

Francia v Town of Islip
2024 NY Slip Op 35475(U)
March 18, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 613825/2020
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

INDEX No. 613825/2020CAL. No. 202300666OTSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY**P R E S E N T :**Hon. JOSEPH A. SANTORELLI
Justice of the Supreme CourtMOTION DATE 7/19/23 (002)
MOTION DATE 8/10/23 (003)
MOTION DATE 9/7/23 (004)
ADJ. DATE 10/12/23
Mot. Seq. # 002 MG
Mot. Seq. # 003 MG
Mot. Seq. # 004 MG; CASEDISP-----X
CHRISTINE FRANCIA,

Plaintiff,

- against -

TOWN OF ISLIP, A&W SAFETY
SURFACING, LLC, RY-LECIA CORP., RY-
LECIA CORP. d/b/a AMERICAN
RECREATIONAL PRODUCTS,Defendants.
-----XSULLIVAN, PAPAIN, BLOCK, MCGRATH,
COFFINAS & CANNAVO, P.C.
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New York, New York 10036

Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion/Order to Show Cause and supporting papers by defendant A&W Safety Surfacing LLC, filed June 9, 2023; by defendant Town of Islip, filed July 10, 2023; by defendant Ry-Lecia Corp. filed August 14, 2023 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers by defendant Ry-Lecia Corp. filed August 17, 2023; by plaintiff, filed August 17, 2023 and

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October 5, 2023; Replying Affidavits and supporting papers by defendant A&W Safety Surfacing LLC, filed August 23, 2023;
by defendant Town of Islip, filed August 29, 2023; by defendant Ry-Lecia Corp. filed October 9, 2023; Other ; it is

ORDERED that the motion (#002) by defendant A&W Safety Surfacing LLC, the motion (#003) by defendant Town of Islip, and the motion (#004) by defendant Ry-Lecia Corp. are consolidated for the purposes of this determination; and it is

ORDERED that the motion (#002) by defendant A&W Safety Surfacing LLC for summary judgment dismissing the complaint against it is granted; and it is

ORDERED that the motion (#003) by defendant Town of Islip for summary judgment dismissing the complaint against it is granted; and it is further

ORDERED that the motion (#004) by defendant Ry-Lecia Corp. for summary judgment dismissing the complaint against it is granted.

Plaintiff Christine Francia commenced this action to recover damages for injuries allegedly sustained as a result of a trip and fall accident that occurred on a sidewalk near the East Lighthouse Walk Playground in Fire Island, New York. The accident allegedly occurred on June 9, 2020, while plaintiff was walking on the sidewalk, when she was caused to fall due to a 3-inch drop-off from the sidewalk to the resilient surface of the playground. The bill of particulars allege that defendant Ry-Lecia Corp. designed the resilient surface, that defendant A&W Safety Surfacing installed the resilient surface, and that the sidewalk and the playground are on premises owned by defendant Town of Islip. Specifically, it alleges that Ry-Lecia was negligent in supervising the installation work of the rubberized resilient surface of the playground and that A&W Safety Surfacing was negligent in installing such surface, allowing a drop off of 3 inches between the edge of the surface and the sidewalk surface. Further, it alleges that the Town of Islip was negligent in maintaining the sidewalk abutting the playground and in installing the playground.

A&W Safety Surfacing moves for summary judgment dismissing the complaint against it, arguing that it owed no duty to plaintiff, and that there is no evidence it created or had notice of the alleged dangerous condition. In support of its motion, A&W Safety Surfacing submits, among other things, copies of the pleadings and transcripts of the parties' deposition testimony. Plaintiff opposes the motion, arguing that a question of fact remains as to the extent of A&W Safety Surfacing's contribution to the dangerous condition.

The Town of Islip moves for summary judgment dismissing the complaint against it, arguing that it did not have prior written notice of a defective condition and that it did not affirmatively create the alleged dangerous condition. In support of its motion, the Town of Islip submitted copies of the pleadings and the transcript of plaintiff's testimony at a General Municipal § 50-h hearing, photographs of the area where the accident occurred, and an affidavit of Noelle Martin. Plaintiff opposes the motion by the Town of Islip, arguing that it affirmatively created the drop-off which caused plaintiff's fall. In

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opposition, plaintiff submits, among other things, her own affidavit and an expert affidavit of Douglas Peden.

Ry-Lecia moves for summary judgment dismissing the complaint against it, arguing that it did not own, operate, control or maintain the subject premises. In support of its motion, Ry-Lecia submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, and photographs of the area where the accident occurred. Plaintiff opposes the motion, arguing that Ry-Lecia was partially responsible for the design of the subject area which created the alleged defective condition.

At her examination before trial and 50-h hearing, plaintiff testified that she was walking along a concrete sidewalk known as East Lighthouse Walk with her three friends at the time of the subject accident. She testified that to her right was a playground, which had rubber flooring underneath the equipment and sand around the perimeter. She testified that prior to the accident, three people were walking towards her pulling a wagon, so she moved to the right of the sidewalk to let them pass. She testified that her "right leg pivoted" on a chipped portion of the sidewalk, causing her to fall. When asked at her examination before trial what caused her right leg to go into the sand, she testified that it was due to the "chip on the concrete." When asked at her 50-h hearing what caused her right leg to slip, she testified that it was due to the chipped concrete.

At his examination before trial, Kevin Brown, the owner of Ry-Lecia, testified that the company is a manufacturer's representative for playgrounds and park amenities. He testified that the Town of Islip entered into an agreement with Ry-Lecia for playground equipment which was to be installed at the subject location. He testified that the site consisted of sand, that a concrete slab was placed on the sand to install the playground equipment, and that a resilient surface was then placed on top of the concrete. He testified that the resilient surface, which consists of interlocking rubber tiles, was about one foot from the sidewalk and that there was sand between the sidewalk and resilient surface. He testified that A&W Safety Surfacing was the contractor that installed the resilient surface.

At her examination before trial, Kimberly Tilghman, the vice president and office manager of A&W Safety Surfacing, testified that the company was hired by Ry-Lecia to install rubber tile at the subject playground. She testified that prior to the installation, the Town of Islip marked off the area where the rubber tiles would be installed. She testified that her company was only hired to install the rubber tiles and was not supposed to fill in the area between the rubber tile and the sidewalk.

At his examination before trial, Oscar Chavez, who is employed by A&W Safety Surfacing, testified that he was the supervisor for the installation of the rubber tiles at the subject location. He testified that when he arrived at the site, the playground equipment was installed on a concrete slab, and that the rubber tiles were to be placed over the concrete slab. He testified that there was a distance of one foot between the edge of the sidewalk and the rubber tile surface, and that A & W Safety was not supposed to install anything in between the rubber tile surface and the sidewalk.

Noelle Martin, who is employed as an administrative aide in the Department of Public Works for the Town of Islip, states that she is responsible for researching the department's records to determine

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whether there were any records of prior written notice alleging a dangerous or defective condition. She states that her search of the computer database revealed that it did not receive any written notice regarding the alleged condition on East Lighthouse Walk and the adjacent playground surface prior to the subject accident.

Douglas Peden, a registered architect and consultant in architecture, construction, and premises safety, states in his affidavit that the Town constructed the playground, but never completed the transition from the concrete walkway to the playground surfacing, leaving a dangerous depression along the edge of the concrete walkway. He cites to the American National Standard (ANSI), which states that when “walkways are adjacent to areas that include hazards to safe use, the edges or limits of the walkways shall be made conspicuous or be guarded.” ANSI further states that when adjacent hazard “pose a significant risk of harm to pedestrians who may inadvertently fall off a walkway edge,” consideration should be made to eliminate the hazard or provide effective guards along the walkway edge. Peden states that there is a dangerous depression along the edge of the concrete walkway which transitions to the playground surfacing. He concludes that the Town of Islip failed to provide a walkway surface that complied with the relevant industry standards and good and acceptable architectural custom and practice.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court’s function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (see *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O’Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (see *Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Engelhart v County of Orange*, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (see *Misa v Town of Brookhaven*, 212 AD3d 804, 181 NYS3d 654 [2d Dept 2023]; *Mitchell v Icolari*, 108 AD3d 600, 969 NYS2d 503 [2d Dept 2013]; *Dugue v 1818 Newkirk Mgt. Corp.*, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]). To establish liability for a dangerous or defective condition, a plaintiff must establish that the defendant created the condition which caused the injury or had actual or constructive notice of its existence (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *McDonnell v Our Layd of Mercy Roman Catholic Church*, 209 AD3d 729, 176 NYS3d 644 [2d Dept 2022]; *Goldin v Riker*, 273 AD2d 197, 709 NYS2d 119 [2d Dept 2000]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant’s employees to

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discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646; *Bykofsky v Waldbaum's Supermarkets, Inc.*, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994]). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]).

Here, A&W Safety Surfacing and Ry-Lecia established their prima facie entitlement to summary judgment in their favor, as they demonstrated that they did not owe a duty of care to plaintiff. It is not disputed that the Town of Islip owns and maintains the sidewalk where the subject accident occurred, and that neither A&W Safety Surfacing nor Ry-Lecia own, possess or control the subject area where plaintiff's accident occurred (*see Zylberberg v Wagner*, 119 AD3d 675, 990 NYS2d 52 [2d Dept 2014]; *Irizarry v Heller*, 95 AD3d 951, 943 NYS2d 606 [2d Dept 2012]; *Grover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729, 869 NYS2d 593 [2d Dept 2008]). Thus, as A&W Safety Surfacing and Ry-Lecia demonstrated that they did not owe a duty to maintain the subject premises, they did not owe a duty of care to plaintiff (*see generally Rosen v Long Is. Greenbelt Trail Conf., Inc.*, 19 AD3d 400, 796 NYS2d 130 [2d Dept 2005]). In opposition, no triable issues of fact were raised. Accordingly, the motion by A&W Safety Surfacing and the motion by Ry-Lecia for summary judgment dismissing the complaint against them are granted.

With regard to the Town of Islip's motion, a municipality that has adopted a prior written notice law cannot be held liable for a defect within the meaning of the law absent the requisite written notice, unless an exception to the requirement applies (*see Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77 [1999]; *Delgado v County of Suffolk*, 40 AD3d 575, 835 NYS2d 379 [2d Dept 2007]; *Wilkie v Town of Huntington*, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006]). Pursuant to Town Law § 65-a and Town of Islip Code § 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 have been given prior written notice of the defect and failed to repair it within a reasonable time thereafter (*see Nixdorf v East Islip School Dist.*, 276 AD2d 759, 715 NYS2d 432 [2d Dept 2000]). There are only two exceptions to the prior written notice 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 (*see Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77; *Sollowen v Town of Brookhaven*, 43 AD3d 816, 841 NYS2d 351 [2d Dept 2007]). The affirmative negligence exception is limited to work by the locality that immediately results in the existence of a dangerous condition (*Yarborough v City of New York*, 10 NY3d 726, 728, 853 NYS2d 261 [2008]).

Here, the Town of Islip established, prima facie its entitlement to judgment as a matter of law with evidence that it did not receive the requisite prior written notice of the alleged defective condition (*see Oliveri v Village of Greenport*, 93 AD3d 773, 940 NYS2d 675 [2d Dept 2012]; *Daniel v City of New York*, 91 AD3d 699, 936 NYS2d 897 [2d Dept 2012]; *Healy v Village of Patchogue*, 28 AD3d 519, 813 NYS2d 499 [2d Dept 2006]). The affidavit of Martin states that she searched the records of the Department of Public Works database for written notice relating to the subject sidewalk and playground and found none. In opposition, plaintiff failed to create a triable issue of fact, as she did not submit any evidence to demonstrate that the Town had prior written notice of the alleged defect or that one of the

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exceptions to such requirement applies (*see Cuzzo v Town of Hempstead*, 61 AD3d 921, 877 NYS2d 463 [2d Dept 2009]; *Corey v Town of Huntington*, 9 AD3d 345, 780 NYS2d 156 [2d Dept 2004])). Here, the expert affidavit of Peden is insufficient to raise a triable issue of fact. Significantly, the expert affidavit consisted of mere speculative and conclusory assertions unsupported by adequate foundational facts and accepted industry standards (*see Strickland v Long Is. Rail Rd.*, 175 AD3d 635, 107 NYS3d 418 [2d Dept 2019]; *DiStefano v Ulta*, 95 AD3d 932, 943 NYS2d 618 [2d Dept 2012]; *Pappas v Cherry Cr., Inc.*, 66 AD3d 658, 888 NYS2d 511 [2d Dept 2009])). While Peden states that the walkway did not comply with relevant industry standards, he fails to sufficiently explain how it violated such standards. Furthermore, during both her examination before trial and her 50-h hearing, plaintiff testified that it was the chip on the concrete that caused her to fall; she did not testify that the 3-inch drop off was the cause. Thus, the motion by the Town of Islip for summary judgment dismissing the complaint against it is granted.

Dated: March 18, 2024


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

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