Monaco v Town of Poughkeepsie
2019 NY Slip Op 34725(U)
January 2, 2019
Supreme Court, Dutchess County
Docket Number: Index No. 2016-52759
Judge: Peter M. Forman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS
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BETHINA M. MONACO,

Plaintiff,

DECISION AND ORDER
Index No. 2016-52759

-against-

TOWN OF POUGHKEEPSIE,

Defendant.
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FORMAN, J., Acting Supreme Court Justice

The Court read and considered the following documents upon this motion:

	PAPERS NUMBERED
NOTICE OF MOTION	1
AFFIRMATION	2
EXHIBITS	3-18
AFFIRMATION IN OPPOSITION	19
EXHIBITS	20-28
REPLY AFFIRMATION	29
EXHIBIT	30

By way of background, this is an action for personal injuries allegedly sustained by plaintiff as a result of a trip and fall accident on August 24, 2015. Plaintiff alleges that her accident occurred while she walking from the public sidewalk adjacent to Collegeview Avenue towards the curb to cross the street. Plaintiff further alleges that the fall was caused as a result of unevenness, depression and/or settling of brick pavers between the sidewalk and the curb. Defendant is alleged to be

negligent in the design, construction and maintenance of the sidewalk and inlaid paver area situated between the sidewalk and the curb.

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]). The movant must set forth a *prima facie* showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the movant sets forth a *prima facie* case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for personal injuries caused by an improperly maintained sidewalk unless it has either received notice of the defect, or an exception to the prior written notice requirement applies (*see LiFrieri v. Town of Smithtown*, 72 AD3d 750 [2nd Dept 2010]). The Court of Appeals has recognized only two exceptions to the statutory rule requiring prior written notice; namely, where a locality created the defect or hazard through an affirmative action of negligence

and where a special use confers a special benefit upon the locality (*see Amabile v. City of Buffalo*, 93 NY2d 471 [1999]).

Here, the defendant has demonstrated its entitlement to judgment as a matter of law by submitting evidence establishing that it had no prior written notice of the defect that allegedly caused plaintiff's fall (*see De La Reguera v. City of Mount Vernon*, 74 AD3d 1127 [2nd Dept 2010]). Specifically, Defendant introduced the affidavit of Town Clerk Felicia Salvatore, which states that "Prior to August 24, 2015, the Town had not received any written notification concerning a defect in the area where Ms. Monaco testified that she fell."

Defendant has also introduced the affidavit of Peter Setaro, a professional engineer. Mr. Setaro discloses that he is presently acting as the Town Engineer in his capacity as a employee of Morris Associates Engineering Consultants, PLLC, which has contracted with the Town since at least 2003 to provide engineering services and private engineering consulting to its Engineering Department.

Mr. Setaro concludes that the stamped concrete sidewalk at issue here was designed in accordance with generally accepted engineering principles. He also states that there is no evidence to support the conclusion that the design of the sidewalk was inferior or faulty or that it contributed in any way to the defect found five (5) years after completion. Mr. Setaro

surmises that the cracking and unevenness in the sidewalk at the accident site developed over time due to the environmental condition of repeated freezing and thawing of the ground underneath the concrete.

In opposition, plaintiff contends that issues of fact exist as to whether or not the defendant had knowledge of the defective sidewalk and/or whether or not the defendant created the defect in designing and constructing the sidewalk project. Plaintiff also argues that the defendant possessed actual or constructive notice of the dangerous condition and defects along the sidewalk, specifically in the vicinity of her fall.

In support of these claims, plaintiff asserts that the municipal records show that, after the sidewalk and street improvements were initially completed by defendant's contractor (Upstate Concrete), a number of defects and irregularities in te vicinity of the concrete sidewalks and stamped concrete were noted by the Town's Engineering Department. Plaintiff also states that at least one of those defects was in the immediate vicinity of where she fell.

The record demonstrates that Upstate Concrete finished the installation of the sidewalk in 2008. Defendant served Upstate Concrete with a Notice of Breach and Demand for Remediation dated September 4, 2009. Upstate Concrete and defendant entered into a remediation agreement on January 19, 2010 to correct the defects,

and defendant issued a certificate of completion on October 12, 2010.

Plaintiff offers no evidence to show that the crack in the stamped concrete, where the plaintiff is alleged to have fell, existed in 2009. The noticed defect that was in the vicinity of the accident concerned the sidewalk and driveway apron, not the stamped concrete. Specifically, the crack that the plaintiff allegedly tripped over was with the red stamped concrete next to a lamppost, not near a driveway. Further, and perhaps more importantly, the defendant's actual or constructive notice of an allegedly defective condition does not override the statutory requirement of prior written notice (*see Wolin v. Town of North Hempstead*, 129 AD3d 833 [2nd Dept 2015]).

Plaintiff also asserts that the defendant created the defect or hazard through an affirmative action of negligence. Specifically, plaintiff alleges that the concrete used for the sidewalk and stamped concrete areas was not mixed properly in certain areas, and not properly sealed in other portions.

In support of this theory, plaintiff cites to a 2001 article by the Portland Cement Association entitled "Concrete Information". Plaintiff fails to offer any expert testimony to corroborate the findings of this article, or to explain how they pertain to the area in which plaintiff allegedly fell. In additio, the affirmative negligence exception to the prior

written notice requirement is limited to work done by a municipality that immediately results in the existence of a dangerous condition (*see Monaco v. Hodosky*, 127 AD3d 705 [2nd Dept 2015]). A nearly five-year gap between the certification of the completion of the project and the alleged discovery of the defect cannot be seen as "immediate." It is therefore

ORDERED, that Defendant's motion for summary judgment is granted and Plaintiff's complaint is dismissed.

This constitutes the Decision and Order of the Court.

Dated: January 2, 2019
Poughkeepsie, New York

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HON. PETER M. FORMAN, AJSC

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