

de Flores v County of Suffolk
2020 NY Slip Op 34914(U)
May 21, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 623935/2017
Judge: Denise F. Molia
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INDEX No. 623935-17

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

ORIGINAL

PRESENT:

Hon. DENISE F. MOLIA
Justice

MOTION DATE: 11/29/2018, 12/12/2018
ADJ. DATE: 5/24/2019
Mot. Seq. #001 - MG
Mot. Seq. #002 - MG

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YRENE BONILLA DE FLORES, :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 COUNTY OF SUFFOLK, :
 SUFFOLK COUNTY DEPARTMENT OF :
 PUBLIC WORKS, :
 SUFFOLK COUNTY TRANSIT AND SAYVILLE :
 PLAZA SHOPPING CENTER, INC. :
 :
 Defendants. :
 :
-----X

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Upon the following papers (1) Notice of Motion for Summary Judgment by Defendant Sayville Plaza Shopping Center, Inc., dated October 23, 2018, and supporting papers (Mot. Seq. 001); (2) Affirmation in Opposition by Plaintiff, dated December 6, 2018, and supporting papers; (3) Affirmation in Reply by Defendant Sayville Plaza Shopping Center, Inc., dated February 7, 2019, and supporting papers; (4) Notice of Cross Motion for Summary Judgment by Defendants County of Suffolk, Suffolk County Department of Public Works and Suffolk County Transit, dated November 19, 2018, and supporting papers (Mot. Seq. 002); (5) Affirmation in Opposition by the Plaintiff, dated February 5, 2019, and supporting papers; (6) Affirmation in Opposition by Defendant Sayville Plaza Shopping Center, Inc., dated February 7, 2019, and supporting papers; (7) Affirmation in Reply by Defendants County of Suffolk, Suffolk County Department of Public Works and Suffolk County Transit, dated February 11, 2019, and supporting papers, it is

ORDERED that defendant Sayville Plaza Shopping Center, Inc.'s motion for summary judgment dismissing the plaintiff's complaint against it and dismissing the cross-claims of the co-defendants is granted as set forth below; and it is further

ORDERED that the cross motion by defendants County of Suffolk, Suffolk County Department of Public Works and Suffolk County Transit for summary judgment dismissing the plaintiff's complaint and the cross-claims asserted against them, is granted.

The plaintiff commenced the instant action on December 14, 2017, alleging that on January 26, 2017 at approximately 8am, the plaintiff sustained personal injuries while at a bus shelter located at the north east corner of Main Street (Country Road 85) and Railroad Avenue in Sayville, New York. The plaintiff claims that she entered the bus shelter and proceeded to the corner, when she caught her leg on the metal frame of the bus shelter, causing her to trip and fall through a missing section of the metal bus shelter where a clear pane, glass, partition, panel or barrier should have been in place. As a result of this incident, the plaintiff claims to have suffered serious injuries, including a left tibial plateau fracture requiring surgery and resulting in scarring. The defendants interposed answers as well as cross claims.

Defendant Sayville Plaza Shopping Center, Inc. ("Shopping Center") now moves for summary judgment dismissing the plaintiff's complaint against it and dismissing the cross-claims of the co-defendants seeking contribution and/or indemnification. Defendants County of Suffolk, Suffolk County Department of Public Works and Suffolk County Transit ("County Defendants") cross move for summary judgment dismissing the plaintiff's complaint against them and dismissing the cross-claims asserted against them by defendant Shopping Center.

To obtain summary judgment, the movant must establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor by tendering evidentiary proof in admissible form (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). To defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (*id.*) "A party who seeks a finding that a summary judgment motion is premature is required to put forth some evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Reale v Tsoukas*, 146 AD3d 833, 45 NYS3d 148 [2d Dept 2017])[*internal citations omitted*]).

Defendant Shopping Center established, prima facie, its entitlement to summary judgment by demonstrating that the plaintiff has no viable basis to hold the Shopping Center liable for injuries the plaintiff allegedly sustained due to a defect in the bus shelter which defendant Shopping Center does not own, operate or control. In support of its motion, the defendant attaches discovery responses from the co-defendants, indicating that the bus shelter in question is owned by Suffolk County and under the control of the Department of Public Works, and that the Department of Public Works is responsible for the maintenance, upkeep and repair of the bus shelter. The defendant Shopping Center also annexes an affidavit of its President, Augusto Malandrucolo, affirming that the defendant Shopping Center never entered into any agreements pertaining to the creation, control, operation, maintenance or repair of the bus shelter, nor has it ever performed any work relating to the bus shelter. The plaintiff does not allege that the injury occurred on the property outside of the bus shelter or due to any defective condition on the property outside of the bus shelter. Here, liability is premised upon alleged negligence in the ownership, maintenance and repair of the bus shelter where the plaintiff was injured. The defendant Shopping Center has established that because it does not own, operate, control or maintain the bus shelter in which the injury occurred, the plaintiff cannot establish liability on the part of the Shopping Center (*see Blakeney v City of New York*, 222 AD2d 390, 634 NYS2d 521 [2d Dept 1995]; *Little v New York City Tr. Auth.*, 132 AD3d 738, 18 NYS3d 110 [2d Dept 2015]).

In opposition, the plaintiff fails to raise a triable issue of fact. The plaintiff argues that more discovery is needed pertaining to the illumination of the area and any possibility that snow removal was related to how the glass panel in the bus shelter was removed. However, the “mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion” (*Reale v Tsoukas*, 146 AD3d 833, 45 NYS3d 148 [2d Dept 2017]; see also, *Creutzberger v County of Suffolk*, 140 AD3d 915, 33 NYS3d 438 [2d Dept 2016]; *Little v New York City Tr. Auth.*, 132 AD3d 738, 18 NYS3d 110 [2d Dept 2015]). The plaintiff cites to no statute or caselaw establishing that the Shopping Center owed any duty to the plaintiff while she was inside County-owned property, regardless of whether the bus shelter is located on property owned by the Shopping Center.

Accordingly, the defendant Shopping Center’s motion for summary judgment dismissing the plaintiff’s complaint against it as well as the cross claims asserted by the co-defendants, is granted. The Court, in its discretion, denies the defendant Shopping Center’s request for sanctions pursuant to 22 NYCRR 130-1.1(c).

The Court next turns to the motion by the County Defendants for summary judgment. The County Defendants argue that because Suffolk County did not receive written notice of the alleged defective condition prior to the plaintiff’s alleged injury as required by the Suffolk County Charter §C8-2A, the plaintiff cannot maintain the instant action. “A municipality that has adopted a prior written notice statute cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies” (*Mahabir v Suffolk County Water Authority*, 130 AD3d 694, 11 NYS3d 863 [Mem][2d Dept 2015]). “Recognized exceptions to the prior written notice requirement exist where the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a special benefit upon it” (*Masotto v Village of Lindenhurst*, 100 AD3d 719, 955 NYS2d 86 [2d Dept 2012]). The Court agrees with the County Defendants’ assertion that the Charter section requiring notice is applicable to the bus shelter here, as the charter’s plain language includes any appurtenance or structure located in proximity or attached to a sidewalk or walkway. The County Defendants submitted evidence in the form of affidavits from County officials demonstrating that no prior written notice of the alleged defect had been received (see, *Albano v Suffolk County Community College*, 66 AD3d 719, 887 NYS2d 200 [2d Dept 2009]; *Tramontano v County of Suffolk*, 239 AD2d 407, 658 NYS2d 342 [2d Dept 1997]). Accordingly, the County Defendants established their prima facie entitlement to judgment as a matter of law (see, *Albano v Suffolk County Community College*, 66 AD3d 719, 887 NYS2d 200 [2d Dept 2009]; *Tramontano v County of Suffolk*, 239 AD2d 407, 658 NYS2d 342 [2d Dept 1997]).

Once the County Defendants satisfied their burden of showing a lack of prior written notice, the plaintiff, in order to defeat the County’s motion, was required to come forward with admissible evidence to raise a triable issue of fact as to whether notice was given, or whether an exception applies (see, *Wohlars v Town of Islip*, 71 AD3d 1007, 898 NYS2d 59 [2d Dept 2010]; *Brown v County of Suffolk*, 89 AD3d 661, 931 NYS2d 685 [2d Dept 2011]). In opposition to the County Defendants’ motion, the plaintiff failed to come forward with any evidence indicating that the County Defendants created the condition through an affirmative act of negligence or that the required notice was provided, thereby failing to raise a triable issue of fact (see, *Lichtman v Village of Kiryas Joel*, 90 AD3d 1001, 935 NYS2d 331 [2d Dept 2011]; *Smith v Town of Brookhaven*, 45 AD3d 567, 846 NYS2d 203 [2d Dept 2007]; *Tramontano v County of Suffolk*, 239 AD2d 407, 658 NYS2d 342 [2d Dept 1997]; *Albano v Suffolk County*, 99 AD3d 741, 952 NYS2d 245 [2d Dept 2012]; *O’Rourke v Town of Smithtown*, 129 AD2d 570, 514, NYS2d 68 [2d Dept 1987]). The plaintiff’s contention that the fact that the glass panel had been completely removed rather than merely cracked, suggests that it may have been the result of an

affirmative act by the County Defendants, amounts to mere speculation (*see, Long v City of Mount Vernon*, 107 AD3d 765, 967 NYS2d 749 [2d Dept 2013]). The Court finds the plaintiff's remaining contentions without merit, including its contention that Suffolk County Charter §C8-2A is inapplicable to the facts herein.

Accordingly, the cross motion by defendants County of Suffolk, Suffolk County Department of Public Works and Suffolk County Transit for summary judgment dismissing the plaintiff's complaint and the cross-claims asserted against them, is granted.

Dated: 5-21-20

HON. DENISE F. MOLIA *E.F.S.C.C.*

HON. DENISE F. MOLIA

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