Doscher v Town of Eastchester
2021 NY Slip Op 33388(U)
September 24, 2021
Supreme Court, Westchester County
Docket Number: Index No. 66073/2016
Judge: Sam D. Walker
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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
PRESENT: HON. SAM D. WALKER, J.S.C.

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KATHERINE DOSCHER and DWIGHT DOSCHER,

Plaintiff,

-against-

DECISION & ORDER
Index No. 66073/2016
Motion Sequence 15

TOWN OF EASTCHESTER, CONSOLIDATED EDISON COMPANY OF NEW YORK, PERSICO CONTRACTING & TRUCKING, INC., and PCT CONTRACTING, LLC.,

Defendants.

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The following papers were received and considered in connection with the above-captioned matter:

Notice of Motion/Affirmation in Support/Exhibits A-L

Factual and Procedural Background

This action arises out of a trip and fall, which the plaintiff alleges occurred on July 31, 2015, on the asphalt/blacktopped portion of the sidewalk on the northerly side of New Rochelle Road between Labelle Road and Alta Drive in Bronxville, New York.

The defendant, Town of Eastchester (the "Town"), now files the instant motion for summary judgment, seeking to dismiss the action as against it. The Town argues that the alleged defect where the plaintiff fell was adjacent to the sub-station belonging to the defendant Consolidated Edison Company of New York ("Con Ed") and that ConEd's representative conceded that Con Ed had a responsibility and duty to maintain the area

where the plaintiff fell. The Town's Superintendent of the Highway Department also confirmed that Con Ed was responsible for the repair, restoration and maintenance of the accident site.

The Town further argues that, even if it had a responsibility to maintain the accident situs, no notice of the alleged defective condition was provided to the Town prior to the plaintiff's alleged fall. There was no opposition to the motion.

Discussion

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law. (*Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). "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 Hosp.*, 68 NY2d 320, 324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In a slip-and-fall case, a defendant moving for summary judgment has the initial burden of establishing, prima facie, that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it, (*Sawicki v GameStop Corp.*, 106 AD3d 979, 966; *Armijos v Vrettos Realty Corp.*, 106 AD3d 847, 847; *Freiser v Stop & Shop Supermarket Co., LLC*, 84 AD.3d 1307, 1308.

Further, "[i]mposition of liability for a dangerous condition on property must be predicated upon occupancy, ownership, control, or special use of the premises" *Velez v*

Captain Luna's Mar., 74 A.D.3d 1191, 1192, 904 N.Y.S.2d 474; *Logatto v. City of New York*, 51 A.D.3d 984, 859 N.Y.S.2d 469; *Canaan v. Costco Wholesale Membership, Inc.*, 49 AD3d 583, 584–585; *Schwalb v Kulaski*, 29 AD3d 563, 564). "'Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property'" (*Velez v Captain Luna's Mar*, 74 A.D.3d at 1192, quoting *Turrisi v Ponderosa, Inc.*, 179 AD2d 956, 957; *Usman v Alexander's Rego Shopping Ctr., Inc.*, 11 AD3d 450, 451).

In this case, Town Law, Section 65-a states in pertinent part that:

> 1. No civil action shall be maintained against any town or town superintendent of highways for damages or injuries to person or property sustained by reason of any highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, dangerous or obstructed condition of such highway, bridge or culvert was actually given to the town clerk or town superintendent of highways, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of, or in the absence of such notice, unless such defective, unsafe, dangerous or obstructed condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence....(NY Town § 65-a).

The Town's Local Law No.3 -1994 incorporates the prior notice requirements of the NY Town Law, Section 65-a, applying it to all sidewalks in the Town. Further, the Town has established that, at the time of the alleged accident, it did not control the subject site.

Accordingly, based on the foregoing and there being no opposition, it is

ORDERED that the action is dismissed as against the defendant, Town of Eastchester.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
September 24, 2021

HON. SAM D. WALKER, J.S.C.