

Quattrocchi v PSEG Long Is., LLC
2019 NY Slip Op 33963(U)
November 21, 2019
Supreme Court, Suffolk County
Docket Number: 17-603540
Judge: Sanford Neil Berland
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SHORT FORM ORDER

E-FILE

INDEX No. 17-603540

CAL. No. 18-02271OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD NEIL BERLAND
Acting Justice of the Supreme Court

MOTION DATE 3-12-19 (002)

MOTION DATE 5-21-19 (003)

ADJ. DATE 5-28-19

Mot. Seq. # 002 - MG

003 - MD

-----X

BARBARA QUATTROCCHI,

Plaintiff,

- against -

PSEG LONG ISLAND, LLC and TOWN OF HUNTINGTON,

Defendants.

-----X

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Upon the following papers read on these motions for summary judgment: Notice of Motion and supporting papers by defendant Town of Huntington, dated February 11, 2019; and Notice of Cross-Motion and supporting papers by defendant PSEG Long Island, LLC, dated May 18, 2019, it is,

ORDERED that the motions for summary judgment by defendants Town of Huntington and PSEG Long Island, LLC are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Town of Huntington for an order granting summary judgment in its favor on the issue of liability is granted; and it is further

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ORDERED that the motion by defendant PSEG Long Island, LLC for an order granting summary judgment in its favor on the issue of liability is denied as untimely.

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained as the result of an accident that occurred on February 11, 2015, when plaintiff, who was crossing the street in front of 16 New Street in Huntington, New York, tripped and fell on a six-to eight-inch metal strip that was sticking up from a metal plate imbedded in the roadway. Plaintiff served a notice of claim upon the Town of Huntington (“Town”) and, subsequently, commenced an action against it, alleging negligence in the maintenance, repair and upkeep of the roadway where the accident occurred. She also commenced a separate action against PSEG Long Island, LLC (“PSEG”) alleging negligence related to the maintenance, repair and upkeep of the metal plate. The actions were consolidated by order of this Court (Asher, J.) dated August 3, 2017.

The Town now moves for summary judgment dismissing the claims against it on the grounds that it had not receive prior written notice of the alleged dangerous condition and did not create such condition. The Town’s submissions in support of the motion include copies of the pleadings and of plaintiff’s notice of claim, the transcript of plaintiff’s testimony at a General Municipal Law § 50-h hearing, the transcripts of the parties’ deposition testimony, and photographs of the alleged defective condition. Also submitted in support of the Town’s motion are affidavits of Town employees Richard Scheffler and Diana Esposito.

According to plaintiff’s notice of claim, on February 11, 2015, at approximately 10:00 p.m., plaintiff was walking across New Street in Huntington when “she tripped and fell over a piece of metal which was dislodged from the street.” At her General Municipal Law § 50-h hearing and in her depositions, plaintiff testified that on the night of the accident, she left the New York Sports Club located at 16 New Street and walked across the one-way street toward her parked car. When she was approximately one-third of the way across the street, she felt something “grab her ankle,” causing her to fall onto a metal plate in the roadway. When she looked back at the area where she had tripped, she observed a thin metal strip attached to the metal plate. The metal plate was level with the surface of the roadway, but the metal strip was sticking up. Plaintiff estimated that the metal strip was six to eight inches in length. Plaintiff identified photographs of the condition which were taken on the night of the incident by another individual leaving the gym and by plaintiff’s son. She testified that she had never observed that condition prior to her accident and did not know what had caused the condition. She further testified that she was not aware of any complaints having been made to the Town regarding the condition.

Richard Scheffler, a highway construction coordinator for the Town, also testified at a deposition in this action. Scheffler testified that as part of his duties for the Town, he issues right-of-way permits to utilities, contractors and residents for work performed on town roads. Based upon an inspection of the subject area that he had performed prior to his deposition, Scheffler testified that the metal plate in the roadway belongs to PSEG. Scheffler stated that New Street is a town road and the Town would be responsible for maintaining the asphalt area surrounding the metal plate, but PSEG would be responsible for making repairs to defective conditions on the metal plate itself. Scheffler stated that he conducted a search for records regarding permits issued by the Town for the subject area dating back to 1999 but did not find any permits issued during that time period. He testified that he also searched for any records regarding construction or repairs performed by the Town on New Street prior to the date of the accident, but his search

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did not disclose any such records. Scheffler further testified that any complaints received by the Town regarding the metal plate on which plaintiff tripped would have been forwarded to him, but he never received any complaints regarding the plate.

An affidavit by Scheffler is also submitted in support of defendant Town's motion. In his affidavit, Scheffler states that one of his duties as a highway construction coordinator and road permit inspector for the Town is to maintain and search for any notices of claim or complaints received by the Superintendent of Highways. He further states that he conducted a search for any notices of claim or complaints received by the Town regarding a dangerous condition on the roadway located at or about 16 New Street in Huntington, New York for the period from February 21, 2010 through February 21, 2015 and found none. Scheffler also states in his affidavit that he searched the Highway Department's records for any complaints related to the roadway in that area for that time period and found none. According to his affidavit, Scheffler conducted searches for records regarding road work and snow removal work performed by the Town in that area and for any road opening permits related to utility work performed by an outside entity, and he found none. Scheffler states that his search of the Highway Department records confirmed that the metal grate and utility box located in the roadway in front of 16 New Street in Huntington was not then owned by the Town nor was it at the time of plaintiff's accident.

An affidavit by Diana Esposito is also submitted in support of the Town's motion. According to her affidavit, Esposito is employed by the Town as a principal clerk, and her job duties include maintaining and searching for various records, including complaints and notices of claim received by the Town Clerk. Esposito states that she conducted a search for any notices of claim or complaints received by the Town Clerk's office regarding a dangerous or defective condition on the roadway at or about 16 New Street in Huntington for the period from February 11, 2010 through February 11, 2015. Esposito avers that her search revealed no record of the Town Clerk having received any notices of claim or complaints regarding any such condition during that time period.

William Toohill testified on behalf of PSEG at a deposition in this action. Toohill is employed by PSEG as an area supervisor and is responsible for supervising technicians who maintain and inspect electrical equipment for PSEG Long Island. Toohill testified that he has never inspected the PSEG equipment on New Street in Huntington. However, based upon his review of photographs of the subject area, he identified the metal plate where plaintiff tripped as a grate covering a PSEG network protector that is located inside an underground vault. Toohill stated that the grate covering the vault is comprised of six plates weighing 600 to 800 pounds each. Two additional vented plates allow heat to escape from the unit. Toohill did not know the purpose of the metal rods between the plates but speculated that they might provide traction for the surface of the plates. He has never observed one of the metal rods protrude upwards, and he has never been advised of such a condition by PSEG technicians. Toohill testified that the network protectors inside the vaults, and the manholes/vaults themselves, are inspected by PSEG technicians every three years. If he were advised of an issue with one of the plates covering the underground vaults, he would report it to the PSEG service section, which would then have a crew replace the unit. Toohill also testified that any complaints to PSEG customer service regarding the cover of a vault would be referred to the service section.

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Where a municipality 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 or roadway 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, 474, 693 NYS2d 77 [1999]; *Garcia v Thomas*, 173 AD3d 842, 102 NYS3d 707 [2d Dept 2019]; *Cruzate v Town of Islip*, 162 AD3d 853, 80 NYS3d 305 [2d Dept 2018]; *Walker v County of Nassau*, 147 AD3d 806, 46 NYS3d 647 [2d Dept 2017]; *Abreu-Lopez v Incorporated Vil. of Freeport*, 142 AD3d 515, 36 NYS3d 492 [2d Dept 2016]). The two recognized exceptions to the statutory rule requiring prior written notice of a defective or dangerous condition apply where: (1) the municipality created the defect or hazard through an affirmative act of negligence, or (2) the municipality derived a special benefit from the sidewalk or roadway unrelated to the public use (*Amabile v City of Buffalo*, 93 NY2d 471, 474, 693 NYS2d 77, 79; *see also Garcia v Thomas*, 173 AD3d 842, 842, 102 NYS3d 707, 708; *Cruzate v Town of Islip*, 162 AD3d 853, 854, 80 NYS3d 305, 306; *Abreu-Lopez v Incorporated Vil. of Freeport*, 142 AD3d 515, 516, 36 NYS3d 492, 493).

As relevant to the current action, pursuant to Town of Huntington Code § 174-3, no civil action may be maintained against the Town for personal injuries sustained as a result of a dangerous or defective condition on a street owned, operated or maintained by the Town unless prior written notice of the condition was given to the Town Clerk or the Town Superintendent of Highways, and the Town failed to repair or remove such condition within a reasonable time after the notice was received. The Town's submissions in support of its unopposed motion are sufficient to establish a prima facie case that it had no prior written notice of the alleged dangerous condition in the roadway and that neither of the exceptions to the prior written notice rule is applicable here (*see Cruzate v Town of Islip, supra; Walker v County of Nassau, supra; Abreu-Lopez v Incorporated Vil. of Freeport, supra*). The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Plaintiff, however, failed to present any evidence in opposition to the Town's motion. Accordingly, defendant Town's motion for summary judgment dismissing the complaint against it is granted.

As to PSEG's motion, improperly denominated as a cross motion (*see CPLR 2215; Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986, 801 NYS2d 376 [2d Dept 2005]), CPLR 3212 (a) provides that if no date for making a summary judgment motion has been set by the court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *see also Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 978 NYS2d 13 [1st Dept 2013]).

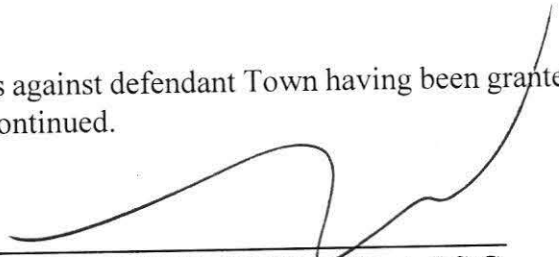
The Court's computerized records show that the note of issue was filed in this action on December 17, 2018. Although the 120-day statutory period for making a summary judgment motion expired on April 18, 2019, PSEG did not make its motion until May 21, 2019, when it was uploaded into the New York State Courts' Electronic Filing System (*see CPLR 2211; Uniform Rules of Trial Cts [22 NYCRR] § 202.5-b [f]*). As there is no explanation in the moving papers for its delay in seeking summary judgment, PSEG's motion must be denied as untimely (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261; *Kershaw v Hosp. for Special Surgery*, 114 AD3d

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75, 978 NYS2d 13; *Fuller v Westchester County Health Care Corp.*, 32 AD3d 896, 821 NYS2d 241 [2d Dept 2006]).

Summary judgment dismissing plaintiff's claims against defendant Town having been granted, the action against the remaining defendant is severed and continued.

Dated: 11/21/2019
Riverhead, New York



HON. SANFORD NEIL BERLAND, A.J.S.C.

____ FINAL DISPOSITION XX NON-FINAL DISPOSITION