

<b>Pettit v Town of Brookhaven</b>
2019 NY Slip Op 34355(U)
September 4, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 17-610592
Judge: Joseph A. Santorelli
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The Town now moves for summary judgment dismissing the complaint due to lack of prior written notice. In support of the motion, it submits, *inter alia*, copies of the pleadings, the transcript of plaintiff's General Municipal Law § 50-h hearing, the transcripts of the deposition of plaintiff, Donna O' Donnell, Kent Caypinar, Thomas Prestia, and the affidavits of Linda Sullivan, dated October 24, 2018, and Lucy A. Murphy dated October 29, 2018. Plaintiff, in opposition to the motion, submits, *inter alia*, copies of the pleadings, the verified bill of particulars, the transcript of plaintiff's General Municipal Law § 50-h hearing, transcripts of the depositions of plaintiff and Donna O' Donnell, and the Town's response to plaintiff's FOIL/document request.

Plaintiff testified at her General Municipal § 50-h hearing that on September 25, 2016 she went to Kaler's Pond Park with her daughter and grandchild. She testified that she walked down to a playground area with her grandchild. Plaintiff testified she was walking on a gravel path back to her car when her foot went into a dip in the walkway, which caused her to trip and fall.

Similarly, plaintiff testified at her examination before trial that on September 25, 2016, she was at Kaler's Pond Park when she walked into a dip in a gravel walkway and was caused to fall. She further testified at her entire left foot went down into the dip and she fell forward. Plaintiff testified that the gravel path where she fell was a grass walkway on her prior trip to the park.

Donna O'Donnell was deposed as a witness for the Town. She testified that she has been employed by the Town since 2005 as park attendant on a seasonal basis. Ms. O'Donnell testified that she works at Kaler's Pond Park and was working on September 25, 2016 at that park. She testified that her duties are to clean the park, including the bathrooms and walkways. She testified that she wrote a report about plaintiff's accident and recorded the report in a red logbook. Ms. O'Donnell testified that plaintiff insisted she look at the walkway where she allegedly had her accident. She testified she observed the walkway, and believed it was not dangerous to pedestrians. She further testified that she then called public safety for plaintiff. Ms. O'Donnell testified that the walkways at the park were new. Last, she recalled there was only one other incident at the park, which involved an elderly woman who fell by the bathrooms.

Kent Caypinar was also deposed as a witness for the Town. He testified that he has been employed by the Town's Department of Park's for the last 21 years and currently is working as an out of title foreman in a geographical area called Ward Six, which includes Kaler's Pond park. Mr. Caypinar testified that before testifying at his examination before trial, he reviewed the Ward Six log book for work orders. He testified that his search revealed that no work was performed on September 25, 2016 or the preceding week at Kaler's Pond Park. He then testified that the walkways in Kaler's Pond Park are made of gravel and were constructed by an outside contractor in 2013. He testified that the outside contractor built all the trails and retaining walls, and filled the trails with gravel. Mr. Caypinar testified that there is no maintenance performed on the trails because they are basically gravel.

In her affidavit, Lucy Murphy states that she has been employed by the Town as an executive assistant with the Department of Parks since 2016. She explains that her duties include overseeing the logging of written notices of defects and conducting searches of Department of Parks records, e.g., log books, index record book and files maintained and kept in the regular course of its business, to

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determine if the Department of Parks received prior written notice of defects at incident locations. Ms. Murphy states that she made a diligent search of the log book, index record book, and file maintained and kept by the Department of Parks in the regular course of its business for prior written complaints at the accident location, including but not limited to any walkway/pathways eroding or flooding at Kaler's Pond Park for three years prior to and including the date of plaintiff's accident. She states that her search revealed that the Department of Parks did not receive any written complaints, notifications or notices of claim regarding any walkway defects, including but not limited to any walkway/ pathway eroding or flooding, in Kaler's Pond Park during the three years period prior to the date of plaintiff's accident.

In her affidavit, Linda Sullivan states that she has been employed as an senior office assistant with the Town of Brookhaven's Clerk's Office since 2007. She explains that her duties include logging litigation pleadings and written notices of defects, and conducting searches of Town Clerk records, e.g., Town Clerk log book, index record book and files maintained and kept in the regular course of its business, to determine if the Town received prior written notice of defects at incident locations. Ms. Sullivan states that she made a diligent search of the log book, index record book, and file maintained and kept by the Town Clerk in the regular course of its business for prior written complaints at the accident location, including but not limited to any walkway/pathways eroding or flooding at Kaler's Pond Park for three years prior to and including the date of plaintiff's accident, September 25, 2016. She states that her search revealed that the Town Clerk did not receive any written complaints, notifications and/or prior notices of claim to the Town regarding any walkway defects, including but not limited to any walkway/pathway eroding or flooding, in Kaler's Pond Park for three years prior to the date of plaintiff's accident.

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 (*see 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 (*see 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]).

The Town has enacted a prior written notice statute, which limits its liability in civil actions filed against it, provided that neither the Town Clerk nor Town Superintendent of Highways has received prior notice of an alleged defect or condition which allegedly caused a plaintiff's accident and injury. Section 84.1 A of the Brookhaven Town Code states in pertinent part:

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Prior written notice required. No civil action shall be commenced against the Town of Brookhaven or the Superintendent of Highways for damages or injuries to persons or property sustained by reason of the defective, out-of-repair, unsafe, dangerous or obstructed condition of any highway, street, bridge, culvert, or crosswalk or pedestrian walkway open to the public, of the Town of Brookhaven, unless, previous to the occurrence resulting in such damages or injuries, written notice of such defective, out-of-repair, unsafe, dangerous or obstructed condition, specifying the particular place and location was actually given to the Town Clerk or Town Superintendent of Highways and there was a failure or neglect within a reasonable time, after the giving of such notice, to repair or remove the defect, danger or obstruction complained of ...

Section 84.1 B of the Brookhaven Town Code states as follows:

In the absence of written notice as required above, no civil claim shall be maintained against the Town of Brookhaven; nor shall any civil claim be maintained based on an allegation that such defect, danger or obstruction existed for so long a period of time that the same should have been discovered and remedied in the exercise of reasonable care and diligence; nor a claim that any Town employee possessed actual notice of such defect, danger or obstruction unless written notice is filed with the Town Clerk as required above.

Where, as here, a municipality has enacted a prior written notice statute pursuant to Town Law Article 65, it may not be subjected to liability for personal injuries caused by an improperly maintained pedestrian walkway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (*see Barnes v Incorporated Vil. of Port Jefferson*, 120 AD3d 528, 990 NYS2d 841 [2d Dept 2014]; *Carlucci v Village of Scarsdale*, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]; *Wilkie v Town of Huntington*, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006], citing *Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77 [1999]; *Lopez v G&J Rudolph*, 20 AD3d 511, 799 NYS2d 254 [2d Dept 2005]; *Ganzenmuller v Incorporated Vil. of Port Jefferson*, 18 AD3d 703, 795 NYS2d 744 [2d Dept 2005]). “The only two recognized exceptions to a prior written notice requirement are the municipality’s affirmative creation of a defect or where the defect is created by the municipality’s special use of the property” (*Gonzalez v Town of Hempstead*, 124 AD3d 719, 2 NYS3d 527 [2d Dept 2015]; *Forbes v City of New York*, 85 AD3d 1106, 926 NYS2d 309 [2d Dept 2011]). The affirmative negligence exception is limited to work by the municipality that immediately results in the existence of a dangerous condition (*see Yarborough v City of New York*, 10 NY3d 726, 853 NYS2d 261 [2008], *Sola v Village of Great Neck Plaza*, 115 AD3d 661, 981 NYS2d 545 [2d Dept 2014]).

Here, the Town has failed to establish that both the Town Clerk and Town Superintendent of Highways did not receive prior written notice of the alleged defect or condition on the walkway where plaintiff had her accident as mandated by Brookhaven Town Code section 84.1A. Specifically, the Town failed to demonstrate that the Town Superintendent of Highways did not receive prior written

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notice of the alleged defect or condition which allegedly caused plaintiff's accident. The Town's motion papers including the affidavit of Lucy Murphy aver that the Town's Department of Park's did not receive prior written notice of the alleged defect or condition. However, the Town's motion does not address whether the Town Superintendent of Highways had prior notice of the alleged defect or condition. (*see* Town of Brookhaven Code § 84-1 [A]; *cf Magee v Town of Brookhaven*, 95 AD3d 1179, 945 NYS2d 177 [2d Dept 2012]). Since the Town failed to meet its prima facie burden, it is not necessary for this Court to review the sufficiency of plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr., supra*). Accordingly, the Town's motion for summary judgment in its favor is denied.

Dated: SEP 04 2019



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HON. JOSEPH A. SANTORELLI  
J.S.C.