

Drouin v City of Newburgh
2020 NY Slip Op 35281(U)
July 27, 2020
Supreme Court, Orange County
Docket Number: Index No. EF002165-2020
Judge: Sandra B. Sciortino
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This opinion is uncorrected and not selected for official publication.

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 ORANGE

-----X

CURTIS DROUIN,

Plaintiff,

DECISION AND ORDER

INDEX NO.: EF002165-2020

Motion Date: 7/15/2020

Sequence No. 1

-against-

**CITY OF NEWBURGH, CITY OF NEWBURGH
DEPARTMENT OF PUBLIC WORKS, 255
FIRST STREET, LLC, and "ABC CORP.", (the
latter name being fictitious, true name unknown,
and used to connote persons responsible for this
occurrence),**

Defendants.

-----X

SCIORTINO, J.

The following papers numbered 1 to 11 were considered in connection with the unopposed application of defendant City of Newburgh (Newburgh) for summary judgment, dismissing the Complaint and all cross-claims as against it:

PAPERS

NUMBERED

Notice of Motion/Affirmation (Walsh)/Exhibits A-F/
Affidavit (Vitek)/Exhibits H-I

1 - 11

Background and Procedural History

This is an action for personal injuries arising out of a slip and fall accident which is alleged to have occurred on April 16, 2019 at approximately 11:00 a.m. near 255 First Street in the City of Newburgh. Plaintiff alleges that he fell to the ground on a dangerous, defective and/or hazardous area of broken and uneven sidewalk.

Plaintiff served a Notice of Claim against Newburgh on August 9, 2019. (Exhibit A) Newburgh served a Demand for 50-h Hearing originally scheduled for August 30, 2019. (Exhibit B) Upon the plaintiff's request for an adjournment, the hearing was rescheduled to September 20, 2019. On September 19, 2020, plaintiff's counsel again asked for an adjournment advising that plaintiff was homeless and did not have transportation. Plaintiff counsel was going to provide transport, but could not do so on that day. A paralegal from plaintiff's law firm was to reschedule. In October and November 2019, Newburgh was advised that plaintiff was unavailable for the 50-h hearing as he was in rehab. (Exhibit C) The 50-h hearing was never held.

On June 9, 2020, Newburgh was served with a Summons and Complaint (Exhibit D) which had been electronically filed on March 16, 2020, just prior to the limitations of the Court's functions due to the COVID crisis. Newburgh filed its Answer on June 12, 2020. (Exhibit F) Co-defendant 255 First Street LLC filed its Answer on May 14, 2020. (Exhibit E)

By Notice of Motion electronically filed on June 17, 2020, NEWBURGH seeks summary judgment dismissing the complaint and all claims as against it. Newburgh states that plaintiff's failure to comply with General Municipal Law §50-h precludes him from commencing an action against the city and, even if plaintiff had complied, Newburgh had no prior written notice of the allegedly defective condition as required by the Code of the City of Newburgh, section C6.45. (Exhibit H)

Neither defendant filed any responsive papers.

Discussion

For the reasons which follow, the application of Newburgh is granted, and the Complaint is dismissed as against it and as against named defendant City of Newburgh Department of Public

Works (DPW).

“A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Nash v Port Wash. Union Free School Dist.*, 83 AD3d 136, 146 [2d Dept 2011], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986])

The purpose of General Municipal Law § 50-h is to enable a municipality to make a prompt investigation of the circumstances of a claim, by examining the claimant about the facts. The oral examination serves as a supplement to the claim and provides an investigatory tool to the municipality with a view toward settlement. (*Colon v. Martin*, 170 AD3d 1109 [2d Dept 2019]) Compliance with a demand for an oral examination of the claimant is a condition precedent to the commencement of an action against a municipal defendant, and the failure to so comply warrants dismissal. (*Cardella v. Suffolk Co. Police Department*, 176 AD3d 1029 [2d Dept 2019]; *Bernoudy v. County of Westchester*, 40 AD3d 896 [2d Dept 2007]) While compliance with section 50-h has been excused in exceptional circumstances (*See, e.g., Hur v. City of Poughkeepsie*, 71 AD2d 104 [2d Dept 1979]), no such circumstances were presented here. The only excuse proffered was plaintiff's entrance into rehab at some undefined point. The Second Department has held that not even a personal injury plaintiff's incarceration excuses a failure to appear at a 50-h hearing. (*Zapata v. County of Suffolk*, 23 AD3d 553 [2d Dept 2005])

Moreover, even if plaintiff had made such a showing, Section C6.45 of the City Code of Newburgh provides that there may be no tort liability unless written notice of the defect or dangerous condition was filed with the City Clerk and no action was taken to remedy or repair the condition within a reasonable time. Newburgh submitted the affidavit of the City Clerk, Lorene Vitek, who

avers that she made a search of the files in her office and found no record of written notice of a dangerous condition at or near 255 First Street within the City, on or before April 16, 2019, the date of plaintiff's alleged fall.

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 street or sidewalk unless it has received written notice of the defect." (*Weinstein v. County of Nassau*, 180 AD3d 730 [2d Dept 2020]; quoting, *Cimino v County of Nassau*, 105 AD3d 883, 884 [2d Dept 2013]) There is an exception to the prior written notice requirement where the municipality affirmatively created the defect through an act of negligence (*id.*), but no such showing has been made in this matter.

As such, the application of defendant Newburgh for summary judgment is granted. Newburgh has asserted, and no party controverts, that the DPW is a part of the city government and has no legal existence separate and apart from the city. As such, summary judgment is also granted as against DPW.

All cross-claims are dismissed as moot.

The remaining parties shall appear for Preliminary Conference on September 4, 2020 at 11:00 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: July 27, 2020
Goshen, New York

ENTER:



HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*