

Douglas v City of Mount Vernon

2023 NY Slip Op 34647(U)

January 3, 2023

Supreme Court, Westchester County

Docket Number: Index No. 57044/2020

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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WINSOME DOUGLAS,
Plaintiff,

Index No. 57044/2020

– against –

**DECISION & ORDER
Seq. #7, 8, 9**

THE CITY OF MOUNT VERNON, NEW YORK, PD
MTVERNON INVESTORS, LLC. and HENRY SOLLY,

Defendants.

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The following papers were read and considered on this motion by defendant PD MTVERNON INVESTORS, LLC.'s motion (Seq. 7) for an Order granting it summary judgment dismissing plaintiff's amended complaint, pursuant to CPLR 3212; and on this cross-motion by defendant HENRY SOLLY (Seq. 8) seeking summary judgment dismissing plaintiff's amended complaint and all cross-claims, pursuant to CPLR 3212; and on this motion by defendant THE CITY OF MOUNT VERNON (Seq. 9) seeking summary judgment dismissing plaintiff's amended complaint, pursuant to CPLR 3212, on the grounds that (1) there is no prior written notice of the alleged dangerous or unsafe condition of the sidewalk as required by §265 of the Charter of the City of Mount Vernon and (2) no exceptions to the prior written notice statute apply; and for such other and further relief as this Court deems just and proper, together with the costs of the motion.

Papers Considered

NYSCEF Doc. No. 83-143

Seq. 7

1. Notice of Motion/Statement of Material Facts/Affirmation of Stuart R. Lang, Esq. in Support/Exhibits A-I/Amended Notice of Motion.
2. Affirmation of Gary G. Cooper Esq. in Opposition/Memorandum of Law/Statement of Material Facts.
3. Affirmation of Stuart R. Lang, Esq. in Reply/Exhibit A.

Seq. 8

1. Notice of Cross-Motion/Affirmation of Marjorie Jules, Esq. in Support/Statement of Material Facts/Exhibits A-E/Affirmation in Support of Marjorie Jules, Esq.

2. Memorandum of Law in Opposition/Affidavit of Edward Douglas in Opposition/Affirmation of Gary G. Cooper, Esq. in Opposition/ Exhibits A-D.
3. Affirmation of Marjorie Jules, Esq. in Reply and in further Support of Cross-Motion.

Seq. 9

1. Notice of Motion/Statement of Material Facts/Affirmation of Johan Powell, Esq. in Support/Memorandum of Law/ Exhibits A-F/Affidavit of Phillip Fountain in Support/Affidavit of Cherylnn G. Puma in Support.
2. Memorandum of Law in Opposition/Affirmation of Gary G. Cooper, Esq. in Opposition/Exhibits A-D/Statement of Material Facts.

In this action by the plaintiff to recover for personal injuries, defendants all move for summary judgment dismissing the amended complaint. Plaintiff opposes the motions. The Court notes that all parties request that the Court take judicial notice of the photographs and images submitted in support of and in opposition to these motions.

Factual and Procedural Background

Plaintiff commenced this action by filing a summons and complaint on July 9, 2020, alleging she was injured on May 1, 2018 when she was caused to trip and fall on an uneven and cracked public sidewalk and a three (3) inch steel bar which protruded from the sidewalk, adjacent to premises known as 316 E. 3rd Street, Mount Vernon, New York. Defendant City of Mount Vernon ("City") filed its' answer with affirmative defenses and a cross-claim on July 23, 2020. On December 22, 2020, defendant Henry Solly ("Solly") filed his answer with affirmative defenses and cross-claim. On March 2, 2021, defendant PD MtVernon Investors, LLC. ("PD MtVernon") filed its' answer with affirmative defenses and cross-claim. On December 30, 2021, plaintiff filed a second amended complaint¹. On May 9, 2022, plaintiff filed a third amended complaint. On October 18, 2022, defendant PD MtVernon filed its' answer with affirmative defenses and cross-claim to plaintiff's third amended complaint.

In support of the instant motion, defendants rely, *inter alia*, on plaintiff's Notice of Claim, the 50-h hearing transcript, the pleadings, affidavits, satellite images, photographs and the deposition testimony of the parties. Plaintiff testified, in sum and substance, that she tripped and fell on an uneven and cracked sidewalk where a three (3) inch bar protruded from the sidewalk, adjacent to premises known as 316 E. 3rd Street, Mount Vernon, New York.

¹ See Decision and Order [Giacomo, J.] which, *inter alia*, struck plaintiff's Second Amended Complaint filed to NYSCEF as Doc. No. 57.

Defendant PD MtVernon submits, *inter alia*, the Affidavit of Peter Molinari in support of its' motion for summary judgment². Mr. Molinari submits that PD MtVernon owns a fifty (50) percent interest in the subject premises which abuts the subject sidewalk. Furthermore, Mr. Molinari alleges that PD MtVernon did not create the alleged dangerous condition, as it is the remnant of a broken traffic sign. Mr. Molinari also contends that PD MtVernon did not make special use of the portion of the sidewalk that abuts the property, where plaintiff alleges she tripped and fell. Furthermore, he maintains that PD MtVernon was solely an investor of the adjacent premises and purchased an interest in the property in order to obtain a zoning variance to construct affordable housing on the site. Mr. Molinari also avers that no one associated with PD Mt Vernon ever visited the property or exercised any control over the property from the date of purchase on February 6, 2018 to the date plaintiff fell on May 1, 2018. Therefore, PD Mt Vernon is entitled to summary judgment.

In further support of its' motion, PD MtVernon also submits a Google Maps image from July 2016 which depicts a motorcycle parked on the sidewalk next to a traffic sign³. Defendant additionally submits a Google Maps photo captured in August 2017 which demonstrates that the traffic sign is no longer there⁴.

Similarly, defendant Solly moves for summary judgment dismissing the complaint and joins in the arguments of defendant PD MtVernon, as he is the other fifty (50) percent owner of the premises, which abuts the subject sidewalk. Defendant Solly also submits an affidavit stating, *inter alia*, that he never installed, maintained, repaired or removed the traffic signpost, the remnant of which plaintiff alleges she tripped over.⁵ He further submits that the only maintenance he performs on the property is to cut the grass inside the perimeter inside the fenced area on the property abutting the sidewalk. Additionally, defendant Solly avers that he uses the driveway for purposes of cars entering and exiting his business, but that the driveway is at least five (5) to ten (10) feet away from the location of plaintiff's fall.

Defendant City also moves for summary judgment. The City moves on the grounds that (1) there is no prior written notice of the alleged dangerous or unsafe condition; and (2) an exception to the prior written notice statute does not apply, which defendant City asserts as affirmative defenses in its' answer.

In support of its' motion, defendant City relies upon Section 265 of the Charter of the City of Mount Vernon, which provides that no civil action shall be maintained against the city for personal injuries as a result of a dangerous condition on, among other things, a street, highway, or sidewalk unless written notice of the defective, unsafe, dangerous, or obstructed condition was actually given to the Commissioner of Public Works (see Charter of City of Mount Vernon § 265). Defendant avers that it is not subject to liability

² See Affidavit of Peter Molinari filed to NYSCEF as Doc. No. 90.

³ See Image filed to NYSCEF as Doc. No. 92.

⁴ See Image filed to NYSCEF as Doc. No. 93.

⁵ See Affidavit of Henry Solly filed to NYSCEF as Doc. No. 99.

for the plaintiff's personal injuries, because a diligent search was conducted of the City's records and there is no record of the City having received prior written notice of the alleged defective sidewalk condition claimed here. Additionally, defendant City submits that plaintiff cannot demonstrate that an exception to the prior written notice statute applies. Defendant City asserts it did not create the alleged condition through any affirmative act of negligence, nor is there any evidence that the City derives any special benefit from the use of the subject location, which is a public sidewalk. As such, defendant City submits that since plaintiff is unable to prove that either of these exceptions to the prior written notice statute applies, summary judgment in its' favor is warranted.

In further support of the motion, defendant City submits the Affidavit of Philip Fountain ("Fountain"), a Principal Clerk of the City of Mount Vernon's Department of Public Works.⁶ He states, *inter alia*, that he conducted a good faith and diligent search of the City's records and found no prior written notice or complaints of any defects at the subject location on the sidewalk. Fountain further indicates that his search revealed that the City never performed any work at the location prior to plaintiff's accident. Defendant City also submits the Affidavit of Cheryl G. Puma, who is employed as Law Coordinator in the City's Law Department.⁷ She states she requested a search of the City's records for "...complaints of defects, prior written notices, notices of defects, permits, work orders, violations etc...." In response, she received a memo dated September 24, 2018 from the former Deputy Commissioner of the Department of Public Works ("DPW"), ie. Anthony Amiano which states that his search of the records maintained by the Department of Public Works revealed no such records concerning the subject location. Upon locating the memo while organizing her file in this matter and due to the fact that Mr. Amiano is no longer employed by the City, Ms. Puma requested that a subsequent search be performed by Phillip Fountain, the Principal Clerk at DPW.

In opposition to defendants' motions, plaintiff relies on the images of a steel rod encased inside and protruding from the sidewalk abutting the subject property. Plaintiff also relies on the "Aided Case Report" prepared by a Mount Vernon Police Officer and the officer's photographs. Plaintiff also submits the Affidavit of Edward Douglas, who is plaintiff's husband with attached exhibits⁸. Plaintiff additionally relies on a January 18, 2018 Notice of Violation, issued by the City's DPW and a photograph which accompanied the violation⁹. The Aided Case Report prepared by Officer Pereira states in part "I observed the sidewalk to be cracked and unlevelled as well as a 3 inch bar, where a city sign used to have been placed protruding from the ground."¹⁰

With respect to defendant Solly, plaintiff submits that he denied using the property to repair vehicles during his deposition testimony, however he admitted in an Affidavit to using the property solely for purposes of conducting a business which services vehicles.

⁶ See Affidavit of Philip Fountain, Exhibit H, filed to NYSCEF as Doc. No.114.

⁷ See affidavit of Cheryl G. Puma filed to NYSCEF as Doc. No. 115.

⁸ See Affidavit of Edward Douglas and Exhibits A-D filed to NYSCEF as Doc. No 122-127.

⁹ See Exhibits annexed to plaintiff's Affirmation in Opposition filed to NYSCEF as Doc. No. 117.

¹⁰ See Exhibit "A" annexed to plaintiff's Affirmation in Opposition filed to NYSCEF as Doc. No. 117.

Plaintiff adds that defendant Solly also admitted to using the property to store approximately twelve (12) to (14) vehicles at any given period of time. However, plaintiff submits that a 2017 Google Maps photo evidences that defendant Solly stored many more vehicles on the subject property than the number he set forth in his affidavit. Plaintiff also relies on a Google Maps photograph of the property in June 2018, within one (1) month of plaintiff's fall and he argues that the photograph demonstrates extensive damage to the sidewalk area adjacent to the front gate of the property, which includes oil leak stains on the sidewalk in front of and adjacent to the front gate.

In further opposition, plaintiff argues that the "No Parking" sign was apparently removed, which creates questions of fact for the jury. In addition, plaintiff argues that one photograph shows a motorcycle parked near the original sign which creates another issue of fact as to whether defendant Solly created a special use of the entire or portions of the sidewalk to move and park vehicles as part of his business operations. Plaintiff also argues that defendant PD MtVernon is jointly and severally liable for any injuries arising from defendant Solly's actions including any special use of the sidewalk and any actions of his which created or contributed to the hazardous condition of the sidewalk. Plaintiff further argues that defendant PD MtVernon had a duty to inspect and correct the condition of the defective sidewalk once it became an owner as tenant in common with defendant Solly.

With respect to the City's motion for summary judgment, plaintiff submits, *inter alia*, a photograph date stamped on January 16, 2018, taken by an employee of the City's DPW which shows the sidewalk in front of the subject property¹¹. Plaintiff also submits a copy of a Notice of Violation¹². Plaintiff submits portions of Fountain's testimony, wherein he stated that the Notice was to advise a property owner that there was a hazardous condition on the sidewalk and that there was deterioration which was to be fixed within thirty (30) days¹³.

In reply, defendant PD MtVernon argues that its' status as a tenant in common with defendant Solly is the sole basis upon which plaintiff argues defendant PD MtVernon is responsible for plaintiff's injuries. Defendant PD MtVernon submits that it has no liability as a tenant in common because it never exercised possession and control over any part of the property from the time it purchased a fifty percent (50%) interest on February 6, 2018 through May 1, 2018, the date of plaintiff's accident. Defendant once again relies on Peter Molinari's affidavit, which it argues demonstrates that no one who is associated with PD MtVernon ever visited the property or exercised any control over the property and this is undisputed. PD MtVernon argue that the photographic evidence demonstrates that the property was put to an exclusive use by defendant Solly in connection with his automotive business, which PD MtVernon had no connection to whatsoever, as it was solely a real estate investor. Additionally, defendant PD MtVernon contends that while defendant Solly made special use of the property, the broken municipal sign that caused

¹¹ See photograph annexed as Exhibit B to plaintiff's Affirmation in Opposition filed to NYSCEF as Doc. No. 132.

¹² See Notice of Violation annexed as Exhibit D to plaintiff's Affirmation in Opposition filed to NYSCEF as Doc. No. 134.

¹³ See page 38 of Phillip Fountain's deposition transcript filed to NYSCEF as Doc. No. 133.

the accident has not been connected by plaintiff in any way to defendant Solly's automotive work or to the driveway where traffic flows from the sidewalk. While defendant PD MtVernon concedes the driveway itself constitutes a special use by defendant Solly of that portion of the sidewalk where traffic flows, this area is not located close to where plaintiff alleges she fell. Moreover, defendant PD MtVernon argues that plaintiff has not introduced any competent evidence that raises an issue of fact which connects defendant Solly or his work to a special use of that portion of the sidewalk where the dangerous condition existed or that defendant Solly somehow created the condition. Therefore defendant PD MtVernon contends that plaintiff has failed to overcome defendants' *prima facie* showing of entitlement to summary judgment.

Also in reply, defendant Solly submits, *inter alia*, that plaintiff is now attempting to introduce a new cause of action and theory of liability against him in that his special use of the sidewalk created the dilapidated condition where the subject piece of metal was protruding from the sidewalk. Solly points to plaintiff's Notice of Claim and 50-hearing testimony wherein she consistently stated that her accident was due to her foot coming into contact with the piece of steel that protruded from the sidewalk. In addition, defendant maintains that the location where the driveway is located is not where plaintiff fell. Defendant also argues that his use of the driveway did not in any way alter the portion of the concrete sidewalk slab where plaintiff fell. Additionally, defendant Solly submits that any claims plaintiff now makes which allege that oil slicks caused deterioration to the sidewalk should not be considered as plaintiff and her husband's Affidavit raise these arguments for the first time in response to these motions.¹⁴

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. (*See Winegrad v New York Univ Med Ctr*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). "Once this 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" (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

"Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained street or sidewalk unless it has received written notice of the defect, or an exception to the written notice requirement applies" (*Abreu-Lopez v Incorporated Vil of Freeport*, 142 AD3d 515, 516 [2d Dept 2016] *citing Cimino v County of Nassau*, 105 AD3d 883, 884 [2d Dept 2013]). "Exceptions to the prior written notice requirement have been recognized where the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a special benefit upon it" (*Braver v Village of Cedarhurst*, 94 AD3d 933, 934 [2d Dept 2012]; *Cimino v County of Nassau*, *supra* at 884). Moreover, the exception of affirmative negligence only applies to work undertaken by the municipality

¹⁴ See Affidavit of Edward Douglas filed to NYSCEF as Doc. No. 122.

which immediately results in the creation of a dangerous condition. See *O'Brien v Babylon*, 196 AD3d 494v [2d Dept 2021] and cases cited therein.

Prior written notice provisions, enacted in derogation of common law, are always strictly construed (*Poirier v City of Schenectady*, 85 NY2d 310, 313 [1995]).

Practically, prior written notice provisions result in limiting a locality's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location. (see, *Doremus v Incorporated Vil of Lynbrook*, 18 NY2d 362, at 366...*Hughes v Joahoda*, 75 NY2d 881, 882). This comports with the reality that municipal officials are not aware of every dangerous condition on its streets and public walkways, yet imposes responsibility for repair once the municipality has been served with written notice of an obstruction or other defect, or liability for the consequences of its nonfeasance, as the case may be (*Poirier v City of Schenectady*, 85 NY2d at 314).

Once a municipality demonstrates it did not receive prior written notice of a defect, the burden thereafter shifts to plaintiff to establish that either one of two recognized exceptions to the rule exists. See *Panzavecchia v County of Nassau*, 2022 NY Slip Op 07073 [2d Dept 2022]. Here the City *prima facie* established it did not receive notice of the defect where plaintiff alleges she fell through the Affidavits of Fountain and Puma. See *Dibble v Village of Sleepy Hollow*, 156 AD3d 602 [2d Dept 2017].

In opposition, plaintiff failed to raise a triable issue of fact as to whether the City received prior written notice or as to the applicability of an exception to the prior written notice requirement. See *Hiller v Warwick*, 197 AD3d 631 [2d Dept 2021]; *DD v Incorporated Village of Freeport*, 186 AD3d 795 [2d Dept 2020]; *Wolin v Town of North Hempstead*, 129 AD3d 833 [2d Dept 2015]; *Jason v Town of North Hempstead*, 61 AD3d 936 [2d Dept 2009]; *Braunstein v County of Nassau*, 294 AD2d 323 [2d Dept 2002]; and *ITT Hartford Ins Co v Village of Ossining*, 257 AD2d 606 [2d Dept 1999] all citing *Barnes v City of Mount Vernon*, 245 AD2d 407 [2d Dept 1997].

As to defendants PD MtVernon and Solly, they submit uncontroverted evidence that they did not maintain or repair the sidewalk which abuts their premises. Additionally, there is no evidence in the record that defendants PD MtVernon or Solly created the defective condition that plaintiff tripped on. Nor is there evidence that defendants PD MtVernon or Solly caused the metal bar to protrude from the sidewalk or placed it there due to some special use of that portion of the sidewalk where plaintiff has consistently identified as the location of her fall. See *Gianna v Town of Islip*, 130 AD2d 824 [2d Dept 1996]; *Salvaggio v City of New York*, 28 AD3d 636 [2d Dept 2006]. In opposition to this *prima facie* showing of entitlement to summary judgment, plaintiff does not raise a triable issue of fact as to whether defendants created the defect in the sidewalk, which is not

merely speculative. See *Peretz v Village of Great Neck Plaza*, 130 AD3d 867 [2d Dept 2015]; *Daniel v Khadu*, 190 AD3d 817 [2d Dept 2021].

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this Court, notwithstanding the specific absence of reference thereto.

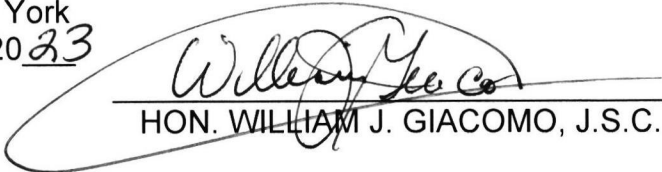
Accordingly, it is hereby

ORDERED that defendants' motions (Seq. 7, 8 and 9) seeking summary judgment dismissing the plaintiff's complaint, as amended and all cross-claims, pursuant to CPLR 3212, are GRANTED in their entirety, without costs.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York

Jan 3, 2023


HON. WILLIAM J. GIACOMO, J.S.C.