

Romano v Town of Babylon
2020 NY Slip Op 34711(U)
October 8, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 605878/17
Judge: Joseph A. Santorelli
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SHORT FORM ORDER **ORIGINAL**

INDEX No. 605878/17
CAL. No. 201901849OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 2/6/20 (001)
MOTION DATE 2/13/20 (002)
ADJ. DATE 7/30/20
Mot. Seq. # 001 MD
 # 002 MG

-----X
AMELIA ROMANO,

 Plaintiff,

 - against -

TOWN OF BABYLON and THE COUNTY OF
SUFFOLK,

 Defendants.
-----X

SANDERS SANDERS BLOCK & WOYCIK
Attorney for Plaintiff
100 Herricks Road
Mineola, New York 11501

JOSEPH WILSON, ESQ.
Attorney for Defendant Town of Babylon
200 East Sunrise Highway
Lindenhurst, New York 11757

DENNIS M. BROWN, ESQ.
Suffolk County Attorney
100 Veterans Memorial Highway, POB 6100
Hauppauge, New York 11788

Upon the following papers read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant County of Suffolk, dated January 6, 2020; Notice of Motion and supporting papers by defendant Town of Babylon, dated January 9, 2020; Answering Affidavits and supporting papers by plaintiff, dated June 8, 2020; Replying Affidavits and supporting papers by defendant Town of Babylon, dated July 14, 2020; Replying Affidavits and supporting papers by defendant County of Suffolk, dated July 27, 2020; Other ____; it is

ORDERED that the motion (001) by defendant County of Suffolk and the motion (002) by defendant Town of Babylon are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (001) by defendant County of Suffolk for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against it is denied; and it is further

ORDERED that the motion (002) by defendant Town of Babylon for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against it is granted.

Romano v Town of Babylon
Index No. 605878/2017
Page 2

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained as the result of a trip and fall accident which occurred on September 24, 2016. At the time of the accident, the plaintiff was walking on the sidewalk adjacent to Chelsea Avenue, near the intersection with Little East Neck Road, in West Babylon, New York, when she tripped and fell on an allegedly defective portion of the sidewalk, near the curb. The plaintiff alleges that the defendants were negligent in, inter alia, the maintenance, repair, and installation of the sidewalk where the accident occurred.

Defendant County of Suffolk ("County") moves for summary judgment dismissing the claims against it on the grounds that it did not receive prior written notice of the alleged dangerous condition, and that there was no affirmative negligence on the part of the County. The County's submissions in support of the motion include copies of the pleadings, the transcript of the plaintiff's testimony at a General Municipal Law § 50-h hearing, and the transcripts of the parties' deposition testimony. Affidavits by Jason Richberg of the Suffolk County Legislature's office, and by John Donovan of the Suffolk County Attorney's office were also submitted in support of the County's motion.

At her General Municipal Law § 50-h hearing by the County, the plaintiff testified that the accident occurred on September 24, 2016. At the time of her accident, she was walking on the sidewalk of Chelsea Avenue, near the intersection with Little East Neck Road, in West Babylon. The plaintiff stated that, as she walked towards the intersection, her toe hit a raised portion of pavement, causing her to fall forward. At her deposition in this matter, the plaintiff further testified that the area where she tripped was near the curb, and that "the curb is uplifted." The plaintiff did not make any prior written or verbal complaints regarding the condition, and she was not aware of any prior complaints.

Andrew Mashkow testified at a deposition on behalf of defendant Town of Babylon ("Town") in this matter. Mashkow is a mason foreman for the Town. He testified that Chelsea Avenue is a town road. Little East Neck Road is a county road, but it is maintained by the Town. Mashkow reviewed photographs of the subject area, and he testified that they depict a curb with a "handicap sidewalk," and that the curb depicted in the photographs is higher than the sidewalk. Mashkow stated that the sidewalk and curb area where the accident occurred were installed by the County in the fall of 1993 or the spring of 1994. His search of the Town's records did not reveal any record of maintenance, repair or alterations performed by the Town on the curb area, or any complaints received by the Town with regard to the subject area.

Paul Morano testified at a deposition on behalf of the County in this matter. Morano is an assistant civil engineer for the County. He testified that the curb at the intersection of Chelsea Avenue and Little East Neck Road was installed during a County construction project in 1995. Although Chelsea Avenue is a town road, the County installed the sidewalk, curb and adjacent parking lot as part of the construction project. He did not know if the finished work was inspected by the County. Little East Neck Road is a county road, but is maintained by the Town pursuant to an inter-municipal agreement between the County and the Town. Morano reviewed photographs of the alleged condition, and testified that the curb appeared "broken" and should not "end abruptly," but "should slope down." He further testified that he conducted a search for notices of claim or prior complaints received by the County regarding the subject area, but found none.

Romano v Town of Babylon
Index No. 605878/2017
Page 3

Where a municipality has enacted a prior written notice statute, it will not be subjected to liability for injuries caused by a defective or dangerous condition on a sidewalk or roadway unless it has received prior written notice of such condition or an exception to the prior written notice requirement applies (*see Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77 [1999]; *Garcia v Thomas*, 173 AD3d 842, 102 NYS3d 707 [2d Dept 2019]; *Cruzate v Town of Islip*, 162 AD3d 853, 80 NYS3d 305 [2d Dept 2018]; *Walker v County of Nassau*, 147 AD3d 806, 46 NYS3d 647 [2d Dept 2017]; *Abreu-Lopez v Incorporated Vil. of Freeport*, 142 AD3d 515, 36 NYS3d 492 [2d Dept 2016]). The two recognized exceptions to the statutory rule requiring prior written notice of a defective or dangerous condition are: (1) where the municipality created the defect or hazard through an affirmative act of negligence, and (2) where the municipality derived a special benefit from the sidewalk or roadway unrelated to the public use (*Amabile v City of Buffalo*, 93 NY2d 471, 474; *see also Garcia v Thomas*, 173 AD3d 842, 842; *Cruzate v Town of Islip*, 162 AD3d 853, 854; *Abreu-Lopez v Incorporated Vil. of Freeport*, 142 AD3d 515, 516).

In support of its motion for summary judgment dismissing the plaintiff's complaint, the County asserts that it cannot be subjected to liability for the plaintiff's accident and resulting injuries, because it did not receive prior written notice of the alleged dangerous condition, as required by Article 8, section 2 of the Suffolk County Charter. The County further asserts that it did not create the alleged condition through an affirmative act of negligence. However, the deposition testimony submitted in support of the County's motion raises issues of fact regarding whether the dangerous condition was created by the County when it installed the sidewalk and curb as part of its earlier construction project in the area. As such, the County failed to establish prima facie entitlement to summary judgment, and its motion is denied (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Nigro v Vil. of Mamaroneck*, 184 AD3d 842, 843, 124 NYS3d 549 [2d Dept 2020]; *Kelley v Incorporated Vil. of Hempstead*, 138 AD3d 931, 933-34, 30 NYS3d 277 [2d Dept 2016]; *McManus v Klein*, 136 AD3d 700, 701, 24 NYS3d 205 [2d Dept 2016]).

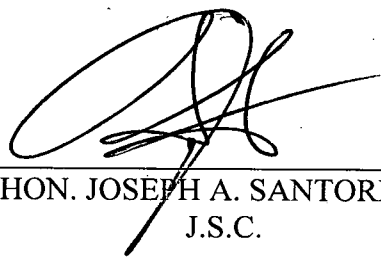
The Town also moves for summary judgment dismissing the plaintiff's complaint, based on the assertion that it did not receive prior written notice of the alleged dangerous condition, as required by Town Law § 65 (a) and Town Code §§ 158-1 and 158-2. In support of its motion, the Town submits copies of the pleadings, the transcript of the plaintiff's testimony at a General Municipal Law § 50-h hearing, and the transcripts of the parties' deposition testimony. The Town also submits an affidavit by Town Clerk Geraldine Compitello, stating that she conducted a search for written notices or complaints regarding the alleged condition, and that she did not find any written notices or complaints received by the Town prior to the date of the alleged accident. In addition, an affidavit by Thomas Stay, the Commissioner of the Department of Public Works for the Town, was also submitted in support of the motion. Stay's affidavit states that he conducted a search of the records of the Department of Public Works for prior written notice of the alleged condition, but that his search revealed no such records.

The Town made a prima facie showing of entitlement to judgment as a matter of law through its submission of evidence, including the deposition testimony and affidavits of its employees, establishing that it did not receive the requisite prior written notice of the alleged dangerous condition, and that neither of the exceptions to the prior written notice rule are applicable herein (*see Abreu-Lopez v*

Romano v Town of Babylon
Index No. 605878/2017
Page 4

Incorporated Vil. of Freeport, supra; Kiszenik v Town of Huntington, 70 AD3d 1007, 895 NYS2d 208 [2d Dept 2010]; *Akcelik v Town of Islip*, 38 AD3d 483, 831 NYS2d 491 [2d Dept 2007]). The burden, therefore, shifted to the plaintiff to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). In opposition, the plaintiff failed to meet this burden. Accordingly, the Town’s motion for summary judgment dismissing the plaintiff’s complaint against it is granted.

Dated: OCT 08 2020



HON. JOSEPH A. SANTORELLI
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION