

Rodriguez v Camacho
2024 NY Slip Op 35130(U)
December 2, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 615456/2023
Judge: Alison J. Napolitano
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

ORIGINAL

SHORT FORM ORDER

INDEX No. 615456/2023
CAL No. 202400748OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 74 - SUFFOLK COUNTY

PRESENT:

Hon. ALISON J. NAPOLITANO
Justice of the Supreme Court

MOTION DATE 8-30-2024
SUBMIT DATE 11-25-2024
Mot. Seq. # 02 - MG

-----X
SOL E. RODRIGUEZ,

Plaintiff,

GRUENBERG KELLY DELLA
Attorneys for Plaintiff
700 Koehler Avenue
Ronkonkoma, NY 11779

- against -

LAW OFFICES OF JOHN TROP
Attorneys for Defendants- Camacho & America
1055 Franklin Avenue, Suite 204
Garden City, NY 10530

SERGIO CAMACHO, DIAZ AMERICA and
TOWN OF BABYLON,

Defendants.

JOSEPH WILSON
TOWN ATTORNEY, TOWN OF BABYLON
Attorneys for Defendant- Town of Babylon
200 Sunrise Highway
Lindenhurst, NY 11757

-----X
Upon the following papers read on this motion for summary judgment; e-filed on the NYSCEF system as documents 48 - 64, 77 - 78, 79, 80 - 84, 87 - 89 & 90 - 91; it is,

Defendant, Town of Babylon, hereinafter "Babylon", moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and cross-claims against it. In support of this motion Babylon contends that it did not have prior written notice of the alleged defect. The plaintiff and co-defendants oppose this motion in all respects.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained on October 6, 2022 when she purportedly tripped and fell on the sidewalk in front of the residential premises owned by co-defendants Sergio Camacho and Diaz America located at 1071 Little East Neck Road, West Babylon, Town of Babylon, Suffolk County, New York. The plaintiff filed her Notice of Claim against the Town on January 5, 2023 and a hearing pursuant to General Municipal Law 50-H was held on April 14, 2023. Plaintiff filed a summons and complaint on June 15, 2023. Babylon filed its answer on July 14, 2023.

Rodriguez v. Camacho, et al.
Index No. 615456/2023
Page No. 2

CPLR §3212(b) states that a motion for summary judgment “shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission.” If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (*Olan v. Farrell Lines, Inc.*, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff’d 64 NY 2d 1092, 489 NYS 2d 884 (1985); *Spearman v. Times Square Stores Corp.*, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, *New York Civil Practice* Sec. 3212.09)).

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 eliminate any material issues of fact from the case (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must “show facts sufficient to require a trial of any issue of fact” CPLR3212 [b]; *Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer*, *supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

In order to establish tort liability the plaintiff must demonstrate the existence and breach of a duty owed to her by the defendant (*Pulka v. Edelman*, 40 NY2d 781, 390 NYS2d 393 (1976); *Palsgraf v. LIRR Co.*, 248 NY 339 (1928); Prosser, “*Torts*” 4th Edition §30, 41-42 and 53)). She must further demonstrate that defendants’ acts or omissions which constituted such breach were a proximate cause of plaintiffs injuries (*Sheehan v. City of New York*, 40 NY2d 496, 387 NYS2d 92 (1976)).

Rodriguez v. Camacho, et al.
Index No. 615456/2023
Page No. 3

The Court in *Zielinski v City of Mount Vernon*, 115 AD3d 946, 947 [2d Dept 2014], held

Where, as here, a municipality has enacted a prior written notice statute, it may not be subject to liability for personal injuries caused by a defective street or sidewalk condition unless it has received prior written notice of the defect, or an exception to the written notice requirement applies (see *Amabile v City of Buffalo*, 93 NY2d 471, 474, 715 NE2d 104, 693 NYS2d 77 [1999]; *Salierno v City of Mount Vernon*, 107 AD3d 971, 971-972, 966 NYS2d 901 [2013]; *Laracuenta v City of New York*, 104 AD3d 822, 822, 961 NYS2d 527 [2013]). The Court of Appeals has recognized only two exceptions to this rule, "namely, where the locality created the defect or hazard through an affirmative act of negligence and where a 'special use' confers a special benefit upon the locality" (*Amabile v City of Buffalo*, 93 NY2d at 474; see *Laracuenta v City of New York*, 104 AD3d at 822; *Katsoudas v City of New York*, 29 AD3d 740, 741, 815 NYS2d 243 [2006]).

In *Morejon v NY City Tr. Auth.*, ___ AD3d ___, 2023 NY Slip Op 03007, [2nd Dept., June 7, 2023], the Court held that

A municipality that has enacted a prior written notification law may avoid liability for a defect or hazardous condition that falls within the scope of the law if it can establish that it has not been notified in writing of the existence of the defect or hazard at a specific location (*Torres v Incorporated Vil. of Rockville Ctr.*, 195 AD3d 974, 975, 146 N.Y.S.3d 519; see *Amabile v City of Buffalo*, 93 NY2d 471, 474, 715 N.E.2d 104, 693 N.Y.S.2d 77). Such [prior written] notice is obviated where the plaintiff demonstrates that the municipality 'created the defect or hazard through an affirmative act of negligence' or that a 'special use' conferred a benefit on the municipality (*Groninger v Village of Mamaroneck*, 17 NY3d 125, 127-128, 950 N.E.2d 908, 927 N.Y.S.2d 304, quoting *Amabile v City of Buffalo*, 93 NY2d at 474).

To establish prima facie entitlement to judgment as a matter of law, the defendant municipality must show, prima facie, the lack of prior written notice; once the defendant establishes that it lacks prior written notice, the burden then shifts to the plaintiff to demonstrate either that a question of fact exists in that regard or that one of the exceptions applies (*Vaisman v Village of Croton-on-Hudson*, 209 AD3d 920, 922, 177 N.Y.S.3d 73; see *Smith v City of New York*, 210 AD3d 53, 175 N.Y.S.3d 529). The only recognized

Rodriguez v. Camacho, et al.
Index No. 615456/2023
Page No. 4

exceptions to the statutory prior written notice requirement set forth in Administrative Code of the City of New York § 7-201(c)(2) 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 (see *Yarborough v City of New York*, 10 NY3d 726, 728, 882 N.E.2d 873, 853 N.Y.S.2d 261).

As this Court explained in *Smith v City of New York* (210 AD3d at 55), "[w]here a locality establishes, prima facie, that it was not provided with prior written notice, the burden shifts to the plaintiff to demonstrate the applicability of an exception to that defense." "[T]his burden-shifting standard should be applied even when the complaint affirmatively alleges that an exception is applicable" (*id.* at 55-56).

The sworn affidavits from both Geraldine Compitello, the Town Clerk for Babylon and Vincent Piccoli, the Commissioner of the Department of Public Works for Babylon, state that they both conducted searches relating to any verbal and/or written complaints or written notices of defect regarding the sidewalk condition in front of 1071 Little East Neck Road. Specifically, Ms. Compitello stated

In my capacity as Town Clerk, I have conducted a thorough search of the records contained in the Office of the Town Clerk for any verbal and/or written complaints or written notice(s) of defect regarding a dangerous and/or defective sidewalk condition in front of the residential premises located at 1071 Little East Neck Road, West Babylon, and specifically, the sidewalk at the northern end of the circular driveway of 1071 Little East Neck Road, approximately 5-8 feet from the telephone pole located thereat, for the period prior to October 6, 2022.

The records of the Office of the Town Clerk for the Town of Babylon contain no prior complaints or written notice(s) regarding a dangerous and/or defective sidewalk condition in front of the residential premises located at 1071 Little East Neck Road, West Babylon, and specifically, the sidewalk at the northern end of the circular driveway of 1071 Little East Neck Road, approximately 5-8 feet from the telephone pole located thereat, for the period prior to October 6, 2022.

Rodriguez v. Camacho, et al.
Index No. 615456/2023
Page No. 5

Similarly, Vincent Piccoli stated in his affidavit

At the request of counsel for the Town of Babylon, I have conducted a thorough search of the records of the Department of Public Works for any verbal and/or written complaints or written notice(s) of defect regarding a dangerous and/or defective sidewalk condition in front of the residential premises located at 1071 Little East Neck Road, West Babylon, and specifically, the sidewalk at the northern end of the circular driveway of 1071 Little East Neck Road, approximately 5-8 feet from the telephone pole located thereat, for the period prior to October 6, 2022.

The records of the Town of Babylon Department of Public Works contain no prior complaints or written notice(s) regarding a dangerous and/or defective sidewalk condition in front of the residential premises located at 1071 Little East Neck Road, West Babylon, and specifically, the sidewalk at the northern end of the circular driveway of 1071 Little East Neck Road, approximately 5-8 feet from the telephone pole located thereat, for the period prior to October 6, 2022.

Further, I have conducted a thorough search of the records of the Department of Public Works for any roadway work performed by the Town of Babylon on the sidewalk in front of the residential premises located at 1071 Little East Neck Road, West Babylon, and specifically, the sidewalk at the northern end of the circular driveway of 1071 Little East Neck Road, approximately 5-8 feet from the telephone pole located thereat, for the period prior to October 6, 2022.

A search of records of the Department of Public Works reveals that the Town did not perform any roadway work at the location of plaintiffs accident at any time prior to, or after, plaintiffs October 6, 2022 accident.

The plaintiff argues that because there was no specific period of time stated related to the records search that Babylon failed to meet their prima facie burden. The Court finds that a reading of the affidavits proffered by the defendant Babylon evince that, upon “thorough” searches by two separate persons responsible for maintaining the notices of defects made to the town, the records contain “**no prior** complaints or written notice(s)” (*emphasis added*).

Rodriguez v. Camacho, et al.
Index No. 615456/2023
Page No. 6

Based upon a review of the motion papers the Court concludes that defendant Babylon has made a prima facie showing of its entitlement to judgment as a matter of law. The plaintiff and co-defendants failed to raise a triable issue of fact as to Babylon being given the requisite prior written notice of the defect or that one of the recognized exceptions to the prior written notice statute exists.

Accordingly, defendant Babylon's motion for summary judgment is granted and the complaint, and any cross claims against the Town of Babylon are dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: December 2, 2024



HON. ALISON J. NAPOLITANO
J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION