair or that the defect in the unrelated area was not due to normal deterioration over a lengthy period of time. There is also no support in the record for the assertion by Plaintiff's counsel that the unrelated defect was in fact repaired by the DISTRICT. Such assertion, contained only in the attorney's affirmation, amounts to nothing more than speculation and mere conjecture. As such, the Plaintiff failed to raise a triable issue of fact as to whether the DISTRICT created or caused the dangerous condition resulting in the Plaintiff's fall. Notably, the cases where an issue of fact is found with this exception, evidence was presented demonstrating that the abutting landowner actually created the alleged defect which caused the plaintiff to fall (*See, Salica v. Lenny's Clam Bar, Inc.*, 292 A.D.2d 438 [2d Dept. 2002]; *see also, Botfeld v. City of New York*, 162 A.D.2d 652 [2d Dept. 1990]; *Cardona v. City of New York*, 305 A.D.2d 303 [1st Dept. 2003]; *Selby v. City of New York*, 34 A.D.3d 440 [2d Dept. 2006]; *Gerena v. Town of Brookhaven*, 280 A.D.2d 450 [2d Dept. 2001]; *Lauer v. Great South Bay Seafood Co., Ltd.*, 299 A.D.2d 325 [2d Dept. 2002]).

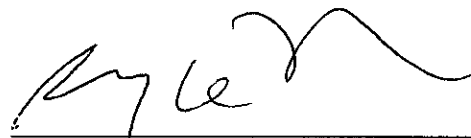
Lastly, the Plaintiff also fails to show that the DISTRICT made special use of the sidewalk.

Accordingly, it is hereby

**ORDERED**, that the motion by the Defendant, FREEPORT UNION FREE SCHOOL DISTRICT, seeking an Order, pursuant to CPLR § 3212, granting it summary judgment dismissing the Plaintiff's Complaint, is **GRANTED**, and the Complaint is hereby **DISMISSED**.

This decision constitutes the decision and Order of this Court.

DATED: Mineola, New York  
December 10, 2018



Hon. Randy Sue Marber, J.S.C.  
XXX

HON. RANDY SUE MARBER

**ENTERED**

DEC 11 2018

NASSAU COUNTY  
COUNTY CLERK'S OFFICE