Castagna v Chacko
2011 NY Slip Op 33748(U)
June 20, 2011
Sup Ct, Nassau County
Docket Number: 601269/2009
Judge: Roy S. Mahon

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

NELIDA CASTAGNA and JOHN CASTAGNA,

Plaintiff(s),

- against -

GEORGE CHACKO, RAY CHACKO, INCORPORATED VILLAGE OF WILLISTON PART, and TOWN OF NORTH HEMPSTEAD,

Defendant(s).

TRIAL/IAS PART 6

INDEX NO. 601269/09

MOTION SEQUENCE NO. 3

MOTION SUBMISSION DATE: April 21, 2011

The following papers read on this motion:

Notice of Motion	**X**
Affirmation in Opposition	**XX**
Reply Affirmation	**X**

Upon the foregoing papers, the motion by the defendant, Village of Williston Park(hereinafter referred to as Village) for an Order pursuant to CPLR §2221 and §3212 seeking to renew the defendant village of Williston Park's motion for summary judgment which was denied by the Court by Order dated August 3, 2010, upon renewal granting defendant Village of Williston Park summary judgment, is determined as hereinafter provided:

In pertinent part, the Court in its August 3, 2010 Order set forth:

> "This personal injury action arises out of a trip and fall on the sidewalk located at 50 Lafayette Street, Williston Park, New York on May 11, 2008 at approximately 11:30 am.
>
> While the moving defendant, the Village of Williston Park through the affidavit of the Village Clerk Julie Kain sets forth that the defendant Village of Williston Park had not received any prior written notice of a defective condition at the location in issue and had not performed any construction or repair work at said location, the defendant George Chacko owner of the premises at 50 Lafayette Street stated at his deposition that the Village of Williston Park had removed a tree that had fallen at his home (*see deposition of George Chacko at pg. 15)*. In light of the fact that there has been no deposition of the

> defendant Village of Williston Park, the defendant Village of Williston Park's application for an Order pursuant to CPLR §3212 granting summary judgment to defendant Village of Williston Park, dismissing the plaintiffs' Complaint in its entirety as against defendant Village of Williston Park, together with all cross-claims, is **denied without prejudice to renew** after said defendant Village of Williston Park's deposition."

In light of the fact that the defendant Village by Keith Bunnell, the Village's superintendent of public works was deposed on July 1, 2010, that portion of the Village's application which seeks renewal, is **granted**.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):**

> "It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York, supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

At the aforesaid deposition, Mr. Bunnell set forth:

> Q. Do you know who removed the tree in front of 50 Lafayette Street?
> A. The village was responsible. It's possible that LIPA assisted with us, but I don't have a written record of it.
> Q. You said LIPA?
> A. We call it LIPA; LILCO or now it's - - they keep changing names.
> Q. You may have answered this but just indulge me, do you - - do you know if there would be any records whatsoever of the actual removal of the tree?
> A. No. I don't know if there is a record of it. I know I don't have one.
> Q. Now, then the tree was removed, would there be an inspection of the sidewalk at the same time?
> A. No."
>
> *see deposition of Keith Bunnell at pg. 16*

The Court initially notes that while the plaintiffs through plaintiff's counsel's affirmation concedes that there is no prior written notice of the alleged condition at 50 Lafayette Street, Williston Park, NY, the plaintiffs contend that the condition in issue was caused by the acts of the Village at that location. In examining this issue, the Court in **Amabile v City of Buffalo**, 93 NY2d 471, 693 NYS2d 77, 715 NE2d 104 stated:

"This Court has recognized only two exceptions to the statutory rule requiring prior written notice, namely, where the locality created the defect or hazard through an affirmative act of negligence (*see, Kiernan v Thompson, 73 NY2d 840, 842)* and where a "special use" confers a special benefit upon the locality (*see, Poirier v City of Schenectady, supra, at 315-315; D'Ambrosio v City of New York, 55 NY2d 454).*"

see Amabile v City of Buffalo, supra at 474

A review of the deposition transcript of Mr. Bunnell beginning at pg. 7 sets forth that subsequent to the alleged accident in issue, the Village received a complaint in 2010 as to the sidewalk at 50 Lafayette Street. Mr. Bunnell testified:

"Q. When did you see that for the first time?
A. On February 22, 2010.
Q. You saw it yourself then.
A. Yes. The office takes the complaint, and they give me a copy of it immediately. So I might have seen it the next morning, but I seen it right away.
Q. What did you do upon receiving the complaint that has been marked as Plaintiff's Exhibit 1?
A. We go out and look at the site and determine if it's a village problem or a homeowner problem. If it's deemed as a homeowner problem, we would send them a letter to advise them that they have to fix the sidewalk. If it's deemed that it's a village problem, then we schedule it for it to be taken care of.
Q. Did you make such a determination in this instance for this complaint?
A. Yes. This instance was deemed that it was - - the sidewalk was raised through the tree root, and so it was scheduled to be replaced.
Q. Was a set letter - - was there any correspondence sent between you and the homeowner?
A. No.
Q. When was the sidewalk replaced?
A. On April 23rd.
MS. PETERSON: This year?
A. 2010, yes.
Q. Was there any defective condition present at the - - in front of 50 Lafayette Street when somebody went to investigate?
MS. PETERSON: Just note my objection to the word "defect."
A. Just rephrase the question.
Q. Did somebody go to the location at 50 Lafayette Street from the village of Williston Park?
MS. PETERSON: After the - -
Q. After they received - -
A. After February 22nd, yes.
Q. Is there a report of what they found there?
A. There's no written report. I scheduled there to be done - - what this number here represents is a work order number.
MS. PETERSON: Pointing to the top right corner.
A. For the sidewalk.

Q. Is there any - - are there any documents related to that work order number?
A. It's not a document, it's a computer record.
Q. Are those computer records still in existence?
A. Yes.

MR. ABEND: I am going to call for the production of those records (Request for computer records if they exist.)

MR. ABEND: In addition, there is currently an outstanding notice for discovery and inspection, which has been served multiple times, and I just reserve our right to a further deposition for the village based upon a response to that outstanding discovery.

Q. What was found , to the best of your knowledge, when somebody from the village came and looked at the sidewalk in front of 50 Lafayette Street?
A. You mean after receiving this complaint?
Q. Yes.
A. We looked at the sidewalk, we determined it was raised and a tripping hazard,, and we scheduled it for replacement.
Q. Whose responsible for maintaining the sidewalks in the village of Williston Park, to the best of your knowledge?
A. All sidewalks are the homeowner's responsibility.
Q. Why was it that you replaced the sidewalk and not the homeowner?
A. When deemed that a tree located between the curb and the sidewalk has a raised sidewalk, it becomes the village's liability.
Q. Now, did you have to remove a tree at the same time that you replaced the sidewalk, or was the tree already removed, if you know?

MS. PETERSON: Note my objection with respect to foundation.

A. As far as I know the tree was removed prior. Although, I don't have a date of when the tree was removed, but the tree was removed prior."

see deposition transcript of Keith Bunnell at pgs 7-12

Upon review of the foregoing, the Court cannot determine whether the removal of the tree in front of 50 Lafayette Street by the Village caused damage to the sidewalk where the plaintiff Nelide Castagna fell. The Court notes that the Village concedes to removing the tree, but not inspecting the sidewalk by the area of removal, but then subsequently replaced the sidewalk due to its defective condition.

Based upon the foregoing, the defendant Village's application for an Order pursuant to CPLR §2221 and §3212 seeking to renew the defendant village of Williston Park's motion for summary judgment which was denied by the Court by Order dated August 3, 2010, upon renewal granting defendant Village of Williston Park summary judgment, is **denied**.

SO ORDERED.

DATED: 6/20/2011

 Roy S. Mahon
J.S.C.