Zitolo v Town of Islip
2015 NY Slip Op 32309(U)
November 30, 2015
Supreme Court, Suffolk County
Docket Number: 10-41860
Judge: Joseph C. Pastoressa
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[* 1]

SHORT FORM ORDER

INDEX No. 10-41860
CAL. No. 14-00612OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 001 - MG
002 - XMG
003 - XMD

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LYDIA ZITOLO,

Plaintiff,

- against -

TOWN OF ISLIP, LONG ISLAND MACARTHUR AIRPORT and SOUTHWEST AIRLINES CO.,

Defendants.

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Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4; Notices of Cross Motions and supporting papers 5 - 12; Answering Affidavits and supporting papers 13 - 18; Replying Affidavits and supporting papers 19 - 23; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Southwest Airlines Co. for summary judgment is granted, and the complaint and all cross claims asserted against it are dismissed; and it is further

ORDERED that the cross motion by defendants Town of Islip and Long Island MacArthur Airport for summary judgment is decided as set forth below; and it is further

ORDERED that the cross motion by plaintiff to amend the pleadings is denied.

Plaintiff commenced this action seeking to recover damages for personal injuries she sustained on September 30, 2009 when she fell in a crosswalk outside the Southwest Airline terminal on Arrival Avenue at MacArthur Airport in Islip, New York. In the complaint, as amplified by the bills of particulars, plaintiff alleges that she was caused to trip and fall, sustaining serious injuries, when her left foot became caught on a broken, raised, depressed and patched area in the crosswalk abutting the handicap ramp. It is alleged that the defendants own, control, operate, maintain, and constructed the premises and are jointly negligent as they are responsible for its repair, and allowed the crosswalk to remain in a defective and dangerous condition.

Defendant Southwest Airlines Co. ("Southwest") and defendants Town of Islip and MacArthur Airport (collectively the "Islip defendants"), in their respective answers to the complaint, each deny liability and assert affirmative defenses and cross claims against the other for contribution and indemnification. In addition, Southwest's cross claim includes an allegation that it is entitled to contractual indemnity, insurance coverage and a defense in this matter from the Islip defendants for which it also seeks costs, expenses and attorneys fees.

Discovery has been completed and the note of issue filed. Southwest now moves for summary judgment dismissing the complaint and all cross claims asserted against it on the grounds that (a) it did not owe or breach any duty to the plaintiff, and (b) no dangerous or defective condition caused plaintiff to fall, as the video evidence shows that she tripped and fell over her own feet. The Islip defendants also argue that plaintiff lost her balance and tripped, and that the video clearly shows she was not in the vicinity of the alleged crack. Additionally, the Islip defendants maintain that plaintiff cannot identify any dangerous condition which caused her to fall, and even if she could, as there was no prior written notice of an alleged defect in the crosswalk, their cross motion for summary dismissal of the complaint should be granted.

Plaintiff, who was 64 at the time if the accident, testified that her son, John Mailinger (not a party herein), drove her to the airport and that they arrived between 5:00 and 5:30 pm for her 6:05 pm flight to Florida. They were rushed as her son had received a call from his job to respond to an emergency, and she was a little worried about missing her flight. As she walked from the parking lot to the terminal, she was carrying a tote, and pushing a medium-sized carry-on suitcase on wheels. She walked in a crosswalk from the parking lot in the direction of the Southwest terminal, and as she stepped on to the handicap ramp, her left foot got caught, causing her to fall on to the right side of her body. Plaintiff testified that prior to, and after the accident she did not see or know what caused her to fall, and that she did not go back to the scene until approximately seven months later. Plaintiff testified that before she left the scene of the accident in an ambulance, her son took photographs of the area. However, she did not indicate to him where or what caused her to trip and fall.

Mailinger testified he did not have any difficulty walking across the crosswalk and on to the sidewalk via the handicap ramp, and that he did not see his mother fall as he was about three feet in front of her. When he heard his mother yelp, he turned around and saw her coming in contact with the ground. Although the plaintiff did not indicate where she had fallen, Mailinger testified he took photographs of a crack in the area, as he wanted to show his mother what caused her to trip. He

admitted, however, that he did not see any defective condition or crack in the sidewalk until after the accident, and that the plaintiff had no clue as to what caused her to trip and fall.

Representatives were deposed on behalf of the Islip defendants and Southwest. The Islip defendants' representative, Gregory Decanio, who is employed by the Town as Chief of Airport Law Enforcement at MacArthur Airport, testified that the Town owns the airport and is responsible for maintaining it. Decanio testified that all slip and fall accidents are reported to him and investigators are dispatched to the scene. If a crack is found, the Town is notified. Decanio also testified that if he or an officer on patrol at the airport observe any type of unsafe maintenance condition, it is reported to Town's LIMA, the police station at the airport, and the Town's maintenance department is notified.

Decanio testified he learned of the subject accident the day after it occurred and contacted his investigative staff to see if it had been captured by the closed circuit video camera. The video coverage was found and burned to a DVD. Decanio testified that he watched the video of the subject incident and saw that the plaintiff's suitcase went off balance, causing her to trip over her own feet, lose her balance and fall. According to Decanio, there were no prior complaints about a defective or cracked condition in the area of plaintiff's accident, and that upon his investigation, a small crack was found, which he testified was not reported to the Town as it was too trivial.

Linda Dzienius, a customer service supervisor employed by Southwest at MacArthur Airport testified that Southwest is not responsible for maintaining the sidewalks or street in front of the terminal. If a defect in the sidewalk is reported by a customer, she would report it to the Town's LIMA office. According to Dzienius, she did not recall ever receiving a complaint about a crack in the sidewalk in front of the terminal. Dzienius testified that she responded to the plaintiff's accident when she received a call on her radio. Dzienius stated that she completed an accident report with information provided by the plaintiff's son as the plaintiff did not provide much information. She further testified that she did not see any unsafe conditions in the area, and had never observed or reported, and was not aware of anyone else who had observed or reported any cracks in the sidewalk in front of the terminal prior to the subject accident.

The defendants are entitled to judgment as a matter of law. Plaintiff unequivocally and consistently testified that she could not identify the cause of her fall (***Ash v City of New York, Trump Village Section 3, Inc.***, 109 AD3d 854, 972 NYS2d 594 [2d Dept 2013]; ***Dennis v Lakhani***, 102 AD3d 651, 958 NYS2d 170 [2d Dept 2013]; ***Aguilar v Anthony***, 80 AD3d 544, 915 NYS2d 284 [2d Dept 2011]; ***Plowden v Stevens Partners, LLC***, 45 AD3d 659, 846 NYS2d 238 [2d Dept 2007]). "In a slip-and-fall case, a plaintiff's inability to identify the cause of the fall is fatal to the action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (***Dennis v Lakhani***, *supra* at 652; ***Capasso v Capasso***, 84 AD3d 997, 998, 923 NYS2d 199 [2d Dept 2011]; *see* ***Blocker v Filene's Basement #51-00540***, 126 AD3d 744, 5 NYS3d 265 [2d Dept 2015]). Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a slip and fall accident, any determination by the trier of fact as to causation would be based upon sheer conjecture (*see* ***Ash v City of New York, Trump Village Section 3, Inc.***, *supra*; ***Dennis v Lakhani***, *supra*; ***Plowden v Stevens Partners, LLC***, *supra*). While plaintiff's evidence need not positively exclude every possible cause of his fall, it must be sufficient to permit a finding of

proximate cause based on logical inferences, not speculation (*see* ***Schneider v Kings Hwy. Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Aguilar v Anthony***, *supra*).

Here, the video surveillance footage proffered by the Islip defendants clearly shows the plaintiff's son traversing the crosswalk onto the subject ramp and sidewalk. The suitcase on wheels catches slightly on the curb of the handicap ramp, but he successfully walks onto the sidewalk. The video shows the plaintiff a few feet behind him. Her suitcase on wheels also catches the curb of the handicap ramp, but she is able to maneuver the suitcase up the ramp, takes another two steps and then trips and fall. Plaintiff clearly loses her balance by either tripping over her own feet or because her suitcase is not steady. It is also clear from the video that she does not trip or stub her foot in the area of the crack photographed by her son as she was at least two feet passed the crack and on the sidewalk.

Furthermore, even if the crack had been a factor in causing her accident, the defendants would be entitled so summary dismissal of the complaint. The Islip defendants concede that the Town owns MacArthur Airport and is responsible for maintenance of the airport, including the roadways and sidewalks, and that Southwest, as lessee, is not responsible for such maintenance. Moreover, no evidence has been presented that Southwest created the purportedly defective condition. Therefore, Southwest cannot be held liable for plaintiff's accident and resulting injuries (*see* ***Casale v Brookdale Med. Assocs.***, 43 AD3d 418, 841 NYS2d 126 [2d Dept 2007]; ***Morgan v Chong Kwan Jun***, 30 AD3d 386, 817 NYS2d 325 [2d Dept 2005]; ***DePompo v Waldbaums Supermarket, Inc.***, 291 AD2d 528, 737 NYS2d 646 [2d Dept 2002]). In response, plaintiff has failed to raise an issue of fact.

In addition, the Islip defendants have made out their prima facie entitlement to judgment by establishing the enactment of Town Code of the Town of Islip § 47A-3, a prior written notice law, and submitting an affidavit of the Airport Administrative Supervisor at MacArthur Airport, who stated that his search of the Town's records revealed no prior written notice of a defective condition on the sidewalk or in the area where the plaintiff's accident occurred (*see* Town Law § 65-a[1]; Town Code of Town of Islip § 47A-3[A]; ***Politis v Town of Islip***, 82 AD3d 1191, 920 NYS2d 185 [2d Dept 2011]; *see also* ***Maya v Town of Hempstead***, 127 AD3d 1146, 8 NYS3d 372 [2d Dept 2015]). In opposition, plaintiff has failed to raise an issue of fact as to whether there was such prior written notice (*see* ***Politis v Town of Islip***, *supra*).

In plaintiff's counsel's affirmation in opposition to the motion and in support of the cross motion to amend the bill of particulars, it is conceded "that the video does indeed reflect that plaintiff's feet did not trip on the sizeable crack on Arrival Avenue that is immediately adjacent to the sidewalk/ramp entrance of the sidewalk, and there is no question of fact as to this point." However, counsel argues that as the cause of the accident was a crack on the roadway, and not on the sidewalk, prior written notice is not a precondition to liability. Thus, it is argued, liability can exist as to the Islip defendants if the Town had actual or constructive notice of the crack. The same argument is posed as to Southwest.

Section 47A-3(A) of the Town Code of the Town of Islip explicitly requires prior written notice of any dangerous or defective condition in the street, sidewalk or crosswalk maintained by the Town. Therefore, without merit is plaintiff's argument that the prior written notice requirement does not apply to the subject crack in the roadway.

Also unavailing is plaintiff's contention that the Town had actual or constructive notice of the purportedly defective condition. "Constructive notice of a condition is insufficient to satisfy the requirement of prior written notice" (***Chirco v City of Long Beach***, 106 AD3d 941, 943, 966 NYS2d 450 [2d Dept 2013]; ***Magee v Town of Brookhaven***, 95 AD3d 1179, 1180, 945 NYS2d 177 [2d Dept 2012]; *see* ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]). Similarly, actual notice does not obviate the need to comply with the prior written notice requirement (***Chirco v City of Long Beach***, *supra*; ***Granderson v City of White Plains***, 29 AD3d 739, 815 NYS2d 246 [2d Dept 2006]). Besides, "[r]ecognized exceptions to the prior written notice requirement exist where the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a special benefit upon it" (***Keating v Town of Oyster Bay***, 111 AD3d 604, 604, 974 NYS2d 271 [2d Dept 2013]; ***Masotto v Village of Lindenhurst***, 100 AD3d 718, 719, 954 NYS2d 557 [2d Dept 2012]). To defeat the Islip defendants' motion, the plaintiff is required to come forward with admissible evidence sufficient to raise a triable issue of fact as to whether the Town either created the condition through its affirmative negligent acts, or whether a special use conferred a special benefit on the Town (*see* ***Magee v Town of Brookhaven***, *supra*; ***Lichtman v Village of Kiryas Joel***, 90 AD3d 1001, 935 NYS2d 331 [2d Dept 2011]). The plaintiff has failed to satisfy this burden.

As to Southwest, the plaintiff has failed to produce evidence that Southwest had, or was chargeable with control over the subject area, or that it created the dangerous condition (*see* ***Casale v Brookdale Med. Assocs.***, *supra*; ***Morgan v Chong Kwan Jun***, *supra*). Unavailing is the plaintiff's assertion that Southwest made special use of the subject area.

The principle of special use, a narrow exception to the general rule, imposes an obligation on the abutting occupier of land, where it puts part of a public way to a special use for its own benefit, controls it, and thereby becomes obligated to maintain the part so used in a reasonably safe condition (*see* ***Breland v Bayridge Air Rights, Inc.***, 65 AD3d 559, 884 NYS2d 143 [2d Dept 2009]; ***Noia v Maselli***, 45 AD3d 746, 846 NYS2d 326 [2d Dept 2007]). The special use is a use different from the normal intended use of the public way, and thus, the special use exception is reserved for situations where an occupier of land whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use (*see* ***Poirier v City of Schenectady***, 85 NY2d 310, 624 NYS2d 555 [1995]; ***Noia v Maselli***, *supra*; ***Lauer v Great S. Bay Seafood Co.***, 299 AD2d 325, 750 NYS2d 305 [2d Dept 2002]). Here, the plaintiff failed to present evidence that would support a finding of special use (*see* ***Breland v Bayridge Air Rights, Inc.***, *supra*; ***Noia v Maselli***, *supra*; ***Lauer v Great S. Bay Seafood Co.***, *supra*).

Based on the above, denied is plaintiff's cross motion to amend her bill of particulars to include a new theory of recovery against Southwest grounded in the special use doctrine and to allege a new cause of her accident against all of the defendants based on the video footage which shows that her luggage got caught in a crack causing her to fall. In addition, the cross motion was filed in December 2014, eight months after the note of issue was filed in April 2014. Plaintiff has not provided any explanation for the eight-month delay in making the motion to amend, nor has she made a showing of special and extraordinary circumstances.

While leave to amend a bill of particulars is ordinarily freely given (*see* CPLR 3025 [b]; ***Cohen v Ho***, 38 AD3d 705, 833 NYS2d 542 [2d Dept 2007]), "once discovery has been completed and the case has been certified as ready for trial, the party will not be permitted to amend the bill of particulars except upon a showing of special and extraordinary circumstances" [internal quotations omitted] (***Schreiber–Cross v State of New York***, 57 AD3d 881, 884, 870 NYS2d 438 [2d Dept 2008]). Finally, where, as here, a party moves for summary judgment, a "court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded in the complaint" as amplified by the bill of particulars ***(Mezger v Wyndham Homes, Inc.***, 81 AD3d 795, 796, 916 NYS2d 641 [2d Dept 2011]).

As the defendants are not liable to plaintiff for her accident and resulting injuries, the defendants' cross claims against each other for contribution and indemnification cannot be sustained, and thus are also dismissed (*see* ***Stone v Williams***, 64 NY2d 639, 485 NYS2d 42 [1984]; ***Lee v Anna Dev. Corp.***, 83 AD3d 545, 921 NYS2d 232 [1st Dept 2011]).

Accordingly, Southwest's summary judgment motion is granted and the complaint and cross claims asserted against it are dismissed; the Islip defendants' cross motion for summary judgment is also granted dismissing the complaint and cross claims asserted against it for contribution and indemnification as moot; and the plaintiff's cross motion is denied.

Dated: November 30, 2015

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION