Parthesius v Town of Huntington
2020 NY Slip Op 35072(U)
July 20, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 604186/2019
Judge: Geroge Nolan

Short Form Order Index No. 604186/2019

SUPREME COURT – STATE OF NEW YORK
PART 55 - SUFFOLK COUNTY

P R E S E N T:
Hon. George Nolan
Justice Supreme Court

DAMON PARTHESIUS,

Plaintiff,

-against-

TOWN OF HUNTINGTON,

Defendant.

Mot. Seq. No. #001 - MD
Orig. Return Date: 03/12/2020
Mot. Submit Date: 07/02/2020

PLAINTIFF'S ATTORNEY
GRUENBERG KELLY DELLA
700 Koehler Avenue
Ronkonkoma, NY 11779

DEFENDANT'S ATTORNEY
NICHOLAS R. CIAPPETA, ESQ.
Town Attorney for the Town of Huntington
100 Main Street
Huntington, NY 11743

Upon the e-filed documents numbered 24 through 39, and upon due deliberation and consideration by the Court of the foregoing papers, it is hereby

ORDERED that defendant Town of Huntington's motion (motion sequence no. 001) for summary judgment is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Damon Parthesisus, on October 9, 2018, when he tripped and fell while walking on the sidewalk within the municipal parking lot located between Main and Elm Streets in Huntington, New York. By his bill of particulars,[1] plaintiff alleges that a patched asphalt repair between two uneven sidewalk flags, created a dangerous condition and that defendant was negligent in creating a defective condition, failing to maintain the sidewalk and failing to provide sufficient lighting and illumination at the accident location.

[1]The court notes that the plaintiff's summons and complaint misidentifies the accident location as a "parking lot at 100 Main Street, Huntington, New York" but that the notice of claim correctly identifies the location as "a sidewalk located within the Elm Street/Main Street municipal parking lot." Further, the evidence to date clearly confirms the location in the notice of claim to be the correct location. Accordingly the court will exercise its discretion and conform the pleadings to the proof pursuant to CPLR 3025(c).

The defendant Town of Huntington ("Town") moves for summary judgment in its favor dismissing the complaint against it on the basis that it lacked prior written notice of the alleged dangerous condition as mandated by Town Law §65-a and Huntington Town Code §174-3 before plaintiff was injured. In support, the Town provides, among other things, copies of the pleadings, deposition transcripts, an affidavit from Richard Scheffler, Highway Construction Coordinator, an affidavit from Diana Esposito, Principal Office Assistant in the Town Clerk's office, an affidavit from Mark Tyree, from the Town Department of General Services and an affidavit from John Carroll, a maintenance Mechanic III/Cement Finisher with the Town Department of General Services.[2]

It is well settled that the proponent of a summary judgment motion bears the initial burden of establishing his or her entitlement to judgment, as a matter of law, in his or her favor by offering admissible evidence sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of any opposition thereto (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once the movant has made the requisite showing, the burden then shifts to the opposing party, requiring him or her to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). On such a motion, the Court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the nonmoving party; the Court is not responsible for resolving issues of fact or determining matters of credibility (*see* ***Chimbo v Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Pearson v Dix McBride, LLC***, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see* ***Chimbo v Bolivar***, *supra*; ***Benetatos v Comerford***, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]).

"[A] municipality that has adopted a 'prior written notice law' 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" (***Forbes v City of New York***, 85 AD3d 1106, 1107, 926 NYS2d 309 [2d Dept 2011]). Prior written notice laws must be strictly construed (***Lagrasta v Town of Oyster Bay***, 88 AD3d 658, 930 NYS2d 254 [2d Dept 2011]). "A verbal or telephonic communication to a municipal body, even if reduced to writing, cannot satisfy the prior written notice requirement" (***Tortorici v City of New York***, 131 AD3d 959, 960, 16 NYS3d 572 [2d Dept 2015]; *see* ***Gorman v Town of Huntington***, 12 NY3d 275, 280, 879 NYS2d 379 [2009]). Writings prepared by Town employees as a result of verbal complaints do not satisfy the prior written notice requirement (*see* ***Wolin v Town of North Hempstead***, 129 AD3d 833, 11 NYS3d 627 [2d Dept 2015]). Prior written repair orders also do not satisfy the statutory requirement (*see* ***Lopez v Gonzalez***, 44 AD3d 1012, 845 NYS2d 91 [2d Dept 2007]; ***Dalton v City of Saratoga Springs***, 12 AD3d 899, 784 NYS2d 702 [3d Dept 2004]).

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[2]In his affidavit, Mr. Carroll states, *inter alia*, that the Town repaired the subject sidewalk in 2019.

Actual or constructive notice of the defective condition are both insufficient to satisfy the prior written notice requirement (***Groninger v Village of Mamaroneck***, 67 AD3d 733, 888 NYS2d 205 [2d Dept 2009]).

However, "[r]ecognized 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" (***Morreale v Town of Smithtown***, 153 AD3d 917, 918, 61 NYS3d 269 [2d Dept 2017], quoting ***Miller v Village of E. Hampton***, 98 AD3d 1007, 1008, 951 NYS2d 171 [2d Dept 2012]). Any affirmative negligence must immediately result in the existence of the dangerous condition (***Yarborough v City of New York***, 10 NY3d 726, 853 NYS2d 261 [2008]; ***Trela v City of Long Beach***, 157 AD3d 747, 69 NYS3d 58 [2d Dept 2018]).

The Town has demonstrated that it had no prior written notice of the alleged defective roadway condition (*see* ***Betz v Town of Huntington***, 106 AD3d 1041, 966 NYS2d 471 [2d Dept 2013]). Pursuant to Section 174-3 of the Huntington Town Code and Section 65-a of the Town Law, the Town will not be liable for a defective or dangerous condition on a sidewalk unless written notice of the defective condition is actually given to the Town Clerk or Superintendent of Highways. The affidavit of Diana Esposito establishes that a search of the Town Clerk's records revealed that no written complaints were received by the Clerk's office concerning any dangerous condition on the subject sidewalk for a period of time dating back at least 5 year prior to the date of plaintiff's accident (*see* ***Fisher v Town of North Hampstead***, 134 AD3d 670, 20 NYS3d 167 [2d Dept 2015]). The affidavit of Richard Scheffler establishes that a search of the Highway Superintendent's office revealed that no written complaints were received by that office concerning any dangerous conditions on the subject sidewalk for a period of time dating back at least 5 years prior to the date of plaintiff's accident (*see* ***Fisher v Town of North Hempstead***, *supra*).

However, t the deposition testimony of Sean Cavanagh, who testified on behalf of the Town, creates a triable issue of fact as to whether the Town created the alleged dangerous condition and further leaves open the question of whether the repair immediately resulted in a defective condition (*see* ***Abreu-Lopez v Inc. Vil. of Freeport***, 142 AD3d 515, 36 NYS3d 492 [2d Dept 2016]). (*see* ***Mollahan v Village of Port Washington North***, 153 AD2d 881, 545 NYS2d 601 [2d Dept 1989]). Mr. Cavanagh testified that while he did not know who made the asphalt repair, it was likely a town employee because "no one else would drive around with asphalt and put it on a sidewalk." The affidavit of John Carroll, meant to establish that the defective condition occurred over time, is conclusory and speculative as to the condition of the asphalt repair as it existed at the time it was made. In his affidavit, Mr. Carroll states that he had "no recollection of observing that asphalt repair prior to being directed to replace that portion of the sidewalk in 2019." Accordingly, the motion by the Town of Huntington for summary judgment dismissing the complaint against it is denied.

The parties are reminded that this matter is scheduled for a compliance conference before the undersigned on August 18, 2020 at 9:30 a.m.

The foregoing constitutes the decision and Order of the Court.

ENTER

Date: July 20, 2020
Riverhead, New York

HON. GEORGE NOLAN, J.S.C.

__ **FINAL DISPOSITION** _X_ **NON-FINAL DISPOSITION**