

<b>McGrath v Town of Hempstead</b>
2019 NY Slip Op 34685(U)
September 19, 2019
Supreme Court, Nassau County
Docket Number: Index No. 604627/2019
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN  
J. S. C.

KARI JEANNE MCGRATH,

TRIAL / IAS PART 25  
NASSAU COUNTY

Plaintiff,

- against -

Index No. 604627/2019

THE TOWN OF HEMPSTEAD, THE TOWN OF  
HEMPSTEAD WATER DEPARTMENT, THE  
TOWN OF HEMPSTEAD HIGHWAY  
DEPARTMENT, and THE COUNTY OF  
NASSAU,

Motion Sequence No. 001

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	<u>2</u>
Replying Affidavits .....	<u>3</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The defendant County of Nassau moves for an order pursuant to CPLR 3211(1) and (7), dismissing the complaint or in the alternative, for summary judgment under CPLR 3211(c), along with any and all cross-claims against it. The County asserts its proof is founded upon documentary evidence, which refutes the plaintiff's allegations, and, conclusively establishes the County lacked jurisdiction over the subject location. The County contends it lacked prior written notice and no exceptions to the prior written notice requirement existed at law, that the County affirmatively created the defect through an act of negligence or a special use resulted in a special benefit to the County.

Only the plaintiff Kari Jeanne McGrath opposed the motion consisting of two alternatives. McGrath responded to both alternatives of dismissing the complaint or awarding

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summary judgment to the County. The plaintiff contends the Court should deny the County's request to dismiss on the County's lack of satisfactory documentary evidence and the County's claim of a failure by the plaintiff to state a cause of action against the County. The plaintiff asserts the documentary evidence does not utterly refute the plaintiff's allegations. The plaintiff maintains the County failed to establish it lacked jurisdiction over the subject location. The plaintiff further asserts the County failed to satisfactorily show a lack of prior written notice or the absence of exceptions to the prior written notice requirement.

The County replied to the plaintiff's opposition. The County pointed out the plaintiff's assertions were based solely on the plaintiff attorney's affirmation which failed to rebut the County's prima facie showing of an entitlement to judgment as a matter of law. The County noted the plaintiff failed to show the County owed a duty to the plaintiff; that the County had jurisdiction over the subject location; or the existence of an exception to the prior written notice requirement.

The plaintiff alleged an incident happened on April 13, 2018, approximately 2:50 P.M., at 739 Cynthia Drive East Meadow at its intersection with Andrea Road, East Meadow, Town of Hempstead, County of Nassau, State of New York. The plaintiff claimed the incident took place in a hole in the subject roadway causing the plaintiff to be thrown in and about a motor vehicle, and injured.

The Court notes that "[j]udicial notice has never been strictly limited to the constitutions, resolutions, ordinances, and regulations of government, but has been applied by case law to other public documents that are generated in a manner which assures their reliability . . . the location of real property recorded with a clerk [citation omitted]" (*Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 19 [2d Dept 2009]). "[T]he test for judicial notice as 'whether the fact rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentiarily proven' [citation omitted]" (*Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d, *supra*, at 20). Here, the County satisfied that test regarding the location of the subject accident location as described by the plaintiff and displayed in a publicly accessible website domain with the available document in support of self-authentication. That admissible evidence is documentary evidence the accident location as outside of the County's jurisdiction (CPLR 4511[c]).

"In order to establish a prima facie case of negligence, a plaintiff must first demonstrate the existence of a duty owed by the defendant to the plaintiff [citation omitted]" (*Schulman v*

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*City of New York*, 190 AD2d 663 [2d Dept 1993]. Here, the County satisfied the burden of showing that it did not own the subject location where the accident happened. Hence, the County owed no duty to the plaintiff regarding it. In opposition, the plaintiff fails to demonstrate the County undertook a duty of maintenance over the subject location where the accident happened (*see Hynes v Town of Cornwall*, 234 AD2d 423 [2d Dept 1996]).

The Court acknowledges the County moved on alternative grounds for dismissal or summary judgment, and the County and the plaintiff elected to expound about dismissal and summary judgment (*compare* CPLR 3211[c] and CPLR 3212). The Court notes none of the other defendants expressed any opposition to the County's motion for dismissal or summary judgment, and the County notified the other defendants it sought summary judgment on any cross-claims against the County (*see* CPLR 3211[c]; *cf. Sopesis Const., Inc. v Solomon*, 199 AD2d 491 [2d Dept 1993]). The Court determines the County established a prima facie entitlement to summary judgment as a matter of law. The Court recognizes that prior written notice of an alleged defect, under these circumstances, is a condition precedent to maintaining an action against the County arising from an alleged defect (*see*, Nassau County Administrative Code § 12-4.0[e]; *Amabile v City of Buffalo*, 93 NY2d 471 [1999]). The County satisfied its initial burden of demonstrating that it had not received prior written notice of the alleged defect.

Here, the County proffered evidence in admissible form as exhibits, including the plaintiff's notice of claim, the summons and complaint, the jurisdictional map of the subject location, the County Clerk's record listing the United Cerebral Palsy Association of Nassau County as the owner of 739 Cynthia Drive East Meadow, an affidavit dated April 16, 2019, by Veronica Cox, assigned to the Bureau of Claims and Investigations in the Office of the Nassau County Attorney and an affidavit dated April 16, 2019, by Anthony Esposito, a landscape architect II with the Nassau County Department of Public Works. Cox stated personally searching the Nassau County notice of claim files and notices of defect files kept by date and location at the Office of the Nassau County Attorney for a period of six years prior to and including the date of loss (*see Walker v County of Nassau*, 147 AD3d 806, 806-07 [2d Dept 2017]). Cox stated there were no records of any prior notices of claim or prior written complaints involving any dangerous or defective conditions at the subject location for a period of six years prior to and including the date of loss. Esposito stated familiarity with the appurtenances, roadways, and sidewalks under the jurisdiction of the County of Nassau. Esposito stated personally conducting an investigation for the Office of the Nassau County Attorney, about the instant claim alleging personal injury on April 13, 2018, which occurred on the public road located near 739 Cynthia Drive at its intersection with Andrea Road, East

Meadow, Town of Hempstead, County of Nassau, State of New York, as a result of an alleged defective condition. Esposito stated personally searching the records of the Nassau County Department of Public Works, which includes records of: inspections, maintenance, contracts, complaints, repair, and permits, which are kept at department offices. Esposito stated that review showed the County had no records responsive to the search, covering six years prior to the plaintiff's alleged date of loss (*Walker v County of Nassau*, 147 AD3d, *supra*). Esposito further attested to the accuracy of the jurisdictional map annexed to the County's moving papers, as a true and accurate representation of roadway jurisdiction within the County of Nassau.

In opposition, the plaintiff failed to raise a triable issue of fact with respect to the assertion that written notice was not required because the County affirmatively created the alleged defect by its negligence (*Ovisinak v Town of Southold*, 277 AD2d 295[2d Dept 2000]). The plaintiff's unsubstantiated allegation, by the plaintiff attorney's affirmation, that the County created the defective condition was insufficient to defeat the motion because the plaintiff's attorney had no personal knowledge of the facts (*Brooks v Vil. of Babylon*, 251 AD2d 526 [2d Dept 1998]). Moreover, the plaintiff did not claim the County made any special use of the accident location (*see Ferreira v County of Orange*, 34 AD3d 724 [2d Dept 2006]).

ORDERED, ADJUDGED and DECREED that the motion is GRANTED awarding the County summary judgment against the plaintiff along with summary judgment on any and all cross-claims against the County.

So ordered.

Dated: **September 19, 2019**

ENTER:



J. S. C.

NOT FINAL DISPOSITION

**ENTERED**

**SEP 23 2019**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

HON. ANTONIO I. BRANDVEEN  
J.S.C.

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