

Aceves v Town of Ramapo
2024 NY Slip Op 35675(U)
March 19, 2024
Supreme Court, Rockland County
Docket Number: Index No. 031640/2022
Judge: Thomas P. Zugibe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
ANA SILVA GUTIERREZ ACEVES,

Plaintiff,

-against-

THE TOWN OF RAMAPO,

Defendant.

-----X
ZUGIBE, J.

DECISION & ORDER

Index No.: 031640/2022

Motion Seq. No. 1

Defendant TOWN OF RAMAPO (the “Town”) has filed a motion for an Order of the Court granting summary judgment pursuant to N.Y. CIV. PRAC. L&R (“CPLR”) 3212 and dismissing the Complaint filed by ANA SILVA GUTIERREZ ACEVES (“Plaintiff”). This motion is opposed by Plaintiff. In connection with the instant motion, the Court has reviewed and considered NYSCEF documents numbered 21-33 and 37-47, and hereby renders the following Decision:

RELEVANT BACKGROUND

This action stems from a slip and fall that allegedly occurred on October 18, 2021 on the Albert Drive side of 40 Saddle River Road, near 1 Albert Drive, in Monsey, Rockland County, New York. NYSCEF Docs. 1, 6. As per the Complaint and Amended Complaint, the slip and fall occurred solely by reason of the Defendant’s negligence and/or the negligence of its agents or employees in its ownership, control, operation, management, maintenance, or repair of the premises. *Id.* Issue was joined by the Defendant by the filing of an Answer with affirmative defenses. NYSCEF Doc. 8. One of the affirmative defenses raised in the Answer set forth that no written notice of the alleged defect that caused Plaintiff’s slip and fall was ever presented to the Town as required by the applicable codes and laws. *Id.*

A preliminary conference order was issued by the Court on August 16, 2022. NYSCEF Doc. 14. Prior to the completion of discovery, the Defendant filed a motion for summary judgment based on the fact the Town did not receive prior written notice of the alleged defect, and that, notwithstanding, the evidence reflects that the Town did not create the condition or engage in any special use of the property such that would render it responsible. NYSCEF Docs. 21, 22. In response to the motion, the Plaintiff argued that certain discovery was necessary in order for her to adequately oppose the Town’s motion. The Court, following an on-the-record conference to address the Plaintiff’s request regarding additional discovery, ordered that certain limited discovery take place prior to the Plaintiff being required to oppose the motion. Following the completion of the limited discovery, the Plaintiff filed her opposition to instant motion. NYSCEF Docs. 37-42. The motion is now fully submitted before the Court.

DEFENDANT’S PRIOR WRITTEN NOTICE LAW

The Town of Ramapo requires that prior written notice be given before any liability can

attach for injuries sustained as a result of an allegedly dangerous condition on the Town's property. Specifically, section 243-12 of the Town's Laws sets forth that:

No civil action shall be maintained against the Town or Town Superintendent of Highways for damages or injuries to person or property sustained by reason of any parking lot, highway, sidewalk, bridge or culvert being defective....*unless written notice of such...condition ...was actually given to the Town Clerk or Town Superintendent of Highways* and there was a failure or neglect within a reasonable time after the giving of such notice to repair...

Laws of the Town of Ramapo, Art. III, § 243-12 (emphasis supplied).

STANDARD ON SUMMARY JUDGMENT MOTION

In deciding a motion for summary judgment, the Court's role is solely to determine whether triable issues of fact exist, not to decide those issues. *F. Garofalo Electric Co. v. New York Univ.*, 300 A.D.2d 186, 754 N.Y.S.2d 227 (1st Dept. 2002). This is because the remedy of summary judgment is a drastic one and it should only be granted when it is clear that no triable issue of material fact exists. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). On a motion for summary judgment, the proponent "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." *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 852, 487 N.Y.S.2d 316, 317 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

Once such a showing has been made, the burden of proof shifts such that an opponent to a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. *Alvarez, supra*. The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. *Dowsey v. Megerlan*, 121 A.D.2d 497, 503 N.Y.S.2d 591 (2d Dept. 1986); *Gitlin v. Chirkin*, 98 A.D.3d 561, 949 N.Y.S.2d 712 (2d Dept. 2012). As summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue of fact, or where a material issue of fact is even "arguable", the motion must be denied. *Phillips v. Kantok & Co.*, 31 N.Y.2d 307, 338 N.Y.S.2d 882 (1982); *Andre, supra*.

In cases such as the one presently before the Court, it is well established that prior written notice of a defective condition is a condition precedent to maintaining an action against a municipality, especially when there is a local law that requires such notice. *See, Kolenda v. Incorporated Village of Garden City*, 215 A.D.3d 647, 648, 187 N.Y.S.3d 669 (2d Dept. 2023). The purpose, generally, of prior written notice provisions are to ensure "that a municipality, which is not expected to be cognizant of every crack or defect within its borders, will not be held responsible for injury from such defect unless given an opportunity to repair it[.]" *Vaisman v. Village of Croton-on-Hudson*, 209 A.D.3d 920, 921, 177 N.Y.S.3d 73 (2d Dept. 2022) (internal citation omitted). Therefore, where the municipality establishes, *prima facie*, that it lacked prior written notice the burden shifts to the plaintiff to demonstrate the applicability of one of the two exceptions to the prior written notice rule, to wit, that the municipality created the defect through an act of negligence or that a special use of the property resulted in a special benefit to the

municipality. *See, Kolenda, supra*, at 648.

ANALYSIS

The defect at issue in this case is a pothole. The Plaintiff testified that on October 18, 2021, at 7:00 p.m., she was looking ahead while walking when she stepped into the pothole in the roadway, causing her to slip and fall. The Defendant has moved for summary judgment by reason of its alleged lack of prior written notice in accordance with the Town Law and the line of case law set forth in Defendant's moving papers. However, it is without dispute here that there had, in fact, been prior complaints about the pothole where Plaintiff fell. The issue in this case is whether those complaints constituted "written notice" as specifically required by the Town. This Court now holds that they do not.

In support of its motion, the Defendant submits the affidavits from the Town Clerk, Sara Oshorovitz, and the Superintendent of Highways, Fred Brinn. NYSCEF Docs. 28, 32. Sara Oshorovitz affirmed that she conducted a diligent search of the Town's records for past written notifications for the past five years ending on October 30, 2021, and that the search yielded no results. NYSCEF Doc. 28. Fred Brinn affirmed that he does not review complaints regarding potholes or roadway hazards and that, instead, his service and highway dispatchers handle those issues. Mr. Brinn went on to affirm that he had never, prior to the instant litigation, seen any of the pothole complaints at issue in this case. NYSCEF Doc. 32. Mr. Brinn testified consistently in this regard at his deposition. NYSCEF Doc. 38, p. 18. However, Mr. Brinn also testified that "[t]ypical regular complaints do not make it into [his] world unless it [sic] is escalated up by a very aggravated person or a political entity." *Id.* at 21. Mr. Brinn testified that when complaints are made, either by phone or email, there are other Town employees who are responsible for logging said complaints into the work order system. Mr. Brinn testified that he has no way of knowing whether any given complaint came into his department by phone, email, or written letter, and that he has never seen a work order with a written notice attached to it. *Id.* at 54-55. He further testified that he did not know where (or whether) written complaints were stored. *Id.* at 55. In sum, Mr. Brinn generally denied any knowledge as to how the written notice process actually worked. However, as per Mr. Brinn's testimony, this is because there are others in the department who keep track of the complaints.

The Defendant attached to its motion the affidavit of Theodore Van Nahl Collins, Service Dispatcher for the Town's Highway Department, and a nineteen-year Town employee. NYSCEF Doc. 29. Mr. Collins affirmed that he serves as the primary person interacting with the public regarding the Highway Department's service to the community. *Id.* Mr. Collins indicated that nearly all complaints to the Highway Department concerning highway related matter such as potholes are telephonic. When Mr. Collins receives a phone call with such a complaint, he contemporaneously enters the information into the database used to log the complaints. *Id.* The information is then able to be printed – Mr. Collins refers to the printed complaints as "complaint tickets." *Id.* The complaint tickets are then passed to the supervisors to determine address the issues raised. *Id.*

In this matter, a search of the Town's database revealed three (3) complaint tickets for the subject pothole. NYSCEF Doc. 31. The tickets are dated February 25, 2021, April 27, 2021, and September 27, 2021. *Id.* As per Mr. Collins, the Town's payroll records reflect that he was, in fact, working on each of the three days when complaints were made regarding the subject

pothole. NYSCEF Doc. 29. All three complaints were apparently made by telephone, by the same caller, identified in the complaint tickets as “Guttman.” *Id.* Each complaint ticket gets sent to the highway supervisors, and never the superintendent. Apparently, as per the Complaint ticket generated on September 27, 2021, the caller reached out once again by telephone on October 14, 2021, to report the same pothole. This is documented on the complaint ticket. NYSCEF Doc. 31. Though there can be no question that these complaints were made to the Town, Mr. Collins affirms that he conducted a diligent check of *written* records going back three years prior to October 19, 2021 that could have been submitted to the Town via fax, email, or someone coming into the Highway Department in person to hand deliver a complaint, and that *no results* were found. Mr. Collins can state with certainty, that the complaints that form the basis of the complaint tickets were all made via telephone, and not in writing. NYSCEF Doc. 29.

Based on all of the evidence set forth in support of its motion, the Town contends that they have established, *prima facie*, that it lacked prior written notice of the subject pothole. In opposition, Plaintiff argues that Mr. Britt’s deposition testimony raises issues of fact concerning whether the Defendant truly had prior written notice of the pothole. Plaintiff states that Mr. Brinn admits that “compliance with [the Town’s] prior written notice laws is impossible because of the manner that the Department of Highways manages their complaint notification system.” NYSCEF Doc. 37. Plaintiff also argues that there is ample evidence in the record that indicates that the Defendant either created or exacerbated the pothole with its prior repairs. Based on the reasons laid out in Plaintiff’s opposition, and in the spirit of construing every doubt in a summary judgment motion in favor of the non-moving party, she requests that summary judgment be denied based on the existence of issues of fact.

The Court, after having reviewed the papers, appreciates the point Plaintiff has made. It seems patently unfair that the Town cannot be held responsible for an incident such as that which forms the basis of this Complaint when it had actual notice of the condition at issue. It does not, honestly, appear to be disputed that the Town was aware of the very pothole at issue. Strict compliance with the prior written notice laws is, however, a prerequisite to liability. The case law relied upon by the Defendant is well established and must guide the Court in the instant decision. Actual notice is insufficient to hold the Defendant responsible for the complained-of condition. Rather, there must be evidence of prior written notice having been made to the Defendant in strict accord with their local law. It was not. The complaints that were made were, as per Mr. Collins’ affidavit, all made via telephone and then entered into the Town’s report database which, essentially, generates work tickets. NYSCEF Doc. 29. Telephone complaints do not satisfy the requirement of prior written notice (*Panzavecchia v. County of Nassau*, 211 A.D.3d 846, 179 N.Y.S.3d 763 (2d Dept. 2022)) and verbal complaints reduced to writing by the municipality also do not constitute prior written notice (*Spanos v. Town of Clarkstown*, 81 A.D.3d 711, 916 N.Y.S.2d 181 (2d Dept. 2011)). Further, even where the record reflects citizen complaints were made *and* repair work orders were generated, same has been deemed insufficient to defeat the requirement of prior written notice. *Lopez v. Gonzalez*, 44 A.D.3d 1012, 845 N.Y.S.2d 91 (2d Dept. 2007). In *Prucha v. Town of Babylon*, an Appellate Division, Second Department case relied upon by the Plaintiff, the Court determined that prior written notice requirement was satisfied because there was record evidence that indicated that the *written inspection report* generated in response to the plaintiff’s complaints was given to the defendant, and was handed in directly to the Department of Public Works, the entity designated to receive prior written notice pursuant to the Town’s law. These are not the facts presently before this Court, and as such, *Prucha* is distinguishable.

The record evidence in this instance is clear that no specific written notice of the defect was ever received by either the Town Clerk or the Superintendent of Highways, or his agents or employees as could be ascertained by searches of the Town's written complaint records. Phone records or work orders generated as a result thereof, absent proof that they contained the requisite detail about the defect and were specifically given to an entity designated by the prior written notice law are not sufficient. This Court does not agree that compliance with the Town's prior written notice laws is impossible. The Defendant, therefore, has met its burden.

In opposition, the Plaintiff has failed to establish that the Town created the defect at issue. The evidence establishes that repairs were made to the pothole at issue earlier in 2021, specifically, on March 2, 2021 and April 28, 2021. However, for this particular exception to the prior written notice law to apply, the Plaintiff would need to demonstrate the municipality's action "immediately results in the existence of a dangerous condition[.]" *San Marco v. Village/Town of Mt. Kisco*, 16 N.Y.3d 111, 116, 919 N.Y.S.2d 459 (2010) citing *Yarborough v. City of New York*, 10 N.Y.3d 726, 728 (2008). Potholes, by their nature, are produced as a result of wear and tear of traffic and weather conditions. *See, Id.*

Here, there was admittedly prior repair work performed by the Town with respect to a pothole in the same or a similar location to the subject pothole in the spring earlier in the calendar year when this Plaintiff fell. The Plaintiff has not established that such prior repair work "immediately result[ed]" in the creation of a dangerous condition by the Defendant. The Plaintiff's slip and fall did not occur until six months after the repair work at issue, and there were no complaints lodged with the Town with respect to the subject pothole until a phone complaint was received at the end of September in 2021. Therefore, there has been no evidence proffered that indicates that the Town had received prior written notice of the subject defect following the March and April 2021 repairs. *See, Lopez v. Gonzalez, supra*, at 1013.

CONCLUSION

Based on the foregoing, the Court grants the Defendant's motion in its entirety. It is hereby

ORDERED, that Defendant's motion for summary judgment is granted, and this case is dismissed.

The foregoing shall constitute the Decision and Order of this Court.

Dated: New City, New York
March 19, 2024


Hon. Thomas P. Zugibe, J.S.C.