Reyhanian v Village of Great Neck
2021 NY Slip Op 33649(U)
March 5, 2021
Supreme Court, Nassau County
Docket Number: Index No. 611516/2019
Judge: Helen Voutsinas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 19
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HOMA REYHANIAN,

Plaintiff,

Index No.: 611516/2019

-against-

Motion Sequence Nos. : 001 & 002

VILLAGE OF GREAT NECK,

Present: Hon. Helen Voutsinas

Defendant.
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The following papers were read on these motions:

Notice of Motion, Affirmation and Affidavit in Support, Exhibits........... 1
Notice of Cross Motion, Affirmation and Affidavit in Support, Exhbits.... 2
Affirmation in Reply and In Opposition to Cross Motion..................... 3
Reply Affirmation on Cross Motion.. 4

Defendant Village of Great Neck (the "Village") moves for an Order, pursuant to CPLR §3212 granting summary judgment dismissing plaintiff's complaint, upon the grounds that the Village was not provided with prior written notice of the alleged defective condition, and the Village did not affirmatively create the alleged defective condition. Plaintiff Homa Reyhanian cross moves for an Order, pursuant to CPLR §3212[f] denying defendant's motion for summary judgment to allow for the completion of pretrial discovery. The motions are decided as hereinafter provided.

This is an action for personal injuries arising out of a trip and fall alleged to have occurred on May 25, 2018 at approximately 10:00 a.m. Plaintiff alleges that she was walking in the Village of Great Neck Parking Field No. 4, when she was caused to trip and fall as the result of a hole in the pavement of the parking lot. Plaintiff asserts that the hole is located approximately 99'6" from the curb adjacent to Middle Neck Road and 32'2" from the curb in the back of the parking filed adjacent to the gate leading to Margot Place.

The Village contends that it is entitled to summary judgment because there was no prior written notice of any defective condition on the steps, and the case does not fall within either the affirmative negligence or special use exception to the prior written notice rule.

In support of its motion, the Village submits the pleadings, the affirmation of its attorney and the affidavit of Louis Massaro, the Superintendent of the Department of Public Works for the Village.

It is not disputed that the Village has a prior written notice statute. Section 485-41 of the Village Code provides that no civil action based upon a defective, unsafe, defective, dangerous or obstructive condition may be maintained against the Village unless it had prior written notice of the condition and a reasonable amount of time after written notice to remedy the condition.

In his affidavit in support of the Village's motion, Mr. Massaro, the Superintendent of the Department of Public Works for the Village (the "Department"), attests that he has held that position for 18 years. He states that his job and duties include maintaining records of all prior written complaints as to the condition of Village owned property, including parking lots, streets and sidewalks within the Village. Mr. Massaro confirms that Parking Field No. 4 is owned and maintained by the Village.

Mr. Massaro attests that he personally conducted a search of the prior written notice records maintained by the Village with regard to the alleged defective pavement condition at the subject location within Parking Field No. 4, and that the Village did not receive prior written notice of the alleged condition at the accident location prior to May 25, 2018. He states further that the Village did not receive prior written notice of any defective condition within Parking Field No. 4 prior to May 25, 2018.

Mr. Massaro states that his job duties and responsibilities also include maintaining records of work, maintenance and repairs undertaken by the Village on the Village's property, that he personally conducted a search of the maintenance/repair records maintained by the Village and that the Village did not undertake and/or perform any maintenance or repairs at the accident location, or in the vicinity of the accident location, in 2017 or prior to May 25, 2018, nor did the Village employ, hire, or contract with any persons or entities to perform maintenance or repairs at the accident location prior to the date of plaintiff's accident. He attests that the Village performed work in/around the accident location *after* May 25, 2018, on September 26, 2018, October 1, 2018 and October 3, 2018.

In opposition to the motion, plaintiff submits the affirmation of her attorney, plaintiff's affidavit, copies of several photographs of the parking lot and accident site, and a Google Maps image dated September 2016. Plaintiff argues that defendant's motion for summary judgment must be denied because it is premature, having been made before depositions have been held and discovery completed. Plaintiff also argues that triable issues of fact exist as to whether the Village's repair work created the alleged defective condition. Plaintiff's asserts that it is clear from the photographs she presented that there were different sections of pavement installed at different times, and that the hole which caused her accident is located within a rectangular strip of pavement which is of a different color and level than the rest of the surrounding pavement.

Plaintiff also argues that the Village had actual notice of the defective condition, based upon the fact that the Village employs several agents who patrol the parking areas and issue summonses to enforce compliance with the Village's parking ordinances. Plaintiff argues that these agents "would have seen [the hole] and thereby, the defendant's employees have actual notice." Plaintiff contends that she is entitled to ascertain the names of the Village's parking enforcement agents and to depose them.

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 [1986]). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]). The movant, in this matter the defendant, has the initial burden of proving entitlement to summary judgment,

and failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*See Winegrad v. N.Y.U. Medical Center*, 64 NY2d 851 [1985]).

Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists. (*Id.* at 325; *Andre v. Pomeroy*, 35 NY2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept*., 146 AD2d 572 [2d Dept 1989]). Thus, the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc*., 182 AD2d 446 [1st Dept 1992]). The court's role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp*., 3 NY2d 395 [1957]; *Gervasio v. Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v. United Rubber Supply Co*., 126 AD2d 590 [2d Dept 1987]).

In deciding a summary judgment motion the court must draw all reasonable inferences in favor of the nonmoving party (*Nicklas v. Tedlen Realty Corp*., 305 AD2d 385 [2d Dept 2003]), and the evidence must be construed in a light most favorable to the party opposing the motion (*Benincasa v. Garrubbo*, 141 AD2d 618 [2d Dept 1988)]). "[E]ven the color of a triable issue forecloses the remedy". (*Rudnitsky v. Rabbins*, 191 AD2d 488, 489 [2d Dept 1993]. Furthermore, the credibility of the parties is not an appropriate consideration for the Court. (*See S.J. Capelin Assoc., Inc. v. Globe Mfg. Corp*., 34 NY2d 338 [1974]).

Where, as here, a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a dangerous condition which comes within the ambit of the law unless it has received prior written notice of the alleged defect or dangerous condition, or an exception to the prior written notice requirement applies. (*Trela v City of Long Beach*, 157 AD3d 747, 749 [2d Dept 2018]; *Palka v Village of Ossining*, 120 AD3d 641, 641 [2d Dept 2014] *Leiserowitz v. City of New York,* 81 AD3d 788 [2d Dept 2011]; *De La Reguera v. City of New York,* 74 AD3d 1127 [2d Dept 2010]; *Schleif v. City of New York,* 60 AD3d 926 [2d Dept 2009]; *Smith v. Town of Brookhaven,* 45 AD3d 567 [2d Dept 2007]; *see, Amabile v. City of Buffalo,* 93 NY2d 471, 474 [1999]; *Poirer v. City of Schenectady,* 85 NY2d 310, 314–315 [1995]).

The two exceptions to the prior written notice requirement are: (1) “where the locality created the defect or hazard through an affirmative act of negligence” which “immediately results” in the existence of a dangerous condition; and (2) “where a special use confers a special benefit upon the locality” (*see, Amabile,* 93 NY2d at 474; *see, San Marco v. Village/Town of Mount Kisco,* 16 NY3d 111 [2010]; *Yarborough v. City of New York,* 10 NY3d 726 [2008]; *Oboler v. City of New York,* 8 NY3d 888, 890 [2007]; *Delgado v. County of Suffolk,* 40 AD3d 575, 576; *see also, Pluchino v. Village of Walden,* 63 AD3d 897; *Diaz v. City of New York,* 56 AD3d 599 [2d Dept 2008]).

To establish that a defendant municipality created the alleged defect, the plaintiff must show that the defect was the result of an affirmative act of negligence. (See generally, *Amabile*, supra, 93 NY2d 471). “To fall within the exception, the repair must immediately result in a dangerous condition (*see Oboler v City of New York*, 8 NY3d 888, 889 [2007]; *Laracuente v City of New York*, 104 AD3d 822 [2013]), which made the defective condition more dangerous than it was before any efforts were made to repair it (*see Wilson v. Inc. Vill. of Hempstead*, 120 AD3d 665, 666-67 [2d Dept 2014]; *Kushner v City of Albany*, 7 NY3d 726 [2006]; *Perrington v City of Mount Vernon*, 37 AD3d 571, 572 [2007]).

Upon careful review and consideration of the papers submitted by the parties, the Court finds that this stage of the proceedings, triable issues of fact exist precluding summary judgment. It is readily apparent from the photographs submitted by plaintiff that repairs and patches had been made at the location. What is not clear is when any work was done or who performed the work.

As discussed above, plaintiff argues, inter alia, that this case falls within the affirmative negligence exception to prior written notice requirement. Plaintiff asserts that the photographs submitted "conclusively prove that there was work conducted in the subject location prior to the accident" based on the fact that the color of the patch of pavement in which the hole which caused plaintiff's accident is located, is different from the surrounding pavement.

The applicability of the affirmative negligence exception to the statutory rule requiring prior written notice is conditioned on whether plaintiff can demonstrate that repairs performed by the Village immediately resulted in a pothole or any other surface defect in the area in question. (See *Yarborough v. City of New York*, 10 NY3d 726, 728 [2008]; *Oboler v. City of New York*, 8 NY3d 888, 889 [2007]; *Richards v. Incorporated Vil. of Rockville Ctr.*, 80 AD3d 594, 594 [2d Dept 2011]; *Wiley v. Inc. Vill. of Garden City*, 91 AD3d 764 [2d Dept 2012]; *Rosenthal v. Vill. of Quogue*, 205 AD2d 745 [2d Dept 1994]). The Village's efforts must have immediately resulted in a dangerous condition or exacerbated a previously existing dangerous condition.

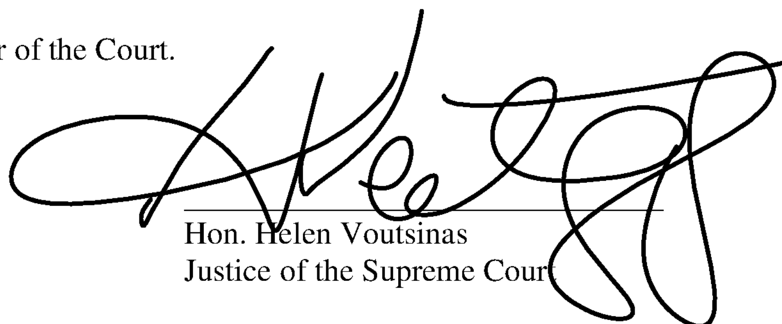
The Court notes that Mr. Massaro states in his affidavit, that a "true and accurate copy of the Asphalt Book" that he maintains regarding asphalt work performed by or for the Village is attached. However, the exhibit attached is only one (1) page from the Asphalt Book, and thus not a "true and accurate copy of the Asphalt Book". The page shows fifteen (15) entries from August 14, 2018 through October 3, 2018 and includes entries for work at the subject location on September 24, 2018, September 26, 2018 and October 3, 2018. The accident is alleged to have occurred on May 25, 2018.

Inasmuch as discovery in the case is in its beginning stages, and information may be within the Village's exclusive knowledge as to, inter alia, whether it created the condition and when it may have been created this Court finds that summary judgment would be premature in this case. (*Fisher v City of New York*, 128 AD3d 763, 764 [2d Dept 2015]; *Adler v City of New York*, 52 AD3d 549, 549-50 [2d Dept 2008]; CPLR §3212[f]).

Accordingly, defendant Village of Great Neck's motion for summary judgment dismissing plaintiff's complaint is **DENIED** with leave to renew upon completion of discovery. Based on the foregoing, plaintiff's cross motion pursuant to CPLR §3212[f] is **DENIED** as moot.

This constitutes the decision and order of the Court.

Dated: March 5, 2021
Mineola, NY



Hon. Helen Voutsinas
Justice of the Supreme Court

ENTERED
Mar 25 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE