

Abramson v Janowski's Hamburgers, Inc.
2020 NY Slip Op 34803(U)
December 21, 2020
Supreme Court, Nassau County
Docket Number: Index No. 606906/2018
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

SUPREME COURT — STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

CAROL ABRAMSON,

Plaintiff,

— against —

TRIAL / IAS PART 22
NASSAU COUNTY

Index No. 606906/2018

Motion Sequence No. 1, 2, 3

JANOWSKI'S HAMBURGERS, INC., BILL
VOGELSBERG, ABOFF'S, INC., ABOFF'S
FRIENDLY PAINT STORE, LLC.,
ABOFF'S OF ROCKVILLE CENTRE, INC.,
F&W CANNATARO INC., FRANK
CANNATARO, TOWN OF HEMPSTEAD
and BIANCA BURGERS, LLC,

Defendants.

The following papers having been read on these three motions:

Motion Sequence No. 1

Notice of Motion, Affidavits & Exhibits	1, 2
Answering Affidavits.....	3
Replying Affidavits.....	
Briefs: Plaintiff / Petitioner.....	
Defendant / Respondent.....	

Motion Sequence No. 2

Notice of Cross Motion, Affidavits & Exhibits 1, 2
 Answering Affidavits.....
 Replying Affidavits.....
 Briefs: Plaintiff / Petitioner.....
 Defendant / Respondent.....

Motion Sequence No. 3

Notice of Motion, Affidavits & Exhibits 1, 2
 Answering Affidavits..... 3, 4, 5
 Replying Affidavits..... 6
 Briefs: Plaintiff / Petitioner.....
 Defendant / Respondent.....

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, including efiled documents/exhibits numbered 55 through and including 111, these three motions are decided as follows:

This matter arose from an alleged trip and fall on September 26, 2017, on the sidewalk located on the south side of Hanscom Place, approximately 70 to 80 feet from its intersection with South Long Beach Road and abutting the parking lot of Aboff's Friendly Paint Store, LLC located at 2415 South Long Beach Road, Rockville Centre, in the Town of Hempstead, State of New York.

The defendants Janowski's Hamburgers Inc., Bill Vogelsberg, and Bianca Burgers, LLC move (**Sequence No. 1**) for an order pursuant to CPLR 3212 granting summary judgment in favor of Janowski's Hamburgers Inc., Bill Vogelsberg, and Bianca Burgers, LLC dismissing the plaintiff, Carol Abramson's complaint and all crossclaims against Janowski's Hamburgers Inc., Bill Vogelsberg, and Bianca Burgers, LLC. The defendants assert no material issues of fact exist regarding any liability or negligence on the part of Janowski's Hamburgers Inc., Bill Vogelsberg, and Bianca Burgers, LLC for the happening of the subject accident.

The defendant Town of Hempstead cross moves (**Sequence No. 2**) for an order granting summary judgment dismissing the plaintiff's complaint and all crossclaims against the Town. The Town asserts the basis of liability against the Town rests on allegations in the amended complaint and bill of particulars that the Town negligently owned, operated, managed, maintained, controlled, repaired, made special use of and caused and/or created the

alleged sidewalk condition, all of which caused the plaintiff's injuries. The Town maintains, pursuant to the Code of the Town of Hempstead Chapter 6, specifically § 6-3, and the Town Law of the State of New York § 65-a (2) receipt of prior written notice is a condition precedent to the maintenance of a civil action against the Town for injuries arising from a defective sidewalk. The plaintiff notes the plaintiff failed to submit any proof indicating the existence of prior written notice of the alleged defect. The plaintiff contends there is no evidence the Town made special use of or caused or created the sidewalk condition that allegedly caused plaintiff's injuries. Hence, no action can be maintained against the Town.

The defendants Aboff's Inc., Aboff's Friendly Paint Store LLC and Aboff's of Rockville Centre, Inc. move (**Sequence No. 3**) for an order pursuant to CPLR 3212 dismissing the plaintiff's complaint against Aboff's Inc., Aboff's Friendly Paint Store LLC and Aboff's of Rockville Centre, Inc. and all crossclaims against them. Aboff's Inc., Aboff's Friendly Paint Store LLC and Aboff's of Rockville Centre, Inc. assert they bear no liability here.

While it is generally true that an owner of land abutting a public sidewalk owes no duty to the public to keep the sidewalk in good repair, an exception exists where the abutting owner or occupier uses the sidewalk for a special purpose, or fails to maintain in a reasonably safe condition a sidewalk which is constructed in a special manner for his or her benefit [citation omitted]
Munnich v Bellmore Dog Grooming, 201 AD2d 631, 631 [2d Dept 1994]

The Court determines Janowski's Hamburgers Inc., Bill Vogelsberg, and Bianca Burgers, LLC and Aboff's Friendly Paint Store LLC and Aboff's of Rockville Centre, Inc. (**Sequence No. 1 and 3**) established prima facie entitlements to judgment as a matter of law. The defendant provided evidence in admissible form showing they owed no duty to the public to keep the subject sidewalk in good repair.

In opposition, the plaintiff failed raised a triable issue of fact regarding liability of Janowski's Hamburgers Inc., Bill Vogelsberg, and Bianca Burgers, LLC or Aboff's Friendly Paint Store LLC and Aboff's of Rockville Centre, Inc. The plaintiff also failed to provide a showing that an exception exists that Janowski's Hamburgers Inc., Bill Vogelsberg, and Bianca Burgers, LLC or Aboff's Friendly Paint Store LLC and Aboff's of Rockville Centre, Inc. used the subject sidewalk for a special purpose, or failed to maintain it in a reasonably safe condition or it was constructed in a special manner for the benefit of Janowski's Hamburgers Inc., Bill Vogelsberg, and Bianca Burgers, LLC or Aboff's Friendly Paint Store LLC and Aboff's of Rockville Centre, Inc.

Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained roadway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies.” The only recognized exceptions to the prior written notice requirement involve situations in which either the municipality created the defect through an affirmative act of negligence, or a “special use” confers a special benefit upon the municipality [citation omitted]

De La Reguera v City of Mount Vernon, 74 AD3d 1127, 1127 [2d Dept 2010].

The Court determines the Town of Hempstead (**Sequence No. 2**) established a prima facie entitlement to judgment as a matter of law (*Bloch v Potter*, 204 AD2d 672 [2d Dept 1994]). Here, the Town provided evidence in admissible form, *inter alia* it enacted a prior written notice statute and the plaintiff attorney’s sworn statement, in the last paragraph of an affirmation stating the plaintiff does not oppose the Town’s motion. Laura Taranto, a clerical employee of the Sidewalk Division of the Highway Department of the Town of Hempstead, stated, in an affidavit, conducting record searches and entering records into the computer system regarding sidewalk conditions. Taranto performed a computerized search of the records of the Sidewalk Division of the Highway Department of the Town of Hempstead regarding repairs which disclosed other than one repair completed in October of 2012, the Town of Hempstead did not perform any affirmative acts to the sidewalk at the subject accident location and did not repair, construct, inspect, replace or design the sidewalk at the subject accident location on or for five years prior to September 26, 2017. Taranto’s computerized search of the records of the Sidewalk Division of the Highway Department of the Town of Hempstead provided no evidence of prior written notice, prior written complaints, prior oral complaints, prior telephonic complaints or prior notices of claim regarding any issues or conditions at the subject accident location on or for five years prior to September 26, 2017.

In opposition, none of the defendants or the plaintiff raised a triable issue of fact regarding liability by the Town of Hempstead. Moreover, none of the defendants or the plaintiff provided evidence of a prior written complaint or an exception to the statutory prior written requirement that the Town of Hempstead created the defect through an affirmative act of negligence, or a “special use” confers a special benefit upon the Town of Hempstead.

ORDERED that the motion by the defendants Janowski’s Hamburgers Inc., Bill Vogelsberg, and Bianca Burgers, LLC (**Sequence No. 1**) is GRANTED for summary judgment in favor of Janowski’s Hamburgers Inc., Bill Vogelsberg, and Bianca Burgers, LLC dismissing the complaint and all crossclaims against Janowski’s Hamburgers Inc., Bill Vogelsberg, and Bianca Burgers, LLC, and it is also,

ORDERED that the motion the defendant Town of Hempstead (**Sequence No. 2**) is GRANTED for summary judgment dismissing the plaintiff's complaint and all crossclaims against the Town of Hempstead, and it is further,

ORDERED that the motion by the defendants Aboff's Inc., Aboff's Friendly Paint Store LLC and Aboff's of Rockville Centre, Inc. (**Sequence No. 3**) is GRANTED for summary judgment dismissing the plaintiff's complaint against Aboff's Inc., Aboff's Friendly Paint Store LLC and Aboff's of Rockville Centre, Inc. and all crossclaims against Aboff's Inc., Aboff's Friendly Paint Store LLC and Aboff's of Rockville Centre, Inc.

This decision will constitute the order of the Court.

Dated: December 21, 2020

ENTERED



ANTONIO I. BRANDVEEN
J. S. C.

NOT FINAL DISPOSITION

ENTERED

Dec 28 2020

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**