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| Donnelly v Grove Beach Hotel Owners, Inc. |
| 2019 NY Slip Op 30979(U) |
| April 5, 2019 |
| Supreme Court, Suffolk County |
| Docket Number: 15-18100 |
| Judge: Joseph A. Santorelli |
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SHORT FORM ORDER

INDEX No. 15-18100
CAL. No. 18-00732OT

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

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

COPY

MOTION DATE 6-28-18 (003)
MOTION DATE 8-16-18 (004)
ADJ. DATE 9-20-18
Mot. Seq. # 003 - MD
004 - MD

-----X
KEVIN DONNELLY,

Plaintiff,

- against -

GROVE BEACH HOTEL OWNERS, INC.,
TOWN OF BROOKHAVEN and GROSFIELD
ENTERPRISES, LLC,

Defendants.
-----X

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Upon the following papers numbered 1 to 62 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 23 - 51; Answering Affidavits and supporting papers 13 - 22; 52 - 54; Replying Affidavits and supporting papers 55 - 56; 57 - 60; 61 - 62; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendant Grosfield Enterprises, LLC, for an order granting summary judgment dismissing the complaint as asserted against it is denied; and it is further

ORDERED that the cross motion by the defendant Town of Brookhaven for an order granting summary judgment in its favor dismissing the complaint as asserted against it is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff Kevin Donnelly as the result of an accident that occurred on April 1, 2015. The accident allegedly happened when the plaintiff tripped and fell on a burned-out section of boardwalk in Cherry Grove, New York. On March 27, 2015, a fire allegedly broke out at Holly House in Cherry Grove, which was owned the defendant Grosfield Enterprises, LLC (hereinafter referred to as "Grosfield"), and then spread to a property owned by the defendant Grove Beach Hotel Owners, Inc. (hereinafter referred to as "Grove Beach"). The subject boardwalk is located on Holly Walk in between the Grosfield and Grove Beach properties. By order dated February 22, 2018, this Court granted a motion by Grove Beach for summary judgment dismissing the complaint against it, finding, among other things, that it was not responsible for maintenance of the subject boardwalk, as all the boardwalks in Cherry Grove were under the control of the defendant Town of Brookhaven (hereinafter referred to as "the Town"), which repairs and maintains them.

Grosfield now moves for summary judgment dismissing the complaint as asserted against it, arguing that it had no duty to maintain the boardwalk where the plaintiff's accident allegedly occurred, and that it did not create the alleged defect or make special use of the area. In support, Grosfield submits, among other things, an affidavit of its officer, Julian R. Fielder, and a copy of an incident report, dated October 18, 2016. The Town opposes the motion and cross-moves for summary judgment dismissing the complaint as asserted against it, arguing, inter alia, that it had no prior written notice of the alleged defect in the boardwalk caused by the fire, and that it did not affirmatively create same by an affirmative act of negligence or special use. In opposition, and in support of its cross motion, the Town submits, among other things, transcripts of the parties' deposition testimony and an affidavit of Linda Sullivan, a senior clerk typist at the Town Clerk's Office.

The plaintiff opposes Grosfield's motion, arguing that there are issues of fact as to whether it created the dangerous condition on the boardwalk, as its contractor allegedly performed work on the property shortly before the fire, and its fire alarm monitoring system may have malfunctioned during the fire. The plaintiff also opposes the Town's cross motion, arguing that there are issues of fact as to whether it created the defect in the subject boardwalk through an affirmative act of negligence, as the Town's employees testified that they operated heavy machinery thereon immediately after the fire. In opposition to both motions, the plaintiff submits an affirmation of his attorney and several photographs depicting the accident site, authenticated by the parties at their depositions. In opposition to the Town's cross motion, Grosfield submits an affirmation of its attorney, excerpts of Mr. Fielder's deposition testimony, and a copy of a purported estimate for repairs, dated November 20, 2014.

A plaintiff seeking damages for personal injuries in a premises liability action must first establish, as a matter of law, that the defendant or defendants owed him or her a duty of reasonable care in maintaining the property (*see Rivera v Nelson Realty, LLC*, 7 NY3d 530, 534, 825 NYS2d 422, 424 [2006]; *Tagle v Jakob*, 97 NY2d 165, 168, 737 NYS2d 331, 333 [2001]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 13, 929 NYS2d 620, 623 [2d Dept 2011]). Without this duty of reasonable care on the part of a defendant, there can be no breach of such duty and, therefore, no proximate cause of the plaintiff's injuries as a result of the breach (*see Conneally v Diocese of Rockville*

Ctr., 116 AD3d 905, 984 NYS2d 127 [2d Dept 2014]; *Ortega v Liberty Holdings, LLC*, 111 AD3d 904, 976 NYS2d 147 [2d Dept 2013]; *Nappi v Incorporated Vil. of Lynbrook*, 19 AD3d 565, 796 NYS2d 537 [2d Dept 2005]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control, or special use of the property (see *Reynolds v Avon Grove Props.*, 129 AD3d 932, 12 NYS3d 199 [2d Dept 2015]; *Chernoguz v Mirrer Yeshiva Cent. Inst.*, 121 AD3d 737, 994 NYS2d 362 [2d Dept 2014]; *Grover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729, 869 NYS2d 593 [2d Dept 2008]). 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]; *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]).

Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of a dangerous and defective condition on a public sidewalk is placed on the municipality, and not the abutting landowner (see *Hausser v Giunta*, 88 NY2d 449, 452-453 [1996]; *Llanos v Stark*, 151 AD3d 836, 57 NYS3d 502 [2d Dept 2017]; *Obee v Ricotta*, 140 AD3d 1134, 35 NYS3d 386 [2d Dept 2016]). However, an abutting landowner will be liable to a pedestrian injured by a defect in a sidewalk where the landowner created the defect, negligently made repairs to the sidewalk, or caused the defect to occur by some special use of the sidewalk (see *Madonia v City of New York*, 164 AD3d 1320, 83 NYS3d 685 [2d Dept 2018]; *Villamar v Pacheco*, 135 AD3d 853, 24 NYS3d 152 [2d Dept 2016]; *Holmes v Town of Oyster Bay*, 82 AD3d 1047, 919 NYS2d 207 [2d Dept 2011]). To constitute “special use,” the landowner must have derived a special benefit from the public property that is unrelated to its public use (see *Kaufman v Silver*, 90 NY2d 204, 207-208, 659 NYS2d 250 [1997]; *Poirier v City of Schenectady*, 85 NY2d 310, 315, 624 NYS2d 555 [1995]; *Llanos v Stark*, 151 AD3d 836, 57 NYS3d 502 [2d Dept 2017]).

As to Grosfield’s motion, the doctrine of “the law of the case” provides that, once an issue is judicially determined, judges and courts of coordinate jurisdiction are precluded from further consideration of that issue, and it applies to any legal determinations that were necessarily resolved on the merits in a prior decision (see *Martin v City of Cohoes*, 37 NY2d 162, 165, 371 NYS2d 687, 689 [1975]; *Ahrorgulova v Mann*, 144 AD3d 953, 42 NYS3d 203 [2d Dept 2016]; *Strujan v Glencord Bldg. Corp.*, 137 AD3d 1252, 29 NYS3d 398 [2d Dept 2016]). Here, the issue of control of the subject boardwalk was determined on the merits by the February 22, 2018 order, and the Court is bound by such determination (see *Martin v City of Cohoes*, *supra*; *Ahrorgulova v Mann*, *supra*; *Strujan v Glencord Bldg. Corp.*, *supra*). As the Court determined that the Town was responsible for maintaining and repairing the subject boardwalk in its prior order, no liability can be attributed to Grosfield for the alleged dangerous condition thereupon on the basis of its control of this area (see *Reynolds v Avon Grove Props.*, *supra*; *Chernoguz v Mirrer Yeshiva Cent. Inst.*, *supra*; *Grover v Mastic Beach Prop. Owners Assn.*, *supra*).

At the outset, the incident report from the Town’s fire investigation submitted by Grosfield in support of its motion contains numerous unsworn and unaffirmed statements, and thus, these portions of

the report are inadmissible (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Utica First Ins. Co. v Gristmill Earth Realty Corp.*, 145 AD3d 1059, 45 NYS3d 482 [2d Dept 2016]). However, Grosfield's submissions demonstrate, prima facie, that it did not make special use of the subject boardwalk by Mr. Fielder's affidavit, by which he states that Grosfield and its employees did not use the subject boardwalk for storage, moving heavy equipment, or placement of cinder blocks or concrete on or before the date of the plaintiff's accident, and that a fence separated Holly House from the subject boardwalk (*see Kaufman v Silver, supra; Poirier v City of Schenectady, supra; Llanos v Stark, supra*).

Nevertheless, Grosfield's submissions fail to eliminate all triable issues of fact as to whether it created the alleged defect on the boardwalk (*see Madonia v City of New York, supra; Villamar v Pacheco, supra; Holmes v Town of Oyster Bay, supra*). By his affidavit, Mr. Fielder avers that, at the time of the fire, Holly House was closed for the winter, and that no employees or officers were present on the property. In addition, Mr. Fielder states that none of Grosfield's employees or contractors had ever made any repairs to the subject boardwalk. Notwithstanding these assertions, Mr. Fielder's affidavit fails to demonstrate, prima facie, that none of its acts or omissions caused or contributed to the fire which burned the subject boardwalk, or that it committed no act from which a jury could rationally infer that it negligently caused same (*cf. Acadia Const., Corp. v ZHN Contracting Corp.*, 144 AD3d 1059, 42 NYS3d 264 [2d Dept 2016]; *Utica First Ins. Co. v Infinity Mech. & Heating, Inc.*, 124 AD3d 630, 1 NYS3d 249 [2d Dept 2015]; *Katz v Eastern Const. Developing and Custom Homes, Inc.*, 100 AD3d 830, 954 NYS2d 600 [2d Dept 2012]). As Mr. Fielder concedes that Grosfield's contractor Charles Balmer had been performing repair work on Holly House during the days preceding the fire, his affidavit fails to eliminate all triable issues of fact as to whether Grosfield's acts or omissions caused or contributed to the fire, thereby creating the alleged dangerous condition on the subject boardwalk (*see Madonia v City of New York, supra; Acadia Const., Corp. v ZHN Contracting Corp., supra; Utica First Ins. Co. v Infinity Mech. & Heating, Inc., supra*).

As to the Town's cross motion, where the owner of a premises is a municipality that has enacted a prior written notice statute, it will not be subjected to liability for injuries caused by a defective or dangerous condition on its premises 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, 693 NYS2d 77 [1999]; *Marciano v Village of Rockville Ctr.*, 136 AD3d 761, 24 NYS3d 520 [2d Dept 2016]; *Palka v Village of Ossining*, 120 AD3d 641, 992 NYS2d 273 [2d Dept 2014]; *Long v City of Mount Vernon*, 107 AD3d 765, 967 NYS2d 749 [2d Dept 2013]). As relevant to the instant action, pursuant to Brookhaven Town Code § 84-1, the Town will not be held liable for a defective or hazardous condition caused by the existence of a defective, out-of-repair, unsafe, dangerous, or obstructed condition on any highway, street, bridge, culvert of the Town unless prior written notice of the condition that caused the plaintiff's injury was given the Town Clerk or Town Superintendent of Highways, and the Town failed to correct such condition within a reasonable time after the notice was received. However, there are two recognized exceptions to the statutory prior written notice rule: (1) if the municipality created the defective or hazardous condition through an affirmative act of negligence, and (2) if the municipality derived a special benefit from the sidewalk or roadway unrelated to the public

use (see *Amabile v City of Buffalo*, *supra*, at 474; *Kiernan v Thompson*, 73 NY2d 840, 537 NYS2d 122 [1988]; *Barnes v Incorporated Vil. of Port Jefferson*, 120 AD3d 528, 990 NYS2d 841 [2d Dept 2014]; *Miller v Town of E. Hampton*, 98 AD3d 1007, 951 NYS2d 171 [2d Dept 2012]). Moreover, the affirmative negligence exception is limited to work performed by the municipality that immediately results in the existence of a dangerous condition (see *Yarborough v City of New York*, 10 NY3d 726, 728, 853 NYS2d 261 [2008]; *Oboler v City of New York*, 8 NY3d 888, 889, 832 NYS2d 871 [2007]; *Joyce v Village of Saltaire*, 126 AD3d 760, 5 NYS3d 490 [2d Dept 2015]).

At his deposition, the plaintiff testified that he was employed as a lineman for National Grid, which sent him to Cherry Grove to restore power after the fire by installing new electric poles, wires, and transformers. The plaintiff further testified that part of the subject boardwalk was burned and part of it was removed, and that it was in the same condition the entire time he was at the site. In addition, the plaintiff testified that about fifty to sixty feet of burned boardwalk remained, and that his accident occurred on this burned remaining portion. The plaintiff then testified that, as he was walking on Holly Walk picking up debris, the boardwalk collapsed slightly, that he lost his footing and stumbled six to eight inches onto the sand, and that his left knee struck a piece of concrete underneath the sand.

At her deposition, Marie Angelone testified that she is employed as a neighborhood aide at the Town Highway Department. Ms. Angelone testified that she searched the Highway Department's records for the five years prior to the plaintiff's accident, and that there were no written record of any dangerous condition on the subject boardwalk prior to the plaintiff's accident. At his deposition, Thomas Vogel testified that he was employed by the Town as its highway maintenance crew leader for Fire Island. Mr. Vogel testified that he received a call at 4:35 a.m. on March 27, 2015 asking for assistance in response to the fire at Holly House. Mr. Vogel further testified that the boardwalk on Holly Walk was burned by the fire, that the Town employees removed the burned boardwalk on the south side to allow equipment into the area, and that they put up a snow fence around this area to cordon off both sides, leaving a small pathway. Moreover, Mr. Vogel testified that the Town left the burned boardwalk on the north side to allow access to insurance companies and utilities, and that they had put up yellow caution tape between the snow fence and the remnants of the Grove Beach property.


Although the Town's submissions establish, *prima facie*, that the Brookhaven Town Clerk and the Town Superintendent of Highways do not have any prior written record of the allegedly dangerous condition present as a result of the burned boardwalk prior to the plaintiff's accident (see Brookhaven Town Code § 84-1; *Amabile v City of Buffalo*, *supra*; *Marciano v Village of Rockville Ctr.*, *supra*; *Palka v Village of Ossining*, *supra*; *Long v City of Mount Vernon*, *supra*), its submissions fail to eliminate all triable issues of fact as to whether it created the condition that caused the plaintiff's accident through an affirmative act of negligence (see *Yarborough v City of New York*, *supra*; *Oboler v City of New York*, *supra*; *Amabile v City of Buffalo*, *supra*; *Kiernan v Thompson*, *supra*; *Joyce v Village of Saltaire*, *supra*). Mr. Vogel testified that the Town's employees had removed the southern portion of the subject boardwalk, and that they left the burned northern portion purposefully. This testimony fails to eliminate all triable issues of fact as to whether the work performed by the Town the day after the fire immediately resulted in the existence of a dangerous condition on the boardwalk (see

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Yarborough v City of New York, supra; Oboler v City of New York, supra; Joyce v Village of Saltaire, supra). As Grosfield and the Town failed to make a prima facie showing of entitlement to summary judgment, the motion and the cross motion are denied, regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

In light of the foregoing, Grosfield's motion and the Town's cross motion are denied.

Dated: APR 05 2019



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

 FINAL DISPOSITION X NON-FINAL DISPOSITION