

Ryan-Fichetti v County of Suffolk

2018 NY Slip Op 34418(U)

April 26, 2018

Supreme Court, Suffolk County

Docket Number: Index No. 15-601250

Judge: Joseph A. Santorelli

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ORIGINAL

SHORT FORM ORDER

INDEX No. 15-601250
CAL. No. 17-00447OT

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

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 7-27-17
ADJ. DATE 10-12-17
Mot. Seq. # 001 - MD

-----X
MARGARET RYAN-FICHETTI,

Plaintiff,

- against -

COUNTY OF SUFFOLK, TOWN OF
HUNTINGTON,

Defendants.
-----X

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant, uploaded June 30, 2017; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, uploaded October 3, 2017; Replying Affidavits and supporting papers by defendant, uploaded October 10, 2017; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendant Town of Huntington for summary judgment dismissing the complaint against it is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Margaret Ryan-Fichetti on August 10, 2014, when she tripped and fell due to a hole on the lawn at defendant Town of Huntington's Heckscher Park ("the park") in Huntington, New York. Plaintiff alleges that the Town of Huntington ("the Town") was negligent in, among other things, maintaining the lawn and failing to warn pedestrians of the dangerous condition on the lawn. The Court's computerized records show that defendant County of Suffolk never joined issue, and the note of issue indicates that the "action against County of Suffolk has been discontinued."

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According to her General Municipal Law 50-h and deposition testimony, plaintiff arrived at the park shortly before 8:00 p.m. to see a jazz concert with friends. It was a clear night and the sun had not yet completely set. After parking, she walked towards the area where she was planning to meet her friends up-hill from the stage. Plaintiff recalled carrying a folding chair by its strap over her shoulder and possibly wearing sandals. She walked on asphalt, took some steps on the grass, and then her left foot went into the hole, causing her to fall. Although she did not closely examine the hole, she stated that her entire foot or almost her entire foot went into the hole. Plaintiff stated that she was looking up the hill towards her destination and that she never saw the hole before stepping in it.

Plaintiff further testified that she had been at the park on the previous night to see a different concert, at which time she walked in the same general area of her accident and had no trouble walking on the grass. Plaintiff stated that she neither complained to the Town about the condition of the park or holes in the grass nor knew of anyone that made such complaints to the Town. In addition, plaintiff was not aware of anyone else that got injured while in the park.

The Town now moves for summary judgment dismissing the complaint against it on the grounds that it did not create the alleged defect in the grass and that it did not have actual or constructive notice of the alleged hazardous condition. The Town submits, in support of the motion, copies of the pleadings; various discovery demands; the notice of claim; the note of issue; photographs; the transcript of plaintiff's General Municipal Law 50-h testimony; the transcript of the deposition testimony of plaintiff and Gary Edwards; and the affidavits of Richard Scheffler, Diana Esposito, and Mark Tyree. In opposition, plaintiff argues that the Town failed to demonstrate that it did not have constructive notice of the hole in the grass. Plaintiff submits, in opposition, her affidavit and photographs.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see Peralta v Henriquez*, 100 NY2d 139, 760 NYS2d 741 [2003]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]; *Frank v JS Hempstead Realty, LLC*, 136 AD3d 742, 24 NYS3d 714 [2d Dept 2015]; *Guzman v State of New York*, 129 AD3d 775, 10 NYS3d 598 [2d Dept 2015]). Property owners, however, are not insurers of the safety of people on the premises (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Donohue v Seaman's Furniture Corp.*, 270 AD2d 451, 705 NYS2d 291 [2d Dept 2000]). To

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establish liability in a premises liability action, a plaintiff must establish that a dangerous or defective condition caused his or her injuries, and that the defendant owner or possessor created the condition or had actual or constructive notice of it (*see Sermos v Gruppuso*, 95 AD3d 985, 944 NYS2d 245 [2d Dept 2012]; *Starling v Suffolk County Water Auth.*, 63 AD3d 822, 881 NYS2d 149 [2d Dept 2009]; *Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.*, 61 AD3d 629, 876 NYS2d 512 [2d Dept 2009]). A defendant moving for summary judgment must show, prima facie, that he or she did not create the defective condition, or have actual or constructive notice of the alleged dangerous or defective condition for a sufficient length of time to discover and remedy it (*see Witkowski v Island Trees Pub. Lib.*, 125 AD3d 768, 4 NYS3d 65 [2d Dept 2015]; *Sinclair v Chau*, 117 AD3d 713, 985 NYS2d 267 [2d Dept 2014]; *Ingram v Long Is. Coll. Hosp.*, 101 AD3d 814, 956 NYS2d 107 [2d Dept 2012]; *Shindler v Warf*, 66 AD3d 762, 887 NYS2d 193 [2d Dept 2009]; *Lezama v 34-15 Parsons Blvd, LLC*, 16 Ad3d 560, 792 NYS2d 123 [2d Dept 2005]). In order to constitute constructive notice, a defect must be visible and apparent and must exist for a sufficient length of time prior to the accident to permit the landowner to remedy it, and it will not be imputed where the defect is latent or would not, upon reasonable inspection, be discovered (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *Schnell v Fitzgerald*, 95 AD3d 1295, 945 NYS2d 390 [2d Dept 2012]; *Applegate v Long Is. Power Auth.*, 53 AD3d 515, 862 NYS2d 86 [2d Dept 2008]; *Curiale v Sharrotts Woods, Inc.*, 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]).

The Town failed to establish, prima facie, that it did not have actual or constructive notice of the hole in the ground at the park (*see Baez v Willow Wood Assoc., LP*, __ NYS3d __, 2018 Slip Op 01589, [2d Dept 2018]; *Nealy v Pavarini-McGovern, LLC*, 135 Ad3d 917, 24 NYS3d 372 [2d Dept 2016]; *Fernandez v Festival Fun Parks, LLC*, 122 AD3d 794, 996 NYS2d 676 [2d Dept 2014]; *Rodriguez v Shoprite Supermarkets, Inc.*, 119 AD3d 923, 989 NYS2d 855 [2d Dept 2014]). Richard Scheffler, the Town's Highway Construction Coordinator and Road Permit Inspector, and Diana Esposito, a Principal Clerk, stated in their affidavits that a search of the Highway Superintendent's and the Town Clerk's offices records did not reveal any claims or complaints of a hole in the lawn at the park received by the Town between October 2009 and October 2014. Mark Tyree, the director of the Town's Department of General Services, which maintains the Town's parks, also stated in an affidavit that a search of the Department of General Services' records did not reveal any claims or complaints of a hole in the lawn at the park received by the Town between October 2009 and October 2014. Mr. Tyree further stated that there are no records of work being performed on the park's lawn, other than regular mowing.

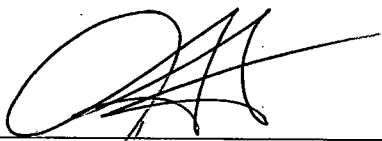
However, these affidavits offer no evidence of when the park's lawn was last inspected. In addition, the deposition testimony of Gary Edwards, the Town's Supervisor Foreman in August 2014, was insufficient to satisfy the Town's initial burden, as he did not have personal knowledge as to any inspection or as to the condition of the park's lawn the day of plaintiff's accident. Reference to general cleaning and inspection practices is insufficient to establish lack of constructive notice without specificity as to cleaning or inspection of the subject area (*see Ansari v MB Hamptons, LLC*, 137 AD3d 1174, 28 NYS3d 397 [2d Dept 2016]; *Garcia-Monsalve v Wellington Leasing, L.P.*, 123 AD3d 1085, 1 NYS3d 228 [2d Dept 2014]; *Rodriguez v Shoprite Supermarkets, Inc.*, 119 AD3d 923, 989 NYS2d 855 [2d Dept 2014]; *Klerman v Fine Fare Supermarket*, 96 AD3d 907, 946 NYS2d 506 [2d Dept 2012]). Neither has the Town submitted "any evidence showing that the allegedly dangerous condition existed for an

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insufficient length of time for them to have discovered and remedied it, as is its burden” (*Raju v Cortlandt Town Ctr.*, 38 AD3d 874, 874-875, 834 NYS2d 211 [2d Dept 2007]). As the Town did not meet its prima facie burden, the motion for summary judgment must be denied regardless of the sufficiency of plaintiff’s opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, *supra*).

Accordingly, the motion by defendant Town of Huntington for summary judgment dismissing the complaint against it is denied.

Dated: APR 26 2018



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

 FINAL DISPOSITION X NON-FINAL DISPOSITION