

Pastrana v Many 85W, LLC

2024 NY Slip Op 34805(U)

September 3, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 610463/2022

Judge: Joseph A. Santorelli

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SHORT FORM ORDER

INDEX No. 610463/2022

CAL. No. 202301881OT

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 3/7/24 (001)

MOTION DATE 4/25/24 (002)

SUBMIT DATE 6/13/24

Mot. Seq. # 001 MG

Mot. Seq. # 002 MD

-----X

AIDA PASTRANA,

Plaintiff,

- against -

MANY 85W, LLC, TOWN OF ISLIP and
COUNTY OF SUFFOLK,

Defendants.

-----X

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Upon the following papers read on this e-filed motion for summary judgment: (1) Notice of Motion/Order to Show Cause and supporting papers by defendant Many 85W, LLC, filed January 18, 2024; (2) Notice of Motion/Order to Show Cause and supporting papers by defendant Town of Islip, filed March 25, 2024; (3) Answering Affidavits and supporting papers by plaintiff, filed April 1, 2024; (4) Answering Affidavits and supporting papers by plaintiff, filed May 13, 2024; (5) Answering Affidavits and supporting papers by defendant Many 85W, LLC, filed May 23, 2024; (6) Answering Affidavits and supporting papers by defendant Town of Islip, filed June 6, 2024; (7) Replying Affidavits and supporting papers by defendant Many 85W, LLC, filed June 11, 2024; it is

ORDERED that these motions are consolidated for the purpose of this determination; and it is further

ORDERED that the motion by defendant Many 85W, LLC for summary judgment dismissing the complaint and all cross-claims against it is granted; and it is further

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ORDERED that the motion by defendant Town of Islip for summary judgment dismissing the complaint and all cross-claims against it is denied.

Plaintiff commenced this action to recover damages for personal injuries she allegedly sustained as the result of a trip and fall that occurred on March 24, 2021 on the sidewalk in front of the commercial premises known as 85 West Main Street in Bay Shore, New York, which was owned by defendant Many 85W, LLC. Plaintiff alleges that defendants were negligent in their maintenance and operation of the sidewalk, and that their negligence was the proximate cause of her injuries. Pursuant to a stipulation filed electronically on November 15, 2023, plaintiff discontinued the action as against defendant County of Suffolk.

Many 85W, LLC now moves for summary judgment dismissing the complaint against it, arguing, among other things, that it did not create the alleged defective condition or make special use of the sidewalk whereupon plaintiff was injured. In support of the motion, it submits, among other things, plaintiff's deposition testimony, and the testimony of Michael Belford, a co-trustee of the trust that owns the building located at 85 West Main Street. Plaintiff opposes the motion, arguing, among other things, that there are issues of fact precluding summary judgment. Defendant Town of Islip (the Town) also opposes the motion, arguing, among other things, that Many 85W, LLC is liable to plaintiff due to its violation of the Town of Islip Code.

The Town also moves for summary judgment dismissing the complaint against it, arguing that the alleged sidewalk defect was trivial and nonactionable, and that it lacked prior written notice of the alleged defective or dangerous condition that caused plaintiff's accident. In support of the motion, it submits, among other things, an affidavit from Town Department of Public Works employee Noelle Martin. Plaintiff opposes the motion, arguing, among other things, that the Town affirmatively created the alleged defective condition. In opposition, plaintiff submits emails from Town employees and a work order. Many 85W, LLC also opposes the motion, arguing, among other things, that the Town created the alleged defective condition, and had notice thereof.

Plaintiff testified that on March 24, 2021, she tripped and fell on a raised sidewalk slab as she was walking on the sidewalk in front of 85 West Main Street in Bay Shore. She testified that the slab was raised approximately two inches, and that next to the slab was a tree. She testified that she returned to the site of the accident the following day, and observed that the sidewalk defect that caused her accident had been repaired, but that she did not know who performed the repair.

Peter Kletchka, who worked as a project supervisor in the Town's Department of Public Works (the Department) at the time of plaintiff's accident, testified on behalf of the Town. He testified that in January 2020, the Department was alerted via telephone that there was a raised sidewalk slab located in front of the address where plaintiff fell, and that a repair was made to the sidewalk shortly thereafter. He also testified that the Town made a repair to the sidewalk in the area where plaintiff was injured subsequent to the accident, but he could not recall the date of that repair.

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Michael Belford testified on behalf of Many 85W, LLC. He testified that Many 85W, LLC employed two workers on a part-time basis who were responsible for daily tasks on the property, such as watering plants and removing snow and ice from the sidewalk in the winter. He testified that these employees never performed maintenance or repairs on the sidewalk, and that the trust did not employ a maintenance company at the premises. He further testified that the trust employed a landscaping company, but that the landscapers only cut the grass in the rear of the building, as there is no grass in front where the sidewalk was located. He testified that there was shrubbery and brickwork adjacent to the sidewalk in front of the building, and that Many 85W, LLC employees watered the shrubs regularly.

On a motion for summary judgment, the movant has the burden to show that it is entitled to judgment as a matter of law and that there are no disputed issues of material fact (CPLR 3212; *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 99 NYS3d 734 [2019]). If the movant meets its burden, then the non-movant must show that there is a material issue of fact to be resolved at trial (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 105 NYS3d 353 [2019]). If the movant does not meet its burden, then the motion must be denied without consideration of any opposing papers (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). On summary judgment, the Court must view the evidence in the light most favorable to the non-moving party (*id.*).

Generally, liability for injuries sustained as a result of a dangerous or defective condition on a public sidewalk is placed on the municipality and not the abutting landowner (*Morales v Village of Ossining*, 218 AD3d 460, 461, 193 NYS3d 131 [2d Dept 2023]). “An abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty” (*Bousquet v Water View Realty Corp.*, 161 AD3d 718, 719, 76 NYS3d 205 [2d Dept 2018]).

The Code of the Town of Islip (the Town Code) § 47A-17 reads, in pertinent part, that “[e]ach owner or occupant of any house or other building ... shall at all times keep the sidewalk in good and safe repair and maintain it in a clean condition and free from filth, dirt, weeds or other obstructions or encumbrances.”

Here, Many 85W, LLC demonstrated its entitlement to summary judgment dismissing the complaint against it (*see Morales v Village of Ossining*, 218 AD3d 460, 193 NYS3d 131; *Bousquet v Water View Realty Corp.*, 161 AD3d 718, 76 NYS3d 205; *Lahens v Town of Hempstead*, 132 AD3d 954, 18 NYS3d 187 [2d Dept 2015]). While section § 47A-17 imposes a duty on abutting landowners to maintain the sidewalk abutting their property, the statute does not expressly impose tort liability on the abutting owner for injuries caused by a violation of that duty (*see id.*). Further, Belford testified that, other than snow and ice removal in the wintertime, Many 85W, LLC did not maintain, make repairs to, or otherwise perform work on the sidewalk. Thus, Many 85W, LLC made a prima facie case that it did not create the alleged defective condition or make special use of the sidewalk (*see Morales v Village of Ossining*, 218 AD3d 460, 193 NYS3d 131; *Bousquet v Water View Realty Corp.*, 161 AD3d 718, 76 NYS3d 205).

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In opposition, plaintiff and the Town failed to raise triable issues of fact (*see Morales v Village of Ossining*, 218 AD3d 460, 193 NYS3d 131; *Bousquet v Water View Realty Corp.*, 161 AD3d 718, 76 NYS3d 205). Because section § 47A-17 does not impose tort liability on abutting landowners, plaintiff and the Town needed to demonstrate that Many 85W, LLC created the alleged defect or made special use of the sidewalk, which they failed to do (*see id.*). Plaintiff argues that a triable issue of fact exists because the “tree/tree roots,” which she alleges “clearly” caused the slab to rise, could have come from the landscaping abutting the sidewalk that defendant watered and maintained. However, evidence of roots under the sidewalk is insufficient to raise a triable issue of fact here (*see Jackson v Thomas*, 35 AD3d 666, 826 NYS2d 433 [2d Dept 2006] [holding that an abutting landowner is not responsible for damage caused to a sidewalk by a tree root]). Accordingly, Many 85W, LLC’s motion for summary judgment dismissing the complaint against it is granted.

The court next turns to the Town’s motion for summary judgment. The Town argues that the defect that caused plaintiff’s fall was trivial and nonactionable. A defendant seeking dismissal of a complaint on the basis that an alleged defect is trivial “must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses . . . [and] [o]nly then does the burden shift to the plaintiff to establish an issue of fact” (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79, 19 NYS3d 802 [2015]; *see Kozik v Sherland & Farrington, Inc.*, 173 AD3d 994, 103 NYS3d 128 [2d Dept 2019]). “There is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable” (*Trincere v County of Suffolk*, 90 NY2d at 977 [1997] [quotation marks and citations omitted]). Instead, “the court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury” (*id.* at 978).

The Town failed to establish, prima facie, that the defect in question was trivial (*see DeLaRosa v City of New York*, 61 AD3d 813, 877 NYS2d 439 [2d Dept 2009]; *Boxer v Metropolitan Transp. Auth.*, 52 AD3d 447, 859 NYS2d 709 [2d Dept 2008]; *Mishaan v Tobias*, 32 AD3d 1000, 821 NYS2d 640 [2d Dept 2006]). Plaintiff testified that the sidewalk slab was raised approximately two inches, and the photograph of the raised slab submitted by the Town is insufficient to establish that the defect was trivial as a matter of law (*see id.*).

As to the Town’s argument that it lacked prior written notice of the alleged defective or dangerous condition, “[p]rior notification laws are a valid exercise of legislative authority” (*Amabile v City of Buffalo*, 93 NY2d 471, 473, 693 NYS2d 77 [1999]). “A municipality that has enacted a prior written notice provision may not be subjected to liability for injuries caused by a defective or dangerous condition [that] 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” (*Brower v County of Suffolk*, 185 AD3d 774, 775, 127 NYS3d 145 [2d Dept 2020] [quotation marks, citations, and alterations omitted]; *see, e.g. Race v Village of Brewster*, 185 AD3d 1071, 128 NYS3d 562 [2d Dept 2020]). “The affidavit of an official charged with the responsibility of keeping an indexed record of all notices of defective conditions received by [a municipality] is sufficient to establish that no prior written notice was filed” (*Scafidi v Town of Islip*, 34 AD3d 669, 824 NYS2d 410 [2d Dept 2006]).

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Where a municipality establishes, on summary judgment, that it did not receive prior written notice, the burden then shifts to the plaintiff to demonstrate one of two recognized exceptions to the rule, *i.e.*, that the municipality affirmatively created the defect, or that a special use resulted in a benefit to the municipality (*Smith v City of New York*, 210 AD3d 53, 175 NYS3d 529 [2d Dept 2022]).


Section § 47A-3 of the Town Code states, in pertinent part:

No civil action shall be maintained against the Town of Islip or any of its employees for damages or injuries to persons or property sustained by reason of any highway, street, bridge, culvert, sidewalk, crosswalk, highway ... owned or maintained by the Town of Islip being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, out of repair, unsafe, dangerous or obstructed condition ... was actually given to the Town Clerk or Commissioner of Public Works, and there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger, obstruction or condition complained of...

The Town, through Martin’s affirmation, demonstrated that it lacked prior written notice of the alleged sidewalk defect (*see Politis v Town of Islip*, 82 AD3d 1191, 920 NYS2d 185 [2d Dept 2011]; *Wohlars v Town of Islip*, 71 AD3d 1007, 898 NYS2d 59 [2d Dept 2010]). Martin averred that her duties include performing searches for records of written notices and complaints against the Town, and that a search of the Town’s records revealed no written notices pertaining to the sidewalk where plaintiff was injured (*see id.*).

In opposition, plaintiff raised a triable issue of fact as to whether the Town’s prior repairs to the sidewalk affirmatively created the defective condition that caused plaintiff’s fall (*see Laracuente v City of New York*, 104 AD3d 822, 961 NYS2d 527 [2d Dept 2013]). Plaintiff submitted emails between Town employees, as well as a work order, which demonstrated that in January 2020 Town employees performed repair work on the sidewalk at the address of plaintiff’s accident in response to telephonic notice of an uplifted sidewalk slab (*see id.*). Accordingly, the Town’s motion for summary judgment dismissing the complaint and all cross-claims against it is denied.

Dated: September 3, 2024



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

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION