

Zucco v Cablevision Sys. Corp. CSC Holdings, LLC
2019 NY Slip Op 34338(U)
June 19, 2019
Supreme Court, Nassau County
Docket Number: Index No. 603351/2019
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

KAREN ZUCCO,

Plaintiff,

-against-

Index No. 603351/2019

Mot Seq. No. 001

CABLEVISION SYSTEMS CORPORATION CSC
HOLDINGS, LLC, ALTICE USA, INC., KAREN
B. FARKAS, KERWIN FARKAS, TOWN OF
HEMPSTEAD and COUNTY OF NASSAU,

Defendants.

_____X

Papers submitted on this motion:

- Defendant County of Nassau Notice of Motion _____ X
- Defendant County Affirmation and Exhibits _____ 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 Plaintiff's 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, Karen Zucco, on December 11, 2017, when she "was lawfully traversing the

sidewalk area in front of/near/adjacent to 3657 Lorrie Drive, in the Town of Hempstead, County of Nassau and State of New York, when she was caused to trip and fall, as a result of a dangerous and trap-like condition” (see Defendant’s Exhibit “A” Plaintiff’s Notice of Claim). Further, the Plaintiff alleges that a defective sidewalk was the cause of her accident (*id.*; Summons and Complaint, annexed as Defendant’s Exhibit “C”). A Notice of Claim was timely served on COUNTY by Plaintiff on or about February 2, 2018. This action was commenced by Plaintiff on March 11, 2019.

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, the 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 in front of/near/adjacent to 3657 Lorrie Drive, Oceanside, Town of Hempstead, County of Nassau and State of New York ("subject location") from the sidewalk located with the Notice of Claims Files and Notice of Defect Files for a period of six (6) years prior to and including the date of loss (see Defendant County's Exhibit "F", Cox Affidavit). Pursuant to this search, no records of prior notices of claim or prior written complaints existed at the location (see *id.*).

In further support of its motion and its argument that it did not have notice of any defect at the location or that the County did not create a defective condition, the County annexes the affidavit of Anthony Esposito, Landscape Architect II with the Nassau County Department of Public Works who by way of work experience and records maintained by the Nassau County Department of Public Works, is familiar with appurtenances, roadways, and sidewalks under the jurisdiction of the County of Nassau (see Defendant County's Exhibit "G", Esposito Affidavit). Upon conducting an investigation of the subject location pursuant to a request by the County Attorney's Office related to this incident, he searched the records of the Department of Public Works, which included contracts, inspection, sidewalk complaints, and repair records of the subject location. His search revealed that the County did not perform or contract for any work related to the subject location, nor did it make any repairs in the vicinity for a period of six (6) years prior to and including the date of occurrence here (see Exhibit "G").

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 (see Exhibit "D", map; Exhibit "E", Nassau County Assessment Record Viewer).

Plaintiff opposes this application by counsel affirmation and asserts that the application is premature and documentary evidence is insufficient. The Court notes that it is in receipt of a complete Notice of Motion, Affirmation and Exhibits submitted by movant.

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 (see *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 (see *Barrett v Jacobs*, 255 N.Y.520 [1931]).

The evidence should be construed in a light most favorable to the party moved against (see *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

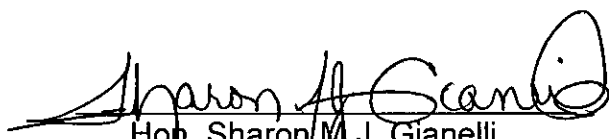
ORDERED that the COUNTY's motion for summary judgment pursuant to CPLR §§ 3211 (c) and 3212 is Granted and any and all cross-claims are dismissed; and it is further

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 **August 7, 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
Supreme Court Justice

DATED: June 19, 2019
Mineola, NY

ENTERED
JUN 20 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE