

Petrone v City of Long Beach
2019 NY Slip Op 34848(U)
May 10, 2019
Supreme Court, Nassau County
Docket Number: Index No. 607041-15
Judge: Robert A. Bruno
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

MARY ANN PETRONE,
Plaintiff,

-against-

CITY OF LONG BEACH, COUNTY OF NASSAU,
RIVIERA TOWERS CORPORATION, LONG
BEACH OWNERS CORP., NAILI and TOWN OF
HEMPSTEAD, PAULSEN REAL ESTATE CORP.,
ATLANTIC PARTNERS CO., CASTLE INDUSTRIES.,
INC., and EAGLE PROPERTY MANAGEMENT CORP.,

Defendants.

TRIAL/IAS PART 12

Index No.: 607041-15
Submission Date: 2-27-19
Motion Sequence: 004, 006

DECISION & ORDER

LONG BEACH OWNERS CORP. and BAGNATO
REATLY SERVICES, LLC d/b/a/ NAI LONG
ISLAND s/h/a NAILI,

Third-Party Plaintiffs

-against-

PAULSEN REAL ESTATE CORP., ATLANTIC
PARTNERS CO., and CASTLE INDUSTRIES, INC.,

Third-Party Defendants.

Papers Numbered

Table listing document sequences and page numbers: Sequence #004 (Notice of Motion, Affirmation & Exhibits, Affirmation in Opposition, Reply Affirmation) and Sequence # 006 (Notice of Motion, Affirmation & Exhibits, Affirmation in Opposition, Reply Affirmation).

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Upon the foregoing papers, the following motions are determined as set forth below:

Sequence #004. Motion by defendant CITY OF LONG BEACH for an Order pursuant to CPLR §3212, seeking summary judgment dismissing plaintiff's Complaint and all cross-claims against CITY OF LONG BEACH.

Sequence #006. Motion by defendant/third-party defendant CASTLE INDUSTRIES, INC. for an Order pursuant to CPLR §3212 dismissing the Complaint, the Third-Party Complaint and all cross-claims against CASTLE INDUSTRIES, INC.

The following facts are taken from the parties' submissions and do not constitute findings of fact by the Court. This is an action to recover damages for personal injuries allegedly sustained in a trip and fall accident that occurred on June 13, 2015, on the sidewalk adjacent to the premises located at 600 and 630 Shore Road, Long Beach, New York. 630 Shore Road is owned by defendant PAULSEN REAL ESTATE CORP., and 600 Shore Road is owned by defendant LONG BEACH OWNERS CORP. ("LONG BEACH"). In 2008, LONG BEACH contracted with defendant CASTLE INDUSTRIES, INC. ("CASTLE") to replace the sidewalk in front of 600 Shore Road. CASTLE replaced the sidewalk up to the property line with 630 Shore Road.

Plaintiff alleges that she was caused to trip and fall as a result of two defective areas in the sidewalk. The first area was located in front of 630 Shore Road, and the second area was located at or about the property line that divides the two properties. Plaintiff claims that the defect in the first area, described as a cracked or broken sidewalk, caused her to stumble, and that the defect at the property line, described as an "incline," caused her to fall. Both defects are circled on photographs marked as exhibits and submitted with the motions.

Motion by defendant CITY OF LONG BEACH (Sequence #004).

The CITY OF LONG BEACH (the "CITY") moves to dismiss the action and all cross-claims against it on the grounds that: (1) the CITY's "tort transfer statute" [Section 256 of the Long Beach Charter] transfers both the duty to maintain sidewalks and the liability for a failure to maintain sidewalks to the adjacent property owner; and (2) the CITY's "prior written notice" law [Section 256A(1) of the Long Beach Charter] precludes liability insofar as the CITY did not receive prior written notice of the alleged sidewalk defect, and none of the recognized exceptions to the prior written notice law applies.

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Section 256 of the Long Beach Charter provides:

“Sec. 256. Maintenance and repair of sidewalks, curbstones and gutters.

The owner or occupant of lands fronting or abutting on any street, highway, traveled road, public lane, alley or square, shall make, maintain and repair the sidewalk, curbstones and gutters adjoining his lands and shall keep such sidewalk, curbstones and gutter free and clear of and from snow, ice and all other obstructions. Such owner or occupant and each of them, shall be liable for any injury or damage by reason of omission, failure or negligence to make, maintain or repair such sidewalk, curbstone and gutter or to remove snow, ice or other obstructions therefrom, or for a violation or nonobservance of the ordinances relating to making, maintaining and repairing sidewalks, curbstones and gutters and the removal of snow, ice and other obstructions from sidewalks, curbstones and gutters.”

The CITY argues that pursuant to Section 256 of the Long Beach Charter, the CITY owed no duty to maintain or repair the sidewalk, and thus it cannot be held liable for any defect resulting from the failure to do so. The Court notes that the language of the provision itself does not expressly impose *sole* liability upon the abutting landowner, or relieve the CITY of its duty to maintain the sidewalks. In the case law reviewed by the Court, Section 256 and similar local laws were typically invoked to impose liability on abutting landowners; the Court found no case in which such a provision was held to free the municipality from liability.

Nonetheless, as the CITY maintains, the Court of Appeals has upheld the validity of Section 256, and other such local laws. *Hausser v Giunta*, 88 NY2d 449, 454 (1996). Moreover, the Court of Appeals has interpreted this provision as effectively “transferring liability from the municipality to abutting land owners.” *Id.* See also *Shepherd v Werwaiss*, 947 F.Supp. 71 (EDNY 1996). 451-452. Insofar as none of the opposing submissions addresses this issue, it is deemed conceded. *Kuehne & Nagel v Baiden*, 36 NY2d 539 (1975); *Steffan v Wilensky*, 150 AD3d 419 (1st Dept. 2017); *Brown v George*, 138 AD3d 466 (1st Dept. 2016).

In any event, the Court finds that the CITY alternatively establishes its right to judgment as a matter of law based upon the absence of prior written notice. Among other things, the CITY submits: (i) the Affidavit In Support of John A. Mirando, Commissioner of Public Works of the City of Long Beach, sworn to on September 7, 2018 (*Mot. Exh. D*), in which Mr. Mirando avers that, according to the records of all notices of defect, which he is required by law to keep, the CITY received no written notice of any defective or uneven condition occurring at the subject location for a period of seven years prior to the accident; and (ii) the Affidavit In Support of Gregory Scott, Superintendent of Street Maintenance of the City of Long Beach, sworn to on September 13, 2018 (*Mot. Exh. J*), in which Mr. Scott avers that there is no record that any employee, agent or contractor of the CITY ever performed any construction or repair work on the sidewalk at the subject location. The foregoing demonstrates, *prima facie*, that the CITY did not have prior written notice of the alleged defect, and that the CITY did not create the alleged

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defect by an affirmative act of negligence. Accordingly the Court finds that the CITY has met its initial burden of proof. See *Charles v City of Long Beach*, 136 AD3d 634 (2d Dept. 2016); *Chirco v City of Long Beach*, 106 AD3d 941 (2d Dept. 2013).

The opposition fails to raise an issue of fact warranting a trial. At most, the opposition asserts that the CITY may have inspected and approved the work performed on the sidewalk by co-defendant CASTLE. It is well settled that there are only two recognized exceptions to the prior written notice law; namely, the municipality's affirmative creation of the defect, or its special use of the property. See *Amabile v City of Buffalo*, 93 NY2d 471, 474 (1999); *Abano v Suffolk County Community College*, 66 AD3d 719 (2d Dept. 2009). Actual or constructive notice of the alleged defective condition does not obviate the requirement of prior written notice. See *Coventry v Town of Huntington*, 165 AD3d 750 (2d Dept. 2018); *Chirco*, 106 AD3d at 943.

Motion by defendant CASTLE (Sequence #006).

Plaintiff alleges that in the course of replacing the sidewalk at 600 Shore Road pursuant to its contract with LONG BEACH, CASTLE created the dangerous condition at the property line, described as an "incline," which caused plaintiff to fall. CASTLE moves for summary judgment dismissing all claims and cross-claims against it, on the grounds that: (i) plaintiff cannot identify the cause of her fall; (ii) CASTLE owed no duty to plaintiff as a matter of law; and (iii) the alleged defect is not actionable, insofar as it is trivial, open and obvious, and not inherently dangerous.

Identification of the Defect. On a motion for summary judgment in a premises liability case, a defendant may establish *prima facie* entitlement to judgment as a matter of law by showing that the plaintiff cannot identify the cause of his or her injury without engaging in speculation. *Baterna v Maimonides Medical Center*, 139 AD3d 653 (2d Dept. 2016); *Godfrey v Mancini Safe Corp.*, 121 AD3d 413 (1st Dept. 2014); *Ash v City of New York*, 109 AD3d 854 (2d Dept. 2013); *Peluso v Red Rose Rest., Inc.*, 106 AD3d 972 (2d Dept. 2013). The plaintiff's inability to identify the cause of the injury is fatal to the negligence claim, because any finding that the defendant's negligence proximately caused plaintiff's injury would be based solely on speculation. *Blocker v Filene's Basement #51-00540*, 126 AD3d 744 (2d Dept. 2015); *Rivera v J. Nazzaro Partnership, LP*, 122 AD3d 826 (2d Dept. 2014); *Patrick v Costco Wholesale Corp.*, 77 AD3d 810 (2d Dept. 2010). A plaintiff's inability to testify exactly as to how the accident occurred does not require dismissal where negligence and causation can be established with circumstantial evidence. *Patrikis v Arniotis*, 129 AD3d 928 (2d Dept. 2015).

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At bar, CASTLE cites portions of plaintiff's testimony from her Municipal Law Section 50-h hearing on October 13, 2015, her deposition on January 18, 2017, and her deposition on January 8, 2018, which, in CASTLE's view, demonstrate that plaintiff was not sure about what caused her to fall. CASTLE highlights the portion of her Section 50-h hearing in which she appears not to remember whether her foot came into contact with the incline which allegedly caused her fall, and notes that she subsequently changed her testimony, on the errata sheet and on subsequent examinations, to claim that her right foot got caught on the incline.

Upon review of the entirety of plaintiff's testimony, the Court finds that it cannot determine, as a matter of law, that plaintiff could not identify the cause of her fall. To the extent that plaintiff's testimony contains discrepancies or inconsistencies as to the cause of her fall, that goes to her credibility, which is a matter for the trier of fact to determine.

CASTLE's Duty to Plaintiff. Generally, a contractual obligation, standing alone, imposes no duty of care to third persons. *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 (2002); *Casiano v Start Elevator, Inc.*, 138 AD3d 582 (1st Dept. 2016); *Medinas v Milt Holdings LLC*, 131 AD3d 121 (1st Dept. 2015). Three exceptions are recognized, only one of which is at issue here; that is, "where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm." *Espinal*, 98 NY2d at 140 (internal citations and quotation marks omitted); *Medinas*, 131 AD3d at 126. See also *Gordon v Pitney Bowes Management Services, Inc.*, 94 AD3d 813 (2d Dept. 2012).

In the context of this exception, "a defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury." *Espinal*, 98 NY2d at 142. The exception applies when the contractor "while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others or increases that risk." *Church ex rel. Smith v Callanan Industries, Inc.*, 99 NY2d 104 (2002).

At bar, CASTLE asserts that it did not create or exacerbate a dangerous condition on the sidewalk. If anything, CASTLE claims, it made the sidewalk safer for pedestrians than it was prior to the replacement work. In support of this claim, CASTLE submits a copy of the transcript of the deposition of Anthony Logiudice, President and owner of CASTLE, conducted on March 19, 2018 (*Mot. Exh. U*); and copies of authenticated photographs, marked into evidence, depicting the sidewalk at the location in question, a few weeks after plaintiff's accident (*Mot. Exhs. N, O, P*).

Mr. Logiudice testified that:

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(i) CASTLE replaced the sidewalk in front of 600 Shore Road, up to the property line, which he identified in the photographs (pp.24-25);

(ii) when the work was completed, the sidewalk that CASTLE installed was flush with the neighboring sidewalk in front of 630 Shore Road (pp.27-28);

(iii) because the sidewalk at 630 Shore Road “had a lot of tripping hazards and their sidewalk was all in disarray,” CASTLE had to install an additional strip of concrete beyond the property line in order to effect a “smooth transition to their sidewalk;” “we needed to keep a clean, straight plane for their sidewalk” (pp. 30-31);

(iv) the installation of this additional concrete was pre-approved by the superintendent of 600 Shore Road and Tim Stapleton (p.28) (from the building’s management company), as it was understood that the smooth transition was necessary to pass inspection (p.34);

(v) after installing the additional concrete, the sidewalk in front of 600 Shore Road was even with the sidewalk in front of 630 Shore Road (pp. 34, 48); Mr. Loguidice qualified this response: “I mean, 600 Shore Road is a level plane. Then we transitioned whatever is to the neighboring property. So I don’t remember if it was even. I am assuming it was even. We had to put transition there, so.” Later, Mr. Loguidice testified that he did not remember if the transitioning concrete was level or at an angle or slope. (pp.55-56).

(vi) the completed work was inspected by the superintendent and Tim Stapleton (p.28), and neither of them complained to Mr. Loguidice about the work, either at the time of completion or at any time thereafter (pp.28-29);

(vii) the completed work was inspected by the City of Long Beach (pp.45-46), and passed inspection; although Mr. Loguidice received no notification or documentation of same, he would have been notified if it had not passed (pp.34-35, 46, 52);

(viii) in order to pass inspection, there had to be a smooth transition between the sidewalks; from his experience, he understood that a smooth transition was not a matter of levelness but of whether there was a tripping hazard, such as a lip. (p.51);

(ix) the photographs shown to him (taken after the accident) did not accurately depict what the sidewalk looked like immediately after he completed his work (7 years prior), because the photographs showed wear and weathering of the concrete on both sides of the property line (pp. 37, 40).

The opposition refers to the photographs and testimony which, in their view, suggest that CASTLE’s replacement of the sidewalk in front of 600 Shore Road created a height discrepancy between the replaced sidewalk and the existing sidewalk at 630 Shore Road, and that accordingly, the transitioning cement installed by CASTLE was angled or sloped upward from 630 Shore Road to 600 Shore Road, constituting the dangerous “incline” which caused plaintiff to fall.

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The Court finds that the evidence submitted on both sides consists solely of subjective estimations of the various dimensions of the so-called incline. Neither party has submitted objective measurements of the height differential between the sidewalks, the angle of the slope from one sidewalk to the other, or the width of the transitioning strip of concrete, either at the time of the accident, or at the time of completion of the sidewalk installation in 2008. Moreover, neither party has offered any expert opinion regarding the standards governing sidewalk installations, or whether this sidewalk conformed to such standard with respect the dimensions and slope of the concrete transitioning strip, either at the time of the accident, or at the time of completion of the sidewalk installation in 2008.

In the context of a motion for summary judgment, CASTLE bears the initial burden to demonstrate, *prima facie*, that it did not create a hazardous condition on the sidewalk. On the record presented, the evidence is insufficient to eliminate issues of fact in that regard. Accordingly, the burden is not met.

Nature of the Alleged Defect. In a premises liability case, there is no duty to protect against an open and obvious condition which, as a matter of law, is not inherently dangerous.” *Mahoney v AMC Entertainment, Inc.*, 103 AD3d 855 (2d Dept. 2013). See *Varon v New York City Dept. of Educ.*, 123 AD3d 810 (2d Dept. 2014); *Bretts v Lincoln Plaza Assoc., Inc.*, 67 AD3d 943 (2d Dept. 2009); *Cardia v Willchester Holdings, LLC*, 35 AD3d 336 (2d Dept. 2006).

“Generally, the issue of whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury. . . . Property owners may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip. . . . There is no “minimal dimension test or per se rule that the condition must be of a certain height or depth to be actionable. In determining whether a defect is trivial as a matter of law, the court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury.” *Martyniak v Charleston Enterprises, LLC*, 118 AD3d 679, 680 (internal citations and quotation marks omitted). See *Trincere v County of Suffolk*, 90 NY2d 976, 977 (1997).

At bar, viewing the evidence in the light most favorable to plaintiff, and giving plaintiff the benefit of every favorable inference (*Derise v Jaak 773, Inc.*, 127 AD3d 1011 [2d Dept. 2015]), the Court cannot determine, as a matter of law, that the alleged defect is trivial or not inherently dangerous.

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The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein. Based upon the foregoing, it is

ORDERED, that the CITY's motion for an Order pursuant to CPLR §3212, seeking summary judgment dismissing plaintiff's Complaint and all cross claims against the CITY (*Sequence #004*) is *granted*; and it is further

ORDERED, that CASTLE's motion for an Order pursuant to CPLR §3212 dismissing the Complaint, the Third-Party Complaint and all cross-claims against CASTLE (*Sequence #006*) is *denied*.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: May 10, 2019
Mineola, New York

ENTER:



Hon. Robert A. Bruno, J.S.C.

ENTERED
MAY 15 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE