

<b>Bazarewski v Town of Islip</b>
2024 NY Slip Op 35172(U)
August 12, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 618520/2020
Judge: George Nolan
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SHORT FORM ORDER

INDEX No. 618520/2020  
CAL. No. 202301504OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 55 - SUFFOLK COUNTY

**PRESENT:**

Hon. GEORGE M. NOLAN  
Justice of the Supreme Court

MOTION DATE 11/9/23 (001)  
MOTION DATE 1/25/24 (002)  
MOTION DATE 3/7/24 (003)  
ADJ. DATE 3/21/24  
Mot. Seq. # 001 MG  
Mot. Seq. # 002 MG  
Mot. Seq. # 003 MG; CASEDISP

-----X  
CRAIG BAZAREWSKI,

Plaintiff,

DAVIS & FERBER, LLP  
Attorney for Plaintiff  
1345 Motor Parkway  
Islandia, New York 11749

- against -

MESSINA PERILLO HILL LLP  
Attorney for Defendant Town of Islip  
285 West Main Street, Suite 203  
Sayville, New York 11782

CHRISTOPHER J. CLAYTON, ESQ.  
Suffolk County Attorney  
100 Veterans Memorial Highway  
Hauppauge, New York 11788

TOWN OF ISLIP, COUNTY OF SUFFOLK,  
LONG ISLAND RAILROAD and  
METROPOLITAN TRANSPORTATION  
AUTHORITY,

Defendants.  
-----X

MULHOLLAND MINION DAVEY MCNIFF  
& BEYRER  
Attorney for LIRR and MTA  
374 Hillside Avenue  
Williston Park, New York 11596

Upon the following papers read on these e-filed motions for summary judgment: Notice of Motions/Order to Show Cause and supporting papers by defendants LIRR and MTA, dated October 10, 2023; by defendant Town of Islip, dated January 8, 2024; by defendant County of Suffolk, dated January 30, 2024; Notice of Cross-Motion and supporting papers \_\_\_; Answering Affidavits and supporting papers by plaintiff, dated February 22, 2024, February 22, 2024, and February 22, 2024; Replying Affidavits and supporting papers by defendant County of Suffolk, dated March 5, 2024; by defendant Town of Islip, dated March 7, 2024; by defendants LIRR and MTA, dated March 12, 2024; Other \_\_\_; it is

Bazarewski v Town of Islip  
Index No. 618520/2020  
Page 2

**ORDERED** that these motions are consolidated for purposes of this determination; and it is further

**ORDERED** that the motion by defendants Long Island Railroad and Metropolitan Transportation Authority for an order granting summary judgment dismissing the complaint and all cross claims asserted against them is granted; and it is further

**ORDERED** that the motion by defendant Town of Islip for an order granting summary judgment dismissing the complaint and all cross claims asserted against it is granted; and it is further

**ORDERED** that the motion by defendant County of Suffolk for an order granting summary judgment dismissing the complaint and all cross claims asserted against it is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on September 26, 2018, at approximately 8:30 p.m., when he tripped and fell over a pothole in a roadway abutting a sidewalk leading to a railroad platform at the Ronkonkoma train station of defendants Long Island Railroad (LIRR) and Metropolitan Transportation Authority (MTA).

Defendants LIRR and MTA move for summary judgment dismissing the complaint and all cross claims asserted against them on the ground that as the abutting property owner, they could not be held liable for plaintiff's injuries. In support, LIRR and MTA submit, *inter alia*, the pleadings, the transcripts of the parties' testimony, and the affidavit of Robert Goldberg.

At his deposition, plaintiff testified that when the train in which he was a passenger arrived at the Ronkonkoma station, he stepped onto the south platform, walked down the stairs, on to the sidewalk, and stepped off the curb into a pothole on a roadway. Plaintiff testified that there is a sidewalk area in between the roadway and the train platform. Plaintiff testified that he never recalled seeing the pothole prior to stepping down the sidewalk on to the roadway.

At his deposition, Bernardo Gomez testified that he is an assistant engineer employed by LIRR. He testified that LIRR and MTA are not responsible for maintaining the sidewalk or the roadway at the Ronkonkoma train station. He testified that the municipality is responsible for the sidewalk and roadway, including the area of the accident.

At his deposition, Peter Kletchka testified that he is employed by the Town of Islip Department of Public Works (DPW). He testified that the subject accident occurred at the northernmost portion of the parking lot abutting the sidewalk and platform area at the Ronkonkoma train station. He testified that the Town was responsible only for maintaining pavement markings, signage, and streetlight repairs in the parking lot of the station. He further testified that the County of Suffolk (County) was responsible for maintaining the asphalt area where the accident occurred.

At her deposition, Jesse Mygland testified that she is a principal engineering aide employed by the County of Suffolk Department of Public Works. She testified that there is a roadway (Easton Street) abutting a sidewalk leading to the railroad platform at the station, and that the subject accident occurred at

Bazarewski v Town of Islip  
Index No. 618520/2020  
Page 3

the north half of Easton Street. She testified that while the south side of Easton Street from the center line is owned and maintained by the County, the north side of the roadway is owned and maintained by the Town.

The affidavit of Robert Goldberg states that he is a senior real estate transaction manager employed by the MTA, and that he searched the records maintained by LIRR and MTA with regard to the ownership of their property. Goldberg averred that his search revealed that the parking lot area on the south side of the Ronkonkoma station, including the area of the accident, was not owned by LIRR and MTA at the time of the accident.

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 (*see La Fleur v Janowitz*, 228 AD3d 636 [2d Dept 2024]; *Morales v Village of Ossining*, 218 AD3d 460, 193 NYS3d 131 [2d Dept 2023]; *Hanus v Long Is. Rail Rd.*, 186 AD3d 679, 129 NYS3d 466 [2d Dept 2020]).

Here, LIRR and MTA have made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that they did not own or make special use of the subject roadway, did not create the alleged defect, and did not breach a statutory duty to maintain the abutting roadway (*see Hanus v Long Is. Rail Rd.*, *supra*; *James v County of Nassau*, 85 AD3d 971, 925 NYS2d 655 [2d Dept 2011]; *Ruffino v New York City Tr. Auth.*, 55 AD3d 819, 865 NYS2d 674 [2d Dept 2008]). Moreover, LIRR and MTA demonstrated that the roadway was not an area used primarily for ingress and egress to a train station that is served by a single carrier; rather, the area at issue is akin to a common area in a multi-carrier facility, for which they did not owe any duty of care to maintain (*see Hanus v Long Is. Rail Rd.*, *supra*; *Mashall v Long Is. R.R.*, 149 AD3d 721, 50 NYS3d 554 [2d Dept 2017]). The adduced evidence indicates that the public roadway where the accident occurred was used by the public to access a bus stop and taxi stand, as well as the south side of the train station (*see Mashall v Long Is. R.R.*, *supra*).

In opposition, plaintiff failed to raise an issue of fact as to whether as the abutting property owner, LIRR and MTA were liable for plaintiff's injuries. Plaintiff contends that since there is no bus stop on the south side of the tracks where plaintiff's accident occurred, the roadway where the accident occurred served primarily for ingress and egress to a train station that is served by a single carrier, and that LIRR and MTA, as a common carrier, owed a duty to maintain the roadway. However, plaintiff failed to submit evidence to raise an issue of fact as to whether common carrier duty to maintain a safe means of ingress and egress for passengers may extend to the roadway (*c.f. Bingham v New York City Tr. Auth.*, 8 NY3d 176, 832 NYS2d 125 [2007]; *St. Germain v Seaman*, 206 AD3d 502, 168 NYS3d 314 [1st Dept 2022]). Accordingly, the motion by LIRR and MTA for summary judgment is granted.

Defendant Town of Islip (Town) moves for summary judgment on the ground that it never received prior written notice of the alleged defective condition as required by Town Law § 65-a. In support, the Town submits, *inter alia*, the pleadings, the transcripts of the parties' testimony, and the affidavits of Peter Kletchka and Teresa Bogardt.

Bazarewski v Town of Islip  
Index No. 618520/2020  
Page 4

The affidavit of Teresa Bogardt states that she is an executive assistant employed in the Town Clerk's office of the Town of Islip. It states that she searched the records maintained by the office of the Town Clerk for written complaints or written notices with regard to any defective condition in the area of the accident for the period of five years prior to the accident. Bogardt averred that her search found that the Town Clerk's office had not received prior written notice of the condition.

The affidavit of Kletchka states that he searched the records maintained by the Town's DPW for written complaints or written notices with regard to any defective condition in the area of the accident for the period of five years prior to the accident. Kletchka averred that his search found that the Town's DPW had not received prior written notice of a condition.

Pursuant to Town Law § 65-a and Code of the Town of Islip § 47A-3, as a precondition to commencing a civil action against the Town to recover damages for personal injuries sustained as a result of a defect in Town property, the Town must be given prior written notice of the defect (*see Otto v Miller*, 177 AD3d 895, 113 NYS3d 228 [2d Dept 2019]; *Ortiz v Town of Islip*, 175 AD3d 699, 107 NYS3d 394 [2d Dept 2019]; *Nixdorf v East Islip School Dist.*, 276 AD2d 759, 759, 715 NYS2d 432 [2d Dept 2000]). Once a municipality establishes that it lacked prior written notice of an alleged defect, the burden shifts to the plaintiff to demonstrate that a question of fact exists as to one of the exceptions to the prior written notice requirement, either that the municipality affirmatively created the alleged hazardous condition or that a special use of the area in question conferred a special benefit upon the municipality (*see Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77 [1999]; *Cruzate v Town of Islip*, 162 AD3d 853, 80 NYS3d 305 [2d Dept 2018]; *Factor v Town of Islip*, 134 AD3d 984, 22 NYS3d 230 [2d Dept 2015]). The affirmative creation exception is limited to work by the municipality that immediately results in the existence of a dangerous condition (*see Oboler v City of New York*, 8 NY3d 888, 889, 832 NYS2d 871 [2007]; *Guss v City of New York*, 147 AD3d 731, 46 NYS3d 652 [2d Dept 2017]; *Donadio v City of New York*, 126 AD3d 851, 6 NYS3d 85 [2d Dept 2015]).

Here, the Town has made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that it did not receive the requisite prior written notice of the alleged defective condition (*see Cruzate v Town of Islip, supra*). In his affidavit, Kletchka testified that he conducted a search of the records contained in DPW and found no prior written notice of a dangerous condition in the vicinity of the accident. In her affidavit, Bogardt testified that her search of the records contained in the Town Clerk's office also revealed no prior written notice of said dangerous condition.

In opposition, plaintiff has failed to raise a triable issue of fact as to whether the Town received prior written notice. Plaintiff has also failed to present evidence indicating that either exception to the prior written notice requirement applied in this case. Plaintiff contends that the condition which caused his injury was created by prior repairs to the roadway performed by the Town in the vicinity of the subject accident. Plaintiff submits, inter alia, prior notices of claim dated August 10, 2016, February 7, 2017, July 21, 2017, May 26, 2018, July 12, 2018, August 8, 2018, February 11, 2019, and July 9, 2019 and prior work orders from 2014 to 2018. All notices of claim indicated that each incident occurred on a walkway, a sidewalk, a pathway, a pavement, or a curb, in a train, or near a pole, not on a roadway, and that the location of each incident had some distance from the area of the accident. Moreover, all work orders issued by the Town

Bazarewski v Town of Islip  
Index No. 618520/2020  
Page 5

DPW included repairs of traffic signs, pavement markings, and street lights, not involved with the pothole on the roadway. Contrary to plaintiff's contention, such prior notices of claim and work orders failed to raise an issue as to whether the alleged dangerous condition was the result of work done by the Town and whether the Town received prior written notice of the condition. Accordingly, the Town's motion for summary judgment is granted.

Defendant County moves for summary judgment on the ground that it had no duty to maintain the location where the subject accident occurred, and that it never received prior written notice of the alleged defective condition as required by section C8-2(A)(2) of the Suffolk County Charter. In support, the County submits, *inter alia*, the affidavits of John Donovan and Frank Tassone.

The affidavit of John Donovan states that he is an investigator employed in the County Attorney's office of the Suffolk County, and that he searched the records maintained by the County Attorney's office for written complaints or written notices with regard to any defective condition in the area of the accident prior to the accident. It states that his search revealed that the County Attorney's office had not received prior written notice of said condition.

The affidavit of Frank Tassone states that he is the Clerk of the Suffolk County Legislature, and that he searched the records maintained by the office of the Clerk of the Legislature for written complaints or written notices with regard to any defective condition in the area of the accident prior to the accident. It states that his search revealed that the office of the Clerk of the Legislature had not received prior written notice of said condition.

Here, the County failed to sustain the initial burden of establishing a *prima facie* case that it had no duty to maintain the area of the subject accident. While Myglund testified that the area of the subject accident was not owned and maintained by the County, Kletchka testified that the County was responsible for maintaining the asphalt area where the accident occurred. Thus, there is an issue of fact as to whether the County was responsible to maintain the area of the accident. However, even if the County was responsible to maintain the area of the accident, the County has made a *prima facie* showing of entitlement to judgment as a matter of law by demonstrating that it did not receive the requisite prior written notice of the alleged defective condition (*see Serrano v County of Suffolk*, 188 AD3d 938, 132 NYS3d 305 [2d Dept 2020]). In his affidavit, Donovan testified that he conducted a search of the records contained in the office of the County Attorney and found no prior written notice of a dangerous condition in the vicinity of the accident. In his affidavit, Tassone testified that his search of the records contained in the office of the Clerk of the Legislature also revealed no prior written notice of said dangerous condition.

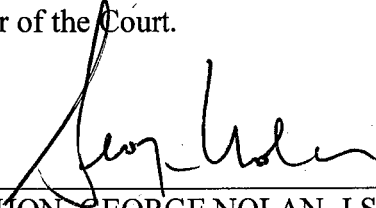
In opposition, plaintiff has failed to raise a triable issue of fact as to whether the County received prior written notice. Plaintiff has also failed to present evidence indicating that either exception to the prior written notice requirement applied in this case. Plaintiff submits, *inter alia*, three prior notices of claim dated May 26, 2018, February 11, 2019, and July 9, 2019. Those notices of claim indicated that each incident occurred on a walkway, a pavement, and a pathway, and that the location of each incident had some distance from the alleged dangerous condition. Contrary to plaintiff's contention, these prior notices of claim failed

Bazarewski v Town of Islip  
Index No. 618520/2020  
Page 6

to raise an issue as to whether the County received prior written notice of the condition at issue in this action. Accordingly, the County's motion for summary judgment is granted.

The foregoing constitutes the decision and Order of the Court.

Dated: August 12, 2024

  
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HON. GEORGE NOLAN, J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION