

Yauch v County of Nassau

2021 NY Slip Op 33796(U)

April 1, 2021

Supreme Court, Nassau County

Docket Number: Index No. 602924/2020

Judge: Helen Voutsinas

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 19**

Present: Hon. Helen Voutsinas

-----X

LAURIE LOU YAUCH,

Plaintiff,

Index No.: 602924/2020

-against-

Motion Sequence No. : 001

**COUNTY OF NASSAU, TOWN OF HEMPSTEAD,
VSPA ENTERPRISE INC., 3056-3068 HEMPSTEAD,
LLC, MINK EYELESAHSES, ARTHUR SMYLES AND
POPY SMILES,**

Short Form Order

Defendants.

-----X

The following papers were read on this motion:

Amended Notice of Motion, Affirmation, Affidavits, Exhibits.....	1
Affirmation in Partial Opposition.....	2
Reply Affirmation.....	3
Affirmation in Reply to Affirmation in Partial Opposition.....	4
Affirmation in Opposition.....	5
Reply Affirmation.....	6

Defendant County of Nassau (hereinafter “the County”) moves for an order pursuant to CPLR §3212 granting summary judgment dismissing plaintiffs’ complaint and second amended complaint as against the County, and all cross claims asserted by co-defendants against it, upon the grounds that the County was not provided with prior written notice of the alleged defective condition and that the County owes no duty of care to plaintiff. The motion is decided as hereinafter provided.

This is an action for personal injuries arising out of a trip and fall accident. Plaintiff alleges that on February 23, 2019 at approximately 7:45 p.m. while walking on the sidewalk by a tree well in front of or near premises 3062 Hempstead Turnpike, Levittown, New York, plaintiff tripped over a tree branch that was not removed from the ground and as a result suffered serious injuries.

The County argues 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 uses exceptions to the prior written notice rule.

Where 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]).

“Prior written notice of a defect is a condition precedent which a plaintiff is required to plead and prove to maintain an action against the [municipality].” (*Rodriguez v New York City*, 152 AD3d 810 [2d Dept 2017]; *Sommer v Town of Hempstead*, 271 AD2d 434 [2d Dept 2000] [“A plaintiff’s failure to plead and prove that the requisite prior written notice of a dangerous condition was given to a municipality requires dismissal of the complaint insofar as asserted against the municipality.”]).

There are, however, two exceptions to this rule: (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 A.D.3d 599, 868 N.Y.S.2d 229 [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 gen. Amabile*, 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]; *Laracuenta 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]).

It is not disputed that the County has a prior written notice statute. Nassau County Administrative Code §12-4.0[e] provides, in relevant part:

“[n]o civil action shall be maintained against the County for damages or injuries to person . . . sustained by reason of any sidewalk . . . walkway . . . curb . . . being defective, out of repair, unsafe, dangerous, or obstructed . . . unless such sidewalk . . . walkway . . . curb . . . and unless written notice of such defective, unsafe, dangerous or obstructed condition of such sidewalk . . . walkway . . . curb . . . was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of . . . to make the place otherwise reasonably safe. Such written notice shall specify the particular place and nature of such defective, unsafe, dangerous or obstructed condition Notice is required to be given as herein provided shall be

made in writing by certified or registered mail directed to the Office of the County Attorney, One West Street, Mineola, New York 11501.”

In support of its motion, the County submits the affidavit of Robert S. DuJardin, an attorney’s assistant assigned to the Litigation and Appeals Bureau in the Office of the County Attorney, at 1 West Street, Mineola, New York. He attests that his duties include maintaining the files containing notices of claim and notices of defect, and that:

The Office of the County Attorney asked me to conduct a search to determine whether Nassau County has prior written notice of a "tree branch that was not removed from the ground" located on the "sidewalk/curb in front/near the tree well of 3062 Hempstead, Turnpike, Levittown, New York 11756" ("accident location").

In response to this request, I attest that I personally searched the notice of claim files and notice of defect files maintained by the Office of the County Attorney. The notice of claim files and notice of defect files are organized by date and location. The time period of the search I conducted was six (6) years prior to and including the accident date of February 23, 2019 ("accident date").

As a result of this search, I attest that there are no records of prior notice of claim or prior written complaints for the accident location for a time period of six (6) years prior to and including the accident date.

The County also submits that affidavit of William Nimmo, who states that he is Deputy Commissioner of the Nassau County Department of Public Works (“DPW”) and that in such capacity, and based on his experience and review of the records, documentation and information maintained by DPW, he is personally familiar with appurtenances, roadways, sidewalks, tree wells, curbs, streets, highways and properties within the jurisdiction of the County. At the request of the Office of the Nassau County Attorney, he conducted a search of the records, documentation and information maintained by DPW to determine whether the County has jurisdiction of the sidewalk, curb and tree well located in front of 3062 Hempstead Turnpike, Levittown, New York. He states that after his search and review of the records, documentation and information maintained by DPW:

I attest that the County of Nassau does not have documentation, records, and/or information regarding repair records, inspection records, *tree well records*, contracts, permits, licenses, *maintenance records*, and/or complaints regarding the accident location and tree well on or before the accident date. The County of Nassau *does not* own, manage, maintain, control, operate, supervise, inspect, repair, or otherwise have any involvement with the accident location. The County of Nassau also *does*

not own, maintain, manage, control, operate, supervise, inspect, repair, or otherwise have any involvement with the tree well. The County of Nassau did not perform any services at the accident location, and the tree well. Finally, the County of Nassau did not appreciate special use of the accident location or tree well.

The County of Nassau does not have jurisdiction of Hempstead Turnpike, Levittown, New York.

The County argues that plaintiff failed to even *allege* in her notice of claim, complaint or amended complaint that the County received prior written notice of the defective tree branch at issue and defective sidewalk in her complaint or in her amended complaint.

A review of the relevant documents shows that plaintiff did not allege prior written notice until she did so in her bill of particulars served on January 14, 2021, in response to a demand for bill of particulars filed by the County on August 21, 2020. The County's instant motion was filed on October 20, 2021. Accordingly, plaintiff only alleged prior written notice almost three (3) months after the County moved for summary judgment.

The Court finds that the County has established its *prima facie* entitlement to judgment as a matter of law by, inter alia, submitting the affidavit of Robert J. DuJardin which demonstrated that the County did not have any prior written notice of the alleged defect (*Koehler v. Inc. Village of Lindenhurst*, 42 AD3d 438 [2d Dept 2007]; *Selburn v. City of Poughkeepsie*, 28 AD3d 468, 469 [2d Dept 2006]). The County also demonstrated, through the affidavit of William Nimmo, that it did not own, maintain, manage, control, operate, inspect or otherwise have any involvement with the accident site, thus demonstrating that the exceptions to the prior written notice requirement doctrine do not apply herein. (See *Umanskaya v 4050 Nostrand Ave. Condominium*, 173 AD3d 812, 812-13 [2d Dept 2019]; *Rivers v. New York City*, 63 AD3d 898 [2d Dept 2009]).

In opposition, plaintiff argues that her pleading "prior written notice" for the first time in her bill of particulars was proper and sufficient. In light of the Court's finding that the County has established, *prima facie*, that it did not have prior written notice, the Court need not address this argument.

Plaintiff next argues that the affidavit of Robert DuJardin, in regard to lack of written notice, is defective, because Mr. DuJardin does not work for the Office of the County Clerk or the "Nassau County Civil Engineer or Highway offices".

The Court finds this argument to be without merit. Nassau County Administrative Code §12-4.0[e]) plainly mandates that the requisite written notice be served on the Office of the County Attorney located at 1 West Street, Mineola, New York 11501. As Mr. DuJardin states in his affidavit, he works in the Office of the County Attorney, at that address, and that is where he searched for, and did not find, any written notice of a defective condition at the site.

Plaintiff, through her attorney's affirmation, contends that while the County might not have jurisdiction over Hempstead Turnpike, "a careful review of the plaintiff's notice of claim and location of incident reveals that the sidewalk and tree area abut a side road that separates the sidewalk and Hempstead Turnpike. A question of fact arises as to whether the County has jurisdiction over this abutting side street."

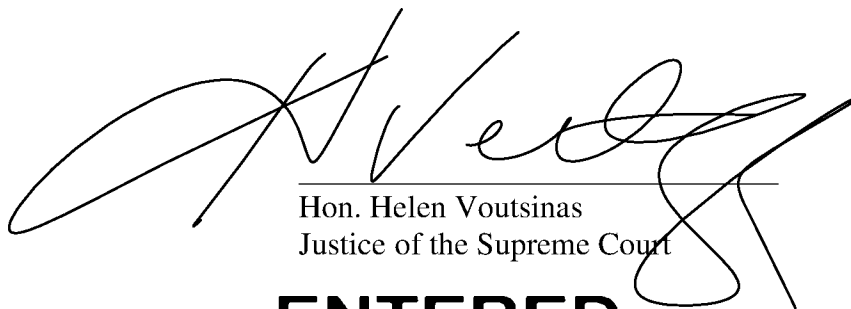
A careful review of plaintiff's notice of claim, complaint and amended complaint reveals that there is no mention of any side road. The notice of claim and the complaint and amended complaint allege that the incident occurred on the sidewalk/curb/near the tree well in front of 3062 Hempstead Turnpike, Levittown, New York. The photographs attached to and made a part of the notice of claim do not show any side road. The photographs, apparently taken within minutes of the incident, depict the precise location of the accident and plaintiff is still on the ground by the fallen tree branch and tree well. The several photographs, taken from different angles and vantage points, do not depict any side road. Plaintiff fails to proffer the name of any side road. The Court finds plaintiff's contentions in this regard to be without merit. In addition, any such claim made at this time would render the notice of claim served on the County defective for failure to sufficiently describe the accident location.

On the facts and evidence presented in the record herein, the Court holds that plaintiff failed to raise a triable issue of fact as to whether the County was provided with prior written notice or whether an exception to that requirement applied (*see Wolin v Town of N. Hempstead*, 129 AD3d 833, 835 [2d Dept 2015]; *Methal v City of New York*, 116 AD3d at 744; *Wald v City of New York*, 115 AD3d 939, 941 [2014]; *Oliveri v Village of Greenport*, 93 AD3d 773, 774 [2012]).

Accordingly, defendant County of Nassau's motion for summary judgment dismissing plaintiff's complaint and any cross-claims as against it is hereby granted.

This constitutes the decision and order of the Court.

Dated: April 1, 2021
Mineola, NY



Hon. Helen Voutsinas
Justice of the Supreme Court

ENTERED

Apr 12 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE