

Sundack v County of Westchester
2019 NY Slip Op 34666(U)
December 12, 2019
Supreme Court, Westchester County
Docket Number: Index No. 69456/2016
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
TRACIE A. SUNDACK,

Plaintiff,

-against-

THE COUNTY OF WESTCHESTER,

Defendant.

-----X
RUDERMAN, J.

DECISION AND ORDER
Motion Sequence No. 1
Index No. 69456/2016

The following papers were considered in connection with defendant’s motion for summary judgment dismissing the complaint pursuant to CPLR 3212:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - K, Memorandum of Law	1
Affirmation in Opposition, Exhibit A, Memorandum of Law	2
Affirmation in Reply	3

This personal injury action arises out of plaintiff Tracie A. Sundack’s trip and fall on the Bronx River Pathway in Scarsdale, New York on December 18, 2015 at approximately 11:00 a.m. Sundack was jogging along the paved pathway when she approached a group of people moving at a slower pace, and attempted to pass them on the left. As she did so, she alleges, she stepped off the pavement, tripped on a piece of wood protruding from the ground, and fell. Plaintiff testified at a deposition that the piece of wood appeared to be the remnant of a tree that had been cut down.

Defendant County of Westchester moves for summary judgment dismissing the complaint against it on the grounds that it did not create the alleged defect or have actual or constructive knowledge of it, and that plaintiff failed to comply with the applicable prior written notice requirement (*see* Laws of Westchester County § 780.01). In support of its prior written notice defense, defendant submits affidavits from the commissioner of the Department of Public Works and Transportation, Hugh Greechan, and the clerk of the Board of Legislators, whose name is either Sunday Vanderberg, the name recited at the beginning of the affidavit, or Malika Vanderberg, the name under the signature. Vanderberg indicates that she has “researched and reviewed the official records within the Board of Legislator's control, specifically the record of

written notices received pursuant to Westchester County Code § 780.01, and no such written notice of a defective condition at the location described in the attached Summons and Complaint and Notice of Claim has been received within the past five years by the County.” The Greechan affidavit indicates that he has “searched and reviewed the official records within the Department of Public Works and Transportation's control, specifically for written notices of the type specified in Westchester County Code § 780.01, and no such written notice of a defective condition at the Bronx River Pathway location described in the attached Summons and Complaint and Notice of Claim has been received within the period of January 2014 through December 2016.”

In support of the County's claim that it did not create or have actual or constructive knowledge of the claimed condition, it also submits affidavits of Peter Tartaglia and Dominick Maglione, employees of the Department of Parks, Recreation, and Conservation, as well as the deposition testimony of Maglione. Both individuals indicate that in their searches of the Department records, they found no maintenance and repair records for the period from December 18, 2014 to December 18, 2015 – i.e., for one year prior to the accident.

In opposition to the County's motion, plaintiff argues that the County has failed to establish a prima facie case for summary judgment because it has not provided evidence to show when the subject area was last inspected. Plaintiff suggests that the Tartaglia and Maglione affidavits indicate that there are no records of when the area in question was last inspected. Additionally, she contends that the lack of prior written notice is not dispositive because the relied-on prior written notice law, section 780.01 of the Laws of Westchester County, contains a constructive notice exception.

Analysis

Westchester County has enacted a prior written notice law applicable to claims of unsafe conditions on “any road, street, highway, bridge, culvert, sidewalk or crosswalk” (see Laws of Westchester County § 780.01). Notably, it has been held that such laws apply as well to unpaved areas alongside walkways; in *Holmes v Town of Oyster Bay* (82 AD3d 1047 [2d Dept 2011]), where the plaintiff allegedly tripped on a tree stump in a tree well in a utility strip which ran parallel to a sidewalk, the Court rejected the plaintiff's contention that the area in which she fell was outside the purview of the Town's prior written notice law (*id.* at 1048).

“Where, as here, a municipality has enacted a prior written notice law, it cannot be held liable absent proof of the requisite notice or an exception to that requirement” (*Holmes v Town of Oyster Bay*, 82 AD3d 1047, 1048 [2d Dept 2011] [citation omitted]). Proof that a search of the relevant records was conducted covering a period of two years prior to the date of the accident, and disclosed no written notice of the defect, has been found to establish a lack of prior written notice (*see Pallotta v City of New York*, 121 AD3d 656 [2d Dept 2014]). The County’s proof, despite a slight irregularity, is sufficient to establish a lack of prior written notice.

The general rule is that “[o]nce a municipality establishes that it lacked prior written notice of an alleged defect, the burden shifts to the plaintiff to demonstrate that a question of fact exists as to one of the exceptions to the prior written notice requirement, either that the municipality affirmatively created the alleged hazardous condition or that a special use of the area in question conferred a special benefit upon the municipality (*see Cruzate v Town of Islip*, 162 AD3d 853, 854 [2d Dept 2018] citing *Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]).

However, here, Westchester County’s prior written notice law includes its own constructive notice exception, explicitly requiring prior written notice of an alleged defect “...unless such defective, unsafe, dangerous or obstructed condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence” (*see Laws of Westchester County* § 780.01). Based on that constructive notice exception built into the law, proof introduced by the County establishing a lack of prior written notice is insufficient to entitle it to summary judgment. To be entitled to summary judgment dismissing the complaint, the County must present a prima facie showing that it did not have constructive notice of the alleged unsafe condition.

“To meet its prima facie burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell” (*Hanney v White Plains Galleria, LP*, 157 AD3d 660, 661 [2d Dept 2018]). The submitted affidavits by Tartaglia and Maglione, and Maglione’s deposition testimony, indicate merely that they found no maintenance and repair records for one year prior to the accident. They do not establish a lack of constructive notice of the presence of the allegedly dangerous tree remnant. As plaintiff observes, the submissions do not establish when the area in question was last inspected or checked.

Nor did defendant satisfy the initial burden of any property owner seeking summary judgment dismissing a trip-and-fall complaint, of “making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see Maloney v Farris*, 117 AD3d 916, 916 [2d Dept 2014]). It failed to establish that it neither cut down a tree and left a remnant behind, nor had constructive notice of the remnant’s existence.

Based upon the foregoing, it is hereby,

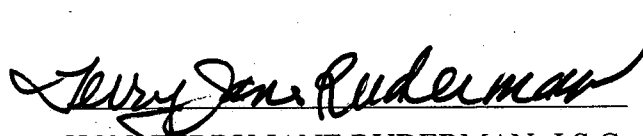
ORDERED that the motion of defendant for summary judgment is denied; and it is further

ORDERED that all parties shall appear on Tuesday, January 14, 2020 at 9:15 a.m. in the Settlement Conference Part of the Westchester Supreme Court, located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York 10601 to schedule a trial.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York

December 12, 2019


HON. FERRY JANE RUDERMAN, J.S.C.