Arbaiza v Incorporated Vil. of Freeport
2020 NY Slip Op 34788(U)
April 13, 2020
Supreme Court, Nassau County
Docket Number: Index No. 606663/18
Judge: James P. McCormack

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

TRIAL/IAS, PART 18
NASSAU COUNTY

ADALBERTO ARBAIZA,

Plaintiff(s),

Index No. 606663/18

-against-

THE INCORPORATED VILLAGE OF FREEPORT,

Motion Seq. No.: 002
Motion Submitted: 1/27/2020

Defendant(s).

XXX

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Defendant, Incorporated Village of Freeport (the Village), moves this court for an order pursuant to CPLR sec 3212, dismissing the complaint against it. Plaintiff, Adalberto Arbaiza (Arbaiza), opposes the motion.

Arbaiza commenced this action, sounding in negligence, by service of a summons and complaint dated May 17, 2018. Issue was joined by service of an answer dated June

28, 2018. The case certified ready for trial on August 21, 2019 and a note of issue was filed on November 18, 2019.

On March 1, 2017, Arbaiza alleges he was walking on the roadway known as Village Plaza East, in front of the Freeport Long Island Railroad Station ticket office, when he tripped and fell over a circular hole in the roadway. As a result of the fall, Arbaiza claims he was injured. The Village moves for summary judgment alleging it had no written notice of the alleged defect,

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]).

"[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]).

In support of the motion, the Village submits, inter alia, the affidavit of Pamela Walsh Boening, the Village Clerk, and the deposition transcript of Robert S. Fisenne, Superintendent of the Department of Public Works for the Village. Ms. Boening states that the Village Code directs that any written notice of a sidewalk defect must be made to the Village Clerk's office. Further, the Village Clerk maintains any notices or records of any such defect. She did a search of all records for the subject location, dating back seven years from the date of the accident, and found no written notices of any defect at the subject location.

Mr. Fisenne testified that the Department of Public Works is responsible for all repairs and maintenance of sidewalks on Village owned property, and keeps records of all such repairs and maintenance. On the day of his deposition he went to the location of the fall and saw the round hole that Arbaiza claims he tripped over. Mr. Fisenne testified that he did not know how the hole came to be in that location. He did not know what such a hole would be used for. If an entity other than the Village wanted to cut such a hole in one of the Village's roadways, the entity would have to apply for a permit.

A search of the records of the Department of Public Works was performed and there was no such permit given to any entity that would allow someone to cut into the street. Mr. Fisenne testified that similar types of holes may be cut for water main access, but there were no water mains under this particular road. A hole of this shape and size would not be used for sewer or drainage purposes. He could not determine who created the hole, nor could he opine why such a hole would have been cut at that particular location.

Based upon the affidavit of Ms. Boening and Mr. Fisenne's deposition testimony, the court finds the Village has established entitlement to summary judgment as a matter of law. The Village received no prior written notice and did not create the defect or make a special use of the subject location. The burden shifts to Arbaiza to raise an issue of fact requiring a trial of the action.

Arbaiza first argues that that his bill of particulars alleges that the Village created the defect, and their motion does not address that allegation. The court disagrees. In his deposition, Mr. Fisenne was questioned a great deal as to what could have created the defect and he denied that the Village created it, or that the Village gave a permit to another entity to create it.

Next, Arbaiza claims that Ms. Boening's affidavit is insufficient. Again, the court disagrees. Ms. Boening's affidavit clearly states that any written notices of defects had to be directed to her office, and that her office keeps any such written notices. She searched through those records going back seven years, and found no written notice of any defect at the subject location.

Finally, Arbaiza argues an issue of fact exists because based upon Mr. Fisenne's testimony, only the Village could have created the holes. This is untrue. Mr. Fisenne testified that the Village did not make the holes, and that the Village did not give anyone a permit to make the holes. The logical conclusion therefore is that a person or entity who did not have permission to make the holes did so, not that the Village made them.

Accordingly, it is hereby

ORDERED, that the Village's motion for summary judgment is GRANTED. The complaint is dismissed.

This constitutes the Decision and Order of the Court.

Dated: April 13, 2020
Mineola, N.Y.

/s/

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