

Pozzulo v Botta

2020 NY Slip Op 35007(U)

January 8, 2020

Supreme Court, Nassau County

Docket Number: Index No. 605876/2017

Judge: Anna R. Anzalone

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK

**PRESENT: Honorable Anna R. Anzalone
Justice of the Supreme Court**

_____ x

IRENE POZZULO and ROCCO POZZULO,

TRIAL/IAS, PART 15

NASSAU COUNTY

Plaintiffs,

- against -

Motion Seq# 3

**CHRISTOPHER BOTTA and CATHERINE D.
BOTTA,**

Index No. 605876/2017

Defendants.

_____ x

CHRISTOPHER BOTTA and CATHERINE D. BOTTA,

Third Third-Party Plaintiffs,

-against-

**INCORPORATED VILLAGE OF ROCKVILLE
CENTRE,**

Third Third-Party Defendants.

_____ x

The following papers read on this motion:

Notice of Motion.....1

Affirmation in Opposition2

This instant action is one of negligence. Plaintiff Irene Pozzulo (“Irene”) alleges that on February 10, 2017 she slipped and fell on an accumulation of snow and ice situated on the driveway apron located at 29 Milford Place, Rockville Centre, New York (“Accident”). The driveway apron

is part of the defendant/third-party plaintiffs' Christopher Botta and Catherine D. Botta ("Botta") private residence, which adjoins/abuts South Side Middle School.

Plaintiff filed a summons and verified complaint against defendant Botta, and issue was joined on July 6, 2017 when Botta filed an answer. On September 28, 2017, Botta commenced a third-party action against Rockville Centre Union Free School District and South Side Middle School ("School District"), and issue was joined on October 19, 2017 when the School District filed an answer. On April 5, 2018, the School District commenced a second third party action against the Incorporated Village of Rockville Centre ("Village") and issued was joined when the Village filed an answer on June 1, 2018. On April 19, 2018, Botta further commenced a third third party action against the Village and issue was joined on June 1, 2018 when the Village answered.

By Decision dated July 9, 2019 and entered July 15, 2019, this Court granted the School District's motion dismissing the third-party plaintiff's complaint, together with any and all cross-claims against the School District. The Village now moves for summary judgment pursuant to CPLR§ 3212 dismissing the plaintiffs' verified complaint, and dismissal of any and all cross-claims against the defendant Village. The Bottas allege that the Village was negligent in its ownership, maintenance, control and repair of the subject area. In addition, the complaint allege that the Village failed to properly remove snow and ice in the area of Milford and Ohio Street.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v. Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 (1968). To make a *prima facie* showing, the motion must be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. *Id.* Once a *prima facie* showing has been made, 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 the action. *Id.*; *see also Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 (1980).

It is undisputed that prior written notice of a defect is required in order to impose liability upon the Village for personal injuries resulting from said defect CPLR §9804; Village Law §6-628. Additionally, the Code of Inc. Village of Rockville Centre. Sec. 341-a states:

No civil action shall be brought or maintained against the Village of Rockville Centre for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous, or obstructed, or in consequence of the existence or accumulation of snow or ice upon any street, highway, bridge, sidewalk or crosswalk, unless written notice of the existence of such condition, relating to the particular place, had therefore actually been given to the Board of Trustees of the Village of Rockville Centre and there had been a failure or neglect on the part of said Village to cause such condition to be corrected or such snow or ice to be removed or the place otherwise made within a reasonable time after the receipt of such notice.

Where a municipality that has enacted a prior statute demonstrates that it has not received written notice of an alleged defective condition, the municipality has established its *prima facie* entitlement to summary judgment as a matter of law. The burden then shifts to the plaintiff to show that one of the two exceptions to the prior written notice requirement apply, which are either that the municipality created the condition through an affirmative act of negligence, or that a special use of the location resulted in a special benefit to the municipality. *Groninger v. Village of Mamaroneck*, 67 AD3d 733, 2nd Dept (2009) aff'd 17 NY3d 125 2011.

On August 2, 2019, John Thorp, the director of operations for the Department of Public Works for the Village of Rockville Centre currently and at the time of the alleged accident testified and also submitted an affidavit. Mr. Thorp indicated that he conducted a search for any prior written complaints or notices regarding the driveway apron located at 29 Milford Place, Rockville Centre, NY ("Subject Location") for five years prior to the date of the Accident and found no prior written complaints or any written notice at the Subject Location. Additionally, Mr. Thorp attests that he conducted a search of the Village records including contracts, permits and repairs and indicated that the Village did not perform any repairs or perform any work at the Subject Location in the five years prior to the Accident. Mr. Thorp reviewed the records which showed that the Village removed snow from all Village streets on February 9, 2019 and continued on February 10, 2019. Prior to the Accident, the Village had not received any complaints from Village residents regarding the snow removal on Milford Place, Rockville Centre. Furthermore, Mr. Torp indicated

that it not custom and practice to assist the South Side Middle School in any way in snow removal, and the school employees are responsible for the snow removal on the School grounds.

The plaintiff submits no evidence that the defendant had prior written notice of the alleged defect, and therefore, the court will now consider if plaintiff has shown that one of the two exceptions to the prior written notice requirement apply, either that the municipality created the condition through an affirmative act of negligence, or that a special use of the location resulted in a special benefit to the municipality. *Id.* The plaintiff only argues that one of the exceptions applies, ie, that the Village created the condition through an affirmative act of negligence. Plaintiff argues that Mr. Thorp could not establish that the Village had nothing to do with the defect. Plaintiff further argues that a jury could determine that the Village actions in plowing the snow near the Subject location was the proximate cause of the accident in that the cleared driveway apron, having been previously shoveled by the homeowner, could have been covered by the actions of the Village snow plows thereafter.

Based upon the papers submitted, the Court finds that there is no evidence that the Village created a hazardous condition through an affirmative act of negligence. *See Lima v. Village of Garden City*, 131 AD3d947, 16 NYS3rd 249 (2d Dept 2015). Accordingly, defendant, Village of Rockville Centre motion to dismiss is granted in its entirety.

Counsel for Defendant Village shall file and serve a copy of the within order with notice of entry upon all parties within twenty (20) days from the date of this Order. The parties shall appear in the DCM trial part as scheduled at 100 Supreme Court Drive, Mineola, NY on January 21, 2020 at 9:30 am.

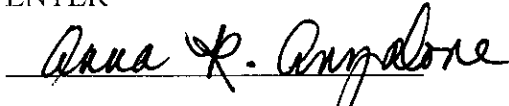
The foregoing constitutes the Decision and Order of the Court.

DATED: January 8, 2020

Mineola, New York

ENTERED
JAN 16 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER


HON. ANNA R. ANZALONE