

Hrisomallis v Town of Huntington
2021 NY Slip Op 33769(U)
March 17, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 614422/2019
Judge: Linda Kevins
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SHORT FORM ORDER

INDEX No. 614422/2019

CAL. No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

P R E S E N T:

HON. LINDA KEVINS
Justice of the Supreme Court

MOTION DATE 9/29/2020
ADJ. DATE 1/5/2021
MOT. SEQ. # 002 - MG

-----X
GEORGIA HRISOMALLIS,

Plaintiff,

- against -

TOWN OF HUNTINGTON, PHUONG
NGUYEN, THAO NGUYEN

Defendants.
-----X

Upon the following papers e-filed and read on this motion for summary judgment: Notice of Motion and supporting papers by defendant Town of Huntington, dated September 3, 2020; Answering Affidavits and supporting papers by defendants Phuong and Thao Nguyen, dated October 20, 2020; Replying Affidavits and supporting papers by defendant Town of Huntington, dated October 23, 2020; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Town of Huntington for an order granting it summary judgment in its favor dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that if this Order has not already been entered, the Town of Huntington is directed to promptly serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2105, upon the Suffolk County Clerk who is directed to hereby enter such order; and it is further

ORDERED that upon Entry of this Order, the Town of Huntington is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff commenced this action in July 2019 to recover damages for personal injuries she allegedly sustained on August 14, 2018 while riding a scooter on a sidewalk located in front of 292 Nassau Road in the Town of Huntington. The complaint alleges that defendants Phuong Nguyen and Thao Nguyen are the owners of the property abutting the subject sidewalk, and that the Town of Huntington (hereinafter the Town) has a duty to maintain it. Plaintiff alleges that the Town was negligent

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in their maintenance and control of the sidewalk and permitted a dangerous condition to exist causing plaintiff to fall from her scooter.

A notice of claim was served on the Town on September 20, 2018 alleging that “the claimant was lawfully a pedestrian crossing Spring Road in the crosswalk and at the apron of the sidewalk leading to an island in the middle of the street located at Spring Road at its intersection with Nassau Road and in front of the premises located at 292 Nassau Road, Huntington Station, NY 11746 and was caused to be precipitated to ground due to an uneven, raised, cracked and broken apron to the sidewalk which also included grass growing between the cracks.”

The Town served an answer to plaintiff’s complaint on August 27, 2020, and now moves for summary judgment dismissing the complaint and cross-claims on the grounds that it did not receive prior written notice of a dangerous condition and it did not create the allegedly dangerous condition. In support of the motion, the Town submits copies of the pleadings; a bill of particulars; a notice of claim; the transcript from plaintiff’s testimony at her 50-h hearing; a police field report and affidavits by Diane Esposito and Richard Scheffler.

Plaintiff testified that on the date of the incident, at approximately 1:30 p.m., she was driving an electric motor scooter on Route 110 to go to the YMCA. She testified that the scooter has one wheel in the front of it and two wheels in the rear, and that her daughter was following in her automobile. Plaintiff testified that she was driving on route 110 for approximately 15 minutes before making a right to cross the street. She testified that she drove the scooter in a cross walk to get to the other side and as she was climbing the sidewalk something caused her to tip over. She testified that she fell to the left and the scooter fell on top of her. Plaintiff testified that a passerby assisted her and that her daughter called emergency services. She testified that the police officer arrived at the scene of the accident, and that she was taken by ambulance to the emergency department at Huntington Hospital.

Plaintiff testified that she had never been on the subject sidewalk prior to the date of the incident, and that she never made any complaints about the sidewalk.

The affidavit of Diana Esposito is submitted. In her affidavit, Esposito states that she is employed by the Town of Huntington as a Principal Office Assistant in the Town Clerk’s Office, and that her job duties include maintaining and searching the Town’s records for notices of claims and complaints received by the Town Clerk. She states that she has conducted a diligent search of the records filed in the Town Clerk’s Office for the time period of August 2014 through August 14, 2018, and that no complaints were received regarding a dangerous or defective condition on the sidewalk, at or about 292 Nassau Road, near the corner of Nassau Road and Spring Street, in Huntington, New York.

Richard Scheffler submits an affidavit and states that he is employed by the Town of Huntington as a Highway Construction Coordinator and Road Permit Inspector in the Town of Huntington Highway Superintendent’s Office, and that his duties include maintaining and searching the records for various complaints and notice of claims received by the Superintendent of Highways. He states that he conducted a diligent search of the records filed in the Highway Superintendent’s Office in the Town of Huntington

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for any notice of claims, or complaints received regarding a dangerous or defective condition on the sidewalk, at or about 292 Nassau Road, near the corner of Nassau Road and Spring Street, in Huntington, New York for a period covering August 14, 2014 through August 14, 2018 including the Department's records for hotline messages, telephone messages, paper correspondence, and road opening permit files, and that the search revealed no records of complaints.

Scheffler states further that he conducted a search of the Highway Department's computer database and paper files for any work records created, filed and maintained by the Superintendent's office related to work performed on the sidewalk at the subject location by the Town's Highway Department and found no records of the Highway Department performing any work on the side walk at the subject location. Scheffler states that he also conducted a diligent search of the Highway Department's files for any record of any road opening permits being issued by the Superintendent of Highways to an outside entity regarding work to be performed on the subject sidewalk, and that his search revealed no such records of the Superintendent of Highways issuing any such road opening permits for the subject location.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, 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 the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595).

A municipality that has enacted a prior written notice statute may not be subjected to liability for injuries caused by a dangerous condition which allegedly caused the accident unless it either has received written notice of the defect or an exception to the written notice requirement applies (*Seegers v Village of Mineola*, 161 AD3d 910, 2018 NY Slip Op 03387 [2d Dept 2018]; *Dibble v Village of Sleepy Hollow*, 156 AD3d 602, 66 NYS3d 26 [2d Dept 2017]; *Poveromo v Town of Cortlandt*, 127 AD3d 835, 6 NYS3d 617 [2d Dept 2015]). The only two recognized exceptions to a prior written notice requirement are the municipality's affirmative creation of a defect or where the defect is created by the municipality's special use of the property (*Amabile v City of Buffalo* 93 NY2d 471, 693 NYS2d 77 [1999]; *Gonzalez v Town of Hempstead*, 124 AD3d 719, 720, 2 NYS3d 527 [2d Dept 2015]). Furthermore, it is incumbent upon the plaintiff to both plead and prove that prior written notice had been given to the town (*see Abbatecola v Town of Islip*, 97 AD2d 780). The Town has enacted a prior written notice statute. Section 174-3 of the Town Code of the Town of Huntington states:

No civil action shall be maintained against the Huntington Town Board, the Huntington Board of Trustees, the Town of Huntington, its elected officials, public officers, agents, servants and/or employees, and no civil action shall be maintained against an improvement or special district within the Town for damages or injuries to person or property sustained by reason of any highway, bridge, culvert, street, sidewalk or crosswalk owned, operated or maintained by the town or owned, operated or maintained by any improvement or special district therein being defective, out of repair, unsafe, dangerous or obstructed unless written notice of the specific location and nature of such defective, unsafe, out of repair, dangerous or obstructed condition by a person with first-hand knowledge was actually given to the Town

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Clerk or the Town Superintendent of Highways in accordance with § 174-5 hereof and there was thereafter a failure or neglect within a reasonable time to repair or remove the defect, danger or obstruction complained of. In no event shall the Huntington Town Board, the Huntington Board of Trustees, the Town of Huntington, its elected officials, public officers, agents, servants and/or employees, or any improvement or special district, be liable for damage or injury to persons or property in the absence of such prior written notice. Constructive notice shall not be applicable or valid.

Here, the notice of claim and complaint are devoid of any allegations regarding prior written notice as required by the Town Code of the Town of Huntington. Consequently, the complaint fails to state a cause of action in negligence based upon the Town's alleged nonfeasance (*Cipriano v New York*, 96 AD2d 817, 465 NYS2d 564 [2d Dept 1983]).

Moreover, the Town established its prima facie entitlement to summary judgment by demonstrating it did not receive prior written notice of the alleged dangerous condition on the sidewalk (see *Taustine v Incorporated Village of Lindenhurst*, 158 AD3d 785, 71 NYS3d 547 [2d Dept 2018]; *Morreale v Town of Smithtown*, 153 AD3d 91761 NYS3d 269 [2d Dept 2017]). Furthermore, plaintiff failed to allege any affirmative negligence or special use in her notice of claim or the complaint. As the prima facie showing which a defendant is required to make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings, the Town is not required to establish that the two exceptions to prior written notice do not apply (*Toscano v Town of Huntington*, 156 AD3d 837, 68 NYS3d 81 [2d Dept 2017]; *Miller v Village of E. Hampton*, 98 AD3d 1007, 951 NYS2d 171 [2d Dept 2012]). In any event, there is no evidence to suggest that the Town created a dangerous condition through any affirmative acts of negligence or that the special use exception applies.

The Town also seeks dismissal on the ground that it had no duty to maintain the subject sidewalk. Pursuant to § 173-16 of the Town Code of the Town of Huntington:

The owner, lessee, tenant and occupant of lands fronting or abutting on any streets, highway, roadway, public lane, alley or square in any zoning district, shall maintain and repair the sidewalk adjoining his lands and shall keep such sidewalk free and clear of snow, ice, filth, dirt, weeds and all other obstructions and shall remove snow and ice within four (4) hours after snow has ceased to fall or after the deposit of any dirt, object or other material upon such sidewalks. The period between 9:00 p.m. and 7:00 a.m. shall not be included in computing such requirements. Such owner, lessee, tenant or occupant, and each of them, shall be liable for any injury or damage to person or property by reason of the omission, failure or neglect to repair or maintain such sidewalk in a safe condition or to remove snow, ice or other obstructions and/or defects therefrom.

Therefore, the duty to maintain the sidewalk is on the abutting property owner, and liability for a dangerous condition is imputed to such property owner.

The Town also submits a certified police report prepared by the officer at the scene of the incident who states that plaintiff told him that she fell off of her scooter. The Town has established its entitlement to summary judgment dismissing the complaint and the cross claims against it. Having met its burden, the burden shifts to the opposing parties to proffer evidence in

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admissible form sufficient to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Plaintiff has not submitted opposition to the motion. However, defendants Phuong Nguyen and Thao Nguyen submit opposition with respect to the Town’s motion for summary judgment dismissing the cross claims seeking indemnification and contribution against it. The Nguyen defendants have not submitted any competent evidence to raise a triable issue of fact sufficient to defeat the Town’s motion. An affirmation by counsel and a google map image from 2013 are insufficient to meet their burden. Accordingly, the Town’s motion for summary judgment in its favor is granted, and the complaint and cross claims are dismissed as against it.

Anything not specifically granted herein is hereby denied.

This constitutes the decision and Order of the Court.

Dated: 3/17/21



HON. LINDA KEVINS

 FINAL DISPOSITION X NON-FINAL DISPOSITION