

Uhric v Town of Hempstead
2024 NY Slip Op 35588(U)
April 9, 2024
Supreme Court, Nassau County
Docket Number: Index No. 603475/21
Judge: Dawn Jimenez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T:

HON. DAWN JIMENEZ, J.S.C.

-----X
ROBERT UHRIC,

Trial/IAS Part 24

Plaintiff,

DECISION/ORDER

-- against --

Index No. 603475/21

Mot. Seq. 1

TOWN OF HEMPSTEAD,

Mot. Date: 1/24/24

XXX

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

29 - 35

Opposing Affidavits (Affirmations) _____

39 - 45

Reply Affidavits (Affirmations) _____

46 - 47

In this action to recover damages for personal injuries, the defendant Town of Hempstead (hereinafter the Town) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint due to the lack of prior written notice as required by Town Law § 65-a and Town of Hempstead Code § 6-3. The plaintiff Robert Uhric (hereinafter Plaintiff) opposes the motion. For the reasons set forth herein, the motion is granted.

On April 6, 2020, Plaintiff was allegedly injured when he was caused to fall as a result of a depression in the sidewalk abutting Elmont Road in Elmont, New York. It is alleged that the area of the sidewalk in question was “collapsed, broken, uneven, dilapidated, unearthed and separated” from the level portion of the surrounding sidewalk. At his deposition, Plaintiff testified that he was walking on the sidewalk when “[his] left ankle fell and turned into the part of the indentation that’s in the sidewalk and [his] ankle rolled” (Plaintiff tr at 14). He described the area of the sidewalk that caused his fall as a 4’ x 4’ “cutout” in the sidewalk, which was filled with “dirt, stones, [and] debris” (*id.*). The dirt and debris were not level with the sidewalk, being about four inches below the surrounding sidewalk according to his deposition testimony.

On March 23, 2021, Plaintiff commenced this action by filing of a summons and complaint. Thereafter, on July 7, 2021, the Town appeared by interposing an answer denying the material allegations in the complaint and asserting various affirmative defenses. The matter was certified as ready for trial on March 7, 2023. On June 6, 2023, plaintiff filed a note of issue with jury demand.

The Town now moves for summary judgment dismissing the complaint. In support, the Town submits a copy of the pleadings and the affidavit of Laura Taranto-Pancia, an office service assistant in the Sidewalk Division of the Town's Highway Department. Taranto-Pancia states that she is responsible for receiving and recording complaints sent to the Town regarding any defects or unsafe conditions in the Town's sidewalks. All records of repairs or construction on streets or sidewalks are also filed with the Highway Department. She avers that she searched the computer management system for complaints involving the condition of the sidewalk and records of repairs or construction on the sidewalk. Her search revealed no written complaints and no repairs or construction on the sidewalk in question for seven years prior to April 6, 2020. Based on the foregoing, the Town argues that it is entitled to judgment as a matter of law dismissing the complaint due to lack of prior written notice.

In opposition, Plaintiff submits his deposition transcript, the deposition transcript of Laura Taranto-Pancia, and the affidavit of his expert, Harold Krongelb, P.E., a licensed professional engineer. Plaintiff challenges the sufficiency of Taranto-Pancia's affidavit and argues that there are triable issues of fact as to whether the Town was provided with prior written notice of the alleged defect. Plaintiff also contends that there are triable issues of fact as to whether the Town affirmatively created the alleged condition. In his affidavit, Krongelb opines that the sidewalk was not maintained in a reasonably safe condition. Based on, among other things, a site inspection and his review of images from Google Maps, he opines that the outer boundaries of the depression are consistent with a straight line from saw-cutting the concrete. He further opines that "the more than 2-inch deep depression where [Plaintiff] tripped and fell was created when the subject concrete was saw-cut" (Krongelb affidavit ¶ 16). He states that the depression was present at least eight years prior to the subject incident based on the Google Maps images.

In reply, the Town submits a further affidavit from Taranto-Pancia in which she avers that there was no written notice of any defect in the sidewalk in the vicinity of the accident since the beginning of 2007. She states that the Town has no records of any contracts or payments to contractors involving alterations or repairs of the sidewalk in the subject location since the beginning of 2007.

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 demonstrate the absence of any material issues of fact (*see* CPLR 3212 [b]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once that initial showing is made, the burden shifts to the nonmoving party to produce evidentiary proof demonstrating the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). While the facts must be considered in the light most favorable to the nonmoving party, "conclusory assertions or speculation and a shadowy semblance of an issue are insufficient to defeat summary judgment" (*Stonehill Capital Mgt. v Bank of the W.*, 28 NY3d 439, 449 [2016] [internal quotation marks and brackets omitted]; *see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

"Where ... a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a dangerous condition which 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" (*Vaisman v Village of Croton-on-*

Hudson, 209 AD3d 920, 921 [2d Dept 2022], quoting *Palka v Village of Ossining*, 120 AD3d 641, 641 [2d Dept 2014]; see Town of Hempstead Code § 6-3; Town Law § 65-a [2]). “ ‘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’ ” (*Morejon v New York City Tr. Auth.*, 216 AD3d 134, 137 [2d Dept 2023], quoting *Vaisman v Village of Croton-on-Hudson*, 209 AD3d at 922; see *Smith v City of New York*, 210 AD3d 53 [2d Dept 2022]).

The only two recognized exceptions to the statutory prior written notice requirement are (1) the creation of the defect through an affirmative act of negligence and (2) where a special use confers a benefit upon the municipality (see *Cross v Town of Hempstead*, 210 AD3d 864, 864 [2d Dept 2022]; *Smith v City of New York*, 210 AD3d at 62). The affirmative negligence exception is limited to work by the municipality that “ ‘immediately results in the existence of a dangerous condition’ ” (*Parthesius v Town of Huntington*, 210 AD3d 789, 791 [2d Dept 2022], quoting *Yardborough v City of New York*, 10 NY3d 726, 728 [2008]).

Here, the Town established its prima facie entitlement to judgment as a matter of law by demonstrating, through a search of the relevant municipal records, that it did not receive prior written notice of the alleged defective condition of the sidewalk. Plaintiff’s arguments regarding the alleged deficiencies in Taranto-Pancia’s affidavit are without merit. It is notable that the Appellate Division, Second Department recently found a substantially similar affidavit sufficient to show lack of prior written notice in a trip-and-fall involving the Town (see *Discepolo v County*, — AD3d —, 2024 NY Slip Op 01794 [2d Dept 2024]). Contrary to Plaintiff’s contention, the Town was not required to eliminate all triable issues of fact with respect to the exceptions to the prior written notice requirement to satisfy its prima facie burden (see *Smith v City of New York*, 210 AD3d at 69). However, notwithstanding this, the Town’s submissions also demonstrate, prima facie, that the Town did not cause or create the alleged defective condition.

In opposition, Plaintiff failed to raise a triable issue of fact as to whether the Town received prior written notice of the alleged defective condition or as to the applicability of one of the exceptions. There is no evidence that the Town created the alleged condition, and Taranto-Pancia testified that the sidewalk was maintained by Nassau County, rather than the Town, since it was abutting a Nassau County road (Taranto-Pancia tr at 22, 24-25). The quoted portions of her deposition testimony and Krongelb’s affidavit are insufficient to raise a triable issue of fact as to whether the Town performed the cuts to the sidewalk considering the foregoing. Krongelb’s affidavit is also insufficient to show that the depression was the immediate result of any action by the Town, as opposed to gradual erosion of fill or dirt in the cutout portion of the sidewalk over time. The images from Google Maps in the affidavit appear to show that the alleged condition has not remained the same over the years and that there have been varying levels of dirt in the cutout.

Plaintiff’s remaining arguments are similarly unavailing and insufficient to raise a triable issue of fact.

Accordingly, it is

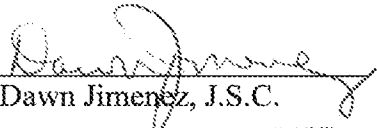
ORDERED that the Town's motion for summary judgment is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: April 9, 2024
Mineola, N.Y.

E N T E R,


Dawn Jimenez, J.S.C.
HON. DAWN JIMENEZ
J.S.C.

ENTERED

Apr 15 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE