

Majnken v Town of Brookhaven
2019 NY Slip Op 34863(U)
August 5, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 15-608560
Judge: Denise F. Molia
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SHORT FORM ORDER

PUBLISH

INDEX No. 15-608560

CAL. No. 18-011960T

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice Supreme Court

MOTION DATE 11-9-18
ADJ. DATE 2-22-19
Mot. Seq. # 001 - MG; CASEDISP

-----X
STEPHEN MAJNKEN,

Plaintiff,

- against -

TOWN OF BROOKHAVEN,

Defendant.
-----X

COELLO & LORENZOTTI, PLLC
Attorney for Plaintiff
320 Carleton Avenue, Suite 2000
Central Islip, New York 11722

ANNETTE EADERESTO, ESQ.
Brookhaven Town Attorney
1 Independence Hill
Farmingville, New York 11738

Upon the following papers read on this motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendant, dated October 2, 2018; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, dated January 15, 2019; Replying Affidavits and supporting papers by defendant, dated February 19, 2019; Other ___; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendant Town of Brookhaven for summary judgment dismissing the complaint is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Stephen Majnken on May 30, 2014, at approximately 11:30 a.m., as a result of a fall he suffered while walking on Robinwood Drive at its intersection with Margin Drive East, in the Town of Brookhaven, New York. It is alleged that the Town of Brookhaven (the Town) was negligent in causing, allowing and permitting the area where plaintiff fell to be and remain in a dangerous condition, resulting in the plaintiff's fall in a storm drain.

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The Town now moves for summary judgment dismissing the complaint due to lack of prior written notice. In support of the motion, it submits, *inter alia*, copies of the pleadings, the transcript of plaintiff's General Municipal Law § 50-h hearing, the transcripts of the deposition of plaintiff and Marie Angelone, and the affidavits of Linda Sullivan and Marie Angelone. Plaintiff, in opposition to the motion, submits, *inter alia*, copies of the pleadings, the verified bill of particulars, the transcripts of deposition of plaintiff and Marie Angelone, and the Town's response to plaintiff's document request.

Plaintiff testified at the General Municipal Law § 50-h hearing that on May 30, 2014, as he was walking across Robinwood Drive, a motor vehicle accelerated towards him, so he "jumped" out of the way to avoid the motor vehicle. He testified that in the process of avoiding the vehicle, he tripped or landed in a "pothole" and fell. Plaintiff further testified that a storm drain was contained in the pothole.

Similarly, plaintiff testified at his examination before trial that he was walking on Robinwood Drive when a speeding motor vehicle approached him so he moved out of the way and as a result he stepped into a storm drain. He testified that there was a traffic light at the intersection of William Floyd Parkway and Robinwood Drive, and that the motorist was speeding to make the traffic light.

Marie Angelone was deposed as a witness for the Town. She testified that she has been employed for nine years in the Town's Highway Department, currently as a neighborhood aide. It is part of her job to establish whether or not the Town had prior written notice of the defect or condition which the plaintiff alleges was the cause of his injuries. She testified that she searched the records maintained by the Town after plaintiff filed his notice of claim. Ms. Angelone testified that Robinwood Drive is maintained by the Town's Highway Department. She explained that she researched plaintiff's notice of claim which revealed that plaintiff tripped and fell over a storm drain that was maintained by the County of Suffolk. She further testified that she opened a work order as a result of plaintiff's notice of claim. Ms. Angelone then testified that a Town highway foreman visited the accident site and generated a report that indicated that the storm drain was maintained by the County of Suffolk.

Ms. Angelone further testified that when the Town would pave a road such as Robinwood Drive, it would call the County of Suffolk and request that the grate of the storm drain be raised to meet the elevated roadway. She indicated that this communication would be made prior to the paving of the roadway. She also testified that she was not aware of when Robinwood Drive was paved before plaintiff's accident in 2014. Ms. Angelone testified in general when the Town paves a road, it hires a contractor. In addition, she testified that her search revealed no written notice of any defect with regard to the storm drain on Robinwood Drive at or near Margin Drive East.

In her affidavit, Marie Angelone reiterates that her search of the records of the Town's Highway Department for the five years prior to plaintiff's accident revealed no written notice of any defect with regard to the storm drain on Robinwood Drive at or near Margin Drive East. In addition, Ms. Angelone states in her affidavit that the Town does not and did not create, own, maintain, manage, or control the storm drain on Robinwood Drive at or near Margin Drive East. Furthermore, the affidavit of Linda Sullivan, an employee in the Town Clerk's office, sets forth that she had searched the index book and

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files maintained by her office for the three prior years and found no written complaints with regard to the subject storm drain.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must offer evidence in admissible form . . . and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]; *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, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O’Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The Town has made a prima facie showing of its entitlement to judgment as a matter of law by demonstrating that it lacked prior written notice of the allegedly defective condition that caused the plaintiff’s accident. Section 84.1 A of the Brookhaven Town Code states as follows:

Prior written notice required. No civil action shall be commenced against the Town of Brookhaven or the Superintendent of Highways for damages or injuries to persons or property sustained by reason of the defective, out-of-repair, unsafe, dangerous or obstructed condition of any highway, street, ...of the Town of Brookhaven, unless, previous to the occurrence resulting in such damages or injuries, written notice of such defective, out-of-repair, unsafe, dangerous or obstructed condition, specifying the particular place and location was actually given to the Town Clerk or Town Superintendent of Highways and there was a failure or neglect within a reasonable time, after the giving of such notice, to repair or remove the defect, danger or obstruction complained of...

Section 84.1 B of the Brookhaven Town Code states as follows:

In the absence of written notice as required above, no civil claim shall be maintained against the Town of Brookhaven; nor shall any civil claim be maintained based on an allegation that such defect, danger or obstruction existed for so long a period of time that the same should have been discovered and remedied in the exercise of reasonable care and diligence; nor a claim that any Town employee possessed actual notice of such defect, danger or obstruction unless written notice is filed with the Town Clerk as required above.

Where, as here, a municipality has enacted a prior written notice statute pursuant to Town Law Article 65, it may not be subjected to liability for personal injuries caused by an improperly maintained

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roadway or sidewalk unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (see *Barnes v Incorporated Vil. of Port Jefferson*, 120 AD3d 528, 990 NYS2d 841 [2d Dept 2014]; *Carlucci v Village of Scarsdale*, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]; *Wilkie v Town of Huntington*, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006]; *Lopez v G&J Rudolph*, 20 AD3d 511, 799 NYS2d 254 [2d Dept 2005]; *Ganzenmuller v Incorporated Vil. of Port Jefferson*, 18 AD3d 703, 795 NYS2d 744 [2d Dept 2005]). "The only two recognized exceptions to a prior written notice requirement are the municipality's affirmative creation of a defect or where the defect is created by the municipality's special use of the property" (*Gonzalez v Town of Hempstead*, 124 AD3d 719, 2 NYS3d 527 [2d Dept 2015]; *Forbes v City of New York*, 85 AD3d 1106, 926 NYS2d 309 [2d Dept 2011]). The affirmative negligence exception is limited to work by the municipality that immediately results in the existence of a dangerous condition (see *Yarborough v City of New York*, 10 NY3d 726, 853 NYS2d 261 [2008]; *Sola v Village of Great Neck Plaza*, 115 AD3d 661, 981 NYS2d 545 [2d Dept 2014]).

"[T]he prima facie showing which a defendant must make on a motion for Summary Judgment is governed by the allegation of liability made by the plaintiff in the pleadings" (*Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214, 905 NYS2d 226 [2d Dept 2010]). Plaintiff alleged, in his pleadings, that the Town was negligent in the design, construction and installation of storm drain and roadway and it thereby created the condition that caused plaintiff's accident. Thus, to establish its prima facie entitlement to judgment as a matter of law, the Town was required to demonstrate, prima facie, both it did not have prior written notice of the alleged defect, and that it did not create the alleged defect (see *Gutierrez-Contreras v Village of Port Chester*, 172 AD3d 1333, 101 NYS2d 149 [2d Dept 2019]; *Trela v City of Long Beach*, 157 AD3d 747, 69 NYS3d 58 [2d Dept 2018]; *Loghy v Village of Scarsdale*, 149 AD3d 714, 53 NYS3d 318 [2d Dept 2017]).

Moreover, evidence such as telephone complaints and work orders is insufficient to raise an issue of fact. Any verbal complaints or other internal documents generated by the Town are insufficient to satisfy the statutory requirement (see *Wilkie v Town of Huntington*, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006]; *Cenname v Town of Smithtown*, 303 AD2d 351, 755 NYS2d 651 [2d Dept 2003]). A verbal complaint reduced to writing by a municipality does not constitute prior written notice (see *Tortorici v City of New York*, 131 AD3d 959, 16 NYS3d 572 [2d Dept 2015]; *McCarthy v City of White Plains*, 54 AD3d 828, 863 NYS2d 500 [2d Dept 2008]; *Akelik v Town of Islip*, 38 AD3d 483, 831 NYS2d 491 [2d Dept 2007]; *Cenname v Town of Smithtown*, *supra*). Prior written repair orders do not constitute prior written notice of prior defects (*Lopez v Gonzalez*, 44 AD3d 1012, 845 NYS2d 91 [2d Dept 2007]; *McCarthy v City of White Plains*, *supra*; *Dalton v City of Saratoga Springs*, 12 AD3d 899, 901, 784 NYS2d 702 [3d Dept 2004]).

Here, the testimony of Marie Angelone and the affidavits of Marie Angelone and Linda Sullivan establish that there was no prior written notice regarding the subject storm drain filed with either the Town Clerk's office or with the Highway Department, as required by the Town ordinance (see *Velho v Village of Sleepy Hollow*, 119 AD3d 551, 987 NYS2d 879 [2d Dept 2014]; *Petrillo v Town of Hempstead*, 85 AD3d 996, 925 NYS2d 660 [2d Dept 2015]; *Pagano v Town of Smithtown*, 74 AD3d 1304, 904 NYS2d 729 [2d Dept 2010]; *LiFrieri v Town of Smithtown*, 72 AD3d 750, 898 NYS2d 629

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[2d Dept 2010]). Likewise, the affidavit of Marie Angelone has established that the Town did not create, own, maintain manage or control the storm drain in question and therefore it not create the alleged dangerous condition (see *Gutierrez-Contreras v Village of Port Chester, supra*; *Trela v City of Long Beach, supra*; *Loghy v Village of Scarsdale, supra*). The Town having established the lack of prior written notice and that it did not create the alleged dangerous condition, the burden shifts to plaintiff to proffer evidence that one of the claimed exceptions to the written notice requirement applies (see *Gagnon v City of Saratoga Springs*, 51 AD3d 1096, 858 NYS2d 797 [3d Dept 2008]; *Betzold v Town of Babylon*, 18 AD3d 787, 796 NYS2d 680 [2d Dept 2005]; *Brooks v Village of Horseheads*, 14 AD3d 756, 788 NYS2d 437 [3d Dept 2005]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's contention that the Town affirmatively created the alleged dangerous condition in the roadway is without support in the record, and speculative in any event (see *Gonzalez v Town of Hempstead, supra*; *Smith v City of Mount Vernon*, 101 AD3d 847, 955 NYS2d 635 [2d Dept 2012]; *Weinberg v City of New York*, 96 AD3d 736, 945 NYS2d 758 [2d Dept 2012]). Plaintiff having failed to raise an issue of fact, the Town is entitled to summary judgment (see *Gonzalez v Town of Hempstead, supra*; *Forbes v City of New York, supra*).

In light of the foregoing, the motion by defendant Town of Brookhaven for summary judgment dismissing the complaint is granted.

Dated: August 5, 2019


A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION