Gunnells v Town of Brookhaven
2021 NY Slip Op 33663(U)
September 14, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 613500/2019
Judge: Joseph A. Santorelli
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ORIGINAL

SHORT FORM ORDER

INDEX No. 613500/2019
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 5-19-2021
SUBMIT DATE 8-12-2021
Mot. Seq. # 01 - MD

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CYNTHIA GUNNELLS and DAWN CACCAVALLA,

Plaintiffs,

- against -

THE TOWN OF BROOKHAVEN and QUINTAL CONTRACTING, CORP.,

Defendants.

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Upon the following papers numbered 1 to 46 read on this motion for summary judgment; Notice of Motion and supporting papers 1 - 12 ; ~~Notice of Cross Motion and supporting papers~~ __; Answering Affidavits and supporting papers 13 - 38 ; Replying Affidavits and supporting papers 39 - 46 ; ~~Other~~ __; ~~(and after hearing counsel in support and opposed to the motion~~) it is,

Defendant, Town of Brookhaven, hereinafter "TOB", moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross-claims against it. In support of this motion the TOB contends that it did not have prior written notice of the alleged defect. The plaintiff opposes the motion and argues that the TOB created the dangerous condition.

The plaintiffs commenced this action to recover damages for personal injuries allegedly sustained at approximately 5:00 p.m. on August 25, 2018 when plaintiff Cynthia Gunnells tripped on a "depressed storm drain cap on a cement walkway" between 79 and 78 Bayview Avenue in the Hamlet of Ocean Bay Park, New York. Gunnells spouse, plaintiff Dawn Caccavalla, asserts a derivitive claim for loss of consortium. The plaintiffs filed a Notice of Claim on November 26, 2018. A hearing pursuant to General Municipal Law 50-H was held on March 19, 2019 wherein Gunnells testified. The plaintiffs filed a summons and complaint on July 16, 2019. The TOB filed its answer with affirmative defenses on August 16, 2019. The plaintiffs filed a supplemental

summons and amended complaint to add defendant Quintal Contracting Corp. on July 1, 2020. The TOB filed its verified answer to the amended complaint on July 28, 2020. Quintal filed its verified answer to amended complaint on October 20, 2020.

CPLR §3212(b) states that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (***Olan v. Farrell Lines, Inc.***, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); ***Spearman v. Times Square Stores Corp.***, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, ***New York Civil Practice*** Sec. 3212.09)).

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 eliminate any material issues of fact from the case (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" CPLR3212 [b]; ***Gilbert Frank Corp. v Federal Insurance Co.,*** 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (***Robinson v Strong Memorial Hospital,*** 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see* ***S.J. Capelin Associates v Globe Mfg. Corp.,*** 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (***Prunty v Keltie's Bum Steer,*** 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (***Prunty v Keltie's Bum Steer,*** *supra*, citing ***Glick & Dolleck v Tri-Pac Export Corp.,*** 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; ***Columbus Trust Co. v Campolo,*** 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

In support of its motion, defendant TOB has submitted, inter alia, an attorney's affirmation; copies of the notice of claim; copies of the transcript from the 50-H hearing; copies of the

pleadings; copies of the transcript from the examination before trial of Cynthia Gunnells; copies of the transcript from the examination before trial of Marie Angelone; a sworn affidavit of Marie Angelone; and a sworn affidavit of Linda Sullivan.

The sworn affidavit from Marie Angelone, an employee of the TOB with the Highway Department, states that she made a search of the records maintained by the Town of Brookhaven's Highway Department "for prior written complaints and/or work orders for the storm drain cap/manhole cover on the cement walkway between 79 and 78 Bayview Avenue in the Town of Ocean Bay Park, Town of Brookhaven", for ten (10) years prior regarding the subject location and the same search did not "reveal any written complaints, work orders, written notifications and/or prior notices of claim to the Town concerning the storm drain cap/manhole cover on the cement walkway. At her deposition Angelone testified that after she received the notice of claim for this action she searched the records for prior written notices, contacted the engineering department to ascertain whether the TOB maintains the location in question and contacted the Town Clerk to determine if any prior notice for the incident location had been received. She also stated that she "spoke to the foreman... Sam Rico... to see if there was a defect at the location".

The sworn affidavit from Linda Sullivan, an employee of the TOB with the Town Clerk's Office, states that she

> made a diligent search of the log book, index record book and files maintained by the Town Clerk of the Town of Brookhaven... for prior written complaints of the storm drain cap/manhole cover on the cement walkway between 79 and 78 Bayview Avenue in the Town of Ocean Bay Park, Town of Brookhaven, County of Suffolk, State of New York, for seven (7) years prior to and including the date of plaintiff's accident, August 25, 2018... which search did not reveal any prior written complaints, notifications and/or prior notices of claim to the Town.

In opposition, the plaintiffs argue that the TOB created the dangerous condition. The plaintiffs submit an affidavit of engineer Stanley H. Fein, P.E., dated July 13, 2021 wherein he opines that "the depressed manhole, Manhole Cover and Walkway were negligently designed, installed and/or constructed... The depression existed from the time the manhole was created... The depression is not the result of naturally occurring processes." Fein indicates that

> The concrete perimeter walls of the depression are uniformly perpendicular to the Manhole Cover. The walls are uniformly smooth and not jagged in appearance. This indicates that the concrete was formed by Brookhaven in the shape of circle, to create the manhole. All of these factors compel me to conclude with a reasonable degree of engineering certainty that the depression was affirmatively created by Brookhaven when it created the manhole within the concrete Walkway.

The Court in ***Zielinski v City of Mount Vernon***, 115 AD3d 946, 947 [2d Dept 2014], held

> Where, as here, a municipality has enacted a prior written notice statute, it may not be subject to liability for personal injuries caused by a defective street or sidewalk condition unless it has received prior written notice of the defect, or an exception to the written notice requirement applies (see ***Amabile v City of Buffalo***, 93 NY2d 471, 474, 715 NE2d 104, 693 NYS2d 77 [1999]; ***Salierno v City of Mount Vernon***, 107 AD3d 971, 971-972, 966 NYS2d 901 [2013]; ***Laracuente v City of New York***, 104 AD3d 822, 822, 961 NYS2d 527 [2013]). The Court of Appeals has recognized only two exceptions to this rule, "namely, where the locality created the defect or hazard through an affirmative act of negligence and where a 'special use' confers a special benefit upon the locality" (***Amabile v City of Buffalo***, 93 NY2d at 474; see ***Laracuente v City of New York***, 104 AD3d at 822; ***Katsoudas v City of New York***, 29 AD3d 740, 741, 815 NYS2d 243 [2006]).
>
> Here, the defendant failed to establish its prima facie entitlement to judgment as a matter of law, as its submissions raised a triable issue of fact as to whether it created the allegedly defective sidewalk condition that caused the plaintiff's accident through an affirmative act of negligence (see ***Kiernan v Thompson***, 73 NY2d 840, 841-842, 534 NE2d 39, 537 NYS2d 122 [1988]; ***Cabrera v City of New York***, 21 AD3d 1047, 1048, 803 NYS2d 584 [2005]; ***Ricciuti v Village of Tuckahoe***, 202 AD2d 488, 488-489, 609 NYS2d 54 [1994]).

In ***Miller v Vil. of E. Hampton***, 98 AD3d 1007, 1008-1009 [2d Dept 2012], the Court held

> In the instant matter, the defendant established that it did not receive prior written notice of the alleged dangerous condition. Nonetheless, it failed to meet its burden of demonstrating its prima facie entitlement to judgment as a matter of law. "[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings" (***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 214, 905 NYS2d 226 [2010]; see ***Braver v Village of Cedarhurst***, 94 AD3d 933, 942 NYS2d 178 [2012]). Here, the plaintiff alleged in her notice of claim, complaint, and bill of particulars that the defendant affirmatively created the dangerous condition which caused the accident through various specified acts of negligence in the design and construction of the sidewalk, the lighting, and the landscaping (see ***Braver v Village of Cedarhurst***, 94

> AD3d 933, 942 NYS2d 178 [2012]). Under these circumstances, the defendant was required to eliminate all triable issues of fact as to whether it affirmatively created the alleged dangerous condition through negligent design and construction to sustain its prima facie burden (see ***id.***; cf. ***Rubistello v Bartolini Landscaping, Inc.***, 87 AD3d 1003, 929 NYS2d 298 [2011]; ***Wall v Flushing Hosp. Med. Ctr.***, 78 AD3d 1043, 1045, 912 NYS2d 77 [2010]). Since the defendant failed to do so, the Supreme Court properly denied its motion for summary judgment without regard to the sufficiency of the plaintiff's opposition papers (see ***Winegrad v New York Univ. Med. Ctr.,*** 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]; ***Hill v Fence Man, Inc.***, 78 AD3d 1002, 1004-1005, 912 NYS2d 93 [2010]).

Based upon a review of the motion papers the Court concludes that defendant TOB did not establish its prima facie entitlement to judgment as a matter of law, and therefore the burden never shifted to the plaintiffs to submit evidence sufficient to raise a triable issue of fact (see ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d at 853). Accordingly, defendant TOB's motion for summary judgment is denied.

Even assuming, arguendo that the TOB sustained its initial burden the plaintiffs proffered sufficient facts to necessitate a trial.

The foregoing constitutes the decision and Order of the Court.

Dated: September 14, 2021

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION