Andruk v Village of Southampton
2018 NY Slip Op 34409(U)
April 6, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 15-607882
Judge: Martha L. Luft
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SHORT FORM ORDER

INDEX No. 15-607882
CAL. No. 17-00332OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 6-15-17
ADJ. DATE 9-12-17
Mot. Seq. # 001 MG; CASEDISP

MADELYN ANDRUK,

Plaintiff,

- against -

VILLAGE OF SOUTHAMPTON, TOWN OF SOUTHAMPTON, SOUTHAMPTON ENTERPRISES, LLC, doing business as CITARELLA and HAMPTON ROAD REALTY, LLC,

Defendants.

MICHAEL F. MONGELLI, II, P.C.
Attorney for Plaintiff
41-07 162nd Street
Flushing, New York 11358

MCCARTHY & ASSOCIATES
Attorney for Defendants
One Huntington Quadrangle, Suite 2C18
Melville, New York 11747

Upon the following papers read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers by defendants, dated May 15, 2017; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, dated August 8, 2017; Replying Affidavits and supporting papers dated, August 24, 2017; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Village of Southampton, Southampton Enterprises, LLC, and Hampton Road Realty, LLC for summary judgment dismissing the complaint is granted.

The plaintiff, Madelyn Andruk, commenced this action to recover damages for personal injuries she allegedly sustained on August 5, 2014, when she tripped and fell while walking on a sidewalk located adjacent to 20 Hampton Road in Southampton, New York. By her complaint, the plaintiff alleges, *inter alia*, that defendants Southampton Enterprises, LLC d/b/a Citarella and Hampton Road Realty, LLC ("Citarella defendants") owned and operated the property adjacent to the defective sidewalk, and that they negligently maintained the sidewalk. The plaintiff further alleges that defendant Village of Southampton (the "Village") negligently issued an outdoor dining permit to the Citarella defendants, that the Citarella defendants

negligently placed tables and chairs on the sidewalk, causing the plaintiff to traverse over a defective portion of the sidewalk, and that actions of the Village and the Citarella defendants (collectively, "defendants") were the proximate cause of her injuries. The plaintiff also alleges that defendant Town of Southampton, among other things, created the defective condition.

Defendants now move for summary judgment dismissing the complaint, arguing that the Village had no prior written notice of the alleged defective condition, and that the Citarella defendants were not responsible for the alleged defect. In support of their motion, defendants submit the pleadings, affidavits, the deposition testimony of the plaintiff, photographs of the area where the incident occurred, and the deposition testimony of an employee of the Citarella defendants. The plaintiff opposes the motion, arguing that the Village negligently issued a permit to the Citarella defendants, and that the Citarella defendants' conduct caused her to be injured. The Court notes that a stipulation discontinuing the action against the Town of Southampton was filed with the Clerk of the Court on January 4, 2016.

At her deposition, the plaintiff testified that on August 5, 2014, she and a friend went to the Village to view an interior design showcase. It was a warm and sunny day, and after attending the showcase, the plaintiff and her friend decided to patronize Citarella. The plaintiff entered Citarella, and exited approximately five minutes later. When she walked out of the store, the plaintiff observed tables and chairs on the sidewalk, and because the table and chairs were obstructing her path, she had to walk "in the tree lane." As she was walking and "trying to navigate" the "shallow amount" of space on the sidewalk, the plaintiff's toe hit the "front lip of the tree area," causing her to fall forward. She was looking straight ahead and there were several people walking in front of her, and "someone to the side." There was also a garbage can in front of the store. Three days after the accident, the plaintiff took photographs of the area in front of Citarella. Although she could not point out the exact location of her accident, she testified that she was walking in a "tree well" in front of the store when she stumbled and fell. There was more than one tree well, and they all consisted of dirt; there was also some brick in the area. The tree well that caused the plaintiff's accident was approximately three inches below the sidewalk. The plaintiff was not aware of any complaints concerning the condition of the area before her accident occurred.

Lautaro Zarate testified that he was the area manger of the subject Citarella store when the plaintiff's accident occurred. Citarella was a gourmet market with a "café area" inside. There were approximately 15 tables inside the store, with 2 chairs per table. Citarella also had a permit, which was issued by the Village, to place tables and chairs outside of the store. Zarate could not recall the number of tables and chairs that were placed outside of the store, and he could not recall whether the area was measured prior to submitting the permit application to the Village. He also was not aware of any violations, summonses, or tickets issued to Citarella concerning the sidewalk area. According to Zarate, there was only one tree well in front of the store. In an affidavit, Zarate stated that Citarella did not install the tree, bricks, or the tree well in front of the store. Citarella also was not responsible for maintaining the tree well, did not perform any maintenance of the area, and did not receive any complaints about the sidewalk prior to the plaintiff's accident.

In an affidavit, Steve Funsch, the Village Administrator, averred that he conducted a search of the Village's records and he did not find any written complaints or notice of claim concerning the sidewalk and tree well in front of Citarella. In his affidavit, Gary Goleski, the Village's Superintendent of Public Works, averred that the Village had no records concerning the date that the tree was planted or when the bricks were

installed. According to Goleski, the "installation of [the] bricks goes back over 30 years," and "unless a complaint is made about a tree well, there is no routine maintenance performed on tree wells in the Village."

Here, the Village argues that it did not have notice of the defective sidewalk; thus, it is entitled to judgment as a matter of law. Under New York law, a municipality has a continuing, nondelegable duty to maintain its sidewalks in a reasonably safe condition for pedestrians (*see* ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]; *see also* ***Delgado v County of Suffolk***, 40 AD3d 575, 835 NYS2d 379 [2d Dept 2007]; ***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006]). However, where a town or village has enacted a prior written notice statute, it will not be subjected to liability for injuries caused by a defective or dangerous condition on a sidewalk unless it has received prior written notice of such condition or an exception to the prior written notice requirement applies (*see* ***Amabile v City of Buffalo***, 93 NY2d 471; *see also* ***Hannibal v Incorporated Village of Hempstead***, 110 AD3d 960, 961, 973 NYS2d 742 [2d Dept 2013]; ***Cimino v County of Nassau***, 105 AD3d 883, 884, 963 NYS2d 698 [2d Dept 2013]; ***Braver v Village of Cedarhurst***, 94 AD3d 933, 934, 942 NYS2d 178 [2d Dept 2012]). 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*; ***Toscano v Town of Huntington***, 156 AD3d 837, 68 NYS3d 81[2d Det 2017]; ***Miller v Village of E. Hampton***, 98 AD3d 1007, 1008, 951 NYS2d 171, 173 [2d Dept 2012]; ***Sollowen v Town of Brookhaven***, 43 AD3d 816, 841 NYS2d 351 [2d Dept 2007]; ***Amabile v City of Buffalo***, 93 NY2d 471).

The Village has established its entitlement to judgment as a matter of law by demonstrating that it did not receive the requisite prior written notice of the alleged defective condition (*see* ***Maya v Town of Hempstead***, 127 AD3d 1146, 1148, 8 NYS3d 372, 375 [2d Dept 2015]; *see also* ***Morreale v Town of Smithtown***, 153 AD3d 917, 918, 61 NYS3d 269, 271 [2d Dept 2017]; ***Oliveri v Village of Greenport***, 93 AD3d 773, 940 NYS2d 675 [2d Dept 2012]; ***Daniel v City of New York***, 91 AD3d 699, 936 NYS2d 897 [2d Dept 2012]; ***Healy v Village of Patchogue***, 28 AD3d 519, 813 NYS2d 499 [2d Dept 2006]; ***Betzold v Town of Babylon***, 18 AD3d 787, 796 NYS2d 680 [2d Dept 2005]; ***Khaghan v Rye Town Park Commn.***, 8 AD3d 447, 778 NYS2d 313 [2d Dept 2004]). Pursuant to Village Code § 95-25, as a precondition to commencing a civil action against the Village to recover damages for personal injuries sustained as a result of a defect in or obstruction on Village property, the Village must have been given prior written notice of the defect and failed to repair it within a reasonable time thereafter (*see* ***Nixdorf v East Islip School Dist.***, 276 AD2d 759, 715 NYS2d 432 [2d Dept 2000]). In an affidavit in support of the motion, the Village Administrator averred that he conducted a search of the Village's records, which indicated that there were no complaints regarding the subject sidewalk or tree well. The plaintiff also testified that she was not aware of any complaints made to the Village concerning the alleged defect in the sidewalk.

Thus, inasmuch as the Village has 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* ***Masotto v Vill. of Lindenhurst***, 100 AD3d 718, 719, 954 NYS2d 557, 559 [2d Dept 2012]; ***Betzold v Town of Babylon***, 18 AD3d 787, 796 NYS2d 680 [2d Dept 2005]). The plaintiff failed to meet her burden. The plaintiff asserts that the Village was negligent in issuing a permit to the Citarella defendants for the placement of tables and chairs on the sidewalk because the Citarella defendants' use of the sidewalk was not in compliance with the Village code. Contrary to the plaintiff's contention "[i]t is well settled that the decision whether to issue a [] permit is a discretionary determination and the actions of the government in

such instances are immune from lawsuits based on such decisions" (***Broncati v City of White Plains***, 6 AD3d 476, 478, 774 NYS2d 573, 574 [2 Dept 2004] [internal quotation marks omitted]; *see* ***McLean v City of New York***, 12 NY3d 194, 199, 878 NYS2d 238 [2009]; ***O'Connor v City of New York***, 58 NY2d 184, 189, 447 N.E.2d 33, 34–35 [1983]). No special relationship was created between the Village and the plaintiff; therefore, even if the Village failed to properly enforce its own codes and regulations, such failure, in and of itself, will not confer liability on the Village (*see* ***Ferreira v Cellco Partnership***, 111 AD3d 777, 779, 976 NYS2d 488, 491 [2d Dept 2013]; ***Lubitz v Vill of Scarsdale***, 31 AD3d 618, 620, 819 NYS2d 92, 94 [2d Dept 2006]; ***Broncati v City of White Plains***, 6 AD3d 476, 478, 774 NYS2d 573, 574 [2 Dept 2004]). Furthermore, the Village's failure to inspect the sidewalk is not an affirmative act to eliminate the requirement for written notice (*see* ***Williams v Town of Smithtown***, 135 AD3d 854, 855, 24 NYS3d 150, 151 [2d Dept 2016] [the affirmative negligence exception is limited to work by the municipality that immediately results in the existence of a dangerous condition]). The Village's representatives averred that the tree well and surrounding brick were installed 30 years prior, and had not been maintained. Accordingly, the Village's application for summary judgment dismissing the complaint and the cross claims against it is granted.

The Citarella defendants argue that they were not responsible for the allegedly defective tree well; thus, they are not liable for the plaintiff's injuries. Generally, an abutting landowner is not liable for injuries sustained by a third party as a result of negligent maintenance of, or the existence of dangerous and defective conditions on the public sidewalk (***Lobel v Rodco Petroleum Corp.***, 233 AD2d 369, 649 NYS2d 939 [2d Dept 1996] *lv denied*, 92 NY2d 813, 680 NYS2d 906 [1998]). There are exceptions to the general rule, however, and "[a]n abutting owner or lessee will be liable to a pedestrian injured by a dangerous condition on a public sidewalk [] when the owner or lessee either created the condition or caused the condition to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner or the lessee and expressly makes the owner or the lessee liable for injuries caused by a breach of that duty" (***Maya v Town of Hempstead***, 127 AD3d 1146, 1147, 8 NYS3d 372, 374 [2d Dept 2015]; *see* ***Vucetovic v Epsom Downs, Inc.***, 10 NY3d 517, 520,860 NYS2d 429 [2008]; ***Lindesay v City of New York***, 56 AD3d 532, 871 NYS2d 148 [2008] *citing* ***Hausser v Giunta***, 88 NY2d 449, 646 NYS2d 490 [1996]).

Here, the Citarella defendants demonstrated that they neither owed a duty to the public to maintain and repair the tree well nor did they affirmatively maintain the tree well or cause the alleged defective condition. In an affidavit, Zarate stated that Citarella did not install the tree, bricks, or the tree well in front of the store. Citarella also was not responsible for maintaining the tree well and did not perform any maintenance of the area. Moreover, the Village's representatives averred that the tree well and surrounding brick were installed 30 years prior. The plaintiff is correct that the Village Code, specifically § 95-10, directs property owners to keep the sidewalk in front of their premises free from obstructions; however, the code does not specifically create tort liability for failure to comply (*see* ***Maya v Town of Hempstead***, 127 AD3d 1146, 1148; *see* ***Taubenfeld v Starbucks Corp.***, 48 AD3d 310, 311, 851 NYS2d 512, 514 [1st Dept 2008]). The plaintiff's primary contention in opposition to defendants' motion is that Citarella derived a special benefit from the public sidewalk by using the sidewalk as an outdoor dining area. Contrary to the plaintiff's contention, although Citarella made special use of a portion of the sidewalk by placing tables and chairs thereon, "the special use did not extend beyond the tables and chairs to the tree well where plaintiff fell" (***Taubenfeld v Starbucks Corp.***, 48 AD3d 310, 31; *see* ***MacLeod v Pete's Tavern, Inc.***, 87 NY2d 912, 914, 640 NYS2d 864 [1996] [special use of the sidewalk by an outside tavern did not include the area were

the plaintiff fell]). Accordingly, inasmuch as there is no dispute that the plaintiff's injury was caused by the height differential between the tree well and the paved portion of the sidewalk, the Citarella defendants have demonstrated that their alleged use of tables and chairs on the sidewalk was not the proximate cause of the plaintiff's injuries (*see* ***Morelli v Starbucks Corp***., 107 AD3d 963, 965, 968 NYS2d 542, 544 [2d Dept 2013]), and the plaintiff failed to raise a triable issue of fact in opposition (*id.*). Accordingly, defendants' motion for summary judgment dismissing the complaint is granted.

Dated: April 6, 2018

Martha L. Luft
A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION