

Pierce v Brooklyn Ave. Assoc.
2019 NY Slip Op 34704(U)
January 9, 2019
Supreme Court, Nassau County
Docket Number: Index No. 608166/18
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

SHERRIE PIERCE,

Plaintiff,

- against -

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 608166/18
Motion Seq. No.: 01
Motion Date: 09/14/18

BROOKLYN AVENUE ASSOCIATES, MASTERS
AUTOMOTIVE RECOVERY, INC. and TOWN OF
OYSTER BAY,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits and Memorandum of Law	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant Town of Oyster Bay (“TOB”) moves, pursuant to CPLR § 3211(a)(7), for an order dismissing plaintiff’s Verified Complaint as against it. Plaintiff oppose the motion.

The instant action was brought to recover for personal injuries allegedly sustained by plaintiff on April 17, 2017, at approximately 3:00 p.m., when she tripped and fell on the sidewalk located in front of the southeast corner of property locates at or about 102 Lauman Lane, Hicksville, County of Nassau, State of New York. *See* Defendant TOB’s Affirmation in Support Exhibit A. The action was commenced with the filing of a Summons and Verified Complaint on

or about June 18, 2018. *See* Defendant TOB's Affirmation in Support Exhibit B. Issue was joined by defendant TOB on or about July 11, 2018. *See id.*

In support of the motion, defendant TOB submits the Affidavit of Kenneth J. Bishop ("Bishop"), Engineering Aide I. *See* Defendant TOB's Affirmation in Support Exhibit C. Bishop asserts, in pertinent part, that, "[i]n my capacity as Engineering Aide I, I work within the Highway Department. Among other tasks, I perform traffic surveys and investigate all notice of claims received by the Town regarding the Highway Department and the Department of Public Works, and I routinely search the records that are maintained by the Highway Department and the Department of Public Works. I am designated to conduct searches, based on the nature and location of the condition claimed to exist, of the Highway Department's records indexed by location for the existence of all written notices of defective, unsafe, out-of-repair, dangerous, or obstructed conditions that were actually served upon the Commissioner of the Highway Department. This location based search of the indexed records maintained by the Highway Department reveals whether any division that falls under the jurisdiction of the Highway Department, such as the Tree and Sidewalk Division, has any records relating to repairs, renovations, maintenance, construction, permits, inspections, and any other documents made in the ordinary course of business for the subject location, including prior written notices of defective conditions.... With respect to an Accident that allegedly took place on April 17, 2017 'on the sidewalk located in front of the southeast corner of property located at or about 102 Lauman Lane, Hicksville, New York' (the 'Incident Location'), I was asked by the Office of the Town Attorney to investigate the conditions, if any, allegedly existing at that location.... On May 10, 2017, I personally searched the indexed records maintained by the Town of Oyster Bay

Highway Department and the Town of Oyster Bay Department of Public Works. My review of the indexed records maintained by the Highway Department, and all divisions thereof, confirmed that in the five (5) years leading up to and including April 17, 2017, the Highway Department did not receive any written notice of defect in the sidewalk at the Incident Location. Finally, my search of the Highway Department and Department of Public Works records, contracts, service orders and work orders did not reveal any information or documents indicating that the Town or any of its contractors or vendors performed work, maintenance, construction, or repair at the Incident Location prior to or on April 17, 2017. Therefore, based upon my review of the aforementioned records, it is my conclusion that the Town did not create the alleged sidewalk defect at the Incident Location because the Town exercises no jurisdiction over the Incident Location and did not perform any work at that location.” *See id.*

Also in support of the motion, defendant TOB submits the Affidavit of Cindy Maloney (“Maloney”) of the Office of the Town Clerk. *See* Defendant TOB’s Affirmation in Support Exhibit D. Maloney asserts, in pertinent part, that, “[t]he Office of the Town Clerk keeps records of written complaints of defects by the address of the location of the purported defect, even if said address is not within the jurisdiction of the Town of Oyster Bay. Given that the Plaintiff has identified 102 Lauman Lane, Hicksville as being near the Incident Location, I used such address while conducting my search as is described herein. On May 5, 2017, following the Town’s receipt of the Notice of Claim and at the request of the Office of the Town Attorney, I personally searched the records of the Town Clerk of the Town of Oyster Bay for a period of five (5) years prior up to and including the incident date of April 17, 2017 for any written notice of defects at the Incident Location. The results of my research indicate that there is no record of the Town

Clerk receiving any written notice of any defective sidewalk conditions at the aforementioned location in the five (5) years leading up to and including the incident date of April 17, 2017.” See *id.*

Counsel for defendant TOB further contends, in pertinent part, that “the outcome of this motion is governed by one dispositive fact: whether the Town had prior written notice of the alleged sidewalk defect prior to Plaintiff’s alleged incident.... As a threshold matter, the Plaintiff must plead and prove compliance with the Town’s prior written notice ordinance. [citations omitted]. Plaintiff is not able to do so, as it is established that the Town did not receive prior written notice of the alleged defect.... By the plain terms of both Town Code § 160-1(A) and Town Law § 65-a(1), the Town is not liable for injuries or damages to persons in the absence of prior written notice of the defect that is alleged to have been the proximate cause of the injuries or damage.... As both the Bishop and Maloney Affidavits explain, the Town did not receive prior written notice of the purported sidewalk defect that is alleged to have been the proximate cause of Plaintiff’s injuries.... In the context of prior written notice ordinances, a municipality’s affirmative negligence in creating the defect or where its special use of the street, highway, or sidewalk creates the defect serve as exceptions to the prior written notice rule. [citations omitted]. However, these exceptions do not apply in the instant case.”

In opposition to defendant TOB’s motion, counsel for plaintiff argues, in pertinent part, that, “[w]hen a party moves to dismiss a complaint for failure to state a cause of action, the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. [citation omitted]. Here, the plaintiff’s motion is seeking dismissal for failure to state a cause of action, yet plaintiff makes no argument in support of this relief.... Here, the Verified Complaint alleges that the Town owns and controls the subject

property. Said complaint alleges that the Town had prior written notice of the dangerous condition. The same complaint also alleges that the Town caused/created the dangerous condition. Furthermore, the complaint alleges that on April 17, 2017, plaintiff, while lawfully on the subject property was caused to trip and fall as a result of an unsafe, hazardous, dangerous, defective and/or trap-like condition. Plaintiff sustained injuries as a result of the incident.”

Counsel for plaintiff adds that, “even if this court accepts the evidence presented and handles the motion as a summary judgment motion, defendant, Town of Oyster Bay, and plaintiff has not had an opportunity to question a Town of Oyster Bay witness at a deposition.”

On a motion pursuant to CPLR § 3211(a)(7), the Court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference. *See ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiffs can succeed on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiffs can ultimately establish the truth of their allegations. *See 219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the Verified Complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013).

In derogation of the common law, a municipality may avoid liability for injuries sustained as a result of defects or hazardous conditions on its public property by means of prior written notification laws. *See Amabile v. City of Buffalo*, 93 N.Y.2d 471, 693 N.Y.S.2d 77 (1999). An exception to the prior written notice laws exists where the municipality creates the defective condition through an affirmative act of negligence. *See id.* Actual or constructive notice of a condition are insufficient to satisfy the requirement of prior written notice under the subject code. *See id.*; *Magee v. Town of Brookhaven*, 95 A.D.3d 1179, 945 N.Y.S.2d 177 (2d Dept. 2012).

“Where, as here, a municipality has enacted a prior written notice statute, it may not be subject to liability for personal injuries caused by a defective street or sidewalk condition unless it has received prior written notice of the defect or an exception to the notice requirement applies. *See Despositio v. City of New York*, 55 A.D.3d 659, 866 N.Y.S.2d 248 (2d Dept. 2008); *Sollowen v. Town of Brookhaven*, 43 A.D.3d 816, 841 N.Y.S.2d 351 (2d Dept. 2007); *Katsoudas v. City of New York*, 29 A.D.3d 740, 815 N.Y.S.2d 243 (2d Dept. 2006); *Borgorova v. Incorporated Village of Atlantic Beach*, 51 A.D.3d 840, 858 N.Y.S.2d 359 (2d Dept. 2007). *See also Poirier v. City of Schenectady*, 85 N.Y.2d 310, 624 N.Y.S.2d 555 (1995).

There are two recognized exceptions to this rule, “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.” *See Amabile v. City of Buffalo, supra.* *See also Lopez v. G & J Randolph Inc.*, 20 A.D.3d 511, 799 N.Y.S.2d 254 (2d Dept. 2005); *Filaski-Fitzgerald v. Town of Huntington*, 18 A.D.3d 603, 795 N.Y.S.2d 614 (2d Dept. 2005).

The Court holds that Section 160-1(A) of the Town Code of the Town of Oyster Bay and Town Law § 65-a(1) apply to the instant action. Therefore, since said statutes apply, no civil action based on the alleged defective condition of the subject sidewalk may be maintained

against defendant TOB unless said defendant had written notice of the subject condition prior to the accrual of the claim.

Through the Bishop and Maloney Affidavits, defendant TOB has demonstrated that no such written notice was received in this matter pertaining to the subject area of the alleged defect that caused plaintiff's injuries.

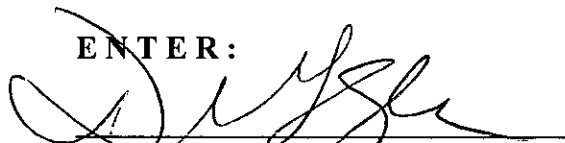
Furthermore, defendant TOB has shown that no affirmative act of negligence on the part of defendant TOB created the alleged defective condition, nor was there a "special use" conveyed upon the subject property.

Accordingly, defendant TOB's motion, pursuant to CPLR § 3211(a)(7), for an order dismissing plaintiff's Verified Complaint as against it, is hereby **GRANTED**.

It is further ordered that the remaining parties shall appear for a Preliminary Conference on February 25, 2019, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
January 9, 2019

ENTERED

JAN 10 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE