

Whales v 500 Dale Plaza Corp.
2021 NY Slip Op 33513(U)
August 5, 2021
Supreme Court, Nassau County
Docket Number: Index No. 606719/2019
Judge: Steven M. Jaeger
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: TRIAL/IAS PART 33**

PRESENT: HON. STEVEN M. JAEGER

TATIA WHALES,

Plaintiff,

XXX

-against-

Index No. 606719/2019
Mot. Seq. No.: 002, 003

**500 DALE PLAZA CORP., CORNER REALTY, INC.,
TOWN OF HEMPSTEAD AND COUNTY OF
NASSAU,**

Defendants.

X

Upon the foregoing electronically filed papers, listed as items 29-44 and 45-76 on the New York State Electronic Filing System, Motion Sequence 002, wherein Defendant TOWN OF HEMPSTEAD moves, pursuant to CPLR §3212, for summary judgment dismissing Plaintiff TATIA WHALES’s complaint and all crossclaims against it and Motion Sequence 003, wherein Defendants 500 DALE PLAZA CORP AND CORNER REALTY, INC., move, pursuant to CPLR §3212, for summary judgment dismissing Plaintiff TATIA WHALES’s complaint and all crossclaims against them are consolidated for disposition and determined as provided herein.

On September 8, 2018, sometime between 12:00 Noon and 1:00 p.m., Plaintiff TATIA WALES (“PLAINTIFF”) was leaving the restaurant Ashlee’s Buffet, located at 508 Uniondale Avenue in Uniondale having finished her lunch there. Plaintiff exited the restaurant, turned right, and was returning to her car which was parked across the street on

Hempstead Blvd. Plaintiff was walking when she tripped and fell on a portion of the cement from the curb that was missing in front of 644 Hempstead Boulevard. Plaintiff sustained injuries including a fractured right wrist and damage to her knee which required a knee replacement.

Plaintiff commenced this action against Defendants TOWN OF HEMPSTEAD (“TOWN”), 500 DALE PLAZA CORP (“500 Dale”), and CORNER REALTY (“Corner Realty”)(collectively “Defendants”) via Summons and Complaint dated May 9, 2019 and duly served upon the parties (This Court previously dismissed the action against the COUNTY OF NASSAU). The Town was sued as the owner of the sidewalk and 500 Dale and Corner Realty were sued as the owners of the premises adjacent to the sidewalk. Defendants joined issue and at the conclusion of discovery moved for summary judgment dismissing Plaintiff’s complaint and all cross-claims against them.

In support of its motion for summary judgment, the Town argues that it had no prior notice of the defect in the sidewalk/curb on front of the premises. The Town has submitted affidavits from its employees averring that a personal search of Town records revealed that no complaints had been received by the Town concerning the condition of the sidewalk/curb for 5 years prior to the incident. The Town maintains that, under the Town Code, § 65-a (1) & (2) of the Town Law of the State of New York and case law, written notice of a defect is a condition precedent to the maintenance of an action against the Town for injuries and that because there was no notice to the Town, it cannot be held liable and therefore is entitled to summary judgment dismissing Plaintiff’s complaint.

Corner Realty argues that it is entitled to summary judgment dismissing plaintiff's complaint because it does not own, manage, control, operate or derive a special use from the premises adjacent to plaintiff's accident and that accordingly, there can be no liability on its part for plaintiff's accident.

500 Dale argues in support of its motion that it is not liable for Plaintiff's accident or injuries because (a) there is no statute, ordinance or code that specifically imposes negligence on it as the abutting landowner; (b) it did not cause or create the condition of the curb prior to the accident; and (c) there was no special use of the curb that would permit the imposition of liability. In support of its argument, 500 Dale submitted the deposition testimony of Saeed Ahmed, owner of 500 Dale, who testified that he did not know about the condition of the sidewalk/curb leading to plaintiff's fall prior to the accident and that prior to the accident date, neither he nor anyone on his behalf ever made any repairs or performed any construction on the sidewalk/curb.

It is well settled that as the proponents of motions for summary judgment dismissing Plaintiff's complaint, Defendants are required to make a prima facie showing of entitlement to judgment as a matter of law through the tender of sufficient evidence demonstrating the absence of any material issues of fact (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]). Once defendants have made this showing, it falls to the Plaintiff, in opposition, to produce proof in evidentiary form sufficient to establish the existence of material issues of fact requiring trial of the action (Alvarez, 68 NY2d at 324).

Here, each of the defendants has tendered sufficient evidence to support their motions for summary judgment. The Town has amply demonstrated that it had no prior written notice of the condition of the sidewalk/curb (Mellor v Village of Elmsford, 101 AD3d 1092 [2d Dept 2012]) for the five years it is required to keep records of such complaints (Fisher v Town of North Hempstead, 134 AD3d 670 [2d Dept 2015]). In opposition, plaintiff failed to tender any evidence of the Town having notice of the condition.

Corner Realty demonstrated, through the affidavit of Saeed Ahmed, also its owner, that it did not own, occupy, control, or make special use of the premises which would subject it to liability (Valmon v 4 M&M Corp., 291 AD3d 343 [1st Dept 2002]). In response, Plaintiff adduced no evidence, but merely pointed out the defect in the form of Corner Realty's evidence, claiming that the affidavit of Corner Realty's owner was neither signed nor notarized. However, this Court notes that the lack of a signature page on Corner Realty's affidavit seems to have been an error made in the process of uploading the affidavit to the New York State Electronic Filing System. The Court will permit correction of this defect in the filing as it is obvious from the face of the affidavit that a page went missing in the uploading process (CPLR §2001).

500 Dale demonstrated, through admissible evidence, that it is also not liable for the condition leading to plaintiff's injury. In the first instance, 500 Dale correctly asserts that as an abutting landowner, it can only be liable to a pedestrian injured on a public sidewalk when (1) it created the condition, (2) caused the condition to occur or (3) a statute or

ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty (Lahen v Town of Hempstead, 127 AD3d 954 [2nd Dept 2015]). Here, 500 Realty has shown that it neither created the condition nor caused it to occur through a special use and that there is no ordinance in the Town of Hempstead making it liable for Plaintiff's injury. In opposition, Plaintiff failed to tender any evidence showing the existence of a material fact.

Accordingly, it is hereby

ORDERED, that Defendant Town of Hempstead's motion, pursuant to CPLR §3212, for summary judgment dismissing Plaintiff's complaint and all crossclaims against it is **GRANTED**; and it is further

ORDERED, that Defendants 500 Dale Plaza Corp. and Corner Realty, Inc.'s motion, pursuant to CPLR §3212, for summary judgment dismissing Plaintiff's complaint and all crossclaims against it is **GRANTED**; and it is further

ORDERED, that all applications for relief not addressed herein are **DENIED**.

DATED: Mineola, New York
August 5, 2021

Steven M. Jaeger

Hon. Steven M. Jaeger
Acting Justice of the Supreme Court

ENTERED

Aug 09 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE