Rocco v County of Suffolk
2019 NY Slip Op 32493(U)
August 23, 2019
Supreme Court, Suffolk County
Docket Number: 10-19242
Judge: David T. Reilly
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[* 1]

SHORT FORM ORDER

COPY

INDEX No. 10-19242
CAL. No. 17-00528OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 9-13-17 (006)
MOTION DATE 9-12-18 (008)
ADJ. DATE 1-30-19
Mot. Seq. # 006 - MD
008 - MD

---X

ANTHONY D. ROCCO, JR.,

Plaintiff,

- against -

COUNTY OF SUFFOLK, TOWN OF BABYLON, AMITYVILLE AMERICAN LEGION POST 1015 and AMERICAN LEGION HOME ASSOCIATION, INC.,

Defendants.

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Upon the following papers numbered 1 to 118 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 20-44; 45-57; Replying Affidavits and supporting papers 59-60 ; Other ___; Notice of Motion/ Order to Show Cause and supporting papers 61 - 99 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 100-110; 111-115 ; Replying Affidavits and supporting papers 116-118 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (Seq. 006) by defendant Town of Babylon for summary judgment and the motion (Seq. 008) by defendants Amityville American Legion Post 1015 and American Legion

Home Association, Inc., for summary judgment dismissing the complaint are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant Town of Babylon for summary judgment dismissing the complaint against it is denied; and it is further

ORDERED that the motion by defendants Amityville American Legion Post 1015 and American Legion Home Association, Inc., for summary judgment dismissing the complaint against them is denied.

This is an action to recover money damages for injuries allegedly sustained by plaintiff Anthony D. Rocco, Jr., on November 3, 2009, when he tripped on a certain sprinkler head located near the sidewalk in front of the premises at 70 Elm Street in Copiague, New York. Plaintiff alleges that defendants County of Suffolk (the County), Town of Babylon (the Town), Amityville American Legion Post 1015 and American Legion Home Association, Inc. (collectively, the American Legion) were negligent in, among other things, the ownership, operation, maintenance, management, supervision and control of the sidewalk and sprinkler heads at the aforesaid premises. In addition, plaintiff alleges a certain protruding sprinkler head located in close proximity to the edge of the public sidewalk constituted a dangerous and defective condition.

Plaintiff initially commenced two separate actions against defendants which were consolidated by this court by Order dated June 28, 2011 (Spinner, J. [Ret.]). Defendants' answers to plaintiff's complaint deny the allegations contained therein and interpose counterclaims and cross claims. A motion by the County for summary judgment dismissing the claims against it was granted by Order issued on September 17, 2014 (Spinner, J. [Ret.]). All discovery has been completed and the note of issue was filed in this matter on April 4, 2017.

The Town now moves for summary judgment dismissing the complaint on the grounds that it lacked prior written notice of the alleged defective sidewalk, that plaintiff did not plead that it had prior written notice in her complaint, and that no exceptions to the prior written notice statute apply. The Town submits, in support of the motion, copies of the pleadings, the notice of claim, the bill of particulars, a compliance conference order, the note of issue, copies of the Town of Babylon Code, the transcript of plaintiff's General Municipal Law 50-h hearing testimony, the transcripts of the deposition testimony of plaintiff, George Price, Michael Gelson, Alexander Santino, Paul Morano, and the affidavits of Thomas Stay and Jennifer Taus. In opposition, plaintiff argues that triable issues of fact remain as to whether the Town affirmatively caused or created the defect.

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 (*see* ***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]).

Where a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a defect which comes within the ambit of the law unless it has received prior written notice of the alleged defect, or an exception to the prior written notice requirement applies (*see* ***Taustine v Incorporated Vil. of Lindenhurst***, 158 AD3d 785, 71 NYS3d 547 [2d Dept 2018]; ***Conner v City of New York***, 104 AD3d 637, 960 NYS2d 204 [2d Dept 2013]; ***Masotto v Village of Lindenhurst***, 100 AD3d 718, 954 NYS2d 557 [2d Dept 2012]). The Court of Appeals has recognized only two exceptions to the prior written notice requirement, namely, where the municipality created the defect through an affirmative act of negligence, or a special use confers a special benefit upon the municipality (*see* ***Yarborough v City of New York***, 10 NY3d 726, 853NYS2d 261 [2008]; ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]; ***Carlucci v Village of Scarsdale***, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]).

Pursuant to Town Law § 65-a and the Town of Babylon Code, as a precondition to commencing a civil action against the Town to recover damages for personal injuries sustained as a result of a defect on Town property, the Town must be given prior written notice of the defect. Section 158-1 of the Town of Babylon Code states:

> No civil action shall be maintained against the Town of Babylon for damages or injuries to person or property (including those arising form the operation of snowmobiles) sustained by reason of any highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed, unless written notice of such defective, unsafe, dangerous or obstruction condition of such highway, bridge or culvert was actually given to the Town Clerk of the Town and there was thereafter a failure or neglect within a reasonable time to repair or remove the defect, danger or obstruction complained of; and no such action shall be maintained for damages or injuries to persons or property sustained solely in consequence of the existence of snow or ice upon any highway, bridge, or culvert unless written notice thereof, specifying the particular place, was actually given to the Town Clerk of the Town and there was a failure or neglect to cause such snow or ice to be removed or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice.

Section 158-2 of the Town of Babylon Code states:

> No civil action will be maintained against the Town for damages or injuries to person or property sustained by reason of a defective, dangerous, unsafe, out-of-repair or obstructed sidewalks of the Town or in consequence of the existence of snow, ice or anything upon any of its sidewalks, unless such sidewalks have been constructed or are maintained by the Town pursuant to statute; nor shall any action be maintained for damages or injuries to person or property sustained by reason of such defective, dangerous, unsafe, out-of-repair or obstructed sidewalks or in consequence of such existence of snow, ice or anything upon any of its sidewalks unless written notice thereof, specifying the particular place, was actually given to the Town Clerk of the

> Town and there was a failure or neglect to cause such defective, dangerous, unsafe, out-of-repair or obstructed sidewalks to be remedied, such snow or ice to be removed or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice.

The Town has established a prima facie case of entitlement to summary judgment by demonstrating, through the affidavits of Thomas Stay and Ms. Jennifer Taus, that it did not receive prior written notice of any defective condition at the location of plaintiff's accident (*see* ***Taustine v Incorporated Vil. of Lindenhurst***, *supra*; ***Conner v City of New York***, *supra*; ***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]; ***Pennamen v Town of Babylon***, 86 AD3d 599, 927 NYS2d 164 [2d Dept 2011]). Mr. Stay, the Town's Commissioner of the Department of Public Works, stated that he is responsible for "overseeing the construction, maintenance[,] and repair of all [Town] owned roadways and sidewalks." Mr. Stay also stated that his job responsibilities include researching whether the Town owns or maintains roadways and sidewalks at issue in claims or lawsuits against the Town. Mr. Stay stated that the Town at no time installed owned, maintained, inspected or controlled the sprinkler head adjacent to Railroad Avenue, on the side of property known as 70 Elm Street, Copiague, New York. Ms. Taus, the Town's clerk-typist, stated that the Town Clerk's office is responsible for "keeping and maintaining records of all complaints and written notices of defects received by the Town," and that she is responsible for "intake and logging in of written complaints made to [the Town] regarding Town owned property, including all Town owned sidewalks, curbs[,] and roadways." Ms. Taus and Mr. Stay both stated that they caused a search of the records for written notices regarding the alleged location of plaintiff's accident in their respective departments, and that the records contain no prior written notice of a defect regarding either the sidewalk area or a sprinkler head adjacent to the sidewalk alongside Railroad Avenue on the side of property known as 70 Elm Street, Copiague, prior to November 3, 2009.

In opposition, plaintiff has raised a triable issue of fact as to whether an exception to the prior written notice requirement applies (*see* ***Oliveri v Village of Greenport***, *supra*; ***Carlo v Town of Babylon***, 55 AD3d 769, 869 NYS2d 549 [2d Dept 2008]; ***Healy v Village of Patchogue***, 28 AD3d 519, 813 NYS2d 499 [2d Dept 2006]; *cf.* ***Pennamen v Town of Babylon***, *supra*). Specifically, plaintiff offered evidence that the Town had replaced the sidewalk adjacent to the subject sprinkler head approximately a week before plaintiff's accident. Plaintiff has raised a question of fact as to whether the Town improperly backfilled dirt next to the sidewalk around the sprinkler head, thereby leaving the sprinkler head exposed and raised and creating a dangerous condition for pedestrians. Therefore, the Town's motion for summary judgment is denied.

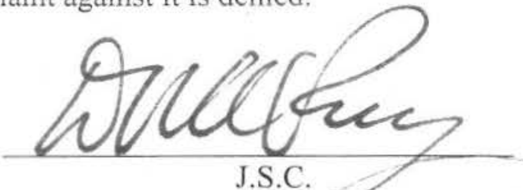
The American Legion also move for summary judgment dismissing the complaint against it, arguing that the alleged defect was latent and that it had no actual or constructive notice of such defect. Defendants' submissions in support of the motion include, *inter alia*, copies of the pleadings and transcripts of the parties' deposition testimony. In opposition, plaintiff contends that the defect was not latent and that the American Legion created or caused the dangerous condition. Plaintiff submits, in opposition to defendant's motion, his attorney's affirmation, the bill of particulars, an expert disclosure response, and an affidavit of a professional engineer.

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 establish a prima facie case of negligence in a premises liability action, a plaintiff must establish that the defendant owed him or her a duty of care, that a dangerous or defective condition on the premises 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 dangerous or 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* ***McElhiney v Half Hollow Hills Cent. Sch. Dist.***, 158 AD3d 615, 70 NYS3d 237 [2d Dept 2018]; ***Kane Peter M. Moore Constr. Co., Inc.***, 145 AD3d 864, 44 NYS3d 141 [2d Dept 2016]; ***Schwartz v Gold Coast Rest. Corp.***, 139 AD3d 696, 31 NYS3d 535 [2d Dept 2016]; ***Jackson v Conrad***, 127 AD3d 816, 7 NYS3d 355 [2d Dept 2015]). To constitute constructive notice, the dangerous or defective condition must be visible and apparent, and must exist for a sufficient length of time prior to the accident to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). The issue of whether a dangerous or defective condition exists on the property of another is generally dependent upon the peculiar circumstances of each case and presents an issue of fact for a jury (*see* ***Portanova v Kantlis***, 39 AD3d 731, 833 NYS2d 652 [2d Dept 2007], *citing* ***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997]).

Here, the American Legion did not establish its entitlement to summary judgment, because it failed to eliminate triable issues as to whether it maintained the premises in a reasonably safe condition. (*see* ***Dillon v Town of Smithtown***, 165 AD3d 1231, 84 NYS3d 84 [2d Dept 2018]). Since the American Legion failed to meet its prima facie burden, it is not necessary for this Court to review the sufficiency of plaintiff's opposition papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Accordingly, the motion by the American Legion for summary judgment dismissing the complaint against it is denied.

Dated: August 23, 2019



J.S.C.

HON. DAVID T. REILLY

____ FINAL DISPOSITION _X_ NON-FINAL DISPOSITION