

Tutein v Incorporated Vil. of Freeport

2019 NY Slip Op 34326(U)

June 24, 2019

Supreme Court, Nassau County

Docket Number: Index No. 601319/2019

Judge: Arthur M. Diamond

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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SOPHIA TUTEIN,

Plaintiff,

-against-

THE INCORPORATED VILLAGE OF FREEPORT,

Defendants.

-----x

TRIAL PART: 6

NASSAU COUNTY

INDEX NO: 601319/2019

MOTION SEQ #: 3

SUBMIT DATE : 5/15/19

The following papers having been read on this motion:

Notice of Motion 1
Opposition 2
Reply 3

Defendant moves this Court for an order pursuant to CPLR §3211(a)(7) to dismiss Plaintiff's complaint, for her failure to comply with the requirements of General Municipal Law (hereinafter "GML") §50-e. Alternatively, Defendant has requested that the motion be converted to a summary judgment motion, pursuant to CPLR §3211(c), granting it summary judgment under CPLR §3212, also dismissing Plaintiff's complaint against it. Plaintiff has opposed the motion. Based upon the following, the motion is granted in its entirety and Plaintiff's complaint is hereby dismissed forthwith.

As a preliminary matter, although Defendant has filed the motion under CPLR §3211 for dismissal, it has requested the Court consider the motion as a summary judgment motion under CPLR §3212. Pursuant to CPLR §3211(c), a court is permitted, in its discretion, to treat a motion to dismiss as a summary judgment motion after adequate notice to the parties. Shayne v. Julien, Schlesinger & Finz, P.C., 110 AD2d 761, 488 NYS2d 66 (2nd Dept., 1985). However, the notice requirement may be dispensed with where the parties have made it unequivocally clear that they are laying bare their proof and deliberately charting a summary judgment course. Imperium Insurance Co. v. Utica First Insurance Co., 130 AD3d 574, 10 NYS3d 898 (Mem). Here, Defendant has made it explicitly clear that they are seeking judgment as a matter of law pursuant to its notice of motion, which has specifically requested summary judgment under

CPLR §3212; furthermore, Plaintiff's opposition papers focus solely on opposing the motion as one for summary judgment. Defendant has included copies of Plaintiff's deposition from a prior hearing on the subject incident conducted under GML §50-h, as well as other affidavits from individuals with knowledge in the case. Therefore, in light of the specific request by Defendant to treat the motion as one for summary judgment, as well as the adequate notice provided to Plaintiff and the nature of her opposition, the Court will consider the within motion as one for summary judgment, pursuant to CPLR §3211(c) and §3212. Montes v. City of New York, 140 AD3d 1038, 33 NYS3d 745 (Mem) (2nd Dept., 2016).

Plaintiff alleges that on March 16, 2018, at approximately 1:08pm, she fell in the middle of a municipal parking lot, located behind 84 N. Main Street, Freeport, New York. She claims that she was caused to trip and fall due to raised and broken cement and pavement in the parking lot, as well as potholes, while walking to her vehicle for lunch. Plaintiff contends that she sustained serious personally injuries, including but not limited, abrasions to her knees, ankles, face, hands, neck, back, and head. Plaintiff further asserts that Defendant owned, managed, and controlled the aforementioned parking lot and was negligent in allowing the parking lot remain in a defective and dangerous condition.

Following the incident, Plaintiff filed a notice of claim on May 22, 2018; thereafter, Plaintiff filed a summons and complaint on January 28, 2019. Defendant, in lieu of filing an answer to the within action, filed the within motion.

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 demonstrate the absence of any material issues of fact. Alvarez v. Prospect Hospital, 68 NY2d 320, 508 NYS2d 923 (1968). To make a prima facie showing, the motion must be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. Id. Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Id.; *see also* 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 unless it has received prior written notice of the dangerous condition or an

exception to the prior written notice requirement applies. Wald v. City of New York, 115 AD3d 939, 982 NYS2d 534 (2nd Dept., 2014). The exceptions to the statutory prior written notice requirement involve situations in which the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a benefit upon the municipality. Phillips v. City of New York, 107 AD3d 774, 967 NYS2d 736 (2nd Dept., 2013). The affirmative negligence exception is limited to work by the municipality that immediately results in the existence of a dangerous condition. Laracuente v. City of New York, 104 AD3d 822, 961 NYS2d 527 (2nd Dept., 2013).

In the instant case, Defendant has submitted two affidavits from employees with knowledge in support of the motion. The first affidavit, from the Village Clerk for Defendant, states that a search of Defendant's records was performed and that Defendant has not received any notice of either a defect or hazard at the subject municipal parking lot within the past five (5) years, as is required under Village Code §27-1 and §27-3. Pursuant to Village Code §27-3 and §27-4, the Village Clerk is the only representative of Defendant designated to receive such notices. The second affidavit submitted by Defendant is from the Superintendent of the Department of Public Works. This affiant states that Defendant has not performed any construction, maintenance, or repairs in the subject location in the past five (5) years, nor has it contracted with any other party to undertake such construction, maintenance, or repairs on its behalf during this same time period. Given this evidence submitted by Defendant, it has satisfied for this Court its entitlement to judgment as a matter of law, and the burden is now properly shifted to Plaintiff to raise a triable issue of fact.

Plaintiff, in opposition, has not submitted documentation contradicting the statements made in the affidavits provided by Defendant. Furthermore, a review of Plaintiff's testimony from the GML §50-h hearing reveals that Plaintiff, although she had been at the location of the incident numerous times prior to the event of March 16, 2018, and observed potential problems, she too failed to notify Defendant or any hazardous condition or defect. Plaintiff also argues that this motion is premature because discovery is incomplete; however, Plaintiff has failed to provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party. Mogul v. Baptiste, 161 AD3d 847, 76 NYS3d 210 (2nd Dept., 2018). For all

of the foregoing reasons, Plaintiff has failed to raise a triable issue of fact or provide an adequate reason to deny the motion at this time. Accordingly, Defendant's motion is granted and the action is hereby dismissed.

Defendant shall file and serve a copy of the within order with notice of entry upon Plaintiff within thirty (30) days from date of this order.

This hereby constitutes the decision and order of this Court.

DATED: June 24, 2019

ENTER



HON. ARTHUR M. DIAMOND
J.S.C.

ENTERED

JUL 05 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE