Esposito v Village of Bellport
2019 NY Slip Op 34786(U)
October 2, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 16-619321
Judge: Vincent J. Martorana
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SHORT FORM ORDER

INDEX No. 16-619321
CAL. No. 18-02372OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

PRESENT:

Hon. VINCENT J. MARTORANA
Justice of the Supreme Court

MOTION DATE 2-28-19 (001)
MOTION DATE 3-28-19 (002)
ADJ. DATE 6-6-19
Mot. Seq. # 001 - MG
002 - MD

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THERESA A. ESPOSITO,

Plaintiff,

- against -

VILLAGE OF BELLPORT, BELLPORT 1896, LLC., and PORTERS ON THE LANE, INC.,

Defendants.

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Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers filed by defendants Bellport 1896, LLC and Porters on the Lane, Inc., on January 29, 2019; filed by defendant Village of Bellport, on March 7, 2019 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers filed by plaintiff, on May 10, 2019; filed by plaintiff, on May 10, 2019 ; Replying Affidavits and supporting papers filed by defendants Bellport 1896, LLC and Porters on the Lane, Inc., on June 5, 2019 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Bellport 1896, LLC and Porters on the Lane, Inc. and the motion by defendant Village of Bellport are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendants Bellport 1896, LLC and Porters on the Lane, Inc. for summary judgment dismissing the complaint and any cross claims against them is granted; and it is further

ORDERED that the motion by defendant Village of Bellport for summary judgment dismissing the complaint and any cross claims against it is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Theresa A. Esposito on February 6, 2016, when she slipped and fell due to ice located on a sidewalk adjacent to the premises known as 19 Bellport Lane, Bellport, New York, where the restaurant, Porters on the Lane, is located. It is undisputed that, on the date of the incident, defendant Bellport 1896, LLC owned and defendant Porters on the Lane, Inc. (Porters) occupied the subject premises, which is located in defendant Village of Bellport.

Plaintiff testified at both a General Municipal Law § 50-h hearing and a deposition, and her testimony was essentially the same. She testified that on Saturday, February 6, 2016, at approximately 8:15 a.m., she was walking north on Bellport Lane, on the east side of the sidewalk, in the Village of Bellport. She testified that the weather conditions that day were "bitterly cold and clear," and that the sidewalk was icy and snow covered, with piles of snow along both sides. She testified there were areas of snow covering the entire width of the sidewalk, piles of snow on the sidewalk and along the curb, and patches of ice between the snow piles. Plaintiff testified the sidewalk conditions were the same the previous night. She testified she did not know if the ground had been treated with anything for the ice, and that she did not observe anyone clearing the snow and ice that morning. She testified that she observed a patch of ice in the sidewalk, measuring approximately three feet long by one foot wide, and stated that she had to traverse the ice, as the rest of the sidewalk was covered in snow. She testified she slipped on the ice, falling onto her right side.

John Giannott, on behalf of Porters, testified he is the owner of Porters on the Lane restaurant and that he leased the premises from Bellport 1896. He testified he was not aware of who is responsible for snow and ice removal on the outside sidewalk, but stated the Village always performed it. He testified neither he nor any of his employees ever removed snow and ice from the sidewalk in front of the building. He further testified that if he observed snow or ice on the sidewalk, he would contact the superintendent of public works or the Village to report the condition, and the Village would respond.

Jason Crane, Superintendent for the Village of Bellport Department of Public Works (DPW), testified that, during 2016, his department would perform snow and ice removal on the subject sidewalk. He testified that based on the Village code, the building owner or resident is responsible for clearing snow and ice on the sidewalk abutting their premises, but that the Village performed the task for the entire business district. He testified that DPW used a tractor plow to push snow from the sidewalk onto the street, and then used a payloader to remove the snow from the street. He testified DPW did this procedure every time it snowed, or if the Village got a call regarding a hazardous condition. Crane testified he did not keep records of what removal activities occurred on any given day, and that the only records kept by DPW with respect to snow and ice removal procedures were general payroll hours, which did not specify any work that was completed.

In his affidavits submitted on behalf of the Village, John Kocay states that he is the Village Clerk for the Incorporated Village of Bellport, and that, pursuant to state law, the Village maintains a prior written notice book to record complaints of hazards on public sidewalks and roadways. He states that "a review of our prior notice book reveals that there were no previous complaints filed with the Village concerning any condition/defect and/or hazardous snow accumulation at [12 Bellport Lane to 19 Bellport Lane] prior to the plaintiff's accident on February 6, 2016." He also states that "no prior written notice of any condition/defect made to this specific location as alleged in plaintiff's complaint at any time prior to February 6, 2016."

Porters and Bellport 1896 now move for summary judgment dismissing the complaint and any cross claims against them, arguing that they did not owe a duty to plaintiff and, if they did owe a duty to maintain the sidewalk, that no tort liability could be imposed against them. In support, defendants submit, *inter alia*, transcripts of the parties' deposition testimony and photographs of the subject sidewalk. Plaintiff opposes the motion, arguing that Porters and Bellport 1896 derived a special use from the area of sidewalk where plaintiff fell, and that this special use caused or contributed to the defect. Plaintiff submits photographs of the subject sidewalk, meteorological data, and the affidavit of George Wright, a meteorologist. Defendant Village does not oppose the motion.

The Village also moves for summary judgment dismissing the complaint and any cross claims against it, arguing that a prior written notice statute was in effect at the time of plaintiff's alleged injury, that no prior written

notice was given of the alleged dangerous condition on the subject sidewalk, and that Porters and Bellport 1896 had a duty to keep the relevant sidewalk free of ice and snow. In support, the Village submits, *inter alia*, transcripts of the parties' deposition testimony, climatological data, and two affidavits of John Kocay, clerk of the Village. Plaintiff opposes the motion, arguing that the Village did not establish that it did not have prior written notice of the icy condition or, in the alternative, that the Village created the icy condition through their prior snow removal procedures. Plaintiff submits photographs of the subject sidewalk, meteorological data, and the affidavit of George Wright, a meteorologist. Porters and Bellport 1896 do not oppose the motion.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***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, evidence must be viewed in the light most favorable to the nonmoving party (*see* ***Chimbo v Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Pearson v Dix McBride, LLC***, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Dillon v Town of Smithtown***, 165 AD3d 1231, 87 NYS3d 84 [2d Dept 2018]; ***Frank v JS Hempstead Realty, LLC***, 136 AD3d 742, 24 NYS3d 714 [2d Dept 2016]). To establish liability in a slip and fall case involving snow or ice, a plaintiff must establish that the dangerous or defective condition caused his or her injuries, and that the defendant owner or possessor created the condition or had actual or constructive notice of it (*see* ***Mann v Zougras***, 169 AD3d 787, 94 NYS 3d 146 [2d Dept 2019]; ***Bader v River Edge at Hastings Owners Corp.***, 159 AD3d 780, 72 NYS3d 145 [2d Dept 2018]; ***Bombino-Munroe v Church of St. Bernard***, 163 AD3d 616, 80 NYS3d 429 [2d Dept 2018]; *see also* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). "The prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings" (***Eisenberg v Town of Clarkstown***; 172 AD3d 683, 684, 99 NYS3d 393 [2d Dept 2019], quoting ***Loghry v Village of Scarsdale***, 149 AD3d 714, 715, 53 NYS3d 318 [2d Dept 2017]).

"Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner" (***Hausser v Giunta***, 88 NY2d 449, 452-453, 646 NYS2d 490 [1996]; *see* ***Finocchiaro v Town of Islip***, 164 AD3d 871, 79 NYS3d 919 [2d Dept 2018]; ***Obee v Ricotta***, 140 AD3d 1134, 35 NYS3d 386 [2d Dept 2016]). However, "[a]n abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty" (***Petrillo v Town of Hempstead***, 85 AD3d 996, 997, 925 NYS2d 660 [2d Dept 2011]; *see* ***Bousquet v Water View Realty Corp.***, 161 AD3d 718, 76 NYS3d 205 [2d Dept 2018]; ***Bachvarov v Lawrence Union Free Sch. Distr.***, 131 AD3d 1182, 17 NYS3d 168 [2d Dept 2015]). "In the absence of a statute or ordinance imposing liability, the owner of property abutting a public sidewalk will be held liable only where it,

or someone on its behalf, undertook snow and ice removal efforts which made the naturally occurring conditions more hazardous" (***Hilpert v Village of Tarrytown***, 81 AD3d 781, 782, 916 NYS2d 817 [2d Dept 2011]; *see* ***Branciforte v 2248 Thirty First St., LLC***, 171 AD3d 1003, 98 NYS3d 626 [2d Dept 2019]; ***Schron v Jean's Fine Wine & Spirits***, 114 AD3d 659, 979 NYS2d 684 [2d Dept 2014]). Further, to constitute a "special use," the landowner or lessee must have derived a special benefit from the public property that is unrelated to its public use (*see* ***Kaufman v Silver***, 90 NY2d 204, 659 NYS2d 250 [1997]; ***Poirier v City of Schenectady***, 85 NY2d 310, 624 NYS2d 555 [1995]; ***Llanos v Stark***, 151 AD3d 836, 57 NYS3d 502 [2d Dept 2017]).

The applicable ordinances that place an obligation on Porters and Bellport 1896, as occupants and owners, to maintain the sidewalk are contained in the Village of Bellport Code §§ 17-1 and 17-2, which state:

> It shall be the duty of every property owner or occupant to keep the sidewalk and curb adjoining his premises in a safe, passable condition. For failure, upon notice by the village clerk of not less than twenty-four (24) hours, to make such repairs as are specified as to place and manner, the board of trustees may cause the repairs to be done and assess the expense of such repairs upon the adjoining land.
>
> The owner or occupant of any premises shall keep the contiguous sidewalks free from dirt, filth, weeds and other obstructions or encumbrances and shall cause such sidewalks to be cleared of snow and ice within twenty-four (24) hours after such snowfall shall have ceased or ice has formed.

Although these provisions of the Village Code require landowners and occupants to maintain their abutting sidewalks in a reasonably safe condition, they do not specifically and expressly impose tort liability for a breach of that duty (*see* ***Bosquet v Water View Realty Corp.***, *supra*; ***Rodriguez v City of Yonkers***, 106 AD3d 802, 965 NYS2d 527 [2d Dept 2013]).

Here, Porters and Bellport 1896 have established prima facie entitlement to judgment as a matter of law. The evidence submitted in support of their motion demonstrates that plaintiff's accident occurred on a public sidewalk, that they did not create the icy condition, nor did they perform any snow and ice removal which made the naturally occurring conditions more hazardous (*see* ***Schron v Jean's Fine Wine & Spirits***, *supra*; ***Hilpert v Village of Tarrytown***, *supra*).

Porters and Bellport 1896 having met their initial burden on the motion, the burden now shifts to plaintiff to raise a triable issue of fact. In opposition, plaintiff alleges that Porters and Bellport 1896 are liable based upon a theory of special use. However, this theory was raised by plaintiff for the first time in opposition to the motion for summary judgment, and thus cannot be considered here as a basis for defeating summary judgment (***Padarat v New York City Tr. Auth.***, 175 AD3d 700, 2019 NY Slip Op 06406 [2d Dept 2019]; ***Taustine v Incorporated Village of Lindenhurst***, 158 AD3d 785, 71 NYS3d 547 [2d Dept 2018]; ***Methal v City of New York***, 116 AD3d 743, 984 NYS2d 71 [2d Dept 2014]). The Village did not oppose the motion and therefore fails to raise a triable issue of fact on the cross claim. Accordingly, Porters and Bellport 1896's motion for summary judgment dismissing the complaint and any cross claims against them is granted.

"A municipality that has enacted a prior written notice provision may not be subjected to liability for injuries caused by a dangerous condition which comes within the ambit of the law unless it has received prior written notice of the alleged defect or dangerous condition, or an exception to the prior written notice requirement applies" (***Eisenberg v Town of Clarkstown***, *supra* at 683; *see* ***Palka v Village of Ossining***, 120 AD3d 641, 992 NYS2d 273

[2d Dept 2014]). There are "only two exceptions to the statutory rule requiring prior written notice, 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" (***Amabile v City of Buffalo***, 93 NY2d 471, 474, 693 NYS2d 77, 79 [1999]; *see* ***Seegers v Village of Mineola***, 161 AD3d 910, 77 NYS3d 86 [2d Dept 2018]; ***Loghry v Village of Scarsdale***, *supra*).

Village of Bellport Code § 2-96 provides in relevant part:

> No civil action shall be commenced against the village for damages or injuries to persons or property sustained because of defective, out-of-repair, unsafe, dangerous or obstructed condition of any highway, street, bridge, culvert, sidewalk, crosswalk or other property or lands of the village or of the existence of snow or ice on such property or lands unless, prior to the occurrence, notice of such defective, out-of-repair, unsafe, dangerous or obstructed condition, specifying the particular place or location, was actually given to the village clerk and there was a failure or neglect, within a reasonable time after giving of such notice, to repair or remove the defect, danger or obstruction or which complained.

Through the affidavits of John Kocay, the Village established, prima facie, that it lacked the requisite prior written notice of the alleged dangerous condition (*see* ***Cruzate v Town of Islip***, 162 AD3d 853, 80 NYS3d 305 [2d Dept 2018]; ***Loghry v Village of Scarsdale***, *supra*).

However, although the Village established, prima facie, that it lacked prior written notice of the icy condition, it failed to establish, prima facie, that it did not create the icy condition through an affirmative act of negligence (*see* ***Eisenberg v Town of Clarkstown***, *supra*; ***Seegers v Village of Mineola***, *supra*; ***Larenas v Incorporated Village of Garden City***, 143 AD3d 777, 778, 39 NYS3d 204, 205 [2d Dept 2016]). Plaintiff alleged in her bill of particulars that the Village created the alleged dangerous ice condition through negligent snow and ice removal operations and, as such, the Village "is required on its motion for summary judgment to make a prima facie showing that it did not create the condition complained of" (***Eisenberg v Town of Clarkstown***, *supra* at 684; *see* ***Manzella v County of Suffolk***, 163 AD3d 796, 82 NYS3d 49 [2d Dept 2018] ***Seegers v Village of Mineola***, *supra*; ***Piazza v Volpe***, 153 AD3d 563, 59 NYS3d 466 [2d Dept 2017]). "While the mere failure to remove all snow or ice from a sidewalk is an act of omission rather than an affirmative act of negligence," (***Larenas v Incorporated Village of Garden City***, *supra* at 778), "[a] municipality's act in piling snow as part of its snow removal efforts, which snow pile then melts and refreezes to create a dangerous ice condition, constitutes an affirmative act excepting the dangerous condition from the prior written notice requirement" (***Eisenberg v Town of Clarkstown***, *supra* at 684, quoting ***Larenas v Incorporated Village of Garden City***, *supra* at 778).

The Village provided evidence regarding its general snow removal operations, arguing that it was not their custom and practice to pile snow on both sides of the sidewalk. However, this fails to demonstrate what snow removal activities were performed prior to plaintiff's accident, what the sidewalk looked like immediately after and raises a question of fact with respect to the sidewalk condition on the day of plaintiff's fall. Further, the Village has failed to establish when the last snow removal was performed on the subject sidewalk. Therefore, the Village has failed to establish, prima facie, that the icy condition on the sidewalk were not the product of its snow removal operations (*see* ***San Marco v Village/Town of Mount Kisco***, 16 NY3d 111, 919 NYS2d 459 [2010]; ***Eisenberg v Town of Clarkstown***, *supra*; ***Seegers v Village of Mineola***, *supra*; ***Larenas v Incorporated Village of Garden City***, *supra*).

The Village having failed to meet its prima facie burden, the Court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). As such, the motion by the Village for summary judgment dismissing the complaint and the cross claims against it is denied.

Accordingly, the motion by defendants Bellport 1896, LLC and Porters on the Lane, Inc. for summary judgment dismissing the complaint and any cross claims against them is granted, and the motion by defendant Village of Bellport for summary judgment dismissing the complaint and any cross claims against it is denied.

Dated: Riverhead, New York
October 2, 2019

VINCENT J. MARTORANA, J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION