

Cummings v Village of Hempstead
2021 NY Slip Op 33516(U)
August 27, 2021
Supreme Court, Nassau County
Docket Number: Index No. 607761/18
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

_____ x

**TRIAL/IAS, PART 12
NASSAU COUNTY**

ANNIE PEARL CUMMINGS,

Plaintiff(s),

Index No.: 607761/18

-against-

**VILLAGE OF HEMPSTEAD, TOWN OF
HEMPSTEAD and COUNTY OF
NASSAU,**

Motion Seq. No.: 002, 003 & 004

Motions Submitted: 6/25/21

Defendant(s).

XXX

_____ x

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....	X
Notices of Cross Motion.....	XX
Affirmation in Opposition and in Support of Cross Motion.....	X
Affirmation in Opposition of Cross Motion and Further Support.....	XX
Reply Affirmation.....	X

Defendant, Village of Hempstead (the Village), moves this court (Motion Seq. 002) for an order, pursuant to CPLR §3212, granting it summary judgment and dismissing the complaint against it. Co-Defendant, Town of Hempstead (the Town), cross moves (Motion Seq. 003) for an order granting summary judgment and dismissing the complaint against it. Plaintiff, Annie Pearl Cummings (Cummings), opposes the

Village's and the Town's cross motions and cross moves (Motion Seq. 004) for an order holding these motions in abeyance until this matter is consolidated with another matter and to vacate the note of issue. The Village and Town oppose Cummings' cross motion. By short form order dated September 10, 2018, this court granted Co-Defendant County of Nassau's unopposed motion for summary judgment and dismissed the case against it.

Cummings commenced this trip and fall action by summons and complaint dated June 5, 2018. Issue was joined by service of an answer with a cross claim by the Town dated June 27, 2018. The Village interposed an answer with a cross claim dated June 28, 2018. The case certified ready for trial on March 18, 2021 and a note of issue was filed on June 8, 2021. Because Cummings complains about having to file the note of issue and repeatedly argues for consolidation, the court will briefly address the history of this matter

A preliminary conference was held, and the preliminary conference order was signed on January 28, 2020. The first compliance conference was scheduled for April 7, 2020 and the depositions were scheduled for April 29 and 30, 2020. The April 7, 2020 date fell during the time the courts were closed due to the Covid-19 pandemic. The conference was not rescheduled until this court directed a conference take place on January 14, 2021. On that date the parties appeared virtually and informed the court that Cummings had been deposed in August, 2020 and other than some paper discovery being served, nothing else had been done. Neither Defendants' depositions nor an independent

medical examination (IME) had been scheduled in the previous five months. The court directed the parties to move discovery more quickly, and directed that Defendants' depositions and the IME be completed by March 18, 2021, which would be the next compliance conference. On March 18, 2021, a virtual conference was held at which the parties informed the court that nothing had been done since the last court date. Despite the court's directive that the depositions and IME be done, the parties, and Cummings in particular, chose to ignore this court's directive and put off those actions because Cummings filed a related action and it was Cummings' decision to put this case on hold until the two matters could be consolidated. Meanwhile, the related matter had to yet to have a preliminary conference, and, for unexplained reasons, the RJI for the related matter did not list the within matter as a related action, resulting in the related matter being assigned to a different judge. Because this court was satisfied that the parties were not interested in performing any further discovery in this matter, the court signed a certification order March 18, 2021.

Cummings alleges she tripped and fell over a defective sidewalk on July 4, 2017 on Clinton Street in the Village of Hempstead. Both the Village and Town move for summary judgment alleging they had no prior written notice of the any defect, and the Town further alleges they did not own, maintain or control the subject sidewalk.

In a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law,

submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Films Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of action. (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980], *supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, (*see Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 [1st Dept 1992]), and it should only be granted when there are no triable issues of fact (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]).

One cannot be held liable for a dangerous or defective condition on property unless ownership, occupancy, control or special use of the property has been established. (*Ruggiero v. City School District of New Rochelle*, 109 A.D.3d 894 [2nd Dept 2013]; *Soto v. City of New York*, 244 A.D.2d 544 [2nd Dept. 1997]; *James v. Stark*, 183 A.D.2d 873 [2nd Dept. 1982]). Further, “[w]here, as here, a municipality has enacted a prior written notice law, it may not be subject to liability for injuries caused by a dangerous roadway

condition unless it has received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies” (*Wald v City of New York*, 115 AD3d 939 [2d Dept 2014]; *Phillips v City of New York*, 107 AD3d 774, [2d Dept 2013]; *see Martinez v City of New York*, 105 AD3d 1013, 1014 [2d Dept 2013]). “The only recognized exceptions to the statutory prior written notice requirement involve situations in which the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a benefit upon the municipality” (*Wald v City of New York, supra*; *Long v City at Mount Vernon*, 107 AD3d 765 [2d Dept 2013]; *Oboler v City of New York*, 8 NY3d 888, 889-890 [2007]; *Miller v Village of E. Hampton*, 98 AD3d 1007, 1008 [2d Dept 2012]). In addition, “the affirmative negligence exception is limited to work by the [municipality] that immediately results in the existence of a dangerous condition” (*Wald v City of New York, supra*, quoting *Yarborough v City of New York*, 10 NY3d 726, 728 [2007], quoting *Oboler v City of New York, supra* at 889).

Furthermore, neither actual nor constructive notice of a given defect is sufficient to overcome the requirement of prior written notice (*Amabile v City of Buffalo*, 93 NY2d 471, 474 [1998]; *Caramancia v City of New Rochelle*, 268 AD2d 496 [2d Dept 2000]). In order for a municipality to be held liable for a condition where no prior written notice was given, a plaintiff must set forth competent evidence that the municipality affirmatively created the alleged offending condition in issue (*see Walker v Incorporated Village of*

Northport, 304 AD2d 823 [2d Dept 2003]; *Monteleone v Incorporated Village of Floral Park*, 74 NY2d 917 [1989]).

THE VILLAGE'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 002)

Herein, in support of its motion, the Village submits, *inter alia*, the affidavits of Patricia Perez, the Village Clerk, and Amare Woldekerkos, Senior Engineering Aide in the Village's Public Works/Engineering Department. Ms. Perez states she performed a search in the "Sidewalk Book" which is the "...official depository of all prior written notices received by the Village...". She researched five years prior to the date of the incident and states there is no record of any prior written complaint of a defective condition on the subject sidewalk. Mr. Woldekerkos also searched records dating back five years from the date of the incident. His search determined that the Village performed no work at the subject location, nor did they hire any entity to perform work on the subject sidewalk.

The Village further alleges the complaint should be dismissed because Cummings failed to include a necessary party. CPLR §1003. This is based on Cummings' complaint in the related action whereby Cummings alleges the Defendants in that action are solely responsible for her injuries. Finally, the Village asserts that the alleged defective condition was open and obvious.

When a municipal employee states by affidavit that a thorough search was conducted and that no prior written notice of the defect was found, there is *a prima facie*

showing of entitlement to judgment as a matter of law (*Dabbs v City of Peekskill*, 178 AD2d 577 [2nd Dept 1994]). Based upon Ms. Perez's affidavit, together with Mr. Woldekekos' affidavit finding that the Village did not affirmatively create the defect, the court finds the Village has established entitlement to summary judgment as a matter of law. The burden shifts to Cummings to raise a material issue of fact requiring a trial of the matter.

In opposition, Cummings once again suggests this case, and these motions, be put on hold because discovery in the related case might lead to relevant information in this case. The entire basis for this argument is some conversations had among counsel. Cummings provides no affidavit, or any other admissible evidence to refute the Village's affidavits that there was no written notice, and that the Village did not affirmatively create the alleged defect. As such, Cummings is unable to raise an issue of fact.

In light of the forgoing, the court declines to address whether the complaint should have been dismissed for failure to include necessary parties and whether the defect was open and obvious.

THE TOWN'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 003)

In support of its motion, the Town submits the affidavit of Laura Taranto, clerical employee with the Sidewalk Division of the Town's Highway Department. Part of Ms. Taranto's duties include conducting searches of sidewalk conditions in the records kept by the Town. These records include written complaints, oral complaints, telephonic

complaints, inspections conducted by the Town, tree removals, and construction done on sidewalks either by the Town or outside contractors. These records are kept in a computerized database. Ms. Taranto researched the subject location and determined that the sidewalk in question is not within the jurisdiction of the Town. The Town did not own, operate, maintain, manage or control the subject sidewalk on the date of the accident or for five years prior. Further, Ms. Taranto's search determined that the Town did not perform any work on the subject sidewalk and did not contract with any entity to perform any work on the sidewalk for at least five years prior to the incident. Finally, Ms. Taranto found no written complaints about defective conditions on the sidewalk for five years prior to the incident. Based upon Ms. Taranto's affidavit, the court finds the Town has established entitlement to summary judgment as a matter of law. The burden shifts to Cummings to raise a material issue of fact requiring a trial of the action. In opposition, Cummings offers no admissible evidence and is unable to raise an issue of fact.

**CUMMINGS' MOTION TO HOLD THESE
MOTIONS IN ABEYANCE, TO CONSOLIDATE
THIS ACTION WITH THE RELATED ACTION
AND TO VACATE THE NOTE OF ISSUE (MOTION SEQ. 004)**

Cummings motion will be denied as moot. However, the dismissal of the complaint against the Village will be without prejudice, with leave to renew only if discovery in the related action produces conclusive proof that the affidavits submitted herein by the Village were inaccurate.

Accordingly, it is hereby

ORDERED, that the Village’s motion for summary judgment (Motion Seq. 002) is GRANTED in its entirety. The complaint is dismissed against the Village, without prejudice, subject to the terms of this order. The cross claim against the Village is dismissed and the Village’s cross claim is dismissed as moot; and it is further

ORDERED, that the Town’s motion for summary judgment is GRANTED. The complaint is dismissed against the Town. The cross claim against the Town is dismissed, and the Town’s cross claim is dismissed as moot; and it is further

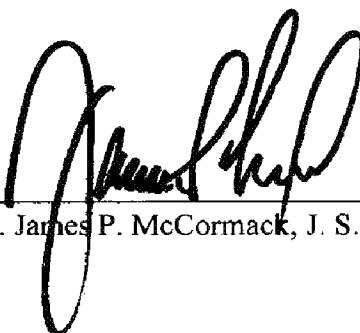
ORDERED, that Cummings motion to hold Motions 002 and 003 in abeyance, to consolidate this action with the related action and to vacate the note of issue (Motion Seq. 004) is DENIED as moot; and it is further

ORDERED, that Motion Seq. 005, which is Cummings prior motion to consolidate the two actions but which was never calendared, is deemed withdrawn based upon the dismissal of the complaint.

The foregoing constitutes the Decision and Order of the Court.

Dated: August 27, 2021
Mineola, N.Y.

ENTERED
Sep 01 2021
NASSAU COUNTY
COUNTY CLERK’S OFFICE



Hon. James P. McCormack, J. S. C.