De Jesus v County of Nassau
2019 NY Slip Op 34232(U)
March 28, 2019
Supreme Court, Nassau County
Docket Number: 617059/18
Judge: Sharon M.J. Gianelli
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 20

Present: Hon. Sharon M.J. Gianelli

_____X

JOSE DE JESUS,

Plaintiff,

-against-

Index No. 617059/18

Mot Seq. No. 001

COUNTY OF NASSAU, TOWN OF HEMPSTEAD, NATIONAL GRID USA, PSEG LONG ISLAND LLC and VERIZON NEW YORK, INC.,

Defendants.

_____X

Papers submitted on this motion:

Defendant County of Nassau Notice of Motion _____X
Plaintiff's Affirmation in Opposition _____X
Reply Affirmation _____X

Upon the foregoing papers, the motion by Defendant, COUNTY OF NASSAU (hereinafter "COUNTY"), seeking an order pursuant to CPLR § 3211 (a) (1) and (7), dismissing the Plaintiffs' complaint, is granted as hereinafter provided. Pursuant to CPLR § 3211 (c), the court hereby converts the defendant's application to an application for summary judgment.

Underlying Facts

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff, Jose De Jesus, on February 3, 2018, when he tripped and fell on a sidewalk located approximately ninety feet north of the corner of Bellmore Road and Range Road

in Bellmore, New York in front of a house with a common address of 1619 Bellmore Road, Bellmore, New York (*see* Exhibit "A", Notice of Claim; Exhibit "C", Summons and Complaint). A Notice of Claim was timely served on COUNTY by Plaintiff on or about April 19, 2018. This action was commenced by Plaintiff on December 21, 2018.

Defendant COUNTY now seeks dismissal of this Complaint against it pursuant to CPLR § 3211 (a) (1) and (7), on the grounds that (1) Plaintiff failed to plead the COUNTY had prior written notice of the defect as required by General Municipal Law § 50-e(4) and Nassau County Administrative Code § 12-4.0(e) and (2) Defendant COUNTY lacks jurisdiction over the subject sidewalk and thus, owed Plaintiff no duty of care. The COUNTY asks the Court to treat this application as one for summary judgment pursuant to CPLR § 3211 (c). The Court grants this application.

Counsel for Defendant, COUNTY, contends that lack of prior written notice of the alleged defect is fatal to the Plaintiff's cause of action against Defendant, COUNTY. Moreover, counsel for Defendant, COUNTY, asserts that no exception to the written notice ordinances applies in the instant matter, as the Defendant COUNTY neither created the allegedly defective condition nor made special use of the subject sidewalk.

To substantiate this contention, counsel for Defendant, COUNTY, references General Municipal Law § 50-e(4) which provides that, as relevant herein, prior written notice of a defective condition in a sidewalk is a prerequisite to a lawsuit against a public corporation for damages caused by such defect. Similarly, Nassau County

Administrative Code § 12-4.0(e) provides that no civil action may be maintained against the COUNTY for damages or injuries to a person or property sustained by reason of any sidewalk, street, driveway, parking field, stairway, walkway, ramp, bridge, culvert, curb or gutter unless prior written notice of the defect was given to the Office of the County Attorney.

In support of its motion, County annexes the affidavit of Veronica Cox, assigned to the Bureau of claims and investigations in the office of the Nassau County Attorney. Her job duties include maintaining the files containing notices of claim and notices of defect. She states that she conducted a search to determine whether the County received prior written notice of any dangerous or defective conditions located on the sidewalk at issue, specifically a plastic PVC pipe material, protruding from the sidewalk located with the Nassau County Department of Public Works. Upon conducting a search for a period of sic (6) years prior to and including the date of the incident, February 3, 2018, no records of prior notices of claim or prior written complaints existed at the location (*see* Exhibit "F", Cox Affidavit).

Additionally, the COUNTY argues that it has no jurisdiction over the location of Plaintiff's alleged accident and annexes exhibits to it application supporting its position.

Plaintiff opposes this application by counsel affirmation and asserts that the application is premature and documentary evidence is insufficient.

Analysis

To grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist (s*ee Barr v. Albany County,* 50 N.Y.2d 247 [1980]; *Daliendo v Johnson*, 147 A.D.2d 312 [2d Dept. 1989]). It is the existence of an issue, not its relative strength that is the critical and controlling for the Court's consideration when making its determination (s*ee Barrett v Jacobs,* 255 N.Y.520 [1931]).

The evidence should be construed in a light most favorable to the party moved against (s*ee Corvino v. Mount Pleasant Cent. School District et al.*, 305 A.D.2d [2d Dept. 2003]; *Weiss v Garfield,* 21 A.D.2d 156 [3rd Dept. 1964]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue (*see Palacino v. Equity Mgmt. Group*, 272 A.D.2d 457 [2d Dept. 2000]; *Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept. 1965]; *Moskowitz v. Garlock*, 23 A.D.2d 943 [3d Dept. 1965]). However, where a party is otherwise entitled to judgment as a matter of law, an opposing party may not simply raise a feigned issue of fact to defeat the claim. To be a "material issue of fact" it "must be genuine, bona fide and substantial to require a trial" (*Leumi Financial Corp. v. Richter*, 24 A.D.2d 855 [1st Dept. 1965]).

Defendant COUNTY maintains that prior written notice is a condition precedent for its liability herein and that Plaintiff's failure to plead and prove such prior notice requires dismissal of the Complaint. *See, Guiliano v Town of Brookhaven*, 34 AD3d 734 (2d Dept. 2006); *Cipriano v City of New York*, 96 AD2d 817, 818 (2d Dept. 1983).

"Prior written notice statutes are strictly construed and only two exceptions are recognized, 'namely, where the locality created the defect or hazard through an affirmative act of negligence and where a special use confers a special benefit upon the locality' " *Chirco v City of Long Beach*, 106 AD3d 941 (2d Dept. 2013), quoting *Amabile v City of Buffalo*, 93 N.Y.2d at 474; *see also, Wolin v Town of N. Hempstead*, 129 AD3d 833, 834 (2d Dept. 2015).

Once a municipality alleges a lack of prior written notice, the burden shifts to Plaintiff to demonstrate that at least one of the recognized exceptions are applicable in order to defeat Defendant's motion. *Methal v City of New York*, 116 AD3d 743, 743-44 (2d Dept. 2014). Since Plaintiff did not oppose this motion and Plaintiff's Verified Complaint does not allege any "special use" or any affirmative acts by the COUNTY to satisfy the "creation" exception, Defendant's motion to dismiss the Complaint must be granted.

Based on the above ruling, the Court finds it unnecessary to rule on the COUNTY's motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a)(1) and (7), claiming it has no duty of care or liability as to Plaintiff.

Furthermore, upon a review of the annexed exhibits submitted by Defendant, the COUNTY has established that it does not have jurisdiction over the area of the alleged incident (*see Kingsbrook Jewish Med. Ctr. V. Allstate Ins. Co.*, 61 A.D.3d 13 (2d Dept. 2009; *see also Miriam Osborn Mem. Home Assn. v. Assessor of City of Rye*, 9 Misc.3d 1019 [Westchester Sup. Ct. 2005]).

Plaintiff's attorney opposes the application solely by his Affirmation. Plaintiff's opposition to Defendant's motion is based upon the claim that there has been no discovery and as such the Defendant's motion is premature. This is insufficient to defeat Defendant's *prima facie* case as established herein.

Thus, the COUNTY has established a *prima facie* case of entitlement of judgment as a matter of law and summary judgment is GRANTED.

Accordingly, it is hereby

ORDERED that the COUNTY's motion for summary judgment pursuant to CPLR §§ 3211 (c) and 3212 is granted and any and all cross-claims are dismissed; and it is further

ORDERED, that the remaining parties are to appear at a Preliminary Conference (see 22 NYCRR 202.12) to be held at the Preliminary Conference Part, located at the Nassau County Supreme Court on **May 15, 2019**. This directive, with respect to the date of the Conference, is subject to the right of the Clerk to fix an alternative date should scheduling require; and it is further

ORDERED, that the Plaintiff shall serve a copy of this Order upon the remaining Defendants, and on the Preliminary Conference Clerk.

All other matters not specifically ruled on herein are hereby **DENIED**.

This constitutes the decision and order of this Court.

Hon. Sharon M.J. Gianelli
J.S.C.

DATED: March 28, 2019
Mineola, NY

ENTERED
APR 05 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE