

Barbour v County of Nassau
2025 NY Slip Op 35612(U)
March 10, 2025
Supreme Court, Nassau County
Docket Number: Index No. 607018/2021
Judge: Gary M. Carlton
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.

SUPREME COURT OF THE STATE OF NEW YORK
NASSAU COUNTY

-----x Sequence 7 and 9

MARK BARBOUR as Attorney in Fact
for MARTHA BARBOUR,

Index No. 607018/2021

Plaintiffs

Hon. GARY M. CARLTON
DECISION AND ORDER

-against-

COUNTY OF NASSAU, THE TOWN OF
HEMPSTEAD, ELMONT UNION FREE SCHOOL
DISTRICT AND THE VILLAGE OF VALLEY
STREAM,

Defendants.

-----X

The following papers read on this motion:

007

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition/Supporting ExhibitsX
Reply Affirmation/Supporting ExhibitsX

The following papers read on this motion:

009

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition/Supporting ExhibitsX
Reply Affirmation/Supporting ExhibitsX

FACTS

Plaintiff, MARTHA BARBOUR claims to have sustained personal injuries
resulting from an accident that occurred on November 7, 2020, while walking

along the sidewalk located in front of the Alden Terrace School,

Defendant THE TOWN OF HEMPSTEAD cross moved for summary judgment (007) on the grounds that it did not own, operate, maintain, manage or control the sidewalk at the subject accident location.

Defendant COUNTY OF NASSAU moved for summary judgment (009) on the grounds that it had no prior written notice of the defect which allegedly caused said injuries and there are no exceptions to the prior written notice statute that apply in this matter.

Plaintiff has discontinued her case against THE VILLAGE OF VALLEY STREAM and has settled the case with the ELMONT UNION FREE SCHOOL DISTRICT.

ARGUMENTS

Counsel for Plaintiff makes procedural arguments to deny THE TOWN OF HEMPSTEAD's cross motion for summary judgment and presents no substantive arguments to deny THE TOWN OF HEMPSTEAD summary judgment. No affirmation has been submitted by one with knowledge. Counsel for the plaintiff speculates that the TOWN may own a utility pole in the area of the accident, but during the course of discovery never established that.

THE TOWN OF HEMPSTEAD submitted the affidavit of Laura Taranto Pancia, employee of the Sidewalk Division of the Highway Department of the

Town of Hempstead who confirmed from a review of the records that defendant, Town of Hempstead, did not own, operate, maintain, manage, inspect, repair or perform construction work on the sidewalk, located at or near 1835 Central Avenue, Valley Stream, New York, on or five (5) years prior to November 7, 2020. The Town of Hempstead addressed plaintiff's speculation raised in the opposition papers about the utility pole by stating that the Town did not own or control the utility pole in the area adjacent to plaintiff's accident.

Counsel for Plaintiff makes procedural arguments to deny that the County's motion for summary judgment.

THE COUNTY OF NASSAU submitted an Affirmation from Robert Dujardin, an employee of the COUNTY assigned to the Bureau of Claims and Investigations, who personally searched the Nassau County Notice of Claim Files and Notice of Defect Files and that the County did not receive any prior notice, whether in the form of a notice of claim or prior written complaints involving any dangerous or defection conditions in front of the Alden Terrace School , that is sufficient.

Counsel for Plaintiff submits that has a duty to maintain the subject sidewalk in a reasonably safe condition, but presents no law or evidence by one with knowledge, only the attorney's affirmation and arguments. Plaintiff raises procedural arguments.

LAW

The standards for review on a motion for summary judgment are well settled. "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. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers", (Winegrad v. N.Y. Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

Plaintiff cites Mango v. LIJ-Hillside, 123 A.D.2d 843, 844 (2d Dept. 1986) to support denying the relief sought by THE TOWN OF HEMPSTEAD because it framed the relief as a cross motion.

Instead this court chooses to follow Kleeberg v. City of New York, 305 A.D.2d 549 (2d Dept. 2003) and ignore the technical defect as plaintiff has not been prejudiced and has had plenty of time to be heard in opposition.

THE TOWN OF HEMPSTEAD has produced evidence showing it had no connection to plaintiff's accident.

Nevertheless plaintiff argues that The Town's cross motion for summary judgment is predicated on its claim that the affidavit of Laura Taranto Pancia did not account for the records maintained by the traffic control and street lighting department. Ms. Pancia referenced during her deposition.

Rather than following up during discovery plaintiff tries to argue that it "is

possible" the utility pole has some connection to this accident and the TOWN OF HEMPSTEAD, citing Weinstein v. County of Nassau, 180 A.D.3d 730 (2d Dept. 2020).

In Weinstein there was actual evidence of THE TOWN OF HEMPSTEAD being involved in a road work defect, but in this case plaintiff fails to specify same in its opposing papers.

In this case the affidavit of JOSEPH RICCIO in support of the reply, addresses the issue raised in plaintiff's opposition by merely reiterating what the moving affidavit of Ms. Pancia had already stated about the sidewalk, that the Town of Hempstead does not and did not own or control the utility pole at the subject accident location on or prior to November 7, 2020.

Where the municipality establishes that it lacked prior written notice, the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule - that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality." (Yarborough v. City of New York, 10 N.Y.3d 726(2008).

THE TOWN OF HEMPSTEAD has no connection to plaintiff's accident.

THE COUNTY OF NASSAU pursuant to Nassau County Administrative Code 12-4(e) is not subject to liability for injuries caused by a defective condition in a sidewalk unless it received written notice of the defect or if an exception to

the written notice requirement applies.

The Affirmation of Robert Dujardino indicates that he personally searched the Notice of Claim Files and Notice of Defect Files for six (6) years prior to November 7, 2020, for any prior written notice of any dangerous or defective conditions in front of the Alden Terrace School.

Where the municipality establishes that it lacked prior written notice, the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule - that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality."; see Denio v. City of New Rochelle, 71 A.D.3d 717, 718, (2d Dept. 2010).

The plaintiff has not done that, see Shannon v. Village of Rockville Ctr., 39 A.D.3d 528, 529 (2d Dept. 2007) and Gorman v. Town of Huntington, 12 N.Y.3d 275 (2009) .

The defendants have made prima facie cases for summary judgment.

Once the Defendants made prima facie showings, the burden shifts to the plaintiff to come forward to overcome defendants submissions by demonstrating triable issues of fact.

No evidentiary proof has been submitted by the plaintiff of prior written notice, construction or special use.

The plaintiffs who live in the immediate area did not testify that they had given any written notice of any problems with the sidewalk to anyone from the town, or the county prior to the accident.

Further Mr. Barbour was unaware of repairs being made to the subject sidewalk before the date of his mother's accident.

Plaintiff has provided no affirmation by one with knowledge which provides evidence of responsibility for any of the remaining defendants.

Plaintiff in opposing the motions for summary judgment must produce proof in admissible form, sufficient to require a trial of material questions of fact on which it rests the opposition.

After more than four years of litigation it is insufficient for plaintiff's counsel to merely argue why the defendants should be held responsible.

Expressions of opinion, though genuinely held, cannot substitute for the presentation of evidentiary facts sufficient to withstand a motion for summary judgment. Fried v. Bower & Gardner, 46 N.Y.2d 765, 413 N.Y.S.2d 650 (1978).

Prior written notice requirements are a condition precedent to a plaintiff's cause of action in which the plaintiff is required to plead and prove. Cipriano v. City of N.Y., 96 A.D.2d 817 (2d Dept. 1983).

Plaintiff's counsel without proof or supporting case law argues that defendants either created the condition or made special use of the area in question.

Affirmations of counsel without knowledge are insufficient, In re Estate of O'Hara,
85 A.D.2d 669, 671 (2d Dept. 1981).

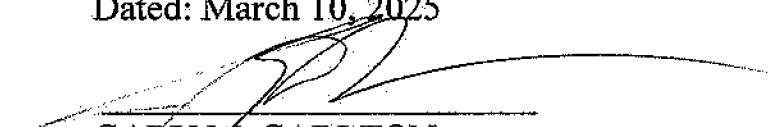
Accordingly, it is hereby

ORDERED, that the motion for summary judgment by THE TOWN OF
HEMPSTEAD (007) is granted and it is further

ORDERED, that the motion for summary judgment by THE COUNTY OF
NASSAU (009) is granted and

The Complaint is dismissed.

Dated: March 10, 2025



GARY M. CARLTON
SUPREME COURT JUSTICE

ENTERED

Mar 12 2025

NASSAU COUNTY
COUNTY CLERK'S OFFICE