Argus v County of Nassau
2012 NY Slip Op 30254(U)
January 23, 2012
Sup Ct, Nassau County
Docket Number: 16549/10
Judge: Thomas P. Phelan
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

LINDA ARGUS and RICHARD ARGUS,

Plaintiff(s),

-against-

COUNTY OF NASSAU and TOWN OF HEMPSTEAD,

Defendant(s).

ORIGINAL RETURN DATE:11/23/2011
SUBMISSION DATE: 11/28/2011
INDEX No.: 16549/10

MOTION SEQUENCE #3

The following papers read on this motion:

Notice of Motion 1
Reply Affirmation in Support 2
Affirmation in Opposition 3

Motion by defendant, County of Nassau ("County"), for an Order granting summary judgment pursuant to CPLR 3212 dismissing plaintiffs' complaint is granted.

This motion arises from an underlying personal injury action wherein plaintiff, Linda Argus, alleges that she sustained injuries on March 26, 2010, after she tripped and fell on a walkway at Nassau Veterans Memorial Coliseum (the "Coliseum"), which was owned by the County. According to plaintiff, the walkway was uneven, depressed and irregular, which ultimately caused a height differential to exist, causing a dangerous and hazardous condition. It is alleged that the defendant County had constructive and actual knowledge or created the condition. Plaintiff's husband, Richard Argus, claims loss of his wife's services as a result of her injuries.

Plaintiff, in September 2011, at the deposition testimony of the defendant's witness, discovered that the County had leased the Coliseum to SMG Facility Management Corporation ("SMG") and filed a separate cause of action against it in October, 2011. At all times referred to herein, the Coliseum was leased to SMG pursuant to a lease agreement.

Defendant argues that the County had no prior written notice of any defective condition as required by its Administrative Code, and plaintiff has failed to allege facts sufficient to indicate that exceptions to the Code, that the County created the alleged defective condition or that the defect in the sidewalk created a "special use" applied to the instant case. Defendant submits as supporting evidence: copies of the pleadings; an affidavit from Diane Palser of the County's Bureau of Claims Management; and transcript of the deposition of John Reardon, the County's Acting Masonry Supervisor.

Plaintiff argues that she first learned of the lease agreement between the County and SMG, by way of Reardon's deposition in September 2011. Additionally, at the time of the instant motion, SMG was not served nor did it receive any notice of the pending action against it. Because the County had not provided information regarding the agreement, and SMG had not joined issue, it cannot be clearly ascertained as to whether the County actually had written notice of the dangerous condition or whether it created the condition. In addition to the pleadings already submitted by defendant, plaintiffs submit deposition transcript of plaintiff, Linda Argus.

The standards for summary judgment are well settled. A Court may grant summary judgment where there is no genuine issue of a material fact and the moving party is, therefore, entitled to summary judgment as a matter of law (Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v. Journal-News*, 211 AD2d 626 [2nd Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of a material issue of fact (*Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). Once this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve.

Generally, a defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie case that it neither created the hazardous condition nor had actual or constructive notice of its existence for a

sufficient length of time to discover and remedy it"(see *Sloane v. Costco Wholesale Corp.*, 49 AD3d 522 [2d Dept 2008]). However, in cases where the defendant is a municipality and such municipality has adopted a prior written notice law, it cannot be held liable for injuries sustained as a result of an alleged defect on its property, absent the requisite notice, unless an exception to the notice requirement applies (Danis v. Incorporated Village of Atlantic Beach, 74 AD3d 1273 [2d Dept 2010]). Two exceptions have been recognized to prior written notice rules. The first is when the municipality has created the dangerous or defective condition through affirmative acts of negligence. The second exception is when a "special use" confers a benefit upon the municipality (see *Abano v. Suffolk County Community College* 66 AD3d 719 [2d Dept 2009]).

Here, the relevant provisions are set forth in § 12-4.0(e) of the Nassau County Administrative Code which provides in relevant part:

> No civil action shall be maintained against the County for damages ro injuries to person or property sustained by reason of any sidewalk,... parking field,... walkway,... being defective, out of repair, unsafe, dangerous, or obstructed... regardless of whether such facility be one as defined by this title or one constructed pursuant to the provisions of article six of the highway law or one constructed by the State and maintained by the County, unless such sidewalk,... parking field,... walkway,... was constructed by the County or by the State or under a permit issued by the County or by the State, and *unless written notice of such defective, unsafe, dangerous or obstructed condition of such* sidewalk,... parking field,... walkway,... was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of...or to make the place otherwise reasonably safe. Such written notice shall specify the particular place and nature of such defective, unsafe, dangerous or obstructed condition.... Notice required to be given as herein provided shall be made in writing by certified or registered mail directed to the Office of the County Attorney, One West Street, Mineola, New York 11501. (emphasis added).

The County, by Ms. Palser, established, prima facie, that it did not have prior written notice of any defective or dangerous condition existing in the Coliseum walkways or parking lots. The affidavit of an official charged with the responsibility of keeping an indexed record of all notices of defective conditions

received by the County is sufficient to establish that no prior written notice was filed. The affidavit need only indicate that the official has caused a search of the department's records to be made and that no written notice of the defective condition was found (see *Cruz v. City of New York* , 218 AD2d 546 [1st Dept 1995]). Further, the County further established its entitlement to judgment as a matter of law by the testimony of Mr. Reardon, who testified that he received no work orders for repairs regarding the particular structures in question (see *Sachs v. County of Nassau,* 60 AD3d 1032 [2d Dept 2009]). As such, defendant has met its burden for summary judgment.

The burden now shifts to plaintiff to submit evidence sufficient to establish an issue of fact requiring a trial (CPLR 3212(b)). Plaintiff does not submit any evidence or argue that there is a question of fact on whether written notice was provided and does not raise an issue of fact on any exceptions to the written notice requirement. Instead plaintiff opposes this summary judgment motion by arguing that the County failed to reveal information regarding its lease with SMG. As such, SMG was not a party in the initial action and consequently, additional facts may uncover that the County did have written notice of or created the hazardous condition. In sum, it would be premature to grant the County's motion at this time.

A party who claims ignorance of critical facts to defeat a motion for summary judgment must first demonstrate that "the ignorance is unavoidable" and that reasonable attempts were made to discover the facts which give rise to a triable issue (see *Lo Breglio v. Marks,* 105 AD2d 621 [1st Dept 1984]). Here, plaintiff failed to indicate whether any efforts were made to discover the identity of the party responsible for the maintenance of said premises (see *Kenworthy v. Town of Oyster Bay*, 116 AD2d 628 [2d Dept 1986]).

In sum, the summary judgment is the procedural equivalent of trial, with both parties required to lay bare their proof, and therefore a "shadowy semblance of an issue is not enough to defeat the motion." (*Lo Breglio v. Marks,* 105 AD2d 621 [1st Dept 1984] *citing Hanrog Distr. Corp. v. Hanioti*, 10 Misc2d 659, 660, [Sup. Ct. New York County [1945]). Summary judgment *must* be granted where it appears that the party defending against the motion has made no reasonable attempt to ascertain the facts (see *Paul Tausig & Son, Inc. v. Providence Washington Ins. Co.*, 28 AD2d 279 [1st Dept 1967], *Cadle Company v. Hoffman*,

[* 5]

237 AD2d 555 [2d Dept 1997]).

Lease agreements between the County and tenants are a matter of public record, and plaintiffs' asserted ignorance of the its existence has not been shown to be unavoidable. In addition, plaintiff failed to show that they took reasonable means to discover the actual entity that actually controlled and maintained the Coliseum and its grounds (see *LoBreglio v. Marks*, supra).

In light of the foregoing, plaintiffs failed to meet their burden. Accordingly, defendant's the County motion is granted, and plaintiffs complaint is dismissed.

This decision constitutes the order of the court.

HON THOMAS P. PHELAN

Dated: January 23, 2012 [signature]

J.S.C.

XXX

ENTERED
JAN 25 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Attorneys of Record

Siben & Siben, LLP
Attn: Richard F. Simmons, Esq.
Attorneys for Plaintiffs
90 East Main Street
Bay Shore, NY 11706

John Ciampoli, Esq.
County Attorney of Nassau County
Attn: Barry M. Dennis, Deputy County Attorney
Attorneys for Defendant County of Nassau
One West Street
Mineola, NY 11501

Joseph J. Ra, Esq.
Town Attorney

Town of Hempstead
One Washington Street
Hempstead, NY 11550