Saltsberg v Town of Oyster Bay
2020 NY Slip Op 34729(U)
November 20, 2020
Supreme Court, Nassau County
Docket Number: Index No. 613505/18
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

TRIAL/IAS, PART 18
NASSAU COUNTY

x

BARRY SALTSBERG,

Plaintiff(s),

Index No.: 613505/18

-against-

THE TOWN OF OYSTER BAY,

Motion Seq. No.: 001

Motions Submitted: 9/16/2020

Defendant(s).

x

The following papers read on this motion:

Notice of Motion/Supporting Exhibits/Memorandum of Law....X
Affirmation in Opposition/Supporting Exhibits..........................X
Reply Affirmation..X
Sur-Reply...X[1]

Defendant, The Town of Oyster Bay (the Town), moves this court for an order, pursuant to CPLR §3212, granting it summary judgment and dismissing the complaint against it. Plaintiff, Barry Saltsberg (Saltsberg), opposes the motion.

[1] The court's Part's rules require prior approval from the court to submit a sur-reply. Counsel sought and received prior approval, thus the court will consider the sur reply.

Saltsberg commenced this negligence action by summons and complaint dated October 2, 2018. Issue was joined by service of an answer dated November 13, 2018. The case certified ready for trial on December 5, 2019, and a note of issue was filed on March 2, 2020.

Saltsberg alleges that on September 17, 2017 he tripped and fell over an uneven gutter in the street in front of 27 Cedar Drive East, Plainview, County of Nassau. Saltsberg lives across the street from that address and was crossing the street to speak to his neighbor. As a result of the fall, he claims he was injured. The Town now moves for summary judgment, claiming it did not have prior written notice of any alleged defective condition.

In a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Films Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which

require a trial of action. (*see Zuckerman v. City of New York,* 49 NY2d 557 [1980], *supra).* The primary purpose of a summary judgment motion is issue finding not issue determination, (*see Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 [1st Dept 1992]), and it should only be granted when there are no triable issues of fact (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]).

Further, "[w]here, as here, a municipality has enacted a prior written notice law, it may not be subject to liability for injuries caused by a dangerous roadway condition unless it has received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies" (*Wald v City of New York*, 115 AD3d 939 [2d Dept 2014]; *Phillips v City of New York*, 107 AD3d 774, [2d Dept 2013]; *see Martinez v City of New York*, 105 AD3d 1013, 1014 [2d Dept 2013]). "The only recognized exceptions to the statutory prior written notice requirement involve situations in which the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a benefit upon the municipality" (*Wald v City of New York, supra; Long v City at Mount Vernon*, 107 AD3d 765 [2d Dept 2013]; *Oboler v City of New York*, 8 NY3d 888, 889-890 [2007]; *Miller v Village of E. Hampton*, 98 AD3d 1007, 1008 [2d Dept 2012]). In addition, "the affirmative negligence exception is limited to work by the [municipality] that immediately results in the existence of a dangerous condition" (*Wald v City of New York, supra*, quoting *Yarborough v City of New York*, 10 NY3d 726, 728 [2007], quoting *Oboler v City of New York, supra* at 889).

Furthermore, neither actual nor constructive notice of a given defect is sufficient to overcome the requirement of prior written notice (*Amabile v City of Buffalo*, 93 NY2d 471, 474 [1998]; *Caramancia v City of New Rochelle*, 268 AD2d 496 [2d Dept 2000]). In order for a municipality to be held liable for a condition where no prior written notice was given, a plaintiff must set forth competent evidence that the municipality affirmatively created the alleged offending condition in issue (*see Walker v Incorporated Village of Northport*, 304 AD2d 823 [2d Dept 2003]; *Monteleone v Incorporated Village of Floral Park*, 74 NY2d 917 [1989]).

Herein, in support of its motion, the Village submits, *inter alia*, the affidavits of Kenneth J. Bishop and Cindy Maloney. Mr. Bishop is an Engineering Aide I employed by the Town in the Highway Department. His duties include performing traffic surveys, investigating all notices of claim received by the Town, and searching the records of the Highway Department and the Department of Public Works. Regarding the allegations contained in Saltsberg's notice of claim, Mr. Bishop states as follows:

> 6. I personally searched records maintained by the Town of Oyster Bay Highway Department and the Town of Oyster Bay Department of Public Works. The records within the Department are indexed by property address. My review of the indexed records maintained by the Highway Department, and all divisions thereof, confirm that in the six (6) years leading up to and including September 11, 2017, the Highway Department did not receive any written notice of the specific defect at 27 Cedar Drive East in Plainview. The search only

> revealed a general petition from the residents of Cedar Drive East in Plainview requesting the Town repave the full length of the entire roadway. The petition does not reference any specific defect, including the alleged defect contained in the Notice of Claim.
>
> 7. Further, my search of the Highway Department and Department of Public Works, records, contracts, and work orders did not reveal any information or documents indication that the Town or any of its contractors or vendors performed work maintenance, construction, or repair of the street and/or gutter at the Incident location.

Ms. Maloney works in the Office of the Town Clerk. Part of her duties is to search the Town Clerk's records for any written notice of defects on Town roads or sidewalks. Ms. Maloney performed a search going back five years from the date of the accident and found no record of any written complaints regarding the subject location.

When a municipal employee states by affidavit that a thorough search was conducted and that no prior written notice of the defect was found, there is *a prima facie* showing of entitlement to judgment as a matter of law (*Dabbs v City of Peekskill*, 178 AD2d 577 [2nd Dept 1994]). Based upon Mr. Bishop's and Ms. Maloney's affidavits, the Town has established entitlement to summary judgment as a matter of law. The burden shifts to Saltsberg to raise a material issue of fact requiring a trial of the matter.

In opposition, Saltsberg annexes, *inter alia*, Mr. Bishop's deposition transcript. During his deposition, Mr. Bishop was shown a letter from the Town to Ms. Georgeanna

Sansobrino, a resident of 22 Cedar Drive East. The letter was in response to a letter that Ms. Sansobrino sent to the Town regarding the condition of Cedar Park East. The letter begins "We are in receipt of your letter regarding the road conditions on Cedar Drive East in Plainview." However, during his search, Mr. Bishop did not, initially, find the original letter. Also during his deposition, Mr. Bishop was shown a letter, or petition (it is referred to as both) from residents of Cedar Park East. This petition is referenced in Mr. Bishop's affidavit annexed to this motion, but was not included with the moving papers. The petition is signed by 17 residents all living on Cedar Park East, including the resident of 27 Cedar Park East. It is addressed to the Town, but to the attention of the Highway Department, and is dated April 16, 2017. The petition states:

> To Whom It May Concern,
>
> The residents of Cedar Drive East in Plainview, NY are requesting that our street to be paved as soon as possible. Over the years, the street has been deteriorating, *it is very uneven* and has many pot holes. We have been made aware that many of the other neighboring side street blocks have been repaved. Our block is in far worse shape than those repaved. We have made several attempts to contact the town to get this request approved, but all efforts have resulted with no return calls or poor explanations of why this request cannot be granted. We all pay extremely high taxes to live in this beautiful town and feel that we deserve a small investment back to make our street safe. (Emphasis added)

In reply, the Town submits the original email Ms. Sansobrino sent on Friday, March 30, 2012. The email does not address any specific defect in the road, but asks when it will be repaved due to "erosion and pot holes on the street". The Town now argues that because the email did not address the area where Saltsberg fell, it cannot serve as prior written notice.

It is the submission of this email that is the subject of the sur-reply. Saltsberg's counsel expresses understandable frustration at the Town's ability to find the email after the opposition was served, and after discovery in the case had been deemed closed. The Town's counsel goes to great lengths explain how the email was overlooked and the efforts that went into finding it. The court does not believe that the failure to include it during discovery or in the moving papers was intentional. But the court is also frustrated that the Town only managed to find it after a more exhaustive search was performed. The prior written notice rule is a tremendous hurdle that taxpayers must overcome. Taxpayers, and the courts, are entitled to the belief that when a municipality employee swears in an affidavit that a search was performed, that the search was exhaustive and performed with some urgency. The court is not satisfied that happened herein.

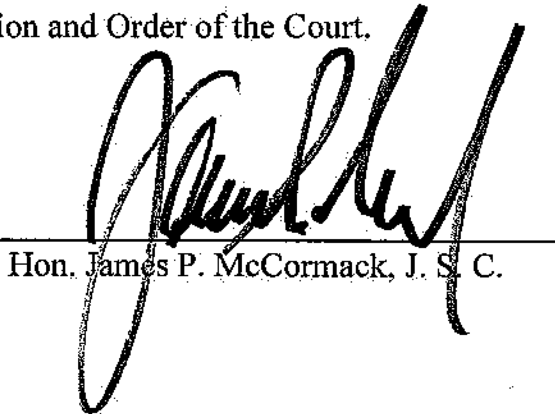
Regardless, Ms. Sansobrino's email is rendered somewhat superfluous by the petition. The resident of 27 Cedar Park East did send in written notice and did complain about, *inter alia*, an uneven roadway. At the very least, this petition raises an issue of fact as to whether or not the Town had prior written notice of the defect.

Accordingly, it is hereby

ORDERED, that the Town's motion for summary judgment is DENIED in its entirety.

The foregoing constitutes the Decision and Order of the Court.

Dated: November 20, 2020
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.

ENTERED
Dec 02 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE