

Keane v Petrillo Family Three, LLC
2020 NY Slip Op 34814(U)
August 10, 2020
Supreme Court, Westchester County
Docket Number: Index No. 61836/2018
Judge: Lawrence H. Ecker
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
MARY KEANE,

Plaintiff,

- against -

PETRILLO FAMILY THREE, LLC, HSBC BANK
USA, N.A., and VILLAGE OF BRONXVILLE,

Defendants.
-----X

INDEX NO. 61836/2018

DECISION/ORDER

**Mot. Seqs. 1 & 2
Submit Date: 6/10/2020**

ECKER, J.

In accordance with CPLR 2219 (a), the decision herein is made upon considering all papers filed in NYSCEF regarding the motion of HSBC BANK USA, N.A. (HSBC),¹ made pursuant to CPLR 3212, for an order granting summary judgment dismissing the amended complaint of MARY KEANE (plaintiff) and the cross claims of codefendants PETRILLO FAMILY THREE, LLC (Petrillo) and the VILLAGE OF BRONXVILLE (the Village), as asserted against HSBC (Mot. Seq. 1); and the motion of the VILLAGE OF BRONXVILLE, made pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's amended complaint and the cross claims of HSBC and PETRILLO FAMILY THREE, LLC, as asserted against the Village (Mot. Seq. 2).

Plaintiff alleges that she sustained injuries on September 11, 2017 when she tripped and fell in front of the premises known as 72-74 Pondfield Road (hereinafter referred to as the subject premises), located in the Village of Bronxville when her foot got caught on the a broken part of the sidewalk. The subject premises is owned by Petrillo and leased to HSBC, who operates it as a commercial bank. The sidewalk and curb area adjacent to the subject premises are owned by the Village. Plaintiff — a resident of the Village — frequented the bank as a customer. On the date in question, plaintiff avers that she parked her car across the street from the subject premises, and as she was walking the roadway to enter onto the sidewalk, her foot became entangled in a broken part of the curbstone on the edge of the sidewalk where two polyvinyl chloride (PVC) pipes were protruding, thus causing her to fall and sustain personal injuries.

¹ HSBC was incorrectly sued as HSBC NORTH AMERICA HOLDINGS, INC. in the initial complaint.

As a result, plaintiff commenced this personal injury action. Each of the defendants interposed separate answers, asserting cross claims against the other. Following discovery, HSBC and the Village now separately move for summary judgment to dismiss the amended complaint and cross claims as asserted against them, each contending on different grounds that they are not liable for plaintiff's injuries.

CPLR 3212 (b) states in relevant part that a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "Summary judgment is designed to expedite all civil cases by eliminating from the [t]rial [c]alendar claims which can properly be resolved as a matter of law . . . when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the [t]rial [c]alendar and thus deny to other litigants the right to have their claims promptly adjudicated" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). Though it is an appropriate tool to weed out meritless claims, summary judgment is a drastic remedy not to be granted where there is any doubt about the existence of a triable issue of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

I. HSBC'S MOTION FOR SUMMARY JUDGMENT (MOT. SEQ. 1)

In support of its motion, HSBC relies upon, among other things, the lease agreements and several lease extensions executed by Petrillo's predecessors and HSBC's predecessors. The first lease agreement, dated June 27, 1978, is for a 20-year term between Edward J. Petrillo as the landlord and Westchester Federal Savings & Loan Association as the tenant. The commercial space rented is for the "southerly one-half of the building" commonly known as 72-74 Pondfield Road. Paragraph 30 of the 1978 lease provides that "Tenant shall at Tenant's expense, keep the demised premises clean and in order, and to the satisfaction of Landlord, and if the demised premises are situated on the street floor, Tenant shall, at Tenant's own expense, make all repairs and replacements to the sidewalks and curbs adjacent [to the subject premises], made necessary by Tenant's use or occupancy of the demised premises, or negligence, and keep sidewalks and curbs free from snow, ice, dirt[,] and rubbish."

After the lease was renewed in January 1999, it was extended to a 5-year term pursuant to an "Extension of Lease Agreement" dated November 3, 2003 between Hampshire Management, LLC and HSBC.² Paragraph 4 therein provides that "Lessor shall be responsible at Lessor's sole cost and expense for all repairs to . . . the sidewalk in front of the Demised Premises." And Paragraph 8 states that "[e]xcept as otherwise modified or amended herein, all other terms and conditions contained in the [initial 1978 lease agreement] shall remain in full force and effect as if set forth herein at length." None of the

² Hampshire became the landlord as successor-in-interest to Hampshire Management Co., who is the successor-in-interest to the Estate of Edward J. Petrillo. Hampshire deeded the subject premises to Petrillo in June 2003. HSBC is the successor-in-interest to Westchester Federal Savings & Loan Association.

enumerated paragraphs set forth thereafter that were amended or modified in the 2003 extension agreement are relevant to this action.

Two subsequent lease extensions entered into between Hampshire and HSBC — one in October 2007 followed by one in August 2013 — reflect that the lease term was extended through February 28, 2019. Other than the provisions pertaining to the amount of rent and the option of further extending the lease, the 2013 “Modification and Extension of Agreement” states that “[e]xcept as modified herein, all of the terms, covenants, conditions and provisions of the Lease are hereby ratified, and shall remain in full force and effect.”

HSBC argues that it is entitled to summary judgment inasmuch as the Village was required to repair or replace the missing curbstone on the sidewalk; that HSBC had no leasehold duty to repair the PVC drainage pipe on the curbside of the sidewalk; and that HSBC owed no duty to plaintiff to repair the curbstone in the sidewalk where plaintiff fell, as was conceded by Gregory Petrillo, an owner of codefendant Petrillo. Importantly, Petrillo does not deny that it was responsible for the roof drainage system and the PVC pipes protruding at the curb. Rather, Petrillo adopts HSBC’s position and supports HSBC’s motion in all respects. Petrillo, however, opposes the Village’s motion in its entirety.

Plaintiff points to the language in paragraph 30 of the 1978 lease agreement and paragraph 4 of the 2003 extension, arguing that the former provision covering “sidewalks and curbs” remains in full force and effect and, so, HSBC, as the tenant, had the obligation to repair and maintain the sidewalk and curb adjacent to the subject premises.

“An owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition” (*Livingston v Better Med. Health, P.C.*, 149 AD3d 1061, 1062 [2d Dept 2017], *lv denied* 29 NY3d 916 [2017]). “An out-of-possession landlord and its agent are not liable for injuries caused by dangerous conditions on leased premises in the absence of a statute imposing liability, a contractual provision placing the duty to repair on the landlord, or a course of conduct by the landlord giving rise to a duty” (*Irizarry v Felice Realty Corp.*, 157 AD3d 874, 874 [2d Dept 2018]; *see O’Toole v City of Yonkers*, 107 AD3d 866, 867 [2d Dept 2013]).

Here, HSBC established its entitlement to judgment as a matter of law as against it because Petrillo, as the out-of-possession landlord, conceded the fact that it had a contractual duty to maintain the sidewalk and curb adjacent to the subject premises (*see Ferraro v 270 Skip Lane, LLC*, 177 AD3d 651, 652 [2d Dept 2019]). The record reflects that PVC pipes are part of the flat roof drainage system installed and maintained by Petrillo. The water exits by a single roof top drain, then passes through an internal piping system that exits the area beneath the curb into the street. A photo of the site of plaintiff’s fall shows the broken curbstone and the two protruding PVC pipes. The record does not evince that HSBC created this defective condition, caused it, or maintained it in any manner whatsoever (*see O’Toole v City of Yonkers*, 107 AD3d at 868). Hence, the court need not address the issue of whether HSBC had notice of the alleged dangerous condition (*see Ferraro v 270 Skip Lane, LLC*, 177 AD3d at 653).

Moreover, plaintiff omits referencing critical language from paragraph 30 of the 1978 lease agreement, which reads that HSBC is to “make all repairs and replacements to the sidewalks and curbs adjacent” to the subject premises that are “*made necessary by [HSBC’s] use or occupancy of the demised premises, or negligence*” (emphasis added). This emphasized language is an essential condition for HSBC to make repairs to the curb. Neither plaintiff nor the Village demonstrated that HSBC did anything to affect the condition of the PVC pipes or the curb area in dispute, and there is nothing in the record to suggest otherwise. Further, the 2003 extension of the lease agreement provides that Petrillo, as the lessor/landlord, was “responsible at [its] sole cost and expense for all repairs to . . . the sidewalk in front of the [subject] [p]remises.” Hence, HSBC was not responsible for the conditions of the sidewalk or curb that plaintiff alleges caused her to trip and fall (see *Ferraro v 270 Skip Lane, LLC*, 177 AD3d at 652; *O’Toole v City of Yonkers*, 107 AD3d at 868).³ Thus, HSBC’s motion for summary judgment dismissing the amended complaint and the cross claims of the Village and Petrillo as asserted against it, is granted.

II. THE VILLAGE’S MOTION FOR SUMMARY JUDGMENT (MOT. SEQ. 2)

In support of its motion for summary judgment, the Village submits, among other things, the deposition testimony of and an affidavit from James Palmer, Village Clerk & Administrator. In so doing, the Village argues that it did not receive prior written notice that the sidewalk or curb had a defective condition as is statutorily required by Village of Bronxville Code § 260-33. The Village further asserts that there is no exception to the prior written notice requirement inasmuch it did not commit any affirmative act that created the alleged defect. The Village emphasizes that the Code expressly prohibits water discharge onto a public roadway and, so, it could not have created the defective condition.

Plaintiff, in opposition, contends that the Village had constructive notice of the defective condition based on: a surveillance video camera system installed by the police department across the street from the subject premises which was in constant operation, including the day of the accident; as well as still images depicting the site of plaintiff’s fall and the area of the PVC pipe near the broken curbstone that caused her accident. This plaintiff argues, coupled with the Village’s admission that it generally bears responsibility for repairing and maintaining curbs along Village roads, is sufficient to create a triable issue of fact to overcome the Village’s motion.

“The Village may be liable only for those defects and dangerous conditions on its streets and sidewalks of which it has been actually notified, in writing. A general awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff’s fall” (*Farrago v Great Atl. & Pac. Tea Co., Inc.*, 17 AD3d 631, 632 [2d Dept 2005] [internal quotation marks, brackets, and citations omitted], *lv denied* 5 NY3d 710 [2005] [citing Village of Bronxville Code § 6-628; Village Law § 6-658; see *Healy v Village of Patchogue*, 28 AD3d 519, 519 [2d Dept 2006])). Here,

³ By arriving at this conclusion, the court need not consider the expert report submitted by plaintiff and the affidavit submitted by HSBC’s professional engineer. The court notes that the condition was repaired after the underlying incident.

the court finds that plaintiff has failed to rebut the Village's showing that it was not responsible for the alleged defective condition that caused plaintiff's trip and fall. Palmer attests that after having conducted a search of the Village's record, the Village had not received any written notices of claim pertaining to the subject premises prior to the date of accident; that the Village did not perform any maintenance or repair work near the accident site for "at least three years" before the accident; and the maintenance and repair of sidewalks adjacent to a property are the landowner's responsibility as is mandated by the Village of Bronxville Code § 260-14 (B) (1) (a). Plaintiff does not point to record evidence that the Village installed, maintained, or repaired the PVC pipes in question. Plaintiff thus failed to establish that the Village received prior written notice of the purported defective condition which allegedly caused plaintiff to trip and fall (*see Chirco v City of Long Beach*, 106 AD3d at 942-943; *Healy v Village of Patchogue*, 28 AD3d at 519-520; *Farrago v Great Atl. & Pac. Tea Co., Inc.*, 17 AD3d at 632-633).

Moreover, where, as here, "a municipality has enacted a prior written notice statute, constructive notice of a condition is insufficient to satisfy the requirement of prior written notice, nor does actual notice obviate the need to comply with the prior written notice requirement" (*Chirco v City of Long Beach*, 106 AD3d 941, 943 [2d Dept 2013] [internal quotation marks, brackets, ellipses, and citations omitted]). The mere presence of the video surveillance camera, in and of itself, is not proof that the Village was on constructive notice of the defective condition. Notwithstanding plaintiff's assertion that Palmer contradicted himself as to the manner in which the Village records notices of defects and logs the maintenance of its streets, plaintiff nevertheless failed to show that the Village was on notice of the alleged defective condition, or that it made repairs so closely in time to the date of the accident that render the Village responsible for such condition. The Village established, prima facie, that it did not create the alleged defect or cause it to occur through use of the sidewalk (*see Rakowski v St. Aidan's R.C. Church*, 135 AD3d 730, 731 [2d Dept 2016]; *Ivanyushkina v City of New York*, 300 AD2d 544, 545 [2d Dept 2002]).

Notwithstanding, Petrillo may still arguably be held liable for the alleged defective condition and plaintiff's resultant injuries. "Generally, liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks is placed on the municipality and not the abutting landowner. However, an abutting landowner will be liable to a pedestrian injured by a defect in a sidewalk where the landowner created the defect, caused the defect to occur by some special use of the sidewalk, or breached a specific ordinance or statute which obligates the owner to maintain the sidewalk" (*Rakowski v St. Aidan's R.C. Church*, 135 AD3d at 731 [internal quotation marks and citations omitted]; *see Cordova v City of New York*, 22 AD3d 784, 785 [2d Dept 2005]).

The relevant ordinance here, Village of Bronxville Code § 260-14 (B) (1) (a), states that "each owner of occupied property in the Village is hereby required to own and keep that portion of any sidewalk which is on the property or between the property and the immediately adjacent street line free of all obstructions . . . and to maintain such sidewalk in good repair and in a safe . . . condition." Petrillo, as the landowner, does not refute that it had this statutory obligation; or that it had a contractual duty under the lease agreement to make repairs/replacements to the sidewalks and curbs adjacent of the subject premises.

Therefore, the court grants the Village's for summary judgment dismissing the amended complaint and the cross claims of Petrillo and HSBC insofar asserted as against it (see *Rakowski v St. Aidan's R.C. Church*, 135 AD3d at 731; *Healy v Village of Patchogue*, 28 AD3d at 519).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by the parties was not addressed by the court, it is hereby denied. Accordingly, it is hereby:

ORDERED that the motion of HSBC BANK USA, N.A., made pursuant to CPLR 3212, for an order granting summary judgment dismissing the amended complaint of MARY KEANE and the cross claims of codefendants PETRILLO FAMILY THREE, LLC and the VILLAGE OF BRONXVILLE as asserted against HSBC BANK USA, N.A., is granted in its entirety (Mot. Seq. 1); and it is further

ORDERED that the motion of the VILLAGE OF BRONXVILLE, made pursuant to CPLR 3212, for an order granting summary judgment dismissing the amended complaint of MARY KEANE and the cross claims of codefendants HSBC BANK USA, N.A., and PETRILLO FAMILY THREE, LLC, as asserted against the VILLAGE OF BRONXVILLE (Mot. Seq. 2), is granted in its entirety; and it is further

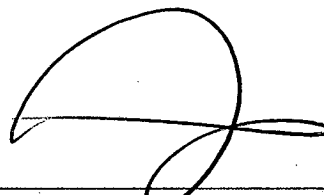
ORDERED that the caption shall be amended accordingly to reflect the determinations made in this decision; and it is further

ORDERED that the remaining parties shall appear at the Settlement Conference Part of the Court, at a date, time, and manner as hereafter directed by that Part.

The foregoing constitutes the Decision/Order of the court.

Dated: August 10, 2020
White Plains, New York

ENTER:



HON. LAWRENCE H. ECKER, J.S.C.

APPEARANCES:

All parties appearing via NYSCEF.