

Hayden v Smith Optical, Inc.

2021 NY Slip Op 33830(U)

September 14, 2021

Supreme Court, Nassau County

Docket Number: Index No. 613498/2020

Judge: David P. Sullivan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. DAVID P. SULLIVAN,
Supreme Court Justice.

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JOSEPH HAYDEN,

Plaintiff,

-against-

SMITH OPTICAL, INC., ISLAND PROPERTIES,
LLC, TOWN OF OYSTER BAY and COUNTY
OF NASSAU,

Defendants.

-----X

IAS/TRIAL PART 22

Index No. 613498/2020

Motion Seq. No. 001

Motion Submitted: 07/02/2021

The following papers read on these motions:

Notice of Motion.....	1
Opposition (Plaintiff).....	2
Opposition (Smith Optical).....	3
Reply.....	4

Defendant County moves this Court for an order dismissing Plaintiff's complaint and any cross-claims against them, pursuant to CPLR §3211(a)(1) and CPLR §3211(a)(7), respectively. Alternatively, Defendant County has requested that the motion be converted to a summary judgment motion, pursuant to CPLR §3211(c), granting it summary judgment under CPLR §3212, also dismissing Plaintiff's complaint against it. Plaintiff has opposed the motion and Defendant Smith Optical has "adopted" the same arguments, but Defendant Town and Defendant Island Properties have not submitted any papers on the motion. Based upon the following, the motion is denied in its entirety.

As a preliminary matter, although Defendant County has filed the motion under CPLR §3211 for dismissal, it has requested the Court consider the motion as a summary judgment

motion under CPLR §3212. Pursuant to CPLR §3211(c), a court is permitted, in its discretion, to treat a motion to dismiss as a summary judgment motion after adequate notice to the parties. Shayne v. Julien, Schlésinger & Finz, P.C., 110 AD2d 761, 488 NYS2d 66 (2nd Dept., 1985). However, the notice requirement may be dispensed with where the parties have made it unequivocally clear that they are laying bare their proof and deliberately charting a summary judgment course. Imperium Insurance Co. v. Utica First Insurance Co., 130 AD3d 574, 10 NYS3d 898 (Mem) (2nd Dept., 2015). Here, Defendant County has made it explicitly clear that they are seeking judgment as a matter of law pursuant to its notice of motion, which has specifically requested summary judgment under CPLR §3212; furthermore, Plaintiff's opposition papers oppose the motion as one for summary judgment. Therefore, in light of the specific request by Defendant County to treat the motion as one for summary judgment, as well as the adequate notice provided to Plaintiff and the nature of her opposition, the Court will consider the within motion as one for summary judgment, pursuant to CPLR §3211(c) and §3212. Montes v. City of New York, 140 AD3d 1038, 33 NYS3d 745 (Mem) (2nd Dept., 2016).

On November 26, 2019, at 11:30am, Plaintiff alleges that he was injured when he tripped and fell due to raised and uneven sidewalk outside of Defendant Smith Optical's storefront located on East Main Street within the Town of Oyster Bay, Nassau County, New York. Plaintiff contends that he tripped and fell as a result of Defendants' negligence, collectively, resulting in injuries to his face, nose, and ribs.

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 Hospital, 68 NY2d 320, 508 NYS2d 923 (1986). To make a prima facie showing, the motion must be supported by affidavit, by a

copy of the pleadings and by other available proof, such as depositions and written admissions. Id. Once a prima facie 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. Id.; *see also* Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 (1980).

Where a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries 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, 982 NYS2d 534 (2nd Dept., 2014). The 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. Phillips v. City of New York, 107 AD3d 774, 967 NYS2d 736 (2nd Dept., 2013). The affirmative negligence exception is limited to work by the municipality that immediately results in the existence of a dangerous condition. Laracuenta v. City of New York, 104 AD3d 822, 961 NYS2d 527 (2nd Dept., 2013).

Liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control, or special use of the property. Ruggiero v. City School District of New Rochelle, 109 AD3d 894, 972 NYS2d 606 (2nd Dept 2013). An exception, in limited circumstances involving a municipality, is limited by work performed by the municipality that immediately results in the existence of a dangerous condition. Yarborough v. City of New York, 10 NY3d 726, 853 NYS2d 261 (2008).

In the instant case, Defendant has submitted two affidavits from employees who purport to have knowledge in support of the motion. The first affidavit, from an attorney's assistant

assigned to the Litigation and Appeals Bureau of Defendant County's attorney, avers that Defendant County has not received prior written notice of a defect or dangerous condition at the subject location, as is required under Nassau County Administrative Code §12-4.0(e), for a period of six (6) years prior to the subject incident. However, this affidavit fails to satisfy Defendant County's burden, as there is no explanation as to what qualifications an attorney's assistant from counsel's office representing Defendant County has to perform such a search; for example, there is not any indication that this individual can speak to how the records are kept by Defendant County and what protocols are followed in receiving and processing any such complaints by it pursuant to the prior written notice ordinance.

The second affidavit, submitted by a deputy commissioner with the Department of Public Works, lacks any probative value whatsoever, since it is unsigned and unnotarized as submitted in the original moving papers. The affidavit itself in its current state is not in admissible form and cannot be considered by this Court. See SunTrust Bank v. Morris, 169 AD3d 951, 92 NYS3d 710 (2nd Dept., 2019). Although Defendant County attempts to rectify this error by submitting a signed and notarized copy as part of its reply papers, since the signature and notarization date occurred significantly after the date the motion was filed, the Court will not consider same. See generally USAA Federal Savings Bank v. Calvin, 145 AD3d 704, 43 NYS3d 404 (2nd Dept., 2016).

Thus, given the deficiencies in Defendant County's moving papers, the motion is hereby denied in its entirety. However, such denial shall not be deemed to preclude Defendant County from filing a summary judgment motion on a similar basis upon the conclusion of discovery and issuance of a certification order by this Court.

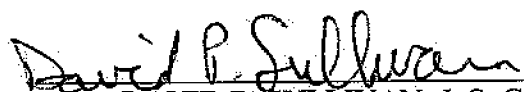
Defendant County shall file and serve a copy of the within order with notice of entry upon all parties within thirty (30) days from the date of this order. Defendant County shall then have forty-five (45) days from the date of this order to file and serve an answer to the complaint and any cross-claims against it.

The preliminary conference currently scheduled for October 7, 2021, is hereby adjourned to December 2, 2021, to accommodate the foregoing.

This hereby constitutes the Decision and Order of this Court.

Dated: September 14, 2021
Mineola, New York

ENTER


HON. DAVID P. SULLIVAN, J. S. C.

ENTERED

Sep 22 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE