Geller v County of Nassau
2021 NY Slip Op 33416(U)
May 19, 2021
Supreme Court, Nassau County
Docket Number: Index No. 609017/2017
Judge: Christopher G. Quinn

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU CIVIL TERM PART 23

Present: HON. CHRISTOPHER G. QUINN
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
----------X
EMILY GELLER,

Plaintiffs,

INDEX NO: 609017/2017
MOTION SEQ. No. 2 - MG

-against-

COUNTY OF NASSAU,

Defendant.

----------X
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
----------X
EMILY GELLER,

INDEX NO: 604715/2019

Plaintiff,

-against-

JP MORGAN CHASE & CO. and HARBRO REALTY CO., LLC.,

Defendants.
----------X
The following papers were read on this motion:

(1) Notice of Motion/Affirmation/Exhibits A-K

(2) Affirmation in Opposition /Exhibits A-C
(3) Reply

In this action plaintiff seeks damages for personal injuries allegedly sustained on October 5, 2016 when she fell on loose bricks and/or rocks near a tree well on a sidewalk outside premises owned by JP MORGAN CHASE .

By decision dated March 5, 2020, the motion of defendant HARBRO REALTY CO., LLC. and defendant JP MORGAN CHASE seeking summary judgment dismissing the claims against it, was Granted.

In this motion the COUNTY of NASSAU seeks summary judgment pursuant to CPLR § 3212, dismissing the claims against it. The COUNTY argues that this action cannot be maintained as there is no evidence of prior written notice of the alleged defect to the COUNTY as is necessary pursuant to the Nassau County Administrative Code, Section 12-4.0(e). The COUNTY also argues that the matter should be dismissed as the plaintiff cannot precisely identify what dangerous condition existed which caused her injury. The COUNTY produced its employee in charge of sidewalk investigations. He testified that there was no written notice of problem at the two locations provided by the plaintiff as to where she believed the accident occurred. Pursuant to the County Administrative Code Section 12-4.0(e), such notice was necessary.

Counsel for the plaintiff opposes. He argues that the plaintiff testified at a General Municipal Law § 50-H hearing, as well as at a deposition, that she returned to the scene of the accident approximately a week after her fall and found that the bricks and or rubble were removed. She testified that her fall was in the area outside the tree well, and identified that area on a photograph (Opposition, Exh. B). Counsel for GELLER claims that this testimony is sufficient to defeat the COUNTY's motion for summary judgment. He argues that plaintiff's recollection, and whether she can identify the exact location of the fall, are questions of fact for a jury to decide [*Solon v. Vozianaov*, 56 AD3d 654 (2nd Dept 2008)]. Plaintiff offers no evidence

to establish that the COUNTY had prior written notice of the alleged defect or that it created it. Plaintiff offers no evidence of such notice.

The COUNTY seeks summary judgment arguing that since there is no evidence that it received prior written notice of any alleged defect, in order to demonstrate that the COUNTY is liable for plaintiff's injuries, the plaintiff must submit competent evidence that the COUNTY affirmatively created the defect [*Gianna v. Town of Islip, et al.*, 646 NYS2d 707 (2nd Dept. 1996); *Block v. Potter, et al.*, 612 NYS2d 236 (2nd Dept. 1994)]. The burden of proof is on the plaintiff to establish that the COUNTY created the defect without such notice. The COUNTY argues that the plaintiff has not offered any competent evidence to support such a claim, and therefore the COUNTY is entitled to summary judgment pursuant to CPLR § 3212.

In a trip and fall case, such as this, it is the plaintiff's burden to set forth evidence demonstrating that the defendant was negligent in creating a defective condition, or failing to correct a defect after becoming aware that it exists. In order to set forth a *prima facie* case of negligence, plaintiff must establish the existence of a duty of a defendant to plaintiff, a breach of such duty, and that the breach was a substantial cause of the resulting foreseeable injury [*Merino v. New York City Transit Authority,* 218 A.D.2d 451 (1st Dept 1996); *Gordon v. City of New York,* 70 N.Y.2d 839 (1987)]. The COUNTY's duty is to protect a plaintiff from an unassumed, concealed or unreasonably increased risk [*Benitez v. New York City Bd. of Educ.* , 73 N.Y.2d 650 (1989)]. Here, there is no evidence the COUNTY created the defect. There is no evidence that the defendant had a continuing duty to repair the sidewalk without prior written notice.

Summary judgment is a drastic remedy which otherwise deprives a litigant of his or her day in Court, it is to be granted where it is clear that there is no triable issue of fact. The Court finds that plaintiff has failed to come forward in proof, in evidentiary form, establishing that an issue of fact exists as to any alleged negligence on the part of defendant COUNTY with respect

to a defect in the lot. The proof presented does not raise a triable issue of fact on these issues [*Roussos v. Cicotta*, 2005 NY App. Div. Lexis 1988 (2nd Dept. 2005)].

Based on the proof presented, the motion of the COUNTY is Granted in its entirety.

It is **SO ORDERED**.

HON. CHRISTOPHER G. QUINN, J.S.C.

Dated: MAY 19 2021

ENTERED
Jun 03 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE