Afshar v Country Pointe at Melville Home Owners Assn., Inc.
2019 NY Slip Op 32784(U)
September 23, 2019
Supreme Court, Suffolk County.
Docket Number: 16-6016
Judge: David T. Reilly
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SHORT FORM ORDER

COPY

INDEX No. 16-6016

CAL. No. 18-02066OT

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 2-28-19 (002)
MOTION DATE 4-15-19 (003)
ADJ. DATE 5-15-19
Mot. Seq. # 002 - MD
003 - MG

---X

JAYNE AFSHAR,

Plaintiff,

- against -

COUNTRY POINTE AT MELVILLE HOME OWNERS ASSOCIATION, INC., FAIRFIELD PROPERTY SERVICES, L.P., COUNTY OF SUFFOLK and NAI LONG ISLAND, INC.,

Defendants.

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Upon the following papers read on these motions for summary judgment: Notice of Motion by plaintiff, dated January 29, 2019, and supporting papers; Notice of Motion by defendant County of Suffolk, dated March 13, 2019, and supporting papers; Answering Affidavit by defendant Country Pointe at Melville Home Owners Association, Inc., dated May 6, 2019; and Replying Affidavit by plaintiff, dated May 10, 2019, and supporting papers; it is,

ORDERED that the motion by plaintiff (# 001) and the motion by defendant County of Suffolk (# 002) are consolidated for purposes of this determination; and it is further

ORDERED that the motion by plaintiff for an Order pursuant to CPLR 3212 granting summary judgment on the issue of liability against Country Pointe at Melville Home Owners Association, Inc. is denied; and it is further

ORDERED that the motion by defendant County of Suffolk for an Order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against it is granted.

Plaintiff commenced this action to recover damages for injuries she sustained on December 6, 2015, when she fell on the public sidewalk abutting the premises owned by defendant Country Pointe at Melville Homeowners Association ("Country Pointe") in Melville, New York. Plaintiff alleges that she tripped on an uneven portion of the sidewalk, and that it was the responsibility of Country Pointe to maintain the sidewalk pursuant to the Huntington Town Code.

Plaintiff now moves for summary judgment on the issue of liability against Country Pointe, arguing that it was negligent in the maintenance, repair, and inspection of the sidewalk. Plaintiff's submissions in support of her motion include her affidavit, her deposition transcript, and the deposition transcript of Nancy Scoca of NAI Long Island, the property manager for Country Pointe. Plaintiff also submits photographs of the alleged dangerous condition on the sidewalk. Country Pointe opposes plaintiff's motion with an attorney's affirmation referencing the deposition testimony of plaintiff and Scoca, and arguing that plaintiff failed to meet her prima facie burden on the motion as questions of fact are present regarding whether there was a "negligent condition," and whether Country Pointe had constructive notice of any such condition. Country Pointe further argues that questions of fact are present regarding the extent to which plaintiff's own negligence caused or contributed to the accident.

Plaintiff testified at her deposition that the accident occurred on December 6, 2015 at approximately 1:00 p.m. At approximately 12:30 p.m., plaintiff had walked from her home to a 7-Eleven store located on Ruland Road and Route 110. Plaintiff stated that the 7-Eleven store is approximately a 10-minute walk from her home, and she had walked there 20 times prior to the date of the accident, taking the same route along Ruland Road. While returning from 7-Eleven on the date of the accident, plaintiff tripped and fell on the sidewalk on Ruland Road, adjacent to Country Pointe Estates. Plaintiff testified that there was no snow, ice or other precipitation on the ground or sidewalk. She was looking straight ahead while walking, when her foot "hit something" and she fell forward. She initially did not know what caused her to trip, but she later noticed that the sidewalk was elevated in the area where she tripped. She did not know the height differential of the elevated portion of sidewalk, but estimated that it was several inches, between two sidewalk flags. Plaintiff testified that she had noticed the elevated area of the sidewalk prior to the accident, but she could not recall when she first noticed it. She never made any complaints about the condition prior to her accident, and she never previously tripped or fell in that area.

Plaintiff's affidavit submitted in support of her motion states that the photographs annexed thereto are a fair and accurate representation of the location of her accident as it existed on the accident date, and that she marked the area where she tripped. The photographs marked by plaintiff depict a section of sidewalk bordered by grass with a roadway to the left and trees to the right. They also depict a cement sidewalk flag apparently raised above the adjacent sidewalk flag. Additional photographs

annexed to plaintiff's affidavit depict a ruler positioned at the area where the sidewalk flag is raised. Based on the ruler depicted in the photographs, the sidewalk flag is raised approximately 1½ inches above the adjacent sidewalk flag.

Nancy Scoca testified that she is employed by NAI Long Island, Inc. ("NAI") as the property manager for Country Pointe in Melville. There are 193 homes located in the gated community at the property. Scoca testified that, as property manager, she walks through the property weekly to inspect the landscaping, sprinklers, garbage removal, snow removal, pool and tennis courts. Contractors are hired for landscaping and snow removal services at the property. There is a public sidewalk on Ruland Road, which borders the Country Pointe property. A fence and grass separates the Country Pointe property and the sidewalk. Scoca testified that she hires contractors to perform snow removal on the public sidewalk abutting the Country Pointe property, but she has never performed any repairs to the public sidewalk. She further testified that she has never observed the sidewalk to be unlevel and she has never received any complaints regarding the sidewalk abutting the Country Pointe property.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). 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.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must offer evidence in admissible form, and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

"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" (***Davidson v City of Buffalo***, 96 AD3d 1516, 1517, 947 NYS2d 702, 703 [4th Dept 2012], citing ***Hausser v Giunta***, 88 NY2d 449, 452-453, 646 NYS2d 490, 491 [1996]; *see also* ***Lagawo v Myers***, 149 AD3d 1056, 52 NYS3d 487 [2d Dept 2017]). However, liability will be imposed where an ordinance or statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalk and imposes liability for injuries resulting from the breach of that duty (*see* ***Hausser v Giunta***, *supra*; ***Lagawo v Myers***, *supra*; ***Shatzel v 152 Buffalo St.***, 129 AD3d 1626, 13 NYS3d 715 [4th Dept 2015]; ***Davidson v City of Buffalo***, *supra*). As applicable here, Town of Huntington Code § 173-16 imposes a duty on the landowner of property abutting, *inter alia*, any streets, highway or roadway, to "maintain and repair the sidewalk adjoining his lands" and to "keep such sidewalk free and clear of snow, ice, filth, dirt, weeds and all other obstructions." Town of Huntington Code § 173-16 further provides that the property owner will be "liable for any injury or damage to person or property by reason of the omission, failure or neglect to repair or maintain such sidewalk in a safe condition or to remove snow, ice or other obstructions and/or defects therefrom."

However, to impose liability upon Country Pointe for the plaintiff's fall, "there must be evidence that a dangerous condition existed, and that the defendants had actual or constructive notice of the condition and failed to remedy it within a reasonable time" (***Livingston v Better Med. Health, P.C.***, 149 AD3d 1061, 1062, 52 NYS3d 482, 483 [2d Dept 2017]). Generally, the issue of whether a dangerous or defective condition exists depends on the particular facts and circumstances of each case, and is properly a question of fact for the jury (*see* ***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997]; ***Easley v U Haul***, 166 AD3d 852, 88 NYS3d 447 [2d Dept 2018]; ***Craig v Meadowbrook Pointe Homeowner's Assn., Inc.***, 158 AD3d 601, 70 NYS3d 557 [2d Dept 2018]; ***Shatzel v 152 Buffalo St.***, *supra*; ***Touloupis v Sears, Roebuck and Co.***, 155 AD3d 807, 63 NYS3d 518 [2d Dept 2017]; ***Fasone v Northside Properties Mgt.***, 149 AD3d 905, 52 NYS3d 428 [2d Dept 2017]; ***Herrera v City of New York***, 262 AD2d 120, 691 NYS2d 504 [1st Dept 1999]). Furthermore, in determining whether an alleged condition constitutes an actionable defect, "[t]he test established by the case law in New York is not whether a defect is *capable* of catching a pedestrian's shoe. Instead, the relevant questions are whether the defect was difficult for a pedestrian to see or identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances" (***Hutchinson v Sheridan Hill House Corp.***, 26 NY3d 66, 80, 19 NYS3d 802, 811 [2015]; *see also* ***Langgood v Carrols, LLC***, 148 AD3d 1734, 1735, 50 NYS3d 733, 735 [4th Dept 2017]).

Plaintiff's motion for summary judgment is denied. Plaintiff correctly asserts that she is not required to show the absence of her own comparative fault to establish prima facie entitlement to judgment as a matter of law as to the issue of defendant's negligence (*see* ***Rodriguez v City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]). However, viewed in the light most favorable to the nonmoving parties, the evidence submitted by plaintiff, including the deposition testimony and the photographs of the area, reveals issues of fact regarding whether the raised area of the sidewalk was an actionable defect (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra;* ***Kam Lin Chee v DiPaolo***, 138 AD3d 780, 31 NYS3d 509 [2d Dept 2016]; ***Shatzel v 152 Buffalo St.***, *supra*). As discussed above, the photographs of the area where plaintiff allegedly tripped reveal that the cement sidewalk flag was raised approximately 1½ inches higher than the adjacent cement flag. However, plaintiff testified that she had traversed the area 20 times prior to the date of the accident without incident, and stated that there was nothing obstructing her view of the sidewalk in the area. Contrary to plaintiff's contention, the New York City Department of Transportation Highway rules regarding what constitutes a "substantial defect" fail to establish that the alleged condition was an actionable defect as a matter of law, as this accident did not occur in New York City, and plaintiff has failed to cite any provision in the Town of Huntington Code, or any applicable statute, defining a "substantial defect" or actionable height differential in a public sidewalk (*see* ***Kam Lin Chee v DiPaolo***, *supra*). Thus, questions of fact exist regarding whether the condition of the sidewalk where plaintiff tripped was a "dangerous condition," which must be determined by the trier of fact (*see* ***Trincere v County of Suffolk***, *supra*; ***Craig v Meadowbrook Pointe Homeowner's Assn., Inc.***, *supra*, ***Shatzel v 152 Buffalo St.***, *supra*).

Defendant County of Suffolk has moved for summary judgment dismissing plaintiff's complaint and all cross claims against it, based on the arguments that it did not own, manage, maintain or control the accident site, and that it did not receive written notice of the alleged defect as required by Suffolk County Charter § C8-2A. The evidence submitted in support of the motion includes the deposition

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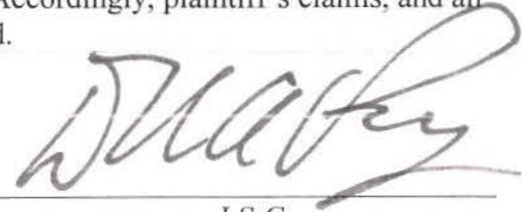
transcript and affidavit of Paul R. Morano, an affidavit of John Donovan, and plaintiff's Notice of Claim against County of Suffolk.

The affidavit of Paul R. Morano states that he is employed by the Suffolk County Department of Public Works as an assistant civil engineer, and that his duties include searching the official records of the Department of Public Works and ascertaining whether the County of Suffolk "owns, maintains or controls a given location." Mr. Morano's affidavit further states that his search regarding the area of the alleged accident revealed that the County of Suffolk did not own, maintain or control the roadway or the adjacent sidewalks at that location. At a deposition in this matter, Mr. Morano testified that, based on his search of the alleged accident location, he determined that Ruland Road is a town road rather than a county road, under the jurisdiction of the Town of Huntington. An affidavit of John Donovan, an investigator employed by the County of Suffolk, states that he conducted a search for records of any written complaints regarding the subject location received by the County on or before December 6, 2015. According to his affidavit, Mr. Donovan's search revealed that the County of Suffolk was not in receipt of any written notice or written complaints concerning the alleged defective condition at the location of the alleged accident. An affidavit of Jason Richberg, Chief Deputy Clerk of the Suffolk County Legislature, was also submitted in support of County of Suffolk's motion for summary judgment. According to his affidavit, Mr. Richberg searched for any written complaints filed with the Clerk of the Legislature, regarding the sidewalk in the subject location, on or prior to December 6, 2015, and his search revealed no such written notice or complaints.

The evidence submitted by County of Suffolk established a prima facie case that it did not own, maintain or control the sidewalk in the area where the accident allegedly occurred and, in any event, that it did not receive prior written notice of the alleged defect (*see* ***Martens v County of Suffolk***, 100 AD3d 839, 956 NYS2d 61 [2d Dept 2012]; ***Quintanta v City of New York***, 302 AD2d 224, 754 NYS2d 261 [1st Dept 2003]; ***Monteleone v Inc. Vil. of Floral Park***, 123 AD2d 312, 506 NYS2d 209 [2d Dept 1986]). Neither plaintiff nor defendants Country Pointe, Fairfield Property Service, L.P., or NAI Long Island, Inc. have submitted opposition advancing any argument, or offering any evidence raising a triable issue of fact, in opposition to County of Suffolk's prima facie showing of entitlement to dismissal of the claims against it (*see* ***Zuckerman v City of New York***, *supra*). Accordingly, plaintiff's claims, and all cross claims, against defendant County of Suffolk are dismissed.

Dated: Sept 23, 2019
Riverhead, NY



J.S.C.
HON. DAVID T. REILLY

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION